

No. 12-0075  
SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,  
Plaintiff below and  
Respondent herein,

v.

Circuit Court of Summers County  
Case No. 10-F-53

R.L. MEADOWS,  
Defendant below and  
Petitioner herein.

**PETITIONER'S BRIEF**

As Corrected

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**III.**  
**Assignments of Errors**

The Petitioner R.L. Meadows relies upon the following errors in support of his appeal:

A. The trial court denied a change of venue motion presented by the defense.

Thereafter, following the passage of seven (7) months on the eve of trial the court, acting sua sponte but without any finding of good cause, removed the case to a different county than the county where the alleged offense was committed in violation of W.Va Constitution, Article 3, Section 14. Plain error is asserted.

B. The trial court denied the Defendant's motion for a mistrial which was made after the mother of the deceased child testified for the third time that she had "passed" a polygraph test. The Court incorrectly found that this error was in each of the three instances invited error, but gave no cautionary instruction to the jury as is required. Plain error is asserted.

C-D. The trial court erroneously permitted the testimony from a child psychologist concerning the psychologist's "interpretations" of the decedent's four (4) year old brother's play activities. That testimony was

- 1) incompetent, unreliable and embodied alleged "statements" which were not statements at all.
- 2) not properly admitted as a 404(b) act as there was no act which was clearly identified or which otherwise met the requirements of Rule 404(b).

E. The trial court erred in allowing cumulative photos of the child in the hospital and in permitting gruesome photos of the autopsy to be admitted as evidence. A total of 27 photographs altogether were admitted.

F. The record establishes by a preponderance of evidence that Mr. Meadows

had ineffective assistance of counsel, thereby depriving him of his right to a fair trial.

**IV.**  
**Statement of the Case**

This case grows out of the tragic death of a 17 month old child named I. H.. I. H.'s mother Christen and the Petitioner, R.L. Meadows resided together, App. 19-466, 470. The trial testimony centered around whether Christen or Mr. Meadows inflicted the injuries which resulted in I. H.'s death.

The child's mother entered into a plea agreement for the offense of gross neglect of a child, App. 52-54, App. 18-278. She agreed to "cooperate" with the State and thereafter testified against Mr. Meadows at trial. Mr. Meadows testified that it was Christen who inflicted the injuries, App. 19-479, 480, 481, 482, 483, 488, 489, 524, 525, 526.

Petitioner R.L. Meadows was indicted for the crimes of murder, death of a child by a guardian or custodian, and child abuse resulting in injury, App. 9. Following his convictions for second degree murder in count one and for counts 2 and 3 as charged he was sentenced to determinate terms of forty (40) years on counts 1 and 2 each and a term of one(1) to five (5) years on count 3, all sentences to run concurrently, App. 1.

The indictment was returned in Summers County, however the trial was held in Monroe County, having been moved there by the Court acting sua sponte. Counsel for the Petitioner earlier filed the following motion on January 21, 2011:

**"Motion to Move The Case To Another County**  
Comes now the Defendant, James R.L. Meadows, by counsel, Warren R. McGraw II, and respectfully moves that the Court remove this case from Summers County, West Virginia to another county wherein the Defendant can gain a fair and impartial trial. The Defendant is currently in the process of collecting data regarding his inability to have a fair trial, and will supplement this

motion with that supporting data at an appropriate later time, App. 12.”

The above motion was denied by order entered on February 11, 2011 which followed a hearing held on January 31, 2011, App. 12. In addressing this motion the Circuit Court noted that:

“It’s a lot simpler to try it in the county where the case arose because that is where all the witnesses are. And if there’s anybody that wants to come watch it, they can do it more easily.” App. 72.

Further the Court stated that:

“ . . . what I would normally do on this case is, is come here on whatever day we pick for the trial, and call in the jury pool. . . and try to pick a jury. Now, if it becomes obvious we can’t get a jury. Typically what we do is have a jury over in Monroe County. And we’d just switch it to there and go there the next day. . .” App. 72-73.

Defense counsel stated:

“That’s satisfactory to us. . . I just wanted to make sure that in the event we get into trying to pick a jury, that we have a motion filed.” Id.

The Court went on to state that:

“in the past that’s worked well, just to have a jury on standby in Monroe County. And that’s what I propose to do here.” App. 74.

Defense counsel then stated that he was just working to meet the motion deadlines but that:

“We’re hopeful also that we can get a jury here in Summers County.” Id.

On September 12, 2011 the Circuit Court convened the final pretrial conference in the case. As the hearing began the Court stated the following:

“The case is currently set for trial on Wednesday September 14<sup>th</sup>. And sometime ago, the defense made a motion for change of venue, which was denied at that time. Since that time, the Court has reconsidered that motion and has determined that it would seem appropriate to grant the motion. . . . , so the motion to change venue will be granted, App. 75-76.

At the September 12, 2011 hearing the State also presented its 404(b) motions which the defense opposed, App 14, 78. These motions were held in abeyance pending an evidentiary hearing, App. 79. Further, at the hearing the Court granted the defense motion to prevent any reference to any polygraph examination, App. 16, 79.

Just before the trial proceedings began counsel for Petitioner asserted objections to the use of “any photographs,” App. 17-32,33. The focus turned to the prejudicial effect of the photographs which were taken of the child’s injuries. The prosecution stated “We’re. . . not using them to inflame the jurors. We’re using them to show the condition that the child was in . . . .” App. 17-34. In ruling that the photographs could be introduced into evidence the Court found as follows:

“If I understand correctly, the State’s theory of the case, at least, is that the child was in reasonably good health early that morning when the mother left home and that the child suffered life-ending injuries while she was in the custody of the Defendant. And the Court feels that there’s—if I understand correctly, there’s pictures after the child was taken to the hospital that showed extensive injuries. And the Court feels that there would be a great deal of probative value here because of that, because they would show that the child was initially uninjured, and then later was injured. So, there’s a great deal of probative value. The Court would recognize there’s also some prejudicial effect of those photographs, but it would seem to me the probative value would outweigh the prejudicial effect. So, the motion to keep out the photographs will be denied.” App. 17, 34-35.

The State’s first trial witness was Sergeant Clemons who is assigned to the State Police

units which investigates crimes against children. She was contacted by an employee of Child Protective Services. Sergeant Clemons testified that she first saw I. H. in the emergency room at the Summers County Hospital, App. 17-55. Many of the photographs which were admitted into evidence were admitted during the State's direct examination of Sergeant Clemons though she did not take some of them.

Sergeant Clemons testified that Mr. Meadows told her that he found the child on the floor of the living room when he came out of the bathroom after hearing a "thud", App. 17-59,60. His explanation was that the child apparently had fallen off of the couch. Other bruises were attributed to a fall off of the mother's bed in the bedroom, App. 17-61.

