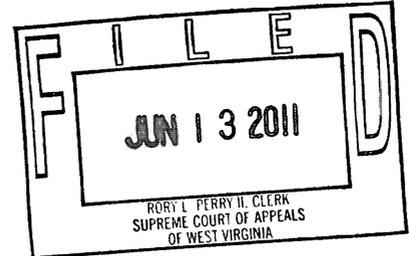


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NUMBER 11-024

**STATE OF WEST VIRGINIA VS.
TERRY ALLEN BLEVINS**



**APPEAL BRIEF FOR DEFENDANT
TERRY ALLEN BLEVINS
For Mercer County Circuit Court Case No.**

09-F-12-DS

STATE OF WEST VIRGINIA VS. TERRY ALLEN BLEVINS

David B. Kelley, Esq.
The Kelley Law Firm
520 Virginia Avenue
Post Office Box 632
Bluefield, Virginia 24605
(276) 326-2110
West Virginia State Bar # 1996
E-mail: dave_kelley@comcast.net

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I. ASSIGNMENTS OF ERROR

- A. The lower court erred in failing to grant the Appellant's Motion for a Change of Venue; and
- B. The lower court erred in not suppressing products of searches performed under aegis of defective search warrants and questionable consent to search, and
- C. The lower court erred in allowing Appellant's alleged statements into evidence as they were not voluntary and were in violation of Appellant's Fifth Amendment Rights, Miranda Rights and other Constitutional Rights, and
- D. Appellant's prompt presentment rights were violated, and
- E. The lower court erred in allowing the State to introduce into evidence recorded telephone conversations from the Southern Regional Jail and to introduce evidence relating to alleged murder weapons, which were subject to interpretation and their probative value was substantially outweighed by the prejudice to the Appellant, and
- F. The lower court erred in not dismissing the action at the Appellant's Counsel's verbal motion at the close of the State's case in chief, and
- G. Appellant was convicted on two counts of murder-first degree and one count of arson-first degree despite insufficient evidence at trial of same; and
- H. The lower court erred in allowing the photographic array and subsequently Witness John Reed's testimony due to the use of a tainted photographic array for identification purposes; and
- I. The lower court erred in allowing the testimony of Chief Medical Examiner, James A. Kaplan, although he had no first-hand knowledge of the matter at hand, and had not been present at the examination of the victims; and

- J. The sentence imposed upon the Appellant violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution; and
- K. Appellant's Counsel's failure to object to errors of law at the Trial Court level constituted plain error.

II. STATEMENT OF THE CASE

The Appellant was charged with one count of Burglary, First Degree, West Virginia Code 61-3-11; two counts of Murder, First Degree, West Virginia Code 61-2-1, one count of Arson, First Degree, West Virginia Code 61-3-1, and one count of Possession with Intent to Deliver a Schedule I Controlled Substance, To-Wit: Marijuana, West Virginia Code 60A-4-401. As a result of Pre-Trial Hearings, the Possession with Intent to Deliver charge was severed from the matter, herein. The Burglary charge was dismissed at the close of the evidence at trial and not presented to the jury for deliberation. As a result of a jury trial in the Circuit Court of Mercer County, West Virginia, the Appellant was found guilty of two counts of Murder, First Degree Without Recommendation of Mercy, and one count of Arson, First Degree. The Appellant was incarcerated to two terms of life without mercy for the two counts of Murder, First Degree, and one twenty year determinate term for the one count of Arson, First Degree (said terms to run consecutively).

On August 11, 2008, at approximately 1:52 p.m., Fire Department personnel arrived on the scene of a dwelling fire at Route 2, Box 300, US Route 19, Kegley, Mercer County, West Virginia. Motorists passing by the scene prior to the Fire Department's arrival had removed victim Delores Barton from the kitchen area of the dwelling to the front yard of the residence. Victim Delores Barton was deceased. At approximately 2:48 p.m. that same day, a second victim, James Barton, was discovered in a pad-locked out building on the Barton property. He

was likewise deceased. Both victims had been severely beaten. Detective M.L. Gills of the Mercer County, West Virginia, Sheriff's Department was lead investigator on the case.

