

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA

VS.

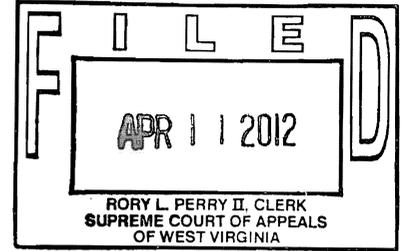
CLAYTON ROGERS,

Petitioner.

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PETITIONER BRIEF

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Supreme Court No. 11-0621

Circuit Court No. 10-F-847  
(Kanawha)

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## ASSIGNMENTS OF ERROR

- I. The trial court's ruling that Mr. Rogers' statement was not taken in violation of the prompt presentment rule, W.Va. Code § 62-1-5(a)(1) (1997) (Repl.Vol.2010), was erroneous and the statement's admission at trial constitutes reversible error. A warrant for Mr. Rogers' arrest was issued on August 29, 2010, for first degree murder and Mr. Rogers was arrested on August 30, 2010, at approximately 3:15 p.m. According to the arresting detective's suppression hearing testimony, they drove Mr. Rogers past the courthouse where the on-duty magistrate was and took him directly to the sheriffs department *for the purpose of taking his statement*.
- II. The trial court denied Mr. Rogers due process when it denied counsel's motion to withdraw based on an *actual conflict of interest*. The trial court's refusal to allow counsel to withdraw denied Mr. Rogers the right to conflict free counsel and is reversible error.
- III. The Prosecutor's Improper, Prejudicial Closing Argument denied Mr. Rogers his Due Process Right To A Fair Trial. The prosecutor referenced facts not in the record, made assertions not supported by the evidence over defense counsel's objections, and *grossly misstated the law* regarding first degree murder, telling jurors in the final minutes of closing that "it only takes a moment to plan ahead, it only takes a moment to premeditate...[Mr. Rogers]He premeditated it - - it only takes a moment." Tr. d3 140.

## STATEMENT OF THE CASE

Clayton Rogers (hereinafter Mr. Rogers') was arrested on August 30, 2010, on an outstanding warrant for the stabbing death of his long time girlfriend Laura Amos (hereinafter Amos). *Appendix Record (A.R.) 85*. Despite the fact Mr. Rogers was under arrest for first degree murder, detectives took him directly to the sheriff's department to interview him before taking him to the on duty magistrate. *A.R. 87*. Mr. Rogers was arrested during business hours on a Monday afternoon and detectives drove past the courthouse in order to arrive at the sheriff's department. Upon presentment to the magistrate, the Kanawha County Public Defender's Office was appointed to represent Mr. Rogers.

Three weeks before Mr. Rogers' trial, counsel realized four of the state's possible witnesses had been represented by other lawyers in the public defender's office on impeachable felonies. Most troubling was that the state's main lay witness, Keith Hubbard (hereinafter Hubbard), had just been counseled and based on his lawyer's advice entered a plea to possession of a stolen vehicle. Mr. Hubbard also had two other felony convictions from 2004, credit card forgery and entering without breaking, in which he was counseled by a second lawyer in the public defender's office. Hubbard was still within the 120 day time limit to file a motion to reconsider sentence on the possession of a stolen vehicle and Hubbard's counsel explained a motion on Mr. Hubbard's behalf was possible. *A.R. 238-39*. Mr. Rogers' counsel met with management in his office and was instructed to file a motion to withdraw due to a conflict of interest. A hearing was held and the motion was denied. *A.R. 270-71*.

During closing, the prosecution misrepresented the evidence, made assumptions not supported by the evidence and grossly misrepresented the elements of first degree murder, all of

which was highly prejudicial to Mr. Rogers' right to a fair trial. Mr. Rogers was convicted by the jury of first degree murder without a recommendation of mercy. *A.R. 803, 815-817.*

Detectives Snuffer and Scurlock (hereinafter the detectives or Det. Snuffer/ Det. Scurlock) arrived in Charleston, with Clayton Rogers in their custody, at approximately 3:40 or 3:45p.m., on Monday August 30, 2010, which was during normal business hours. *A.R. 30, 195.* This, according to the most current Administrative Order establishing the times of Magistrate Court, meant there was a magistrate on duty and available to advise Mr. Rogers of the charges he faced and, most importantly to advise him and ensure he understood all of the constitutional rights and protections he was entitled to due to his arrest.<sup>1</sup> *A.R. 55-57.* Mr. Rogers was under arrest for murder, a capital offense in this state. *A.R. 834.* The detectives failed to present Mr. Rogers to the on-duty magistrate as is mandated by the laws of this state. Instead, detectives intentionally drove past the courthouse and took Mr. Rogers to the sheriff's department so that they could interview him. *A. R. 86-87.*

The actions of Det. Snuffer and Det. Scurlock on August 30, 2010, demonstrate they intended to question Mr. Rogers at the sheriff's department before they took him to the on-duty magistrate from the moment he was placed in the cruiser, despite the fact he was under arrest. *A.R. 86-87, 834, 852.* The entire interaction between Mr. Rogers and the detectives was recorded, including his transport. *A.R. 92.* The detectives can be heard on the audio taped transport *telling* Mr. Rogers they need to talk to him about what happened. They wanted to get his side of the story. *A.R. 837-38.* Additionally, detectives can be heard calling a co-worker and

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<sup>1</sup> A copy of this order is supposed to be on file with the Administrative Office of this Honorable Court pursuant to Rule 1 of Magistrate Court Rules. It was not. The current order on file in the Kanawha County Circuit Clerks Office is from 2006. Counsel placed a copy of that order in the appendix record. *A.R. 55-57*

instructing that person to buy a value meal and a frosty for Mr. Rogers and bring it to the sheriff's department. *A.R. 844-46.*<sup>2</sup>

At no time during the transport or while he was at the sheriff's department did Mr. Rogers state I want to make a statement or I want to tell you what happened. When they arrived at the sheriff's department Mr. Rogers *was not processed* which is the only legitimate reason, according to the laws of this state, he could have been taken to the sheriff's department before being presented to the on-duty magistrate; *instead he was immediately taken to an interview room.* *A.R. 87, 854.* Furthermore, both detectives testified during the suppression hearing they took Mr. Rogers to the sheriff's department with the specific intention of interviewing him:

Q So there was already an arrest warrant issued pursuant to that complaint, correct?

A [Deputy Snuffer] **Yes, sir.**

Q Okay. Now, once you got Mr. Rogers back to the station, **you began questioning him** and originally it was done at that point, correct?

A Yes, sir.

Q So the primary reason that Mr. Rogers was not taken to the Magistrate after he was apprehended was to get the confession from him, right?

A **It's our normal procedure to interview people when we arrest them.**

Q Before you've been to the Magistrate?

A **Yes, sir.**

Q **And primarily that's the most important thing you do before you take them to the Magistrate is to get their side of the story, right.**

A **Yes, sir.**

*A.R. 101-104*

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<sup>2</sup>Det. Snuffer testifies at the motion hearing as though Mr. Rogers asked for food **but** that is not the case. In fact, Det. Snuffer is the one that asks Mr. Rogers: "Are you still hungry?" "Do you want something besides pizza?" *A.R. 844.*

Q Will you state your name, please?

A Donald Scurlock.

...  
Q So after you arrested Mr. Rogers, you went back to the station, the first thing you did was take a statement, right? You didn't take him to the Magistrate, you took his statement.

A **Yes, sir.**

...  
Q And you know that after you take him to the Magistrate, you don't get to talk to him anymore, right?

A **That's true.**

*A.R. 108-115*

Counsel filed a motion to suppress Mr. Rogers Statement based on a violation of prompt presentment statute. A hearing was held on counsel's motion and the court incorrectly held that he was not entitled to relief because he did not also assert the sentence was involuntary. The State claimed Mr. Rogers *wanted* to talk to detectives, that he *indicated he wanted to give a voluntary statement, and that is why he was taken to the sheriff's department by the detectives.*

*A.R. 112* That is not true. Mr. Rogers was under arrest, in handcuffs, and in the back of a locked cruiser. He had no free will in this situation. He was told "we are going to talk to you when we get down here." **At no time during his transport did Mr. Rogers tell detectives he wanted to make a statement.** *See generally transcribed audio transport. A.R.834-53.*<sup>3</sup>

Mr. Rogers was questioned for approximately one hour by detectives, **he was then advised** he had the right to prompt presentment and was asked to waive that right so that he could assist in the search for the knives. *A.R. 92, 93, 912.* Mr. Rogers told detectives during his statement that he remembered throwing his knives as he was going to his friends' house on the

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<sup>3</sup> Mr. Rogers' entire interaction with detectives is transcribed. A.R. pages 834-853 is the audio taped transport. The first time that detectives asked Mr. Rogers if he would talk to them was **after** they had arrived at the sheriff's department and had him in the interview room. *A.R. 857* A.R. pages 854- 915 is the transcribed video interview that occurred at the sheriff's department.

night of the incident. This series of events is disturbing because it further demonstrates detectives intentionally failed to advise Mr. Rogers of his right to prompt presentment until **after he signed a waiver form and gave a statement.** *A.R. 92, 93.*

Mr. Rogers was then processed by Det. Scurlock after he agreed to accompany detectives to search for the knives. *A.R. 914.* The search for the knives was unsuccessful. *A.R. 500.* On the way back to Charleston, detectives again asked Mr. Rogers what he would like to eat and based on his request they purchased food at McDonalds. *A.R. 94.* Detectives then proceeded to the courthouse, ate, and finally took Mr. Roger's for his initial appearance before the on-duty magistrate. Mr. Rogers' paperwork reflects the time was 8:06 p.m. *A.R. 95.*

On the preceding day, August 29, 2010, Clayton Rogers got up, went to church at Manna Meal and then met up with his friends Larry Means and Keith Hubbard at Raymond Riffle's house. *A.R. 538, 861.* They hung out until one o'clock and then went to Go-Mart to buy alcohol. The group also had 2 bottles of vodka, in celebration of Mr. Rogers' birthday. *A.R. 539, 862.* Vodka is something Mr. Rogers did not normally drink because he cannot handle liquor. *A.R. 841, 890.* Upon returning from Go-Mart, they went to the abandoned house which was across the street from Mr. Riffle's and began drinking. No one testified as to a time but at some point after the group arrived at the abandoned house, Amos showed up. *A.R. 861.* The group all began drinking large quantities of alcohol in celebration of Mr. Rogers' birthday. *A.R. 543.*

They could not buy alcohol until 1:00 p.m. because it was Sunday so they could not have started drinking the alcohol they purchased until sometime after 1:00 p.m. and the first calls to 911 occurred at a few minutes after 5:00 p.m. Greg Lacy (hereinafter Lacy) testified he got off work at 3:30 p.m. that day and he walked past the house on his way home. *A.R. 541, 586-87.*

Amos yelled for him to stop so he stopped by for approximately 15 minutes. Lacy testified he took 5-6 shots of vodka during the 10 minutes he was at the house. *A.R. 590*. Mr. Rogers and Amos were there talking and sharing a bottle of vodka. Mr. Rogers and Amos had been in an on and off relationship for years. When they fought, it was over Amos seeing other men. *A.R. 865*.

The night before, on the 28th, Mr. Rogers and Amos exchanged words over her latest male friend, Lacy, and this was witnessed by Hubbard. Hubbard was with Amos and Mr. Rogers for the majority of the day on the 28<sup>th</sup>. *A.R. 550*. That evening, both Hubbard and Amos went to Lacy's and spent the night. Amos told Mr. Rogers there was nothing to the rumors about her and Lacy. She explained Lacy was saying he proposed to her in an attempt to make his ex-wife jealous. *A.R. 588, 878*. However, at trial Lacy testified he had been dating Amos for approximately two weeks at the time of the incident. *A.R. 583-84*.

At some point on the afternoon of Mr. Rogers' birthday, Hubbard and Larry Means left the abandoned house and returned to Go-Mart. *A.R. 545*. Mr. Rogers and Amos went into the abandoned house not long before they left for Go-Mart. Mr. Rogers stated he did not know if Hubbard and Means had returned before he left the house or not. Mr. Hubbard testified he thought Mr. Rogers and Amos were gone by the time they returned to the house. Amos' body was discovered when someone interested in renting the house wanted to look inside. Hubbard immediately ran across the street and requested the neighbor call 911 upon discovery of Amos in the house. *A.R. 546*.