Sergeant Clemons photographed the child while she was in the hospital, App. 17-65, 67, 68, State's Exhibits 7-15, App. 23-27. Others took photographs which were also introduced through Sergeant Clemons, App. 17-68, State's Exhibits 16-28, App. 27-33. She also attended the child's autopsy, App. 17-70.

On cross examination Sergeant Clemons offered the opinion that the Petitioner R.L. Meadows inflicted the injuries which were shown in the photographs, App. 17-71, 72, 83. She stated that the mother took responsibility for one of the child's bruises, on the hip, App. 17-72-73. The Sergeant proceeded to provide her interpretation of the mother's statement including offering hearsay statements from the mother which implicated Mr. Meadows, App. 17-78, 79, 80. The Sergeant also offered her opinions as to who caused each bruise which both she, and other officers in her absence had photographed, App. 17-85.

In response to the question posed of "How long had R.L. been living there at the home," Sergeant Clemons provided an answer which referred to who was there, when they "probably" moved in, what they did for Halloween, adding her conclusion "and that's when the injuries

started,” App. 17-88. The officer again provided an opinion about Mr. Meadows’ guilt in response to inartful questioning:

“Q: So R.L. didn’t do that one. You’re not saying that he caused that injury?

A: No sir. But the severe bruising on the abdomen, on the face, everything else I’ve pointed out.” App. 17-91.

At points during cross-examination the defense counsel and Sergeant Clemons simply engaged in a colloquy about what another person allegedly said concerning the child’s injuries, who caused them, and when, App. 17-94, 95, 96, 97, 98.

A short time during the cross-examination the defense attorney asked the following questions based on information in the officer’s report of her investigation which of course was not otherwise in evidence:

“Q: I see in one of your reports . . . under motives you put down anger?

A: Yes sir

Q: How do you arrive at the conclusion that anger was the motive here?

A: If you have seen—I mean, the pictures. Look at the beating that child—I mean, what other motive, other than you’re mad at the child, could there be? I mean, what could a 17 month old do to provoke that kind of beating?” App. 17-102.

The officer then provided her opinion that the injuries were not from “one-time blows,” App. 17-103.

Sergeant Clemons also testified not only about what witnesses had told her, but also about who was telling the truth and who was not telling the truth, App. 17-106. The redirect examination was largely about matters which on their face were hearsay and which were beyond

Sergeant Clemons' personal knowledge, all provided without defense objection, App. 17-107, 108, 109.

Neighbor Melissa Gill testified. She stated that she was at the trailer where R.L. Meadows and the mother of the deceased child lived on the day before the incident in question, App. 17-114. On that occasion the child I. H.

“ . . . had a few bruises on her forehead and her lip.”  
App. 17-116.

The following morning she was awakened by Mr. Meadows who was at her door holding an unconscious I. H., App. 17-117. She called 911. The ambulance came to her trailer to get I. H.. On cross-examination defense counsel inquired about Mr. Meadows' use of marijuana and that of witness Gill, App. 17-121. Ms. Gill testified that in her judgment the child was in worse condition on the morning when she was rushed to the hospital than she was on the evening before, App. 17-124, 125.

Child Protective Service worker Tammy Wegman testified that she had been called to the hospital, App. 17-128. While there the child's mother Christen told her that the child had, two days earlier, been jumping on the bed with her, had fallen off and hit her head. The mother told her that she then got up, went to the living room, began jumping on the couch and again fell off, App. 17-130. Petitioner R.L. Meadows did not speak with her, App. 17-132. Ms. Wegman took the mother's 3 year old son Ia. H. to be interviewed and to be placed in foster care, App. 17-132.

Ms. Wegman acknowledged having received several different accounts from the child's mother, App. 17-134, perhaps even a fourth version of events, App. 17-135. I. H. had sustained a broken arm which was perhaps the result of previous abuse inflicted by the mother, Id.

Sheriff's deputy James Chellis testified about being called to investigate of this case. He took some of the photographs of the child at the hospital, App. 17-146. He called Child

Protective Services.

Sergeant Christopher C. Smith of the West Virginia State Police took Mr. Meadows' statement which was played for the jury, App. 17-150. On cross-examination he was asked about whether Mr. Meadows appeared to be high on marijuana when he interviewed him for his statement. Sergeant Smith offered his opinion that Mr. Meadows was trying to "cover up . . . what he did to this child," App. 17-154. He stated that Mr. Meadows did not appear to be intoxicated, App. 17-157.

Matt Stalnaker, the paramedic who transported I. H. to the hospital, testified that he reported the cause of injury as "child battering" as the result of "blunt force trauma," App. 18-168. Without objection the paramedic's opinions and his report were entered into evidence, State's exhibit A-30, App. 35-39.

The child's grandmother Alice Meador testified that she saw I. H. earlier in the week when her mother brought her to the grandmother's home for a bath, App. 18-179. She denied seeing any obvious bruising, App. 18-180. Ms. Meador also stated that her daughter came to her home on the morning the child was rushed to the hospital, but telephoned her first early that morning. She testified that while on the phone she could hear the child "talking and playing," Id.

During the second day of trial the Court addressed the State's 404(b) motion, App. 18-188. The first witness called in support of the motion was Masters level psychologist Steve Ferris. His testimony concerned his treatment of I. H.'s brother Ia. H. who had been referred to him by the Summers County DHHR, App. 18-191. The referral came when he began to live with his father and the father's girlfriend following the death of his sister I. H., App. 18-192. Mr. Ferris had seen him 11 times during 2011, Id. The boy is 4 years old, therefore typically his therapy involved playing with toys, App. 18-193.

Because he never said the name of Mr. Meadows, Mr. Ferris “interpreted” his speech as referring to Mr. Meadows any time he said Ro-Ro, App. 18-194. He stated that the child spoke about himself and his sister “beating up” mommy and Ro-Ro and committing other unidentified acts of violence, Id. Mr. Ferris further “interpreted” the child’s behavior as “being angry at someone,” Id.

Mr. Ferris further testified:

“So my interpretation of him, and it was a consistent theme, this was many, many sessions, that he—I felt like he had seen some violence, maybe quite a bit of violence. But I think he’d seen some violence from Ro-Ro either toward his mother, but probably toward himself and also toward his sister. And I think that was a source of the anger.” App. 18-196, 197.

Mr. Ferris was of course specifically asked whether he held his opinion to a reasonable degree of psychological certainty, but he failed to answer the question, App. 18-197 (lines 10-19).

Though Mr. Ferris was asked whether he believed Ia. H. was competent to testify, he indicated that he did not believe that he could or that he “should make the final decision about competency,” App. 18-199. Some of the child’s answers he thought would be confusing, even opposite, he stated, Id.