As a part of a homicide investigation, deputy sheriffs from the Mercer County Sheriffs' Department questioned nearby neighbors and discovered one individual (witness John Reed) who had noticed an apparent broken down vehicle in front of the Barton's residence two days prior to the deaths of the victims. Witness Reed also stated that at approximately 9:00 a.m., on the day of the deaths of the victims, he had had a conversation with an unknown individual who had come to witness Reed's house to inquire about the broken down vehicle (Trial Transcript, Vol. II, p. 110). Witness Reed described this unknown individual as an early to mid-twenties, white male (*Id.* at 111), "with dark hair, a bit shorter than I am [witness Reed], I think. Medium to stocky build with multiple tattoos" (*Id.* at 126). Witness Reed further recalled the automobile driven by the unknown individual as a silver Hyundai car with Virginia temporary registration (Criminal Investigations Division, Investigation Report, dated January 6, 2009, pg 5).

Later on August 11, 2008, Sergeant Woods and Corporal Ruble of the Mercer County Sheriff's Department were in route from the victims' home in Kegley, Mercer County, West Virginia, to the residence of one of the victims' family members in Princeton, Mercer County, West Virginia, when they saw a vehicle that matched witness Reed's description (silver Hyundai) parked at 517 Washington Street, Princeton, Mercer County, West Virginia (November 10, 2009, Suppression Hearing, Vol. I, p. 57).

The officers stopped at the 517 Washington Street address and while inquiring as to the owner of the vehicle, noticed that there was a "strong odor" causing a "reasonable suspicion of drug use in the house" (*Id.* at 33). The officers were given permission by "the young lady of the

house” (originally a co-defendant in the matter, Brittany Davis) to search the house for drug paraphernalia (*Id.* at 34).

The officers obtained information that the vehicle which initiated the stop at 517 Washington Street belonged to Appellant. Detective Gills arrived at 517 Washington Street and while on the front porch of the residence questioned Appellant regarding the crime in the Kegley area (*Id.* at 57-60) and Appellant denied any knowledge of said crime in the “Kegley area” (*Id.* at 58).

Items found during the search of 517 Washington Street included “a Crown Royal small bag which contained plastic baggies which appeared to be marijuana, also a set of scales and some U.S. currency” (*Id.* at 151). These items were found in an upstairs bedroom inside a water cooler. Appellant was arrested by Corporal Ruble on drug charges and transported to the Mercer County Sheriff’s Department in Princeton, West Virginia (*Id.* at 161). At approximately 5:45 p.m., on August 11, 2008, Corporal Ruble placed the Appellant in a holding cell and had no further contact with the Appellant until approximately midnight, when he (Ruble) was asked by Detective Gills to transport the Appellant to a holding cell at the Bluefield Police Department, Bluefield, Mercer County, West Virginia (*Id.* at 163). Corporal Ruble made no arrangements to take the Appellant before a Magistrate for Arraignment on the drug charges as the Appellant was a “suspect in the murder investigation” (*Id.* at 162).

Beginning at 5:45 p.m., on August 11, 2008, when the Appellant arrived at the Mercer County Sheriff’s Department and continuing long into the early morning hours of August 12, 2008, the Appellant was repeatedly, relentlessly, and unremittingly interrogated regarding the events in Kegley. The Appellant was questioned by several different officers, in a variety of

different locations (interview rooms, holding cells, “in front of the holding area”) (November 10, 2009, Suppression Hearing, Vol. I, pgs. 86-90).

At approximately 7:00 p.m., on August 11, 2008, at the request of Detective Gills, witness Reed participated in a photo line-up to identify the unknown male Mr. Reed had described earlier in the day. Witness Reed identified the photograph of the Appellant as that of the individual he had spoken with earlier that morning (*Id.* at 62).

Detective Gills advised the Appellant that a witness had identified the Appellant as having been in the area where the murders occurred and the Appellant stated that he had been in that area earlier in the day to check on a friend’s broken down vehicle. The Appellant agreed to take a polygraph examination and Sergeant Christopher C. Smith of the West Virginia State Police was contacted to administer the test. Sergeant Smith was contacted between 10:30 p.m. and 11:00 p.m., on August 11, 2008 (*Id.* at 171).

At approximately 10:40 p.m. on August 11, 2008, Appellant was informed of his Miranda rights with relation to the murder charges in Kegley and the Appellant executed his Miranda waiver (*Id.* at 64).

Sergeant Smith arrived to perform the polygraph examination “roughly around midnight” (*Id.* at 171). An initial attempt to conduct the polygraph was made a 1:08 a.m., on August 12, 2008, (*Id.* at 174); however, Appellant stated he was too tired at that point to proceed with questioning. The test was halted and Appellant was transported by Corporal Ruble from the Sheriff’s Department in Princeton, Mercer County, West Virginia, to a holding cell to obtain much needed rest at the Bluefield City Police Department, Bluefield, Mercer County, West Virginia.