Mr. Rogers told detectives he panicked, when he was asked why he left the house. *A.R. 874*. He went to a friend's house by following a path up the hill directly behind the abandoned house. *A.R. 602, 871*. Alfred Godbey witnessed Mr. Rogers during this trip. He testified that Mr. Rogers appeared to be highly intoxicated. Mr. Godbey testified Mr. Rogers was on ground

that was not very steep and he would take two steps forward and several steps sideways. He testified it took Mr. Rogers 15 minutes to go 20 feet. *A.R. 650-51.* Mr. Rogers was asked to leave his friend's house shortly after he arrived because they were aware of the warrant for his arrest. *A.R. 604.* Upon being advised to leave, Mr. Rogers hid under a house for the remainder of that day [29<sup>th</sup>] and more than half of the next day [30<sup>th</sup>]. He was without food or water during this time. Mr. Rogers surrendered to police upon the advice of his friend, Timothy Ward, who was told by officers that if he did not surrender and officers had to bring him in there was a good chance Mr. Rogers could be shot. Mr. Ward was able to locate Mr. Rogers and talk him into surrendering to officers. *A.R. 850-51.*

Mr. Rogers repeatedly told officers he did not remember a lot from the evening before but officers refused to believe this and kept pressing Mr. Rogers. *A.R. 834, 840, 841, 852, 869, 870, 875, 877, 885, 887, 888, 890, 892, 909.* Mr. Rogers explained he could only remember bits and pieces of the evening. Several times during his statement detectives told Mr. Rogers' they knew he remembered what happened, otherwise he would not be emotional. *A.R. 869-70*

Detectives continued the pressure:

Scurlock: There's been lots of studies that's been done. A lot of times people will want to forget what happened, but rarely did they actually forget.

Rogers: I can't remember.

Snuffer: Up front, you know we've talked to a lot of people. I can tell you now that you've told some people some things that you did and---

Scurlock: And if you did not have any idea of what had happened

Rogers: I can't remember even telling anybody.

Scurlock: ---you wouldn't have been hiding under the deck in the woods.

Rogers: I know I've done something. **I just couldn't remember what---  
how it—what happened, how it transpired.**

*A.R. 817.*

Mr. Rogers continued to maintain during the entire interview, just like the above excerpt, he could not remember and even stated to the detectives, "I am not trying to hide anything." *A.R. 889.* "I wish to God I could. I'm telling the truth. I can't really---I can't recall." *A.R. 890.* At one point in the interview, Det. Scurlock asked Mr. Rogers if he had ever drunk so much that he suffered from a blackout and Mr. Rogers responded: "[y]eah. I've had a few people tell me the next day how bad I was and I couldn't believe it." *A.R. 904.* Mr. Rogers told officers there had been blackout occasions with Amos in which he had got aggressive with her. *Id.*

Mr. Rogers stated during the beginning of his statement to detectives, based on their prodding, that he "sliced" Amos. He again answered, "I said I cut her throat. Slashed her." *A.R. 870.* Finally, Det. Scurlock asking the same question again... How did you do it? **Rogers, "I guess I did like this." Det. Scurlock, "Was it a slice or like a stab? Rogers, "Slice" A. R. 53.** This answer does not comport with the physical evidence the state presented because the wounds to Amos were stab wounds. The detectives continued pressure and their promises to approach the prosecutor and tell the state Mr. Rogers cooperated, that he was a good guy who just made a mistake made Mr. Rogers eager to please them. Mr. Rogers' inaccurate, but incriminating statement was the only direct evidence the state had in his case.

The court issued a pretrial order that Mr. Rogers be evaluated based on trial counsel's request. Mr. Rogers was evaluated by Bobby Miller (hereinafter Dr. Miller). Dr. Miller concluded Mr. Rogers **was likely operating in an alcoholic induced black-out at the time of the incident.** *A.R. 4, 10.* An indication of just how much alcohol was consumed, in the short time everyone was together, can be derived from the fact Ms. Amos' BAC was .25 according to

the M.E.'s report. *A.R. 635.* Dr. Miller specifically stated: “[b]lackouts’ block the consolidations of new memories into old memories...” *A.R. 10.*

Jurors were never informed of Dr. Miller’s findings, nor were jurors informed of any of the other information regarding Mr. Rogers’ childhood, his multiple involuntary hospitalizations, his past suicide attempts, or his diagnosis of bi-polar disorder, with admitted noncompliance with prescribed medication and his self-medication with alcohol and drugs. *A.R. 8-9.* The information in Dr. Miller’s report was significant and important to the jurors’ consideration of mercy in Mr. Roger’s trial. *See Generally A.R. 1-10.* Unfortunately, no mitigation was presented on Mr. Rogers’ behalf during his trial. Additionally, and equally troubling is that despite knowledge of the findings in Dr. Miller’s report the state chose to portray Mr. Rogers to the jury as an individual who “conveniently” could remember some details but could not remember significant facts about the crime and how it happened— as a liar. *A.R. 764-72, 783-88.*

Approximately three weeks before trial<sup>4</sup>, counsel for Mr. Rogers was provided CIB’s on the State’s list of potential witnesses. At that time, it became apparent to counsel that a major conflict of interest existed in his representation of Mr. Rogers. Four of the State’s potential witnesses had been represented in the past by other members of the Kanawha County Public Defender’s Office trial staff on offenses that were impeachable. *A.R. 237.* Most importantly, Hubbard, the State’s key lay witness, had within the last two months, been represented by another lawyer in counsel’s office and entered a plea on an impeachable felony (possession of a stolen vehicle based on his counsel’s advice. He also had two other felony convictions in Kanawha County from 2004 in which he was represented by a public defender. Mr. Rogers’

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<sup>4</sup> At the hearing on the motion to withdraw, counsel was asked why this motion was filed so close in time to the trial. *A.R. 241* Counsel requested the state provide the records of its witnesses, a routine request. However, at an earlier motion hearing the trial court refused to order the State to provide counsel with the records of its witnesses, ruling that was a job the investigators in the public defender’s office could complete. *A.R. 220-27*

counsel discussed this development with office management, determined this was an “actual conflict” and immediately filed a motion to withdraw as counsel due to a conflict of interest. *A.R. 258-59.*

At the hearing on counsel’s motion, the managing deputy responsible for conflict checks within the public defender office explained to the court how the office processes conflict checks. *A.R. 237-45.* The managing deputy also explained to the trial court Hubbard caused the most concern. Then she further explained Hubbard’s trial counsel was approached once the conflict was discovered in Mr. Rogers’ case and Hubbard’s counsel informed management *that a Rule 35 motion was not out of the question on Hubbard’s behalf. A.R. 239.*

George Castelle, the head of the Kanawha County Public Defender’s Office, was at the hearing and was asked by the trial court to join in the discussion regarding the conflict situation. He explained to the trial court that in less serious cases when a conflict like this arises within the office the individual lawyers impacted are “screened” from the conflicting cases. *A.R. 252-53.* However, he advised the court that in cases like Mr. Rogers it is office policy to follow the restrictions of the conflict rules to the letter due to the fact Mr. Rogers faces the possibility of life without the possibility of parole. He further explained that is why the office felt it necessary to file the motion to withdrawal as counsel in this case. *A.R. 252-53, 258-59.*

The majority of the trial court’s focus during the hearing was on the tremendous amount of state funds that had been expended on Mr. Rogers’ case and how much time and effort it would take another counsel to come up to speed. *A.R. 260-61, 270.* Kanawha County Prosecuting Attorney, Mark Plants, speaking for the state, explained he would not have a problem with counsel staying on and impeaching Hubbard only with information that was public knowledge regarding the convictions.

Additionally, the trial court failed to explain the conflict situation to Mr. Rogers, or explain to him the meaning of the conflict and the consequences it would/could create for him personally. The court also failed to ask Mr. Rogers if he was willing to waive the conflict. The only question the court asked Mr. Rogers was if he understood the issue being discussed and if he was happy with counsel. *A.R. 268*. The court denied counsel's request to withdraw and ordered counsel to continue to represent Mr. Rogers. *A.R.270-71*.

Mr. Hubbard testified at trial and, as expected, gave damaging testimony regarding the day before the incident, August 28, 2010. He testified that he heard Mr. Rogers say, "I'll kill you" to Amos. *A.R. 535-36, 552*. Hubbard also testified about the relationship in general between Mr. Rogers and Amos. Hubbard described a dysfunctional and at times volatile relationship. Despite his damaging testimony, Hubbard *was not impeached by defense counsel* with his impeachable felony convictions, in an attempt to call into question his credibility. *A.R. 549-557*.

During closing argument, the prosecutor made numerous inappropriate statements that were not only misrepresentations of the evidence and testimony but also assumptions that simply were not supported by the evidence.<sup>5</sup> He told jurors Mr. Rogers ran into the woods. *A.R. 784*. The testimony presented was it took Mr. Rogers 15 minutes to walk 20 feet. *A.R. 651*. The prosecutor told jurors Mr. Rogers was not that drunk: "He hit right where he was aiming." *A.R. 789*. There was no testimony where Mr. Rogers was aiming. Finally, the prosecutor told jurors that a mark on Amos' shirt was made by Rogers' wiping off his knife after he had stabbed her. *A.R. 792*. The expert did not testify to what made the stain because the evidence did not support

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<sup>5</sup>One of these statements was made in opening: "And it is that evidence that I will come back before you at the end of this trial and ask that you return a verdict at that time, finding the defendant guilty **and showing him the mercy that he showed Laura Amos on August 29<sup>th</sup>**. Thank you. *A.R. 461-62*. It was not objected to by counsel.

the assertion made by the prosecutor. The expert testified the stain was created when a bloody object was moved across the fabric or the fabric was moved across the object. *A.R. 476.*

These statements and others were made in the final minutes of closing, and were not only improper but highly inflammatory and prejudicial to Mr. Rogers because this was the last thing the jurors heard regarding the evidence presented at trial. Furthermore, there was no way for defense counsel to respond to the prejudicial comments and misrepresentations. Counsel objected to the prosecutor's misrepresentations of the evidence. However, all of his objections, except for the final one, were overruled by the court. *A.R. 789, 790, 791, 792, 793.*

The prosecutor also invaded the province of the jury during closing when he grossly misrepresented the law as to the amount of time necessary to satisfy the element of premeditation:

Mr. Plants: The gist of his argument that he just made was that it's not first-degree murder because he was so intoxicated he couldn't plan ahead or he couldn't premeditate what he did. **Well, it only takes a moment to plan ahead, it only takes a moment to premeditate. And I will submit to you the evidence shows that when he opens those knives and approaches her, he's thinking about killing her. What else would he be doing with those knives? And you intend the natural consequences of your actions. He premeditated it – it only takes a moment—and then he intended to kill her ladies and gentleman of the jury.**<sup>6</sup>

*A.R. 783.*

As demonstrated above, the prosecutor **repeatedly** told jurors first degree murder could be committed in a "moment." *Id.* Unfortunately, this was not objected to nor was the misstatement of the law corrected by the trial court. Misrepresentation of the elements of first degree murder is something this same prosecutor, who is the elected prosecutor of Kanawha County, has done

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<sup>6</sup> None of these assertions made by Mr. Plants was in evidence. Furthermore, all the inappropriate assertions not supported by the evidence furthered the state's goal of obtaining a conviction of first degree murder. This was highly prejudicial because the only issue at stake in Mr. Roger's trial was intent.

in another high profile murder case.<sup>7</sup>

The prosecutor's ending remark to the jury drew counsel's final objection: "I humbly and respectfully request that you all find him guilty of first degree murder without mercy. **Ladies and gentlemen, he'll get to enjoy three meals a day. Laura Amos won't get to enjoy that.**" *A.R. 794.*

### SUMMARY OF THE ARGUMENT

The trial court committed reversible error when it allowed Mr. Rogers statement to be introduced at trial because it was taken in violation of the prompt presentment laws of this state. Compliance with the prompt presentment statute is mandated is mandatory, according to the opinions of this Court. A warrant was issued for Mr. Rogers on August 29, 2010. *A.R. 85.* He was arrested and transported to the sheriff's department on August 30, 2010, by Det. Snuffer and Det. Scurlock. *A.R. 87.* They arrived in Charleston, went into the sheriff's department, had Mr. Rogers seated in an interview room, and had given him Miranda warnings by 3:55 p.m., which is during normal business hours, meaning a magistrate was on duty and available to arraign Mr. Rogers. *Id.* Both Det. Snuffer and Det. Scurlock testified they placed him under arrest for murder and the reason he was taken to the sheriff's department was to see if they could get a statement. *A.R. 208, 214.*