On cross-examination during his voir dire Mr. Ferris once again failed to answer the question about whether he held his opinion to a reasonable certainty, referring to the Court’s role instead, App. 18-200. The child had ceased coming to, or being brought to, his appointments.

The State justified calling Mr. Ferris at trial on the grounds that his testimony proves the absence of mistake and the identify of the perpetrator, App. 18-207. The State also argued that the testimony did not violate the Confrontation Clause, App. 18-207, 208, 209, 210, 211. The defense objected to Mr. Ferris’ testimony arguing that he was actually being used as a witness to

speak in lieu of an incompetent witness, App. 18-212, 213.

The Court concluded that the child's statements were not testimonial in nature rather they were made for treatment, App. 18-213, 214. Further, the Court found that the Ferris testimony was offered to show the absence of mistake and the identity of the perpetrator and that it met the preponderance of the evidence test that the "acts occurred," App. 18-214.

A second 404(b) witness was then offered. Amanda Patrick testified about an incident which she alleged had taken place at a friend's house during the previous fall. She claimed that Mr. Meadows had picked I. H. up, got in her face, cursed at her and then tossed the child onto a couch, App. 18-218, 219. On cross-examination she testified that he didn't toss her hard "like, to hurt her or nothing," App. 18-220. On re-direct examination she said Mr. Meadows was "a little bit" angry, App. 18-222. The Patrick testimony was permitted on the same grounds as Mr. Ferris' testimony was i.e. the absence of mistake and the identity of the perpetrator, App. 18-224, 225, 226.

Chief Medical Examiner Dr. James Kaplan testified about I. H.'s injuries and the cause of her death. His report is a trial exhibit, App. 41. He noted blunt force injuries to the head and face, App. 43 and blunt force injuries to the child's abdomen, App. 44. There was also a broken left arm which was healing as well as knee contusions and a cut lip. Dr. Kaplan stated that most of the child's injuries appeared to "have been around for a period of time" which he elaborated on by stating that it was difficult to say whether the injuries occurred at the same time or at different times, App. 18-233. He concluded that the injury to the child's brain was sufficient to cause her death, App. 18-235. In his opinion the child had been punched or kicked in her stomach, App. 18-241. Photographs taken during the autopsy were introduced over defense counsel's objection App. 18-251, 252. Counsel argued that the photographs were grotesque,

were not necessary and were designed to inflame the jury, App. 18-254, 255. The trial court found that the photographs value had a “great deal of probative value” for the extent and number of injuries and, said the Court:

“I don’t really consider it all that gruesome.” Id.

Cristen was briefly examined by the State on direct examination, App. 18-265 to 272. Regarding her presence on the date I. H. was rushed to the hospital, she testified that she had gotten up early to make an appointment at the Department of Health and Human Resources, App. 17-266. She stopped at her mother’s to take a shower she says, App. 18-267. She claims that she left her child on the couch with Mr. Meadows, App. 18-268. After being called to the hospital by Mr. Meadows she saw her daughter with “all kinds of bruises all over her,” App. 18-270, which she claimed were new.

Regarding the child’s injuries Cristen testified that the mark on her nose occurred when I. H. had fallen at her mother’s home, App. 18-283, that she might have told Melissa Gill about “whipping” her daughter, App. 18-285, 286, 27, and curiously that I. H. would

“ . . . lay down in the floor and hit her head on the floor.” App. 17-287.

The child’s head banging on the floor occurred “maybe twice a month” App. 18-312. She conceded that she told Sgt. Clemons that she had grabbed I. H. by the arm and hit her hard, but disavowed the accuracy of that statement, App. 18-313. Cristen also testified that I. H. had hit her head on the baseboard of the bed when she and the child were playing, causing a bruise, App. 18-314.

The following occurred during Cristen’s cross-examination:

Q. Is there any way for us to tell in your statement which-what is truthful and what wasn’t?

A. Is there any way?

Q. Yes, ma'am. You give a lot of different versions of everything.

A. I've already took a polygraph to it, and I passed. App. 18-315.

And, referring to another statement provided by Cristen to Sgt. Clemons, defense counsel asked

Q. Did she take a statement from you about that or when was that, you gave—she answered.

A. Actually, they took a second statement when I took my polygraph. I told them then. App. 18-316.

During redirect examination Cristen testified that there were red flags about Mr. Meadows because he “had a temper,” App. 17-322-323. No objection was offered by the defense. She also testified that her daughter died as a result of injuries inflicted by Mr. Meadows, App. 18-326.

On re-cross examination Cristen again mentioned her polygraph examination after this rather bizarre commentary.

Q. [Cristen], you say that, now, you're being truthful. I mean now do we know that? . . . do you wave some magical wand. . .

Do you see my quandary? Do I suddenly say that, okay, she's telling the truth here today? . . . How can I not look at you with skepticism?

A. Because, actually when I took my polygraph, they asked me if I had ever whipped my daughter. And I said no. I actually passed it. And had I done any bodily harm to my daughter, and I said no. And I passed it. I mean, right there's the truth". App. 18-326, 327.

The defense attorney moved for a mistrial, referring to the pretrial motion which was granted concerning the polygraph. The Court ruled that because the responses were made to

defense questions, any error had been invited by defense counsel, App. 18-330, 331.

The final witness called by the State was psychologist Steve Ferris. He testified about his eleven sessions with the brother Ia. H., App. 19-338. He offered the “interpretation” that R.L. Meadows (Ro-Ro or something like that) was

“ . . . somewhat violent in the home” App. 19-339.

He says he based his interpretation from observations which he made while the boy, then age four, was playing with toy figures, App. 19-339 to 341. Mr. Ferris testified that while four (4) year olds are at the peak of their imagination he claims to be able to distinguish imaginary from factual by consistency.

“ . . . but most of the time if they’re very, very consistent, then I think there’s probably some significant element of truth in that.” App. 19-343.

Mr. Ferris’ testimony was rife with references to the toy figures as being his sister, Ro-Ro, a whipping tree or a motorcycle, App. 19-344 to 346. Illustrative of Mr. Ferris’ testimony is the following:

“ . . . wanted to keep the sissy figure away from Ro-Ro. Again, I think this was a story or imagination. Maybe it had some truth to it. I could never figure it out with Ia. H..” App. 19-345.

No objections were offered during the testimony and at no time did the State have Mr. Ferris qualify that his “interpretations” which appear as opinions or conclusions were offered to a reasonable degree of certainty. The defense counsel did object that the psychologist’s reports, States exhibits A-38 and 39 were “too speculative and full of conjecture,” App. 19-347.

On cross-examination Mr. Ferris stated that Ia. H. indicated violent behavior by his mother, App. 19-354. The record does not reflect that Mr. Ferris’ reports themselves were

admitted in evidence, see volume 3 transcript index, App. 19. They are a part of this record in this Court. App. 56-60.