In route to the holding cell, according to Corporal Ruble, Appellant asked Ruble how he dealt with seeing dead people. Ruble questioned Appellant as to what made him ask such a question and Ruble reported Appellant responded "I seen them two dead people." Ruble stated at that point, "I did not really ask him any more questions" (*Id.* at 152). Ruble called Detective Gills and Detective Gills advised Ruble to return Appellant to Princeton (*Id.* at 153).

Upon return to Princeton, Appellant informed Detective Gills that he had seen another individual kill the victims and that the Appellant had become frightened and left the crime scene (*Id.* at 68). This information was elicited from the Appellant without any additional discussion of constitutional rights or the execution of another Miranda waiver.

At approximately 3:05 a.m., on August 12, 2008, Appellant was advised of his constitutional rights by Sergeant Smith and subsequently executed a Miranda waiver. The Appellant then submitted to a polygraph examination.

As the Appellant was being held on the aforementioned drug charges, at no time during the nightlong interrogations was the Appellant free to leave.

Between the hours of 4:00 a.m. and 5:00 a.m., on August 12, 2008, Detective Gills attempted to obtain a search warrant of the Appellant's Washington Street residence. The Honorable William J. Sadler, Mercer County Circuit Court, 9th Judicial Circuit, initially denied the search warrant request, agreeing only to authorize the warrant after Detective Gills inserted a handwritten line on the warrant that stated the Appellant "has confessed to being at the residence [victims' residence] and had seen the two victims dead at the [victims'] residence" (*Id.* at 70). It should be noted that Detective Gills testified that co-defendant, Brittany Davis had given a second consent to search to her cousin Corporeal Summers (November 10, 2009, Suppression Hearing, Vol. I, pg. 84). A search of the Appellant's Washington Street residence was

conducted at 5:45 a.m., on August 12, 2008. The following items were seized: one shovel, one towel, one wash rag, one set of keys, one blue shirt, one black bag and “ashes collected from back yard” (Property receipt). A subsequent search warrant was issued for a search of the Appellant’s vehicle. A search of this vehicle was performed at 6:41 p.m., on August 12, 2008. The following items were collected: one film canister with a carpet sample, one shirt, and fourteen cotton swabs taken from the vehicle. Although these numerous items were collected and tested for blood and DNA evidence, no challenge was made and none of the items were submitted by the State at the Trial of Appellant.

On August 11, 2008, Brittany Davis, Co-Defendant and girlfriend of the Appellant, was interviewed by Sergeant Smith. At that time, Davis informed Smith that on the day of the murders the Appellant came home with blood on his face and burned his clothes in the back yard of the Washington Street residence. She stated that the Appellant had given her Seven Hundred Dollars in cash and had telephoned her from the victims’ residence on the morning of the murders and that she heard Mrs. Barton talking in the background (November 10, 2009, Motions Hearing, pp. 21-22). Brittany Davis also testified to these facts at trial. Further, Brittany Davis testified at the Appellant’s Trial that the charges against her (Accessory to Murder After the Fact) were dropped for assistance provided to the State including consent to search the home and testimony in the Trial in this matter (Trial Transcript, Vol. II, pg. 208). It should be noted that at this point the testimony of two witnesses was inconsistent. Ms. Davis’ testimony indicated that she agreed to this search and gave the key to her cousin, Corporal Summers, and that he was on duty as an officer at the time (November 10, 2009, Suppression Hearing, Vol. I, pgs 13 and 14), while Corporal Summers’ testimony is that he did not ask for consent to search and was not interviewing Ms. Davis (Trial Transcript, Vol. II, pg. 99).

During the investigation, Detective Gills was contacted by the Southern Regional Jail about telephone conversations between Appellant and Brittany Davis that had occurred between the dates of August 12, 2008, and August 14, 2008. Detective Gills obtained copies of the taped conversations. Selections of the tapes were played for the jury at Trial in the above captioned matter.

As a part of the investigation, death/post mortem examinations were performed on both victims by Robert C. Belding, M.D. Dr. Belding completed a report on each victim, and submitted said reports to the Prosecutor's office on April 8, 2009. At Trial in the above matter, Dr. Belding was not present to testify, as he was no longer employed by the State Medical Examiner's Office. James Kaplan, M.D., Chief Medical Examiner for the State of West Virginia, testified as to Dr. Belding's autopsy reports.

The Appellant was arraigned on the murder charges at approximately 1:00 p.m. on August 12, 2008. The Appellant waived the Preliminary Hearing and the case was bound over for presentment to the Grand Jury.