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<sup>7</sup> Mark Plants, The Prosecuting Attorney of Kanawha County, argued to the jurors in the Rhonda Stewart trial that premeditation could be satisfied in two seconds. Appellate counsel for Ms. Stewart raised this misrepresentation of the law as error on Ms. Stewart's behalf. However, this Honorable Court did not reach the issue in her case. Ms. Stewart's conviction was reversed on another ground making it unnecessary for this Court to reach that assignment of error. Supreme Court Case No. 101179 Unfortunately, Mr. Rogers case, which was tried after Ms. Stewart's case, demonstrates a disturbing patter by Mr. Plant's to grossly misrepresent the law as to premeditation in first degree murder cases that must be addressed. Even more concerning is the fact that he typically only appears and participates in high profile murder cases where the obligation of the prosecutor under *State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977)*, is heightened to ensure that the defendant is afforded a fair trial. Mr. Plants has vowed to re-try Ms. Stewart in the media on multiple occasions, and has since began that process. Therefore, this is an issue that must be addressed by this Honorable Court. *A.R. 39, 42.*

Det. Snuffer even testified it was procedure to take individuals who are under arrest to the sheriff's department to try to get a statement before they are taken to a magistrate. *A.R. 103*. Det. Scurlock acknowledged officers are not able to speak to defendants once they have been taken to a magistrate and part of his job is to interview and investigate cases. *A.R. 115*. In denying defense counsel's motion to suppress, the trial court found the delay was caused by the officers interviewing Mr. Rogers. *A.R. 214*. The court incorrectly held that because Mr. Rogers did not also allege his statement was **involuntary**, that the statement was admissible. *Id.*

The trial court also committed reversible error when it denied counsel's motion to withdraw as counsel due to a conflict of interest. *A.R. 270-71*. Upon being supplied with CIB's on the state's witnesses, defense counsel with the Kanawha County Public Defender's Office discovered four of the state's potential witnesses had been represented by other members of the trial staff in the public defender office on impeachable offenses. Hubbard, the state's main lay witness, had just recently plead to a theft related felony and therefore still was within the timeframe to file a Rule 35 motion to reconsider sentence, something his trial counsel informed public defender management was not out of the question. *A.R. 238-39*. After discussing these issues with management, the consensus was the issues presented an actual conflict prompting Mr. Rogers' counsel to immediately file a motion to withdraw. A hearing was held on counsel's motion. At the end of the hearing, the trial court denied counsel's motion. *A.R. 271*.

"Assistance of Counsel" guaranteed by the Sixth Amendment contemplates the assistance be conflict free. *Glasser v. United States*, 315 U.S. at 70-77, 62 S.Ct. at 465, 467-468. The same constitutional right to conflict free counsel is insured by *W.Va. Const. art. III, § 14. Syl. Pt. 1, Cole v. White*, 180 W. Va. 393, 394, 376 S.E.2d 599, 600 (1988). The trial court did not discuss the conflict and the consequences of that conflict on the record with Mr. Rogers. The court

simply asked if he understood the issues involved and if he was happy with counsel's performance. *A.R. 268*. This was not sufficient to justify a knowing, intelligent, and voluntary waiver of a conflict involving such an important constitutional right as the right to counsel.

Additionally, the court had counsel, an officer of the court, standing before it asserting he could not adequately represent Mr. Rogers' due to a conflict of interest. In *State ex. rel Blake v. Hatcher*, 218 W.Va. 407,417, 624 S.E.2d 844, 854 (2005), this Court developed a non-exhaustive list of considerations to assist lower courts when faced with the obligation of making this type of decision:

(1)the potential for use of confidential information by defendant's counsel when cross-examining the State's witness; (2) the potential for a less than zealous cross-examination by defendant's counsel of the State's witness; (3) the defendant's interest in having the undivided loyalty of his or her counsel; (4) the State's right to a fair trial; and (5) the appearance of impropriety should the jury learn of the conflict. These factors are to be considered in light of the individual facts and circumstances of each case.

All five of these factors were present and highly relevant in Mr. Rogers' case.

The Fourth Circuit reversed a conviction for abuse of discretion due to a district court's *failure* to disqualify counsel who had represented the prosecution's "star witness" in a prior trial. *Hoffman v. Leeke*, 903 F.2d 280, 288–90 (4th Cir.1990). *Leeke* presented the exact situation we have in Mr. Rogers' case and the Fourth Circuit found the trial court's refusal to remove counsel was an *abuse of discretion*. The trial court's refusal to remove counsel was an abuse of discretion. Counsel's continued representation denied Mr. Rogers his constitutional right to conflict free counsel, therefore, he is entitled to a new trial.

The prosecutor's remarks in closing argument require reversal in Mr. Rogers' case because he misrepresented the evidence, made assertions not supported by the evidence, and most importantly, he grossly misstated the law of first-degree murder to jurors. Additionally, the prosecutor's final statement to jurors in rebuttal closing had no other purpose but to inflame

jurors and encourage a decision based on emotion and facts not relevant to the case instead of the evidence. The prosecutor ended his closing by stating: I humbly and respectfully request that you all find him guilty of first degree murder without mercy. Ladies and gentlemen, he'll get to enjoy three meals a day. Laura Amos won't get to enjoy that. I'll end, ladies and gentlemen. I'll ask you to review the evidence objectively and find him guilty of first degree murder, and please withhold a recommendation of mercy. A.R. 794. This was a calculated statement intended to inflame jurors moments before the jury began deliberation regarding Mr. Rogers life.

### STATEMENT REGARDING ORAL ARGUMENT

Mr. Rogers' Counsel requests oral argument in this case as the right to conflict free counsel issue is an important constitutional issue of first impression. This case should therefore be heard on the Rule 20 docket.

### ARGUMENT

- I. **The trial court's ruling that Mr. Roger's statement was not taken in violation of the prompt presentment rule, W.Va. Code § 62-1-5(a)(1) (1997) (Repl.Vol.2010) was erroneous and the statement's admission at trial constitutes reversible error. A warrant for Mr. Rogers' arrest was issued on August 29, 2010, for first degree murder and Mr. Rogers was arrested on August 30, 2010, at approximately 3:15 p.m. According to the arresting detective's suppression hearing testimony, they drove Mr. Rogers past the courthouse where the on-duty magistrate was and took him directly to the sheriffs department *for the purpose of taking his statement.***

**Standard of Review:** In Syllabus point 1 of *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 1996, we set out the standard of review of a circuit court's ruling on a motion to suppress: When reviewing a ruling on a motion to suppress... the circuit court's factual findings are reviewed for clear error. It has also been held by this Court that "we review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action." *State v. Lilly*, 194 W.Va. 595, 600, 461 S.E.2d 101, 106 (1995).

At approximately 3:18 p.m. on Monday, August 30, 2010, Mr. Rogers surrendered to officers, was handcuffed, placed in a cruiser, advised he was under arrest for murder, and advised of his Miranda Rights. He was then told , by detectives, they needed to talk to him about what happened and they were aware of what he had told other folks. Det. Scurlock stated they needed to get Mr. Rogers' side of the story.<sup>8</sup> *A.R. 837-38*. Detectives drove Mr. Rogers to the sheriff's department and lead him directly to an interview room. *A.R. 837-38*. **At no time during this trip did Mr. Rogers tell detectives he wanted to make a statement, nor did he initiate conversation.** *A.R. See Generally 834-53*. At 3:55 p.m.,<sup>9</sup> on a Monday afternoon, with an on-duty Kanawha County Magistrate available and on the bench, detectives began advising Mr. Rogers of his Miranda rights and took his statement in violation of this State's mandatory Prompt Presentment Laws.

**Mandatory Compliance**—that was the finding this Honorable Court reached in *State v. Persinger*, 169 W. Va. 121, 286 S.E.2d 261 (1982), when it construed the prompt presentment statute found in W. Va.Code § 62-1-5(a)(1) (1997) (Repl.Vol.2010). Specifically, this Court held: “The provision of W.Va.Code § 62-1-5 [1965] stating that ‘[a]n officer making an arrest upon a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence, shall take the arrested person without unnecessary delay before a [magistrate] of the county in which the arrest is made,’ **is hereafter mandatory.**” *Syl. Pt. 5, State v. Persinger*, 169 W. Va. 121, 286 S.E.2d 261 (1982) quoting *Syl. Pt. 1, State v. Mason*, W.Va., 249 S.E.2d 793 (1978)(*emphasis added*).<sup>10</sup> See also *State v. Milburn*, 204 W.Va.

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<sup>8</sup> Detectives repeatedly told Mr. Rogers throughout the interview that he needed to tell the truth so that they could go to the prosecutor and tell him that Mr. Rogers was a good guy who just made a bad decision. This was not raised on behalf of Mr. Rogers during pretrial motions.

<sup>9</sup> The relevant timeframe the trial court should have considered regarding Mr. Roger's prompt presentment claim.

<sup>10</sup> Our prompt presentment rule is contained in W. Va.Code § 62-1-5(a) (1) (1997) (Repl.Vol.2010) and provides: An officer making an arrest under a warrant issued upon a complaint ..., shall take the arrested person without

203, 214, 511 S.E.2d 828, 840 (1998)(Davis, dissenting)(“By statute, our *mandated* preliminary appearance before a magistrate serves other vital purposes in addition to informing the defendant of his right against self-incrimination and his right to counsel.”)

Subsequently, in *Syl. Pt. 1, State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984), this Court explained it was broadening *Syl. Pt 6, Persinger*<sup>11</sup> to include the “totality test” in determining whether a statement was involuntary. However, Justice Cleckley took great care in the opinion to stress the totality test did not change the *mandate of complying with the prompt presentment rule* especially when the purpose of the delay is due to officers obtaining a statement from the defendant. Cleckley wrote: “ ‘The delay in taking a defendant to a magistrate may be a *critical factor* [in the totality of circumstances making a confession involuntary and hence inadmissible] **where it appears that the primary purpose of the delay was to obtain a confession from the defendant.**’ Syllabus Point 6, *State v. Persinger*, [169 W.Va. 121], 286 S.E.2d 261 (1982), as amended.” *See also State v. Mays*, 172 W.Va. 486,490, 307 S.E.2d 655, 658 (1983) (Therefore, this case *must be reversed* because of the unreasonable delay between the appellant’s seizure(which had all of the elements of a lawful arrest, including the possession of a valid warrant) and his presentment before a magistrate.); *State v. Bennett* 179 W.Va. 464, 370 S.E.2d 120 (1988).

Importantly, after *Guthrie* reaffirmed prompt presentment was still relevant and mandatory, this Court further explained: “[o]ur prompt presentment rule ..., **is triggered when an accused is placed under arrest. . . .**” *State v. Humphrey*, 177 W. Va. 264, 265, 351 S.E.2d

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unnecessary delay before a magistrate of the county where the arrest is made. *See also* W. Va. R.Crim. P. 5(a) (“An officer making an arrest under a warrant issued upon a complaint ... shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made.”)

<sup>11</sup> The delay in taking the defendant to a magistrate may be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant. *Syl. Pt. 6, State v. Persinger*, 169 W. Va. 121, 122, 286 S.E.2d 261, 263 (1982)

613, 614 (1986). An additional holding regarding the prompt presentment rule that was decided after *Guthrie* and is highly relevant explains: “[t]he State bears the burden of proving that **delay was not for the purpose of obtaining a confession.**” *In the Matter of Steven William T.*, 201 W.Va. 654, 661, 499 S.E.2d 876, 883 (1997) (emphasis added). *See also State v. Rush*, 219 W.Va. 717, 724, 639 S.E.2d 809, 816 (2006). Mr. Rogers was under arrest for murder the moment officers came into contact with him because there was an active warrant for his arrest. One of the detectives can be heard advising Mr. Rogers he was under arrest for murder, on tape, as he was being placed in the cruiser. *A.R. 834. It is impossible for the state to prove the delay in taking Mr. Rogers before the magistrate was for any reason other than to take his statement based on the testimony given by the detectives during the suppression hearing and due to the detectives’ actions on August 30, 2010.*

Furthermore, despite the arguments of the State *that were incorrectly accepted by the trial court* in Mr. Rogers case, the prompt presentment rule **is not nullified merely because the police read *Miranda* warnings to a suspect who is under arrest.** This Court *strongly and emphatically* rejected this very argument in *State v. Deweese*, 213 W.Va. 339, 345, 582 S.E.2d 786, 792 (2003). Justice Davis wrote: “[w]e summarily reject this argument, as it would completely abolish the very essence of the prompt presentment rule.” *Id.* The sole purpose of the prompt presentment rule “is to bring a *detached judicial officer* into the process once an arrest ha[s] been made to furnish meaningful protection for a defendant's constitutional rights.” *State v. Ellsworth*, 175 W.Va. 64, 69, 331 S.E.2d 503, 507–08 (1985) (emphasis added). *See also State v. Grubbs*, 178 W.Va. 811, 814, 364 S.E.2d 824, 827 (1987) (The prompt presentment rule “requires an individual to be promptly taken before a neutral magistrate after arrest. This is to insure that the accused is fully informed of his various constitutional and statutory rights.”).