After resting their case, the State moved the Court to prohibit the defense from presenting any evidence of a prior inconsistent statement attributed to Cristen, App. 19-360 to 365. The statement attributed to Cristen was said to have been made to her former cell mate. The content of the prior inconsistent statement is contained in what is tendered as Defendant's exhibit 1, App. 61-71. In it Cristen is said to have told the cellmate that she broke I. H.'s arm two days before the child died, that an innocent man was sitting in jail, that she had gone too far, that the baby was having trouble breathing before she left that morning, and that Mr. Meadows would take the blame for her. The State argued that the defense had failed to confront Cristen with the statement when she was on the witness stand, App. 19-362.

The Defendant called several witnesses who described the poor treatment of I. H. on the part of her mother Cristen. These witnesses also described Cristen as being untruthful, see testimony of Debra Parks, Teresa Ripley and John Cameron Mann, App. 19-367, 377 and 385 respectively.

Teresa Worrells testified that she was at the hospital when they terminated care for I. H.. She and Cristen had driven there together, App. 19-396, 397. She described Cristen as not being terribly upset except for a couple of moments, App. 19-397. When they left the hospital after treatment was terminated Cristen and Ms. Worrells shopped at Wal-mart for more than an hour, App. 19-398.

Ex-Sheriff Garry Wheeler of Summers County was called by the defense. He had been working as an investigator for the State on this case. He was asked about Cristen's cellmate

whose interview contained the prior inconsistent statement, App. 19-404. The statement was marked as an exhibit, App. 19-405. It was not introduced. The Defendant later called Stephanie Witham, Cristen 's cellmate who had provided a statement to Sheriff Wheeler. She testified that Cristen told her things which indicated that Mr. Meadows was innocent, however the State's objection to lack of proper foundation was sustained, App. 19-457.

Mr. Meadows' mother Robin Pack testified about the rough manner in which Cristen treated her children, App. 19-415 to 418. Ms. Pack testified that Cristen had threatened her, App. 19-419. She sought help from law enforcement, Id.

Cristen 's former husband and I. H.'s father Dustin H. testified that he and Cristen had been married for 8-9 years, App. 19-429. They were also the parents of the brother Ia. H.. He had witnessed Ms. Hurley hitting I. H. in the mouth, App. 19-433. Cristen told him that she wanted to "get rid of [I. H.]" App. 19-436. He described his wife as being dishonest, App. 19-434.

Other witnesses testified about Cristen 's poor treatment of her children and her lack of honesty, App. 19-441, 449. Witness Jeremy Yancey was present at the 404(b) incident which was described by Amanda Patrick, App. 19-453. He says it was not violent, just a foot and a half from the couch and with no way to hurt I. H., App. 19-454.

The defense had earlier called Dr. Norman Miller of Michigan State University out of turn and by video conferencing. He is a psychiatrist and neurologist who was offered as an expert on the effects of drugs on the brain and behavior, App. 18-291, 292. His opinion was that Mr. Meadows' statement to Sgt. Smith was unreliable due to his prolonged marijuana use, App. 18-294, 295. He opined that it would also affect criminal intent, App. 18-299, 300. The likelihood of violence by Mr. Meadows was low he believed, App. 18-307.

The final trial witness was the Petitioner R.L. Meadows. He testified that his marijuana use occurred daily, was heavy and had continued for 5 to 6 years, App. 19-467. He had graduated from high school in 2009 where he had played baseball and basketball and worked with children, App. 19-463, 464. Regarding I. H.'s injuries, he testified that he had been away from the home at a friend's and upon returning he noticed that I. H. had bruises "completely down the face," App. 19-479, 480. On the day before the child collapsed he says Cristen hit I. H. 15 to 20 times all over her body, App. 19-483. Also, on the last night she admitted to having slapped the child and hit her head on the headboard of the bed, App. 19-488. I. H. was asleep in the bedroom but when Cristen left to go to DHHR she sat I. H. beside him on the couch, App. 19-490. He says that he noticed that something was wrong with the child's breathing and soon ran the child over to Ms. Gill's trailer, App. 19-491, 492. He agrees that his first statement given to police, or most of it, was false, App. 19-502.

**V.**  
**Summary of Argument**

The arguments for reversing Mr. Meadows conviction consist of six grounds. First, the trial court contravened the West Virginia Constitution when it moved the case to a county different than the one where the crime was alleged to have occurred without finding good cause for removal. Second, the court erred when it permitted a witness for the prosecution to state three times that she had passed a polygraph test. The court denied a mistrial, failed to instruct the jury on the subject, and erroneously determined that on each occasion it was invited error. Third, the court improperly permitted a child psychologist to provide his opinion about the meaning of a four year old's play therapy as he had observed it. The psychologist's testimony did not meet the requirements of the Rules of Evidence as pertains to hearsay. Fourth, the child psychologist's testimony did not meet the requirements for introduction under Rule 404(b) of the

Rules of Evidence. Fifth, the court abused its discretion by permitting 27 photographs of the deceased child into evidence, many of which were cumulative and several of which were extremely prejudicial as being gruesome. Sixth, the Petitioner was denied a fair trial in that he had ineffective assistance of counsel.

**VI.**  
**Statement Regarding Oral Argument and Decision**

The Petitioner believes that this is a case which is appropriate for oral argument as it appears suitable under the criteria expressed in Rule 20. More particularly, the case is one of fundamental public importance. The Petitioner has been sentenced to a term of forty (40) years and the victim in this case was a child of tender years whose mother entered a plea of guilty to a lesser offense.

**VII.**  
**Argument**  
**A.**

**The transfer of Mr. Meadows trial to Monroe County without the attendant finding of good cause shown for the transfer violated W.Va. Constitution, Article 3, Section 14, the Rules of Criminal Procedure and W.Va. Code §62-3-13**

This Court reviews rulings on a motion for a change of venue under an abuse of discretion standard. Decisions by the trial court on questions of law are reviewed de novo.

It was reversible error for the trial court to move Mr. Meadows' trial to Monroe County. Although at first blush it would appear that the trial court was simply doing precisely what Mr. Meadows' defense attorney had earlier requested when it moved the case to another county. However, such removal was not attended with an appropriate finding of good cause shown. It therefore violated the West Virginia Constitution. Moreover, a careful reading of the record reveals that the act of removing the case was done contrary both to the expectations of the defense and the statements which were previously made by the trial court. Although a trial

court's ruling on change of venue is generally reviewed for an abuse of discretion, in this instance the plain error rule and ineffective assistance of counsel also merit consideration.