On February 9, 2009, this matter was presented to the February, 2009, Term of the Mercer County Grand Jury. Indictment # 09-F-12 as filed in open court on February 10, 2009, charging the Appellant with the five counts as noted, previously.

On or about June 1, 2009, counsel for the Appellant contacted Don Richardson and Associates, Charleston, Kanawha County, West Virginia, with regard to conducting a Public Opinion Survey for the purposes of determining the necessity for a change of venue in the above captioned matter. At the request of counsel for the Appellant, the Court authorized such a survey to be performed. The survey was performed and a hearing was held on the Appellant's Motion for Change of Venue on October 27, 2009. At said hearing, expert Don Richardson explained in

great detail his methodology, the sample demographics and statistical analysis of the results. According to testimony by expert Richardson, the case at bar fell within the parameters of other cases he analyzed that had been granted a change of venue. By Order of the Court dated October 27, 2009, the Court took the Appellant's Motion for Change of Venue under advisement and Ordered that all jury panels would be brought into the Court for completion of a jury questionnaire.

On April 9, 2010, a Motions Hearing was held. A total of 113 jury questionnaires had been returned to the Court prior to that hearing, and disposition of said potential jurors was made at the hearing. Accordingly, the prospective jurors had returned 113 questionnaires, and 28 of the 113 were to be disqualified due to answers on the questionnaires indicating knowledge of the crime at hand. Counsel for the Appellant renewed their Motion for a Change of Venue (Transcript Motions Hearing, April 9, 2010, pg 34.) Despite concerns of Appellant's counsel regarding community rumors surrounding the case and an active hostile sentiment, the Court ruled that "I'm reserving—so we're going to start this trial right here, but all the cases say that the venue can be—that motion, rather can be renewed all the way up to when we draw to seat the jury. So, I mean, I think you've made a clear record on it" and "THE COURT: I'm going to let you voir dire the heck out of them and just go from there" (*Id.* at 35).

Further, at the April 9, 2010, Motions Hearing, it was disclosed that the medical examiner in the above captioned matter was no longer employed by the State Medical Examiner's Office. At that hearing, the Court was advised by the Prosecutor that the medical examiner was "unavailable" for testimony. The Court directed that the medical examiner be "subpoenaed" (Transcript Motions Hearing, April 9, 2010 pg. 70). Said medical examiner was not present at trial. The Appellant objected to the inability to cross-examine Dr. Belding at trial regarding his

examinations. Based on an *in camera* interview between the Court and Dr. James Kaplan regarding the reasons for the termination of employment of the medical examiner who performed the autopsies in this case, the Chief Medical Examiner was permitted to testify in lieu of Dr. Belding's testimony.

Trial in the above matter began on Tuesday, April 13, 2010, with jury selection. Testimony began on Wednesday, April 14, 2010, and concluded on Thursday, April 15, 2010. On April 15, 2010, the prosecution rested its case. The Appellant's counsel moved the Court for an acquittal as to all counts in the Indictment, due to insufficiency of evidence. The Court granted said motion in regard to Count One, Burglary. The Appellant's motion with regard to the remaining counts was denied. The jury returned its verdict of guilty of two counts of Murder, First Degree and guilty to one count of Arson, First Degree. On or about May 7, 2010, the Appellant filed a Motion For Judgment of Acquittal Notwithstanding Verdict and/or new Trial. Said Motion was argued on May 27, 2010. After hearing arguments of counsel, the Circuit Court denied Appellant's motion and accordingly, the Appellant was sentenced to confinement for the remainder of his natural life without the possibility of parole for each offense of "Murder-First Degree" and an indeterminate term of not less than two years nor more than twenty years for the offense of "Arson-First Degree." (Court Order, dated May 27, 2010, pg. 2). Said sentences were set to run consecutively

On June 1, 2010, the Appellant was re-sentenced as the sentence imposed for the crime of Arson—First Degree, at the May 27, 2010, sentencing hearing was erroneously imposed (indeterminate term of two to twenty years) and the correct sentence for that crime, that of a determinate term of twenty (20) years, was imposed.

On February 11, 2011, the Appellant was again resentenced for purposes of effectuating this appeal.

III. SUMMARY OF ARGUMENT

The Appellant should have been granted a change of venue, as indicated by the public opinion survey, which showed a staggering number of potential jurors could not presume innocence. Only forty (40) percent could presume innocence, and nearly eighty (80) percent admitted prior knowledge of the case due to extensive media coverage.