**To rule otherwise would make the prompt presentment rule meaningless and avoidable by simply advising defendants of their Miranda rights.**

The requirement to have a defendant presented without delay to a neutral magistrate is sound policy that is in place to *protect precious constitutional rights* of a defendant who is under arrest. The United States Supreme Court explained the necessity of prompt presentment by stating: “[l]egislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. *McNabb v. United States*, 318 U.S. 332, 343-44, 63 S. Ct. 608, 614-15 (1943).

This Honorable Court recognized prompt presentment laws are rooted in common law and were **mandated by our legislature**. “These are substantial rights *which the legislature has mandated should be accorded a person who has been arrested. To permit these valuable rights to be denied or substantially postponed by police officials is plainly against the tenor of the legislative will.*” *State v. Persinger*, 169 W. Va. 121, 134-35, 286 S.E.2d 261, 269-70 (1982). Furthermore, “[i]t must be stressed that our statutory right to a prompt presentment before a magistrate is not a new concept.” *Id.*

Additionally, the State’s reliance on footnote 10<sup>12</sup> of *Deweese* was misplaced and was possible only because of its *incomplete recital* of footnote 10 to the trial court. *A.R.* 135-36. The State failed to recite the final sentence of the footnote which was *highly relevant* and *directly on*

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<sup>12</sup> Footnote 10 reads: “We wish to make clear that our prior cases do permit delay in bringing a suspect before a magistrate when the suspect wishes to make a statement. *See* Syl. pt. 3, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986) (“The delay occasioned by reducing an oral confession to writing ordinarily does not count on the unreasonableness of the delay where a prompt presentment issue is involved.”). **However, our cases have never held that the police may purposefully delay taking a suspect before a magistrate in order to encourage the suspect to make a statement.**”

*point* to the facts of Mr. Rogers' case. The final sentence of footnote 10 states: "**However, our cases have never held that the police may purposefully delay taking a suspect before a magistrate in order to encourage the suspect to make a statement.**"<sup>13</sup> That is exactly what the two detectives testified they did in order to obtain a statement from Mr. Rogers. Det. Snuffer testified:

Q So the primary reason that Mr. Rogers was not taken to the Magistrate after he was apprehended was to get the confession from him, right?

A **It's our normal procedure to interview people when we arrest them.**

Q Before you've been to the Magistrate?

A **Yes, sir.**

Q And that's what you did in this case?

A **Yes, sir.**

A.R. 101-104.

Then Det. Scurlock testified:

Q So you normally don't take people to the Magistrate if they want to talk to you, even though there's already been a warrant issued for their arrest?

A **If they wish to speak with us, no.**

Q **Do you understand that the prompt presentment rules are mandatory, that you have to take them to the Magistrate?**

...

Q And you want to do that, don't you. I mean that's what you're trying to do. You're investigating a case, you want to take a statement, correct?

A As part of my job, I feel that that's my duty. I have no personal interest either way.

Q And you know that after you take him to the Magistrate, you don't get to talk to him anymore, right?

A **That's true.**

A.R. 108-115.

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<sup>13</sup> "Examples of necessary delay might include those required: 1) to carry out reasonable routine administrative procedures such as recording, fingerprinting and photographing; 2) to determine whether a charging document should be issued accusing the arrestee of a crime; 3) to verify the commission of the crimes specified in the charging document; 4) to obtain information likely to be a significant aid in averting harm to persons or loss to property of substantial value; 5) to obtain relevant nontestimonial information likely to be significant in discovering the identity or location of other persons who may have been associated with the arrestee in the commission of the offense for which he was apprehended, or in preventing the loss, alteration or destruction of evidence relating to such crime." *State v. Persinger*, 169 W. Va. 121, 135-36, 286 S.E.2d 261, 270 (1982) Counsel would note that trial counsel went through these acceptable reasons of delay with officers during the suppression hearing and both officers denied that any of these situations were applicable to Mr. Rogers case.

Mr. Rogers at no time stated, "I want to tell you what happened" or "I want to make a statement." And, Mr. Roger's behavior was *not* that of an individual voluntarily going to speak with the detectives at the sheriff's department. Mr. Rogers was physically placed under arrest, he was in handcuffs, and he was being transported in a cruiser. There was no free-will being exercised on his part. Mr. Rogers was being *compliant* with the detectives and the situation he was in, *as he was required to do because he was under arrest*. He had no choice but to go to the sheriff's department. The situation in which Mr. Rogers gave his statement to detectives was completely different from a situation in which an individual is contacted by officers and asked to come to the sheriff's department and the individual voluntarily goes and ultimately gives an incriminating statement, or a situation where the individual is under arrest and initiates conversation or states he would like to give a statement or just voluntarily starts telling what happened.

Det. Snuffer and Det. Scurlock made a conscious decision to take Mr. Rogers to the Sheriff's Department. One of the first things audible during the transport was detectives *telling Mr. Rogers* they were going to take him to the sheriffs department and talk with him. They wanted to get his side of the story. *A.R. 837-38*. This demonstrates detectives intended to take Mr. Rogers to the Sheriff's department from the moment he was placed in the Police cruiser. Snuffer testified it was policy to take a person *who is under arrest to the department* and try to get a statement *before they are taken to the magistrate*. *A.R. 103*. And Scurlock admitted they are well aware of the fact that after a defendant is taken to the magistrate they cannot take a statement. *A.R. 115*.

Another fact which clearly demonstrates the detectives' intentions is on the way to the sheriff's department, detectives called a co-worker and instructed them to get a Wendy's value

meal and a frosty for Mr. Rogers and bring it to *the interview room* at the sheriff's department. Once at the Sheriff's department, Mr. Rogers was immediately taken to an interview room. He was not finger printed, or photographed. Det. Scurlock read Miranda rights to Mr. Rogers again and at this point Det. Snuffer looked at his watch and announced it was 3:55 p.m. *A.R. 102.*

A magistrate was on duty in the Kanawha County Judicial Annex at the time detectives drove by with Mr. Rogers, in order to take him to the sheriff's department. The laws of this state **mandate** that the detectives take Mr. Rogers before a magistrate without unnecessary delay.<sup>14</sup> The magistrate would have advised Mr. Rogers of his rights, and filled out the necessary paperwork to appoint counsel for him. *Importantly, the state did not present an explanation for the delay that is acceptable under the laws of this state.* Also, counsel went through the list of acceptable delays this Honorable Court listed in *Persinger*, with the detectives, during the suppression hearing and the officers testified none of the acceptable reasons for delay applied in Mr. Roger's case. *See footnote 13.*

*Even* the trial court's ruling denying the motion to suppress acknowledged the rules of prompt presentment were violated. *A.R. 214.*<sup>15</sup> The court **incorrectly** focused on the fact Mr.

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<sup>14</sup> The State attempted to *incorrectly* keep the focus in Mr. Rogers case on the entire amount of time that elapsed during his detention and ultimate presentment to the magistrate. However, this Court held *that is not the correct focus*. According to this Court, which noted opinions of numerous other jurisdictions around the country, *the correct focus is on the purpose of the delay.* *State v. Persinger, 169 W. Va. 121, 136, 286 S.E.2d 261, 270 (1982)* See also *State v. Mitter 169 W.Va. 652, 657, 289 S.E.2d 457, 461(1982).*

<sup>15</sup> The trial court stated in its full ruling denying the motion to suppress Mr. Rogers statement: "I mean I think that they were good arguments, quite frankly. But the Court looks at the reason for the delay and does find that part of that was to obtain a statement. I think they said that it was. But here we do not have Mr. Rogers saying that he didn't voluntarily give one. And the Court would find that a reason for the delay was for a confession, and you pointed to the appropriate case law that says the Court may find or consider foremost that the sole purpose, or main purpose, of the delay is for purposes of confession, that that may in and of itself trigger a violation of prompt presentment. The Court in this case did not find that to be dispositive. I think it's undisputed that there was a period of time wherein the officers questioned him. He gave it voluntarily. The Court cannot find that, under these circumstances, that the period of time wherein this occurred was violative of the prompt presentment. Would I have had a different opinion if that Magistrate Court had been open from 6:00 to 8:00, and there was not an explanation of what occurred during that time, maybe it would have -- that two hours would have mattered. But the only evidence the Court heard on that was that it's customary that it was closed from 6:00 to 8:00. It wasn't disputed. I don't know it would have been different, but -- so I just don't find that the length of time or the reasons for the delay would have violated and did violate the prompt presentment."

Rogers failed to assert his statement was involuntary and, on the fact that magistrate court was closed from six to eight p.m. a finding based solely on the testimony of Det. Scurlock. Additionally, the trial court's focus on the period of time between 6:00 to 8:00 p.m., demonstrates the court did not even focus on the correct time frame when ruling on counsel's motion to suppress. *A.R. 215*. Therefore, a review of the totality of the circumstances, including the testimony of the two detectives, demonstrates the delay in presenting Mr. Rogers to the on-duty magistrate was for the purpose of eliciting a confession from Mr. Rogers. Thus, Mr. Rogers' right to prompt presentment was violated in this case and the incriminating statement obtained by detectives, as a result of the delay, renders Mr. Rogers' statement inadmissible. The trial court's ruling to the contrary must be reversed. Allowing Mr. Rogers statement to be admitted at trial was reversible error; therefore Mr. Rogers is entitled to a new trial.

**II. The trial court denied Mr. Rogers due process when it denied counsel's motion to withdraw based on an *actual conflict of interest*. The trial court's refusal to allow counsel to withdraw denied Mr. Rogers the right to conflict free counsel and is reversible error.**

**Standard of Review:** Recognizing the trial court's need for latitude, several courts have applied an abuse of discretion standard when reviewing decisions on disqualification motions. *State ex rel. Blake v. Hatcher, 218 W. Va. 407, 418, 624 S.E.2d 844, 855 (2005)*.

Less than two months prior to Mr. Rogers' trial, the state's key lay witness, Hubbard, represented by a trial lawyer in the Kanawha County Public Defender's Office, entered a plea to felony possession of a stolen vehicle. He also had credit card forgery, and breaking without entry in which he was represented by a public defender which could have been used to impeach his testimony as they were all theft related convictions. Public defender management questioned trial counsel regarding the status of Hubbard's case upon the discovery of the conflict situation.

Hubbard's counsel informed management a Rule 35 motion to reconsider sentence was not out of the question. *A.R. 239.*

This was explained to the court during the hearing on counsel's motion to withdraw. This should have indicated to everyone involved Hubbard's plea was less than 120 days old, giving him even more incentive to testify against Mr. Rogers. The court was also notified three other potential state witnesses had also been represented by public defender trial staff on impeachable offenses resulting in additional conflicts if they were to testify. *A.R. 237.* Mr. Rogers' counsel was in an "actual conflict" situation as his duty to Mr. Rogers required him to impeach Mr. Hubbard's testimony with his prior felony convictions.<sup>16</sup>

The court heard the above information and from the managing deputy who processes conflicts. *A.R. 237-45.* The court also heard from George Castelle, the Chief Public Defender of Kanawha County, who told the court in less serious cases lawyers could be screened but in serious cases, like Mr. Rogers' case, the conflict rules are followed to the letter due to the risks the clients face and, that is why the motion was necessary and filed in Mr. Rogers' case. *A.R. 252-53.* The prosecutor told the court he would not have a problem if trial counsel impeached Hubbard with information that was public knowledge. The court asked counsel to verify that he would only use public knowledge. There was no discussion with Mr. Rogers on the record regarding the conflict, what risks were involved to him personally due to the conflict, or if he was willing to waive his right to conflict free counsel. Additionally, Hubbard was not asked if he was willing to waive the conflict. The court, after considering the motion, denied the motion to withdraw and in doing so denied Mr. Rogers effective assistance of counsel as guaranteed by

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<sup>16</sup> Another layer to the potential conflict was that Mr. Hubbard's counsel would have to advise him to testify against Mr. Rogers, if that was in his best interest, in an attempt to increase his chances of getting relief on his Rule 35 motion to reconsider sentence. This would place two public defenders from the same office in adverse positions as well as the two clients involved.

the Sixth Amendment. *A.R.* 270-71. Defense counsel did not impeach Mr. Hubbard’s testimony by using his prior felony convictions. *A.R.* 549-557.