**The West Virginia Constitution Mandates that criminal trials take place in the county where the alleged offense was committed.**

West Virginia Constitution in Article 3, section 14 states the following:

*“Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay and in the county where the alleged offense was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county.”*

The foregoing provision of our Constitution equates the requirement as to the county of trial to such other fundamental rights as a public jury trial and the right to confront the witnesses who testify against the accused. Therefore, it should be considered as a right which, particularly under the circumstances of this case, required the accused's waiver of record. Instead we are left to assume from a silent record that the client ratified the lawyer's tacit approval of the Court's decision. App. 76.

Both our criminal rules and statutes implement the constitution. Rule 18 of the West Virginia Rules of Criminal Procedure states:

*“Except as otherwise permitted by statute or by these rules, the prosecution shall be held in a county in which the offense was committed.”*

And Rule 21(a) states:

*“a) For prejudice in the county of indictment—The circuit court upon motion of the Defendant shall transfer the proceedings as to that Defendant to another county if the Circuit Court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the Defendant that he or she cannot obtain a fair and impartial trial at the place fixed by law for holding*

the trial.”

W.Va Code §62-3-13 holds that a court “may on the petition of the accused, and for good cause shown” order removal to another county. In contrast to the foregoing statute, rules and constitutional provision after the trial court below first denied the defense motion to move the case, App. 12, 72, the court acted on its own seven (7) months later when it reconsidered the request but without making any finding of prejudice and good cause, App. 75, 76. The record below is absolutely devoid of any showing of good cause and the court made no mention of cause in stating that the matter was being reconsidered and the case was being removed to Monroe County where a jury had already been summoned.

It appears that both the trial court and counsel were proceeding correctly at the time the venue issue was first addressed on February 11, 2011, see statement of the case p. 2 supra. What is required to change venue is proof of a present hostile sentiment against the accused which extends throughout the county, State v. Walker, 188 W.Va 661, 425 S.E. 2d 616 (1992). That is typically determined at such time as the jury is selected, Cleckley, Handbook on West Virginia Criminal Procedure, vol. 1 p. 847. The existence of such hostility can be extensively explored in voir dire, Walker, 425 S.E. 2d at 626. The trial court stated and defense counsel anticipated that an attempt would be made to select a Summers County jury, App. 72-73, 74 i.e. “We’re hopeful also that we can get a jury here in Summers County.”

Undersigned counsel submits that the foregoing error is plain, that it affects a substantial, indeed a fundamental right as defined by West Virginia law, and that it seriously affected the proceedings, State v. Miller, 194 W.Va. 3,459 S.E. 2d 114 (1995). Because the right is a fundamental one under the West Virginia constitution the burden is on the State to prove beyond a reasonable doubt that no prejudice exists as the result of this violation. State v. Myers, 204

W.Va. 449, 513 S.E. 2d 676 (1998); Rule 52(b) West Virginia Rules of Criminal Procedure.

Further, reversal of the convictions below is necessary in order to preserve the integrity of the process. To ignore changing the county of trial absent any finding of good cause allows a change of venue for no reason at all. In such circumstances venue could be changed at the whim of a judge, for reasons which are helpful to the State, or for mere convenience because a court “just wants to.” Although this is generally a matter within the Court’s discretion it is submitted that when no good cause is found that discretion has been abused.

In the event that a waiver of error is believed to have occurred below, then the counsel should be deemed to have been ineffective, see discussion infra p.32. It is significant that no record was made to indicate that Meadows was consulted about the change of venue which came as it did at the last minute. Mr. Meadows had been an athlete at the local high school and the mother of I. H. was known in the community so the sentiment and knowledge of a local jury would be an important factor to consider before selecting a jury. No indication of strategy exists to support the decision not to object to the last minute removal. Thus waiver by counsel to a right personally possessed by the accused and/or failure to consult with the client is indicative of ineffective assistance.

**B.**

**The act of mentioning three times that a witness “passed” a polygraph test required the trial court to grant a mistrial and even if a mistrial were not required a cautionary jury instruction must have been given. The conclusion that the mentioning invited error on each occasion is not supported by the record**

Whether to grant a mistrial is reviewed for abuse of discretion. Errors made in interpreting or applying the law are subject to a de novo review. There were two (2) persons who were suspects in this case. At trial each accused the other and each denied being the party who inflicted the injuries for which Mr. Meadows stands convicted. It was therefore crucial as to

which one of them the jury believed. Cristen presented as perhaps the most important witness to be offered by the State. Her testimony and demeanor was key. However, the record of the testimony of this important witness is both odd, and in the case of the cross-examination, the testimony appears at times to be out of control. Undersigned counsel acknowledges that many of the problems which appear during Cristen's testimony can be attributed to defense counsel *ergo* the claim of ineffective assistance is raised. The most egregious of these problems is the mention of having "passed" a polygraph examination—three times, App. 18-pp. 315, 316 and 326-327, and see pp. 10-11 supra.

As a threshold matter, it is well-recognized in West Virginia and elsewhere that the results of polygraph tests are inadmissible in a criminal trial, State v. Frazier, 162 W.Va. 602, 252 S.E. 2d 39 (1979). Moreover, reference to an offer or refusal to take a polygraph test is inadmissible certainly as it pertains to the Defendant, State v. Chambers, 194 W.Va. 1, 459 S.E. 2d 112 (1995). Thus, at a minimum this testimony presents a troublesome and prejudicial development when a critical witness who is herself a suspect repeats having "passed a polygraph" in front of the jury. The prejudice is increased when the jury is not instructed by the trial court to disregard the testimony or otherwise cautioned by the Court that polygraph test results are not considered reliable as evidence in West Virginia.

Several decisions rendered by this Court are instructive, perhaps dispositive, of this issue. In State v. Porter, 182 W.Va. 7401, 392 S.E. 2d 216 (1990) this Court not only reiterated the rudimentary principle that polygraph results are inadmissible in criminal trials, but this Court also repeated the rule that when it does occur the jury should be given a cautionary instruction to disregard any such evidence. This is true even when the Defendant is responsible for the testimony being offered. More recently in State v. Lewis 207 W.Va. 544, 534 S.E. 2d 740 (2000)

it was likewise the defense who elicited the testimony about polygraph examination. Again, it appears from the Court's holding, which cites Porter, that a key feature which saved the case from reversal was the fact that the trial court gave a cautionary instruction to the jury to disregard such evidence. That also represents the saving feature relied upon in State v. Acord, 175 W.Va. 611, 336 S.E. 2d 741 (1985).

In the case sub judice no cautionary instruction was given. Further, no instruction at the close of the case addressed this matter. No request was made by either counsel asking to address the polygraph references and/or to disregard such references. The jury was left to believe that "passing" a polygraph has legal significance. Moreover, the jury could very well have believed that the fact that an agent of the State administered the test to Ms. Hurley promoted her as telling the truth based purely on the fact that she "passed" the test and then testified as a State's witness. In this instance prejudice to Mr. Meadows surely exists. The questions which remain are (1) whether the error was as the trial court found "invited" by defense counsel and (2) even if it were invited error (a) does it nevertheless require that a cautionary instruction must be given, and (b) does it represent further evidence of ineffective assistance of counsel.

### **Invited Error**

Invited error is a cardinal rule of appellate review which is a branch of the doctrine of waiver, State v. Day, 225 W.Va 794, 696 S.E. 2d 310 (2010); State v. Crabtree 198 W.Va. 620, 482 S.E. 2d 605 (1996). This rule is however not without exceptions.

Plain error requires reversal in the face of invited error when a fundamental right is involved, State v. Redden 199 W.Va. 660, 487 S.E. 2d 318 (1987). In this case, stating on three (3) occasions that a witness as critical as Cristen "passed" a polygraph exam contravenes the right to a fair trial. Further, the fact that this evidence came during defense attorney's somewhat

careless examination which included counsel's commentary contravenes the right to effective assistance of counsel.

At times when the invocation of the invited error doctrine results in a manifest injustice or a miscarriage of justice and when it would be inimical to the integrity of the judicial process the doctrine should not be applied. State v. Crabtree, *supra*. Counsel submits that is precisely the case before this Court. Not once, but three (3) times this utterance occurred and in no instance did the trial court intervene or provide an instruction. The fact that it occurred more than once and the Court had addressed this issue before trial clearly suggests that Cristen's several responses were hardly her effort to be responsive to counsel's questions, even if the questions were inartful.

It is also doubtful that all of these responses about the polygraph were actually "invited." That is especially true of the second response given on the subject when Cristen refers to her second statement to police "when I took my polygraph," App. 18-316. This response appears purely gratuitous. On her third mention of the test Cristen stated that... "I actually passed it... And I passed it. I mean right there's the truth," App. 18-326,327. Counsel submits that these occasions do not represent an "invitation" from counsel to have her speak about her presumed polygraph results which courts know full well are not deemed to be scientifically reliable. Unfortunately, jurors do not know that.

In conclusion this error should result in reversal in that: first, the trial court's handling of this matter represents plain error as the court failed in it's duty to instruct the jury, State v. Lambert, 173 W.VA. 60, 312 S.E. 2d 31 (1984); second, the failure of counsel to seek an instruction from the court and the manner of questioning Cristen is evidence of ineffective assistance of counsel.

**C.**

**The trial court erroneously permitted child psychologist Steve Ferris, M.A. to offer his opinions as based upon his “interpretations” which do not properly fall within Rule 803 (4) of the Rules of Evidence as they were not statements or utterances made for purposes of therapy and diagnosis. Further, Mr. Ferris’ testimony not based on a reasonable degree of certainty.**

A trial court’s evidentiary rulings and application of the Rules of Evidence are reviewed for abuse of discretion. The testimony of Steve Ferris, M.A. is the subject of two (2) infirmities as presented in this appeal. Mr. Ferris was offered to present evidence of alleged collateral crimes, Rule 404(b) West Virginia Rules of Evidence, App. 18-189. The basis for admitting his testimony was said to be the absence of mistake and for the jury to consider when identifying, the person who inflicted the injuries. The jury was so instructed, App. 19-366, 367.

In denying the Defendant’s objection the trial court relied in part upon this Court’s decision in State v. Payne, 225 W.Va. 602 694 S.E. 2d 935 (2010). In Payne, this Court upheld trial testimony of a medical provider in a sex abuse case about a child victim’s statements, see State v. Edward Charles L., 183 W.Va. 641 398 S.E. 2d 123(1990). In the instant case these salient facts exist: one, Mr. Ferris testified that he was “interpreting” a child’s acts which he reported he observed during times when the child was playing with toys; two, Mr. Ferris did not indicate that the child Ia. H. was competent to be a witness—in fact his testimony appears to be the contrary, App. 18-199; three, Mr. Ferris failed to testify that his conclusions were based upon a reasonable degree of certainty. In fact, he was twice asked that specific question and twice failed to answer it, App. 18-197, 199, 200. The defense objection that Ferris’ opinions were speculative and full of conjecture was correct, App. 19-347.

The following passages from Mr. Ferris’ testimony establish the point that Ferris’ conclusions are mere speculation and conjecture:

. . . I think there's *probably some significant element of truth*. . .  
App. 19-343.

. . . I think this was a story or imagination.  
*May be it had some truth to it. I could never figure it out with Ia. H..*  
App. 19-345.

Moreover, the indication by Mr. Ferris was that the child would be incompetent to testify although he “punted” that issue back to the Court. The rationale for admitting a psychologist’s testimony of a child abuse victim who is engaged in play therapy is that statements made to one who is providing treatment were given for the purpose of diagnosis and treatment and were not offered for the truth of the matters therein asserted, Edward Charles L. supra, 398 S.E. 2d at pp. 135-141. These kinds of statements are considered as having the patina of reliability or at least no reason exists for the patient to be dishonest.

In the instant case there were no real “statements” by Ia. H., rather these were “interpretations” of the child’s activities on the part of Mr. Ferris. Further, no meaningful testimony about diagnosis or treatment or about a treatment plan for him was provided. It thus appears from the record that Mr. Ferris never utilized his observations for the purposes intended under Rule 803(4) of the West Virginia Rules of Evidence. There was no diagnosis, just conclusions which were themselves not reasonably certain.

The testimony of Mr. Ferris amounted to little more than suppositions and naked interpretations. The Court’s reliance upon State v. Payne was misplaced as Mr. Ferris’ testimony failed to meet the two (2) part test for admitting Rule 803(4) hearsay statements contained in Payne and in Edward Charles L., see Payne, syllabus point 4. There is nothing about Ia. H.’s motive and nothing about the “content of the statement” which is being reasonably relied upon in providing treatment or making a diagnosis. The case and the rule are simply not applicable. In

fact there is no evidence that he was ever a victim of child abuse thereby triggering the reliance on Payne to begin with.

### **Hearsay and the Confrontation Clause**

While this Court does not necessarily have to reach this question because the use of Rule 803(4) was in error, it merits mentioning that the State also argued that the confrontation clause was not violated by this testimony, App. 18-207 through 210. It is accepted that non-testimonial utterances and statements do not violate the right of confrontation, Crawford v. Washington, 541 U.S. 36 (2004); State v. Kaufman, 227 W.Va. 537, 711 S.E. 2d 607 (2011). However, the defense attorney got it right. The effect of Mr. Ferris' testimony was to admit incompetent "testimony" which was not ever a statement or an utterance which was understandable. The trial court abused its discretion in permitting Mr. Ferris to provide such testimony in this case.