The Sixth Amendment provides that a criminal defendant shall have the right to “the Assistance of Counsel for his defense.” This right has been accorded, “we have said, not for its own sake, **but because of the effect it has on the ability of the accused to receive a fair trial.**” *United States v. Cronin*, 466 U.S. 648, 658, 104 S.Ct. 2039 (1984) (*emphasis added*). See also *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S. Ct. 1237, 1240, (2002). In *Glasser v. United States*, 315 U.S. at 70-77, 62 S.Ct. at 465, 467-468 , the Court held the “Assistance of Counsel” guaranteed by the Sixth Amendment contemplates **the assistance be conflict free**. Where a constitutional right to counsel exists under *W.Va. Const. Art. III, § 14*, there is a correlative right to representation that is **free from conflicts of interest**. *Syl. Pt. 1, Cole v. White*, 180 W. Va. 393, 394, 376 S.E.2d 599, 600 (1988) (*emphasis added*). The assistance of counsel is among those “constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,” *Holloway v. Arkansas*, 435 U.S. 475, 476, 98 S. Ct. 1173, 1174 (1978), quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827(1967).

The controlling United States Supreme Court case regarding a conflict, in which defense counsel brings it to the trial court’s attention, but the court forces counsel to continue the representation in violation of the right to conflict free counsel, is *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173 (1978) In *Holloway*, defense counsel alerted the trial court that he could not adequately represent the competing interests of three codefendants. The trial court denied counsel’s request to appoint other counsel. The *Holloway Court* reversed, *deferring to the judgment of counsel recognizing a defense lawyer is in the best position to determine when a conflict exists*, and the lawyer has an ethical obligation to advise the court of any problem, and

that his declarations to the court are “*virtually made under oath.*” *Id. at 485–486, 98 S.Ct. 1173 (emphasis added).* The court found the conflict counsel tried to avoid by timely objecting undermined the adversarial process and therefore the defendant was entitled to a new trial. *Id. at 490, 98 S.Ct. at 1173.*

The *Holloway Court* explained joint representation of conflicting interests is **inherently suspect**, and because counsel's conflicting obligations to multiple defendants “effectively sea[l] his lips on crucial matters” and make it difficult to measure the precise harm arising from counsel's errors. *Id. at 489–490, 98* The court further held **automatic reversal** is the proper remedy when defense counsel is forced to continue representation that is a conflict of interest, **over his timely objection.** *Id. at 488, 98 S.Ct. 1173 (emphasis added)* See also *Mickens v. Taylor, 535 U.S. 162, 167-68, 122 S. Ct. 1237, 1241-42 (2002)* (“[W]henver a trial court improperly requires joint representation over timely objection reversal is automatic.”); *Syl. Pt. 4, Cole v. White, 180 W. Va. 393, 394-95, 376 S.E.2d 599(1988)* (“In a case of joint representation, once an actual conflict is found which affects the adequacy of representation, ineffective assistance of counsel is deemed to occur and the defendant need not demonstrate prejudice.”).

The *Glasser Court*, explained that no measurement of prejudice is necessary because there is no way to determine the precise degree of prejudice sustained. The Court held that “the right to have the assistance of counsel who is conflict free is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.” 315 U.S. 60, 75-76, 62 S.Ct. 457, 467 (1942). A trial court denies a defendant the right to have the effective assistance of counsel, guaranteed by the Sixth Amendment, as in Mr. Rogers’ case, when it requires the continued representation by a lawyer who is burdened by a conflict.

Therefore, a verdict rendered when counsel labored under an actual conflict must be set aside and a new trial ordered. The *Glasser Court* explained that unconstitutional multiple representation is never harmless error and reversal is required because:

. . . the evil-it bears repeating-is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And *to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.*"

*Holloway*, 435 U.S. at 490-91, 98 S.Ct. at 1173(emphasis added). The United States Supreme Court again explained why prejudice is presumed when counsel is burdened by the existence of an actual conflict of interest, explaining that due to the conflict counsel is in a position where they **must breach the duty of loyalty, "perhaps the most basic of counsel's duties."** *Cuyler v. Sullivan*, 446 U.S. 335, at 345-50, 100 S.Ct. 1708, at 1716-19 (emphasis added). This Court has also addressed the issue counsel is faced with when an actual conflict is present: "The concern is two-pronged: '(a) the attorney may be tempted to use that confidential information to impeach the former client; or (b) counsel may fail to conduct a rigorous cross-examination for fear of misusing his confidential information.'" *State ex rel. Youngblood v. Sanders*, 212 W. Va. 885, 890, 575 S.E.2d 864, 869 (2002). See also *U.S. v. Williams*, 81 F.3d 1321, 1325 (1996).<sup>17</sup>

Importantly, a defendant's interest is *not* the only interest a court is required to consider when ensuring the fairness and integrity of a criminal trial. "[C]ourts have an independent

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<sup>17</sup> "The ethical canons thus present the lawyer with a Hobson's choice: the lawyer must either seek to elicit confidential information from the former client, or refrain from vigorous cross-examination. Because the conflicting ethical imperatives under such circumstances place the defense lawyer in an untenable position, representation under such circumstances is presumptively suspect." (citing *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 416-17, 624 S.E.2d 844, 853-54 (2005) (citations and footnote omitted)).

interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings are fair to all who observe them.” *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 1698( 1998). Therefore, when evaluating Sixth Amendment claims, “the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.” *Id. at 159, 108 S.Ct. at 1697.*

Waiver of conflict free counsel is possible; however, that is a decision that must be made on a case by case basis and above all the record must demonstrate the waiver was made voluntarily, knowingly, and intelligently. *Hoffman v. Leeke*, 903 F.2d 280, 288 (4th Cir. 1990). This requirement was not met in Mr. Rogers’ case. In *United States v. DeBerry*, 487 F.2d 453-54 (1973), the convictions of two defendants represented by the same retained counsel were reversed by the Second Circuit, finding the inquiry of the district court judge insufficient to establish lack of prejudice. In reaching that decision the court noted an opinion from the First Circuit, *United States v. Foster*, 469 F.2d 1, 5 (1st Cir. 1972), that held the lack of satisfactory judicial inquiry shifts the burden of proof on the question of prejudice to the Government. *United States v. DeBerry*, 487 F.2d at 453 n. 6. A waiver would have been invalid in Mr. Rogers’ case even if there had been sufficient inquiry by the trial court.

The conflict in Mr. Roger’s case was so serious it is of the type that cannot be waived without calling into question the integrity of the judicial system. Therefore, even if a defendant is willing to waive and in fact does fully and properly waive the conflict on the record, “[a] district court is free to disqualify counsel . . . because of the judiciary's ‘independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.’” *United States v. Basham*, 561 F.3d 302, 323 (4th Cir. 2009) (citations omitted). The integrity of the system is so vital to its successful

operation, a court is not even required to point to an actual conflict but instead can rely on a showing of a “serious potential for conflict.” *Wheat*, 486 U.S. at 164, 108 S.Ct. at 1700. See also *United States v. Harmon*, 914 F. Supp. 275, 277 (N.D Ill. 1996)<sup>18</sup>

Applying the United States Supreme Court’s decision in *Wheat*, the Fourth Circuit has “upheld a district court's decision to disqualify counsel who had previously represented a witness at his current client's trial, *United States v. Williams*, 81 F.3d 1321, 1324–25 (4th Cir.1996), and reversed for abuse of discretion a district court's *failure* to disqualify counsel who had represented the prosecution's “star witness” in a prior trial. *Hoffman v. Leeke*, 903 F.2d 280, 288–90 (4th Cir.1990).” 81 F.3d at 1324.<sup>19</sup> *Leeke*, presented the exact situation present in Mr.

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<sup>18</sup> “[T]he court must evaluate and balance the interests of the defendant, the other client represented by the defendant’s counsel, the government, and the court and public based on the circumstances of each particular case. Furthermore, although a defendant may waive his or her right to conflict-free counsel, the trial court still remains obligated to address the situation. The court has a duty “to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment.” *United States v. Messino*, 852 F.Supp. 652, 655 (citing *Wheat*, 486 U.S. at 161, 108 S.Ct. at 1698). The court also has an “institutional interest in the rendition of just verdicts in criminal cases,” because criminal proceedings must “appear fair to all who observe them.” *Wheat*, 486 U.S. at 160, 108 S.Ct. at 1698.

<sup>19</sup> See also, *United States ex rel. Williams v. Franzen*, 687 F.2d 944, 949 (7th Cir.1982) (attorney's representation of three codefendants held to be an actual conflict of interest where one of the codefendants testified adversely to the others); *Brown v. United States*, 665 F.2d 271 (9th Cir.1982) (attorney's simultaneous representation of a prosecution witness and the defendant was held to be an actual conflict of interest); *Parker v. Parratt*, *supra*, 662 F.2d at 484 (“Clearly, a conflict would arise where one defendant attempts to exonerate himself by pointing the finger of guilt at codefendants”); *Taylor v. United States*, 226 F.2d 337 (D.C.Cir.1955) (representation of the defendant and a government witness by the same attorney was held to be a conflict of interest requiring a new trial); *Matter of Darr*, 143 Cal.App.3d 500, 502, 191 Cal.Rptr. 882, 884 (1983) (“defense counsel's simultaneous representation of a key prosecution witness constituted an actual conflict of interest which denied petitioner his right to effective assistance of counsel”); *People v. Dace*, 153 Ill.App.3d at 896, 506 N.E.2d at 335 (where a prosecution witness was represented by one member of a law firm and the defendant was represented by another member of the same law firm, “we have a classic case of a *per se* conflict of interest which constitutes reversible error”); *People v. Duckmanton*, 137 Ill.App.3d 465, 467, 92 Ill.Dec. 211, 213, 484 N.E.2d 942, 944 (1985), *app. denied*, 111 Ill.2d 571, 94 Ill.Dec. 554, 488 N.E.2d 553 (1986) (“it is well established that simultaneous representation of a defendant and a State's witness by one attorney creates a *per se* conflict of interest”); *Commonwealth v. Hodge*, *supra*, 386 Mass. at 168, 434 N.E.2d at 1248 (where defense counsel's law firm represented a prosecution witness, defense counsel “was operating under a genuine conflict of interest from the time it became clear that [the witness] would give nontrivial testimony for the Commonwealth”); *People v. Wandell*, 75 N.Y.2d 951, 953, 555 N.Y.S.2d 686, 687, 554 N.E.2d 1274, 1275 (1990) (“a conflict existed by virtue of defense counsel's representation of the prosecution's chief witness”); *People v. McDonald*, 68 N.Y.2d 1, 9, 505 N.Y.S.2d 824, 828, 496 N.E.2d 844, 848 (1986) (in an arson case, defense counsel's simultaneous representation of the corporate victim, where an officer of the latter testified for the prosecution, constituted “an actual conflict”); *In Interest of Saladin*, 359 Pa.Super. 326, 333, 518 A.2d 1258, 1262 (1986). See also *Castillo v. Estelle*, 504 F.2d 1243 (5th Cir.1974); *United States v. Pinc*, 452 F.2d 507 (5th Cir.1971); *The People v. Stoval*, *supra*, 40 Ill.2d at 112-113, 239 N.E.2d at 443; *Com. v. Westbrook*, 484 Pa. 534, 540, 400 A.2d 160, 163 (1979). *Austin v. State*, 327 Md. 375, 388-90, 609 A.2d 728, 734-35 (1992)

Rogers case and the Fourth Circuit found the trial court's refusal to remove counsel was an abuse of discretion. This Court's decision in *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 624 S.E.2d 844 (2005), is indicative of just how serious the issue of counsel acting with a conflict of interest is and that it must be dealt with appropriately. In *Hatcher*, this Court developed a non-exhaustive list of considerations to assist lower courts in making this type of decision:

(1) the potential for use of confidential information by defendant's counsel when cross-examining the State's witness; (2) the potential for a less than zealous cross-examination by defendant's counsel of the State's witness; (3) the defendant's interest in having the undivided loyalty of his or her counsel; (4) the State's right to a fair trial; and (5) the appearance of impropriety should the jury learn of the conflict. These factors are to be considered in light of the individual facts and circumstances of each case.