#### **D.**

### **The trial court erroneously admitted psychologist Steve Ferris' testimony under Rule 404(b) of the Rules of Evidence**

Mr. Ferris, as previously noted, was a 404(b) witness. Rule 404(b) states in pertinent part:

*"Evidence of other crime, wrongs, or acts. . . ."*

This Court has held that admission of 404(b) evidence is reviewed under a three step analysis, State v. LaRock, 196 W.Va. 294 470 S.E. 2d 613 (1996). The question as posed was the admission so arbitrary and irrational as to be abuse of discretion, State v. McGinness, 193 W.Va. 147, 455 S.E. 2d 516 (1994). Mr. Ferris was the last State's witness to testify. The entirety of his trial testimony before the jury is found in the 23 pages which comprise the record of that testimony, App. 19-334 to 357. Counsel submits that there was no meaningful evidence offered of what specific act or crime or wrong that the State relied upon as being the "collateral crime"

for the jury to consider. This is as close as the testimony comes:

“But he talked about Ro-Ro whipping Sissy’s butt. He talked about-in a session. . . Ro-Ro whipping him. Again, wanted to keep the Sissy figure away from Ro-Ro. Again I think this was a story or imagination. *Maybe it had some truth to it. I could never figure it out with Ia. H..*” App. 19-344, 345.

Admission of the foregoing was clear error in that it does not meet the requirement that sufficient evidence exists that an act occurred. The evidence of other crimes or wrongs or acts must be supported by a preponderance of the evidence to show that the acts actually occurred and that the Defendant committed them. The above acts must be relevant to the crimes which are charged and must be balanced against prejudice, confusion and a waste of time, State v. McGinness, supra. The acts must also have a temporal connection to the crimes for which the Defendant is on trial, Edward Charles L., supra 398 S.E. 2d at 133. On the face of the record below, Mr. Ferris’ testimony fails to qualify for admission under Rule 404(b) as it fails to meet any of the aforementioned requirements.

Employing the three step analysis results in the conclusion that this evidence should not have been admitted. First, is there clear error in the trial court’s determination that the evidence shows that the other acts occurred. It is impossible to determine what act, wrong or crime is being relied upon. Second, a *de novo* review is conducted as to whether the trial court correctly found that the evidence was admissible for a legitimate purpose. In the absence of evidence of an act it follows that there is no legitimate purpose for the evidence. Third, was the trial court’s conclusion correct in deciding that the other acts evidence is more probative than prejudicial, State v. LaRock, supra. The latter is considered under an abuse of discretion standard. Counsel submits that Mr. Ferris’ evidence does not rise to the level of threshold admissibility. Its admission by the Court below was both arbitrary and irrational and requires reversal of Mr.

Meadows convictions as such evidence, or the suggestion of such evidence, was more prejudicial than probative.

**E.**

**The trial court erred by admitting 27 photographs of the injured child which included both cumulative evidence of the same injuries and gruesome photos taken at the autopsy**

The State introduced 36 photographs into evidence. Of those, 27 were photos of the child both in the hospital and during autopsy. The admission of this evidence is reviewed for abuse of discretion. The record is ambiguous in regard to the State's exhibit 32 which in the index to the transcript is said to be "withdrawn" but which the body of the transcript states was admitted, App. 18-252. As the Court noted in denying the Defendant's objection

"The Court: I think it was State's Exhibit 32 and 34 that you were objecting to.

Mr. McGraw: Yes, sir.

The Court: We'll note your objection."  
App. 18-256.

Reversal on this ground requires a showing of clear abuse, State v. Derr, 192 W.Va. 165, 451 S.E. 2d 731 (1994); State v. Waldron, 218 W.Va. 450, 624 S.E. 2d 887 (2005). Such admissibility is determined on a case-by-case basis considering Rules 401 through 403 of the West Virginia Rules of Evidence, Derr, syllabus point 8.

In this case, defense counsel objected to "any of the photographs," App. 17-32 and he referred to the balancing test under the applicable rules of evidence, App. 17-33. Later, the Court appears to reduce his interpretation of what counsel was objecting to as being exhibits 32 and 34 which are autopsy photos of the child's skull after it was peeled back, App. 49, 50, but see discussion, App. 18-254. The defense counsel refers to the photos as being "grotesque" having resulted in tears among several of the jurors. The Court there expresses a more expanded

interpretation of the objections, Id.

In addressing this issue it is important to recall that the jury had the benefit both of Dr. Kaplan's report, App. 40-48, State's Exhibit 31, and his graphic testimony about the child's injuries and the cause of death. It therefore appears that the number of photographs, especially those of the autopsy, Exhibits 32 through 36, represent prosecutorial overkill. Moreover, it was unnecessary to introduce a total of 22 photographs of I. H. as taken of her by officers at the hospital, App. 23-33. These photos include multiple angles of her face and head showing the same injuries. The photographs as cumulatively presented result in unfair prejudice to the accused and are disproportionate to their value as evidence, Derr, syllabus point 9, Rule 403 of the West Virginia Rules of Evidence.

"Gruesome" is defined as causing horror or disgust, Webster's New Word Dictionary, 1995. Undersigned counsel submits that whether something is gruesome as defined above is like defining pornography. It is hard to define in mere words, but you know it when you see it. In the instant case the several autopsy photographs are indeed gruesome. The infirmity with the hospital photographs lies in the sheer numbers presented.

The fact that the photos are gruesome does not render them inadmissible as evidence. While the trial court did speak to the applicable rule, App. 17-34, 35, it is submitted that the Court abused its discretion in reaching its conclusion. The unfair prejudice to Mr. Meadows which results from the needless presentation of cumulative evidence and the prejudice from the autopsy photos tips the balance in favor of excluding all of the autopsy photographs and admitting only a few representative photos taken at the hospital. Admitting all of them as was done constitutes reversible error as it represents an abuse of discretion by the trial court.

F.

**The record below establishes the ineffective assistance of counsel during these proceedings**

The Petitioner asserts that he was denied the effective assistance of counsel. In this instance the record as it currently exists is adequate to determine this issue, State v. England, 180 W.Va. 342, 376 S.E. 2d 548 (1988); State v. Smith, 181 W.Va. 700, 384 S.E. 2d 145 (1989). The burden is on Mr. Meadows to prove this assertion by a preponderance of the evidence, State v. Thomas, 157 W.Va. 640, 203 S.E. 2d 445 (1974), syllabus point 22. The deficiencies which are hereinafter addressed are such that they satisfactorily establish the inadequacy of legal representation and that the inadequacy prejudiced Mr. Meadows' case in such a way that it would have affected the jury's decision, Strickland v. Washington, 466 U.S. 668 (1984); State v. ex rel. Myers v. Painter, 213 W.Va. 32, 576 S.E. 2d 277 (2002); Wickline v. House, 188 W.Va. 344, 424 S.E. 2d 579 (1992).