*Id.* All of these factors were relevant to Mr. Rogers' case.

Two Rules of Professional conduct are also applicable to conflict of interest situations: 1.7<sup>20</sup> and 1.9.<sup>21</sup> The comments to these rules also provide valuable guidance. The comment section for 1.7 states: “[a] waiver is effective only if there is disclosure of the circumstances and *there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.*” (*emphasis added*) This demonstrates the first client, who would be Hubbard in Mr.

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(“...[A]n actual conflict of interest existed in the present case where defense counsel's law partner represented a codefendant who testified adversely to the defendant.”)

<sup>20</sup> WV R RPC Rule 1.7:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

<sup>21</sup> WV R RPC Rule 1.9:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

Rogers' case, is the client who must be initially approached regarding a waiver. This is logical because if the initial client refuses to waive the conflict the lawyer is barred from representing the new client. This exact situation is what set the events in motion for the prosecutor to be the moving party in *Hatcher*, 218 W. Va. at 407, 624 S.E.2d at 844. It was the original client of defense counsel, who was currently a witness for the state in the current action, that objected to counsel's representation of the defendant. *See also State ex. rel. McClanahan v. Hamilton*, 189 W.Va. 290, 430 S.E.2d 569(1993)

Hubbard was never questioned by the court on the record regarding the conflict. However, the court had counsel speaking for Hubbard, under oath and as an officer of the court. Counsel and management from the Kanawha County Public Defender's Office explained the situation presented an actual conflict and in order to protect the interests of everyone involved, *especially Mr. Rogers' rights based on the gravity of his case*, counsel should be removed. The comment section to 1.7 without a doubt makes the decision in Mr. Roger's case an easy one by stating: ". . . as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, ***the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.***" (*emphasis added*) There is no way that a disinterested lawyer would recommend Mr. Rogers waive the actual conflict at issue. And even more significant, the comment states it is unethical for a lawyer to even request that a client waive the conflict **or** provide representation in a situation like Mr. Rogers.

A relevant issue involved in this argument, that has not been addressed by this Honorable Court, is how a Public Defender's Office is to be treated in a conflict situation. There are

numerous variations in place throughout the country. Some states treat public defender offices like all other firms holding that if it is a conflict for one member it is a conflict for the entire firm.<sup>22</sup> Other jurisdictions have applied a more narrow approach treating each district office of the Public Defender's Office as a firm. *Duvall v. State*, 399 Md. 210, 232, 923 A.2d 81, 94-95 (2007) (We hold that, at a minimum, each district office of the public defender should be treated as a private law firm for conflict of interest purposes.) A hybrid of the above listed methods has emerged also in which there is no *per se rule* regarding public defender offices and the decision is made on a case by case basis.<sup>23</sup> This is the option that seems to make the most sense and is essentially what was described to the trial court and used within the Kanawha County Office when dealing with conflict assessments. However, as was stated to the trial court in regards to Mr. Rogers' case, when there is an actual conflict and you have a client facing the most serious sentence this state imposes, the conflict rules should be followed to the letter. *A.R. 252-53, 258-59*. Nothing about the trial courts analysis of this situation was correct. Trial counsel alerted the court to the conflict. The court was also informed Hubbard had incentive to testify against Mr. Rogers because his trial counsel still had time to argue for a reconsideration of sentence. *A.R. 239*. Hubbard's trial counsel was part of the same office and same division as Mr. Rogers' trial

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<sup>22</sup> See also, *Williams v. Warden*, 217 Conn. 419, 586 A.2d 582, 589 n. 5 (1991); *Rodriguez v. State*, 129 Ariz. 67, 628 P.2d 950, 953-54 (1981) (en banc); *State v. Smith*, 621 P.2d 697, 698-99 (Utah 1980); *Allen v. Seavy*, 519 P.2d 351, 353; *Ward v. State*, 753 So.2d 705, 708 (Fla. Dist. Ct. App. 2000).

<sup>23</sup> See also *Asch v. State*, 62 P.3d 945, 953 (Wyo. 2003) (concluding that "a case-by-case inquiry, rather than per se disqualification, [is] appropriate for cases alleging a conflict of interest based on representation of co-defendants by separate attorneys from the State Public Defender's Office"); *State v. Bell*, 90 N.J. 163, 447 A.2d 525, 529 (N.J. 1982) (requiring the court to determine the likelihood of prejudice resulting); *People v. Robinson*, 79 Ill.2d 147, 37 Ill. Dec. 267, 402 N.E.2d 157, 162 (1979) (requiring the trial court to conduct a case-by-case inquiry to determine whether, and to what extent, a conflict of interest existed); *People v. Daniels*, 52 Cal.3d 815, 277 Cal. Rptr. 122, 802 P.2d 906, 915, cert. denied, 502 U.S. 846, 112 S.Ct. 145, 116 L.Ed.2d 111 (1991) (automatic disqualification would hamper ability of public defender to represent indigents in criminal cases); *State v. Pitt*, 77 Hawaii 374, 884 P.2d 1150, 1156 (1994) (case-by-case inquiry because public defender's office, as a government office, is different from a law firm); *People v. Miller*, 79 Ill.2d 454, 38 Ill. Dec. 775, 404 N.E.2d 199, 202 (1980) (no *per se* rule is necessary; a case-by-case analysis is sufficient to determine whether any facts peculiar to the case preclude multiple representation within a public defender's office).

counsel. The trial court's ruling requiring counsel to stay on Mr. Rogers' case denied him his right to conflict free counsel as envisioned by the Sixth Amendment. The state's key witness, Hubbard, was not impeached with his felony convictions as a result. Due to this erroneous ruling by the trial court Mr. Roger's is entitled to a new trial.

**III. The Prosecutor's Improper, Prejudicial Closing Argument denied Mr. Rogers of his Due Process Right To A Fair Trial. The prosecutor referenced facts not in the record, made assertions not supported by the evidence over defense counsels objections, and *grossly misstated the law* regarding first degree murder, telling jurors in the final minutes of closing that "it only takes a moment to plan ahead, it only takes a moment to premeditate...[Mr. Rogers]He premeditated it - - it only takes a moment." A.R. 794 These combined errors in the closing argument by the prosecutor denied Mr. Rogers his Due Process Right to a Fair Trial.**

**Standard of Review:** In Syllabus Point. 5, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995), the Court stated that "[a] judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney which do not clearly prejudice the accused or result in manifest injustice." The Court further stated that "[f]our factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." *Id.* at Syl. Pt. 6.

In addition, since there was no objection to the prosecutor's repeated misstatement of the law regarding first-degree murder, that issue also will have to be decided under the plain error standard.

"[A] prosecuting attorney is not just an officer of the court, like every attorney, but is also a high public officer charged with representing the people of the State" and "can therefore usually exercise great influence upon jurors." *State v. Hamrick*, 216 W.Va. 477, 481, 607 S.E.2d 806, 810 (2004) (quoting *State v. Swafford*, 206 W.Va. 390, 398, 524 S.E.2d 906, 914 (1999) (Starcher, J., concurring)). A prosecutor is required to maintain a position that is not partisan,

eager to convict, but rather must deal fairly with the accused. *Id.* **Prosecutorial remarks that have a significant “tendency to mislead the jury and to prejudice the accused[,]” require reversal.** *Id.* (quoting *State v. Sugg*, 193 W.Va. 388, 393, 456 S.E.2d 469, 474 (1995)). The prosecutor’s ability to exercise great influence over the jury was especially true in Mr. Rogers case for two reasons:

1. Mr. Rogers case was a high profile murder case. It was publicized routinely: at the time it occurred, every time the case was in court leading up to trial, and daily during trial. Despite the fact that jurors are instructed not to listen to the news or read anything regarding the case, the fact that news casters the jurors are familiar with were in the courtroom makes a statement about the case.
2. The prosecutor was making these remarks, during the trial, as the elected prosecutor of Kanawha County. Mr. Plants typically makes appearances in high profile cases, therefore, his appearance alone as “the top law enforcement officer of Kanawha County” was also making a statement of the importance of the case to jurors.

The prosecutor’s remarks in closing argument require reversal in Mr. Rogers’ case because he misrepresented the evidence, made assertions not supported by the evidence, and most importantly, he grossly misstated the law of first-degree murder telling jurors it could be committed in a moment. “The prosecutor's argument was therefore misleading, and it would have been appropriate for the judge to interrupt the prosecutor, and to correct [his] legal error even in the absence of a defense objection. ‘When counsel misstates the law, the better practice is for the court to intervene promptly and to correct the misstatement.’” *Brown v. United States*, 766 A.2d 530, 542 (D.C. 2001) (quoting *Thomas v. United States*, 557 A.2d 1296, 1304 (D.C.1989)).

The prosecutor told jurors Mr. Rogers walked across the room toward Amos with his knives pulled intending to kill her. *A.R.* 783. There was absolutely no testimony or evidence produced at trial to support this statement. Mr. Rogers and Amos were the only two inside the

house. *A.R. 545*. Mr. Plants told jurors Mr. Rogers “was accurate he hit where he intended to hit” because he severed both carotid arteries. *A.R. 791*. Again, there was no testimony regarding where Mr. Rogers intended to stab Amos. Furthermore, as counsel pointed out during his objection, the evidence presented by the **state** was that one carotid artery was severed. *A.R. 791*.

It is obvious the detectives had been to the scene and were trying to get Mr. Rogers to fill in pieces to the puzzle during the hour long interview. Questioning Mr. Rogers about the knives, Scurlock asked: “[d]id you shake the blood off of them or anything like that?” Mr. Rogers responded, “Whatever is on it is on it still on it.” *A.R. 960*. This answer by Mr. Rogers was turned into Mr. Plants’ bold, unsupported assertion to jurors, in rebuttal closing that the drops of blood pictured dripped off of Mr. Rogers’ knife while he stood there watching her bleed. Mr. Plants was also holding the photo for jurors to see. *A.R. 789*. However, the detective who was qualified as an expert and testified regarding the evidence did not make that assertion **because** the evidence did not support it. In fact, a close look at the picture shows that the more probable source, Amos’ hand, fell at an angle as there are spatters that radiate out from the blood drops in a direction consistent with her hand falling into the blood causing the drops discussed in the picture.

Mr. Plants’ further misrepresented evidence pictured in a second crime scene photo in what was probably the most prejudicial and inflammatory misrepresentation of the evidence he made in rebuttal closing. Plants told jurors Mr. Rogers stabbed Amos and then wiped his knife off on her shirt because the stain appears to be in the shape of a pocket knife. *A.R. 792*. The same smear on Amos shirt was explained by the crime scene expert, during his testimony, as “a smear like someone drug an object that had blood on it across the shirt due to the feathering of the stain.”

Counsel objected to these assertions, asking the court how Mr. Plants could be allowed to make these assertions regarding the evidence when the expert did not based on review of the exact same evidence. *A.R. 792*. The court overruled counsel's objection, holding it was argument and it was the jurors' job to determine what happened. *A.R. 792*.

Finally, Mr. Plant's ended his closing by telling jurors that when deciding mercy to think about the fact that even if the jury withholds mercy: " [l]adies and gentlemen, [Mr. Rogers] he'll get to enjoy three meals a day. Laura Amos won't get to enjoy that." *A.R. 794*. This final sentence of his closing was his attempt to inflame the jury against Mr. Rogers and take their attention off of the facts of the case. Mr. Plant's conjured up emotion, passion, hatred, and sympathy immediately before jurors were to begin deliberating. *This was a calculated move on his part to end his closing in a dramatic way*. His highly inflammatory and prejudicial ending comment could possibly allow jurors to justify a decision to withhold mercy by "inject[ing] extraneous appeals to sympathy and prejudice, and lessen the jury's sense of responsibility over the seriousness of it's verdict." *Gershman at 529-30*

The jury was further misled on the law of first-degree murder by the prosecutor's repeated prejudicial assertion that Mr. Rogers could commit first-degree murder in a "moment." *A.R. 783*. This is not the first time Mr. Plants, the elected prosecutor of Kanawha County, misrepresented the law on first degree murder in a high profile murder case.<sup>24</sup> In the case of

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<sup>24</sup> This Honorable Court has taken judicial notice of other petitions filed before it. *See State ex. rel. Cephas v. Boles, 149 W.Va. 537, 142 S.E.2d 643(1921), In re. Breedlove, 186 W.Va. 279, 412 S.E.2d 473(1991)* Additionally, the Fourth Circuit has also taken judicial notice of another court's notice, order, or judgments. *Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236(4<sup>th</sup> Cir. 1989)*. Courts are hesitant to take judicial notice of anything in criminal cases due to the fact the defendant's liberty is at stake. However, in this instance, taking judicial notice of the facts and arguments made in Mrs. Stewart's case will be promoting the very legitimate policy this Court honors in criminal cases. Counsel is asking this court to do so again because this very troubling behavior of misrepresenting the elements of first-degree murder is becoming a pattern. Even more alarming is the fact that Mr. Plants appears in the high profile murder cases which are usually those in which the elevated responsibilities of *Boyd* apply. An additional reason for this court to address this issue is that it will continue until Mr. Plant's is told what he is doing is improper. Importantly, Mr. Plants vowed on numerous occasions in the media to re-try Ms. Stewart following this

State v. Rhonda Stewart<sup>25</sup> he argued to jurors that Ms. Stewart could have committed first-degree murder in two seconds.<sup>26</sup> Both of these prejudicial arguments substantially mislead the juries and demonstrates a disturbing pattern of misstatement of the law in the most serious murder cases. Additionally, the misstatement came during rebuttal closing which is the final opportunity anyone has to discuss the evidence of the case with jurors, making the misstatements even more prejudicial because jurors are even more likely to recall the last things they heard. And, it was impossible for counsel to respond to these misrepresentations except by way of objecting. Further, there is no guarantee jurors would understand the outcome of an objection followed by a discussion. Mr. Plants' argument in Mr. Rogers' case denied him his due process right to a fair trial guaranteed by *Article III, § 10 of the West Virginia Constitution and the Fourteenth Amendment to the United States Constitution*.

Application of the *Sugg* factors indicates the prosecutor's closing argument was very prejudicial and denied Mr. Roger's a fair trial. First, the prosecutor's remarks mislead the jury by asking them to consider evidence not in the record and to make assumptions not supported by the evidence. This Court has stated that "counsel must keep within the evidence, [and] not make statements calculated to influence, prejudice, or mislead the jury[.]" *Syl. Pt. 2, State v. Kennedy, 162 W.Va. 244, 249 S.E.2d 188 (1978)*. Accord *Syl. Pt. 7, State v. England, 180 W.Va. 342, 376 S.E.2d 548 (1988)*. In *State v. Guthrie, 194 W.Va. 657, 679, 461 S.E.2d 163, 185 (1995)*, the Court noted, "[i]t is unprofessional conduct for the prosecutor to intentionally refer to or argue

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Court's reversal of her conviction. In fact, the case is scheduled to be tried in June of 2012 and there has been considerable media coverage of the beginning stages of her case as it is prepared for trial.

<sup>25</sup> Supreme Court Case No. 101179. A complete copy of Mr. Plants' closing argument in this related case will be included in the Appendix for this Court's consideration. *A.R. at 43-54*

<sup>26</sup> MR. PLANTS [prosecutor]: Let's just assume, again, give her the benefit of the doubt. I got the burden here. I carry it gladly. Base your decision on the evidence. Assuming what she said is true, let's assume that she was intending to com[m]it suicide that day. She drove back to the hospital intending to shoot herself and she changed her mind. Two seconds before she put the gun to Sammy Stewart's temple. Ladies and gentlemen, that's first degree murder. *A.R. 52*

on the basis of facts outside the record.” (quoting *Standard 3-5.9, American Bar Association Standards for Criminal Justice* (2<sup>nd</sup> ed. 1980)). *Accord State v. Moose*, 110 W.Va. 476, 477, 158 S.E. 715, 716 (1931).

“It is misconduct for a prosecutor to insinuate that factual issues have already been authoritatively determined.” *Prosecutorial Misconduct* 2<sup>nd</sup> edition, §§11:34 Bennett Gershman. (529) A prosecutor is not permitted to make arguments not supported by the record, otherwise the prosecutor becomes an unsworn witness against the defendant. *See ABA Standards for CJ* §§ 3.5-8(a), 3-5.9 (3d. ed. 1993). Deliberate misrepresentation of the evidence by the prosecutor lead to a reversal by the United States Supreme Court in *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 758 (1967) This clear misstatement of West Virginia law, by the elected prosecutor of Kanawha County in the final minutes of closing, regarding first-degree murder “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Sugg*, 193 W.Va. at 405, 456 S.E.2d at 486 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974)).

The *Sugg* factors indicate the prosecutor’s improper argument was so damaging as to require reversal of the conviction. First, the prosecutor’s argument that Mr. Rogers could commit first-degree murder in a “moment” grossly misstated the law and mislead the jury to find him guilty of that offense. While an intent to kill may be formed in a moment, first-degree murder cannot be committed after instantaneous premeditation and momentary deliberation, which is all that can occur in a “moment.”

In *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), Justice Cleckley writing for the Court stated in *Syllabus Points 5 and 6*:

5. Although premeditation and deliberation are not measured by any particular period of time, **there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed.**
6. In criminal cases where the State seeks a conviction of first degree murder based on premeditation and deliberation, a trial court should instruct the jury that murder in the first degree consists of an intentional, deliberate, and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder. To the extent that *State v. Schrader*, 172 W.Va. 1, 302 S.E.2d 70, (1982), is inconsistent with our holding today, it is expressly overruled.

The *Guthrie Court* further explained that premeditation *cannot be instantaneous nor deliberation momentary to prove first-degree murder:*

This means there must be an opportunity for some reflection on the intention to kill after it is formed. The accused must kill purposely after contemplating the intent to kill. Although an elaborate plan or scheme to take life is not required, our *Schrader*'s notion of instantaneous premeditation and momentary deliberation is not satisfactory for proof of first degree murder. . . . ***To speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms. It deprives the statutory requirement of all meaning and destroys the statutory distinction between first and second degree murder.***

*Id.* at 675, 461 S.E.2d at 181 (emphasis added). Thus, "murder in the first-degree is a calculated killing as opposed to a spontaneous event." *Id.* at 674, 461 S.E.2d at 180. Mr. Plants told jurors first-degree murder could be **a spontaneous event** in the final moments of trial and he was not corrected by the trial court.

In *State v. Hatcher*, 211 W.Va. 738, 741, 568 S.E.2d 45, 48 (2002), the prosecutor argued in closing argument that "premeditation can be formed in an instant[.]" Citing the above

syllabus points and quotation from *Guthrie*, this Court held the prosecutor's erroneous misstatement of the law prejudicial to the defendant and reversed the conviction. *Id. at 742, 568 S.E.2d at 49*. The Court said since the element of premeditation was not indisputably shown by the State's evidence, the jury **could have** relied on the prosecutor's erroneous statement of the law. *Id.*

The same reasoning is applicable here. The State's proof of premeditation and deliberation was disputed and questionable. The prosecutor's misstatement was highly problematic because intent was the issue in dispute for jurors to decide in this case. It is likely the jury relied on the prosecutor's misrepresentation of the law to reach its decision as to the element of premeditation and deliberation. The probability that jurors relied on the prosecutors misrepresentation of the law is highly likely as Mr. Plants made this misstatement of the law in the final moments of argument. The misrepresentation is even more troubling when considered along with his misrepresentations of the evidence, his improper assumptions regarding the evidence, and his appeal to juror's emotions which also occurred in the final minutes of closing. *See also State v. Hutchinson, 215 W.Va. 313, 322, 599 S.E.2d 736, 745 (2004)*. Mr. Plants' statement that first-degree murder can be committed in "a moment" is a gross misstatement of the law.

Secondly, the prosecutor's improper argument regarding the commission of first degree murder was repeated four times and its impact was devastating to the defense in light of the State's case and lack of evidence of premeditation and deliberation (the third *Sugg* factor):

Mr. Plants: The gist of his argument that he just made was that it's not first-degree murder because he was so intoxicated he couldn't plan ahead or he couldn't premeditate what he did. **Well, it only takes a moment to plan ahead, it only takes a moment to premeditate. And I will submit to you the evidence shows that when he opens those knives and approaches her, he's thinking about killing her. What else would he be doing with those knives? And you**

**intend the natural consequences of your actions. He premeditated it – it only takes a moment—and then he intended to kill her ladies and gentleman of the jury.**<sup>27</sup>

*A.R. –3d 140.*

The third Sugg factor, relating to the strength of the prosecution’s proof to establish guilt of first-degree murder, demonstrates how prejudicial the prosecutor’s repeated misstatements were. The State presented evidence of premeditation through the testimony of Hubbard who had reason to comply with the state as he was still eligible for a motion to reconsider sentence. *A.R. 239.* The only other evidence the state had was Mr. Rogers’ inaccurate but incriminating statement that was taken in violation of prompt presentment laws and was pulled out of him by detectives repetitive questioning and promises of leniency.

Mr. Rogers stated, “I guess I did this” due to their prodding as to how he cut Amos. Mr. Rogers stated during the beginning of his statement to detectives based on their prodding that he “sliced” Amos. *A.R. 883.* This description by Mr. Rogers does not comport with the physical evidence the state presented at trial. **The wounds to Amos were stab wounds not slicing wounds.** Furthermore, the State never presented any significant evidence to disprove Mr. Rogers’ argument that he was so intoxicated that he was not capable of forming intent to kill. The state’s evidence showing Amos had a BAC of .25 supported Mr. Rogers’ claim of *extreme intoxication* as both he and Amos were drinking together in celebration of his birthday. *A.R. 624, 838.* This extremely high BAC also supported his assertion of a blackout which was verified and supported by the court-appointed expert who found Mr. Rogers **was likely acting in an alcoholic induced blackout at the time of the incident.** *A.R.4, 10.*

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<sup>27</sup> None of these assertions made by Mr. Plants was in evidence. Furthermore, all the inappropriate assertions not supported by the evidence furthered the state’s goal of obtaining a conviction of first degree murder. This was highly prejudicial because the only issue at stake in Mr. Rogers trial was intent.

Studies indicate there are several causes of an alcohol induced blackout and there are varying degrees.<sup>28</sup> Use of drugs along with alcohol increases the chance of a blackout. *A.R.* 29.<sup>29</sup> Some blackouts are “total” meaning the individual cannot remember anything associated with the time period involved. In “partial” blackouts individuals can remember portions or bits and pieces of an incident. This is the type of situation Mr. Rogers is describing. Importantly, studies show individuals in a blackout can interact and talk with others, appearing as though there is nothing wrong with them. They will be able to carry on normal conversations and even recall particulars about the timeframe in which the blackout is occurring *but* will not be able to remember these same facts later. *A.R.* 16.<sup>30</sup> This Honorable Court referred to the testimony of an expert in *State v. McFarland*, verifying this very thing: “[f]inally, the petitioner’s expert testified that persons suffering from alcoholic blackouts, similar to that suffered by Mrs. B. on the night in question, can perform several tasks but not remember those tasks when they awake from the blackout.” --*S.E.2d--*, 2011 WL 5902232 (2011).

The individual who suffered an “alcohol induced blackout” may eventually “pass out”; however, it is important to realize the two are completely different. An individual who suffered a blackout will not be able to recall the events they participated in or discussed with others during the blackout. Dr. White from Duke University Medical Center wrote that if recreational drugs were tools he would describe alcohol as the sledgehammer. *A.R.* 26. This is because the

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<sup>28</sup> The area of alcoholic blackouts has recently gained a lot of attention due to numerous high profile tragedies on college campuses. This in turn has promoted more research in the areas. The articles relied upon came from Duke. In 2002, Eric White and colleagues asked *A.R.* 772 undergraduates if they had ever awoke after a night of drinking unable to remember the events of the night before. 51 % reported having a blackout sometime in their life, 40% reported having one in the year before the study. *Alcohol’s Damaging Effects On The Brain*, Alcohol Alert, Number 61, October 2004, available at <http://pubs.niaaa.nih.gov/publications/aa63/aa63.htm> Entire article at *A.R.* 18

<sup>29</sup> *What Happened? Alcohol, Memory Blackouts, and the Brain*, National Institute On Alcohol Abuse and Alcoholism, <http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm> Entire article at *A.R.* 26

<sup>30</sup> Alcohol-induced blackouts are not reserved for alcoholics, Hazelden, <http://www.hazelden.org/web/public/ade080218.page> Entire article at *A.R.* 16

extreme and sudden flooding of the brain with alcohol or the steady and continuous consumption of a large volume of alcohol prevents the brain from storing these events in short term memory. So once the individual passes out or goes to sleep the memories are gone. Studies also indicate those questioning someone who has experienced a blackout should be very careful not to suggest anything to the individual as they usually are so desperate to recall what did in-fact happen they will adopt the suggestion as a memory.