**Sgt. Clemons' Testimony**

As previously mentioned State Police Sgt. Melissa Clemons' was the first witness to testify at Mr. Meadows' trial. On her direct examination Sgt. Clemons provided inadmissible hearsay testimony on several occasions to which defense counsel offered no objection, App. 17-56, 65, 70. Standing alone these omissions are of little or no consequence, however it appears to have established a pattern which frankly got out of hand in the testimony which followed. This problem permeated the entire proceedings.

Cross-examination began with a question about Sgt. Clemons' decision to charge Mr. Meadows, App. 17-71, 72. Immediately, the examination turned to other "statements" which the Sergeant had obtained which was an invitation for the witness to wade headlong into nonstop hearsay, App. 17-72. From page 72 to page 90 of the trial transcript the questions and answers

are virtually all about hearsay. The vice of this questioning is that it resulted in opinions and self-serving commentary as well as explanations about what was contained in the statements which the officer secured, see e.g. 17-78, 79, 80, 81, 82 and 90. The officer's commentary reflects that the defense had so thoroughly lost control of this witness that this officer became much more than a witness, see e.g. App. 17-91, 94, 95, 96, 98, 99, 102, 104 and 106. Sgt. Clemons was converted by the cross-examination into giving opinion evidence on who inflicted each of the injuries and when they were inflicted, App. 17-96, 97. She became an advocate arguing the State's case. In his cross-examination counsel allowed the officer to provide her opinion as to motive by referring to her report when counsel brought it up, App. 17-102, 103. There is nothing about this examination which would reflect sound strategy or tactics.

On redirect examination there was more hearsay offered as Sgt. Clemons was allowed to testify about matters which were clearly not within her personal knowledge which were presented to the jury as if they were accepted facts, App. 17-108, 109. Of course, one could argue that the redirect examination was responsive to cross, but that simply illustrates the ineffectiveness of counsel.

### **Other Deficiencies**

The cross-examination of the child's mother Cristen was also carelessly handled. At points counsel appears to be musing aloud when he says "Do you see my quandary? Do I suddenly say. . ." App. 18-327. If the trial court is found to have been correct in ruling that each of the several comments about "passing" a polygraph represents invited error then it would follow that this mistake by counsel seriously prejudiced Mr. Meadows. Moreover, the failure to insist on a cautionary instruction is a failure even through the primary responsibility in this regard belongs to the Court.

During the defense case the trial court prohibited counsel from introducing an alleged prior inconsistent statement made by Cristen on the grounds that defense counsel had failed to lay the proper foundation, App. 19-457. Counsel had failed to inquire of Cristen whether she had made such a statement, see also Garry Wheeler examination, App. 19-403 to 407. This failure represents a fundamental error about potentially important evidence.

Counsel also neglected to raise the fact that there was no finding of good cause to change the place of trial to Monroe County. While that omission might be attributed to strategy in that counsel had filed such motion seven (7) months earlier, counsel and the Court had stated that they hoped to be able to select a Summers County jury. No one later tried to do that although that would have been proper and clearly was the subject of prior exchanges.

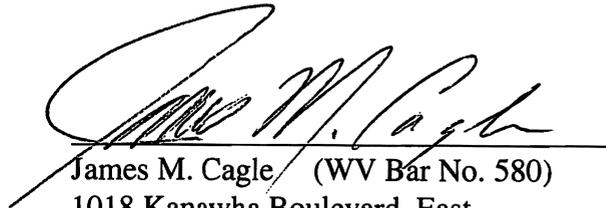
There was also the failure of counsel to consult with Mr. Meadows after trial and before sentencing, App. 80. At sentencing a recess had to be taken to review for the first time the sentencing report, Id. This is likewise reflective of inadequate representation.

This Court has previously determined that counsel has been ineffective when he fails to attack or adequately investigate the capacity to waive one's Miranda rights, Wickline v. House, supra. This Court has found ineffective assistance based upon multiple omissions and mistakes by trial counsel obtained directly from reading the trial record. State v. Thomas, supra. Other courts have found counsel to have been ineffective when counsel fails to object to inadmissible tangible evidence, Com v. Lester, 572 A. 2d 694 (PA, 1990); State v. Garrett, 600 N.E. 2d 1130 (OH, 1991); Skiles v. State, 448 S.E. 2d 560 (S.C. 1994); Chatom v. White, 858 F. 2d 1479 (11<sup>th</sup> Cir, 1988); see also State v. Smith, 186 W.Va. 33, 410 S.E. 2d 269 (1989) in which this Court remanded a case because counsel had failed to preserve a fourth amendment issue by not moving to suppress evidence.

Courts have found ineffective assistance by counsel's failure to object to hearsay evidence, in the failure to establish a foundation for witness testimony, in failing to effectively cross-examine witnesses, and in failing to object to jurisdiction or venue. Mason v. Scully, 16 F. 3d 38 (2<sup>nd</sup> Cir. 1994); State v. Aplaca, 837 P. 2d 1298 (HW. 1992); Wright v. State, 581 N.E. 2d 978 (Ind. Ct. App. 1991); Wilson v. Mintzes, 761 F. 2d 275 (6<sup>th</sup> Cir. 1985); State v. Owens, 611 N.E. 2d 369 (Oh 1992); Com. v. Butler, 566 A. 2d 1209 (1989); Brown v. Butler, 811 F. 2d 938 (5<sup>th</sup> Cir. 1987). Each of these omissions exists in the record of the instant case, therefore the record fully supports a finding of ineffective assistance.

### **VIII** **Conclusion**

For the foregoing reasons Mr. Meadows' convictions should be reversed and this case remanded to the Circuit Court of Summers County for retrial.

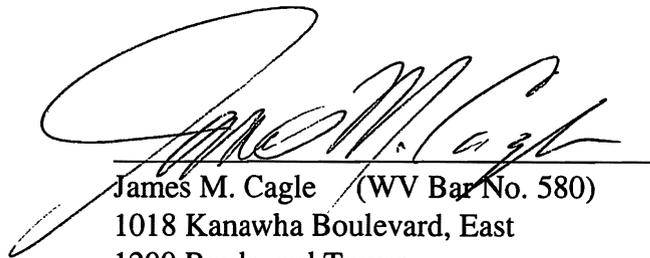
  
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**CERTIFICATE OF SERVICE**

***Hand Delivered***

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The undersigned, James M. Cagle, Counsel for the Petitioner, R.L. Meadows, does hereby certify that a true and correct copy of the **Petitioner's Brief** as corrected was served hand delivered to Scott E. Johnson, Senior Assistant A.G. on this the 15<sup>th</sup> day of February, 2013.



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