Groups known to be prone to blackouts are: alcoholics, individuals who drink a large amount of alcohol in a short period of time, and women. *A.R. 26.* Mr. Rogers' told officers he had suffered from blackouts in the past. He also told officers the group was drinking and doing pills on the night of the incident which increases the chances of blackouts. Mr. Rogers fell in at least two high risk groups that night: drinking a large amount in a small amount of time and being an alcoholic. Additionally, people with a history of blackouts are more vulnerable to the effects of alcohol on memory than those without a history of blackouts. *A.R. 30.* Despite Mr. Rogers' continuous and consistent denial of memory, detectives were relentless and would not quit asking Mr. Rogers different questions over and over. It is obvious the detectives had been to the scene and were trying to get Mr. Rogers to fill in pieces to the puzzle. *A.R. 68.* Detectives also on numerous occasions made promises to Mr. Rogers:

Snuffer: I just want you to be honest with us, and I want—because I want to be able to go to our prosecutor and say, 'Look, Geno, told us the truth. He's sorry for what he did. It was an accident. He had got out of control.'<sup>31</sup> *A.R. 841.*

Scurlock: "Geno, unfortunately, a lot of people have to hit this point in their life before it gets better....When people hit the bottom, they don't have anywhere to go but better. You just need to make things

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<sup>31</sup> Detective Snuffer did not even know Mr. Rogers name, he asked the deputy who was providing them with a case number moments after they had just said all this stuff to Mr. Rogers about knowing he was not a bad guy: "[w]hat's this guy's name?"

right. You know what I mean? There's still a lot of good that you can do in the world." *A.R. 843.*

Scurlock: Normally what we see is once people sit down and talk to us they realize we are just ordinary old guys....We're here to try to help you through it. It will all come out.

Snuffer: We just want to be able to tell them: Look, he's sorry for what he did, and he has been honest with us. He made a mistake. He is not a bad guy.

Scurlock: Honesty is the biggest thing here. I know it's tough buddy....Hey he was honest with us, the more forthcoming you are, the better that is....[W]e are not going to sit and spoon feed you and tell you what to say...If you want to be honest then that is up to you.

Scurlock: Remember what we said in the car about honesty?

Mr. Rogers: It's just honest. I'm just--- I don't

...

Mr. Rogers: It's kind of--- I don't---I don't remember actually physically doing it. I know I did it. *A.R. 870.*

These promises were not raised by trial counsel as an inducement to make Mr. Rogers' statement involuntary; however, the promises are still relevant for this Court to consider along with Dr. Miller's finding that Mr. Rogers was in fact operating under a blackout when he committed the crime. The State was aware of Dr. Miller's conclusion but still chose to play on the facts at trial and **portray Mr. Rogers as a liar who "conveniently" did not remember the crime but, did remember other facts and who also "conveniently" told others about what he did before he "forgot everything."** *A.R. 766-770, 783-791.*

This evidence is consistent with someone who was operating in an alcoholic blackout **and** all of which negates the elements of first degree murder in this case. Mr. Rogers would obviously remember the details that occurred before he reached the BAC that triggered his

blackout;<sup>32</sup> furthermore, it is possible to remember bit and pieces of events that occur during a blackout. The most important fact for individuals who are not familiar with blackouts and what happens during one is: Mr. Rogers would be able to discuss specifics of the event until he passed out or went to sleep because an alcoholic induced blackout impacts the brain's ability to **store memories**.

Here you have Mr. Rogers stating over and over I do not remember. Believe me I want to remember but, I cannot. Detectives would not quit....How did you do it? To which he responded, "I said I cut her throat. Slashed her." *A.R. 870*. **"I guess I did like this."** Scurlock **"Was it a slice or like a stab? Rogers, "Slice"** *A.R. 883*. This answer given at the same time that he was demonstrating was **inconsistent** with the physical evidence. The wounds show Amos was stabbed. This demonstrates Mr. Rogers suffered from a blackout because he did not have an accurate memory of events. It further shows Mr. Rogers began guessing as to what occurred during this hour of repetitive questioning in an attempt to please detectives.

Mr. Rogers even eerily and accurately described a blackout in his own words to detectives when they were telling him that they knew he knew what happened because he told others. "As far as my---at the time, if it happened, it was in my mind freshly. Now it's been 24 hours or whatever, how long it has been or something like that, and some of them just ain't clicking in my head. I know I did it." *A.R. 879*. "...I can't---if I could bring it back in my brain, I can't---that's one part I can't." *A.R. 903*. Mr. Roger's denied and could not state for certain one element that would justify a conviction for first degree murder during his statement with detectives. He repeatedly admitted he did it, "I had to, I was the only other one there", but he also repeatedly stated I do not know how, or why I did it. *A.R. 870*.

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<sup>32</sup> Who was at the house, what he did that morning, what shirt he was wearing. All of these facts were determined before intoxication.

Thus, it was critical to the jury's decision on the first-degree murder elements of intent, malice, deliberation, and premeditation to determine Mr. Roger's mental state. As shown above, the prosecutor's repeated misstatements regarding first degree murder were so prejudicial it constitutes reversible error. Mr. Plants grossly misrepresented the evidence regarding Mr. Rogers' intent. He further stated authoritatively and without being corrected by the trial court that first degree murder could be committed in a moment on four separate occasions to jurors. The evidence of first-degree murder in Mr. Rogers' case was open to serious question, the prosecutor's serious misrepresentations of the evidence and his assumptions that were not supported by the evidence were extremely prejudicial to Mr. Rogers case. Importantly, these improper statements bolstered the State's case at a time when counsel could not respond and the statements were the last thing jurors heard regarding the evidence presented at trial.

As to the fourth *Sugg* factor, it is evident the prosecutor's comments were deliberately made and designed to tip the scales in the State's favor. Why else would the prosecutor grossly misrepresent both the law of the state and the evidence produced at trial? In *Syllabus Points 3 and 4, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977)*, this Court emphasized that prosecutors must deal fairly with the accused and **that this duty is more elevated in cases that are particularly serious or repugnant in nature:**

3. The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartially, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.
4. The standard of fair and impartial presentation required of the prosecutor may become more elevated when the offense charged is of a serious or revolting nature, as it is recognized that a jury in this type of case may be more easily inflamed against the defendant by the very nature of the crime

charged.

In *State v. Swafford*, 206 W.Va. at 397, 524 S.E.2d at 913, Justice Starcher, in a concurring opinion, further explained the prosecutor's duty to be fair and not raise issues with the jury it has no right to consider:

\* \* \*

**The privilege of addressing the jury should never be taken as a license to state, or to comment upon, or to suggest that the jury draw an inference from, facts not in evidence, or for that matter to raise issues which a jury has no right to consider such as race, religion, economic status, the accused's exercise of a constitutional right, or some other issue designed to encourage jurors to act with an improper motive.**

Every citizen must be able to trust their criminal justice system. The public must be assured that the guilty will be punished and that the innocent will be exonerated. But when there is a reasonable question of guilt or innocence, the public should be assured that both sides will get a fair shot to prove their case. However, even the most conscientious prosecutors may be tempted to sneak their thumb onto the scale of justice to make it more certain that the jury reaches a guilty verdict. (emphasis added).

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What is so damaging and prejudicial about the prosecutor's misstatement of the law is that it mislead the jury to believe they could find Mr. Rogers guilty of premeditated first-degree murder if he decided to kill her just a single moment before she was stabbed- - a spontaneous event. It is evident the prosecutor's misstatement of the law was deliberately calculated to cause the jury to find Mr. Rogers guilty despite his argument that he was so intoxicated that he could not form the intent to kill.

The last statement in Mr. Plants' closing argument regarding Mr. Rogers having three meals a day which Amos would not, was calculated, it was not relevant to the case, and it could serve no other purpose than to inflame jurors against Mr. Rogers. This final statement of his closing clearly violated Mr. Plants' duty to seek justice and his elevated duty to deal fairly with Mr. Rogers due to the severity of the facts involved. And while counsel's objection to the

statement was sustained, jurors were not instructed by the trial court to disregard Mr. Plants' last comment. However, even if the court had instructed jurors to disregard the final comment, that would not have cured this error because the moment Mr. Plants stated this, the point was made, and the damage was done.

The Prosecutor's Improper Misstatement of The Law Is Plain Error

Although defense counsel failed to object to the prosecutor's improper closing argument, this error should be noticed as plain error for two reasons. First, this Court has consistently held the trial court has an independent duty to intervene when a prosecutor makes an improper closing argument.

The trial court also committed reversible error when it failed to intervene for the purpose of limiting and correcting improper remarks made by the prosecuting attorney during closing.

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[T]he trial court has a duty to independently protect the accused's right to a fair trial free from improper remarks by the prosecuting attorney. . . . It is the responsibility of the court to ensure the final argument to the jury is kept within proper, accepted bounds.

\* \* \*

We find . . . that the trial court erred by not intervening in order to limit and correct the prosecutor's fundamentally improper remarks.

*State v. Moss*, 180 W.Va. 363, 367-68, 376 S.E.2d 569, 573-74 (1988) (*Emphasis added; citations and internal quotes omitted*). *Accord State v. Grubbs*, 178 W.Va. 811, 818, 364 S.E.2d 824, 831 (1987); *State v. Kanney*, 169 W.Va. 764, 766, 289 S.E.2d 485, 487. The trial court should have intervened in this case. Refusing to accept the state's argument that the court's correct instructions cured any harm caused by the prosecutor's misstatement of the law, the court in *Brown v. United States*, 766 A.2d 530, 542-43 (D.C. 2001), explained: "[n]ot every juror is trained in abstract logic and, in the absence of a prompt and explicit correction of prosecuting counsel's misstatement, the possibility cannot be overlooked that the jury misunderstood an

essential point of law. That danger would have been avoided if the judge had intervened immediately after the erroneous statement....” The *Brown* Court, also found it problematic that the misstatement of the law by the prosecution came at the end of rebuttal closing when the “jury’s attention may well have been at its peak. The judge’s instruction as to the elements..., on the other hand, came well into the judge’s charge.” *Id.*

Secondly, the prosecutor’s improper, prejudicial argument rises to the level of plain error. Plain error is defined as “(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” *State v. Miller, 194 W.Va. 3, 18, 459 S.E.2d 114, 130 (1995).*

The facts of this case meet the plain error test. As discussed above, the prosecutor’s misstatement of the law regarding first-degree murder is an error that is plain and obvious. This Court conflates parts three and four of the plain error test, noting errors that affect substantial rights are prejudicial errors and must have affected the outcome of the trial. *Id.* That occurred here because, as shown above, the prosecutor’s prejudicial argument likely affected the outcome of the trial denying Mr. Rogers his right to a fair trial.

### CONCLUSION

As to the first issue, Mr. Rogers requests that this Honorable Court Reverse his conviction and Order that his statement be suppressed because it was taken in violation of the Prompt Presentment Rule. Mr. Rogers requests that his case be reversed and remanded for a new trial on issues two and three.

Respectfully Submitted,

CLAYTON ROGERS  
By Counsel

A handwritten signature in black ink, appearing to read "C. L. Walden". The signature is written in a cursive style with a large initial "C" and "L".

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**CERTIFICATE OF SERVICE**

I, Crystal L. Walden, hereby certify that on the 11<sup>th</sup> day of April, 2012, I hand delivered a copy of the foregoing *Petitioner's Brief and the Appendix Record* to counsel for respondent, Benjamin F. Yancey, III, Assistant Attorney General, Office of the Attorney General, State Capitol, Building 1, Room W-435, Charleston, WV 25305.



Crystal L. Walden  
Counsel for Petitioner