Any items seized as a result of the search warrant issued for the Appellant's residence should be suppressed, as the warrant itself was defective. Even the issuing Judge declared the warrant to be insufficient for probable cause until the police officer hand-wrote a statement that the Appellant had "confessed to seeing the victims' bodies." Additionally, the consent to search the residence appears to have been contrived and based on inconsistent testimony. The Appellant's alleged statements should have been set aside (therefore causing the basis for the warrant to be insufficient). The Appellant was denied his request for a break from questioning, and Officer Ruble, to he made the alleged statement should have avoided a conversation; rather, the officer purposely engaged the Appellant in a conversation to elicit information regarding his statement. Any alleged statement was used in violation of the Appellant's Fifth Amendment, Miranda and other constitutional rights.

Certain telephone calls made by the Appellant from Southern Regional Jail should have been suppressed because their probative value was outweighed by their prejudice to the Appellant. The Appellant never made any statements to the effect that he committed the act, yet the importance placed on these calls by their very admission into evidence unduly influenced the jurors' emotions. It is a delicate balancing act, but the prejudice of the taped calls clearly

outweighed any probative value. Additionally, the State's introduction of alleged weapons and inflammatory photographs was aimed at further stirring the emotions of the jurors and was therefore unfairly prejudicial to the Appellant.

The Appellant contends that his Counsel's verbal motion at the close of the State's evidence should have been granted and the conviction overturned for insufficiency of evidence. Indeed, the State could offer no witness who could claim "I saw [the Appellant] do it," nor could it produce evidence of the plan to kill, motive to kill, or deliberate intent to kill. The State relied upon the heinous nature of the crime to convince the jury of the Appellant's guilt. Likewise, the State produced no witness to say "I saw [the Appellant] do it" as to the arson charge.

The photo array and subsequent identification of the Appellant at trial by witness Reed should have been suppressed, as the photo array was unfairly biased toward the Appellant. His was the only photo showing tattoos and the use of "mug shots" taken before a wall marked to show height. The photos obviously and unfairly showed the Appellant's shorter stature in relation to the other individuals. Certainly an individual speaking face to face with the Appellant could guesstimate his height, but such a determination would not be so apparent in a photograph. The obvious portrayal of his shorter stature and physical characteristics in the Appellant's mug shot made it far too easy for the witness to identify the Appellant.

Appellant avers that, although the Chief Medical Examiner likely rose to his position because of his skills, the testimony of James Kaplan, M.D., should have been disallowed because he could speak only to the facts stated in the autopsy reports. The serious nature of the charges at hand should be held to a higher measurement of actual first-hand knowledge of the facts and the need for cross-examination, thereto.

Appellant was convicted of an extremely heinous crime on circumstantial evidence, without the right to cross-examine one of the State's witnesses (Dr. Belding). The sentence imposed upon the Appellant clearly violates the proportionality principle and is unduly harsh. Finally, the oversight by Appellant's counsel to object more strenuously to the State's use of Chief Medical Examiner James Kaplan and oversight in objecting to the admission of certain photographs and weapons which were highly inflammatory and prejudicial toward the Appellant clearly fall under the plain error doctrine.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As stated in Rule 18(a) of the Revised Rules of Appellate Procedure, in regard to the criteria for oral argument, "oral argument is unnecessary when:

- (1) all the parties have waived oral argument; or
- (2) the appeal is frivolous; or
- (3) the disparities issue or issues have been authoritatively decided; or
- (4) the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument."

Under the above-stated rule, the Appellant avers oral arguments are not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

V. ARGUMENT

A. The lower court erred in failing to grant the Appellant's Motion for a Change of Venue.

The West Virginia Supreme Court has repeatedly held that "[t]he fact that a jury free from exception can be impaneled is not conclusive, on a motion for change of venue, that prejudice does not exist, endangering a fair trial..." E.g. *State v. Dandy*, 151 W. Va. 547, 564 153 S.E.2d 507, 516 (1967). Good cause to change venue was established by a public opinion survey

performed by Don Richardson Associates (DRA), indicating that of the 206 potential jurors surveyed, only forty (40) percent could presume innocence. Additionally, only eight (8) percent of the potential jurors polled could consider mercy. An astounding seventy-nine (79) percent of the 206 potential jurors surveyed were knowledgeable of the news media attention stirred by this case. Additionally, the instant matter grabbed an extensive amount of media attention. An article ran in the Bluefield Daily Telegraph outlining intimate details into the “simple life” of the elderly victims, aimed at stirring community outrage. In this case, there was a hostile sentiment present in the community which permeated the trial and prevented the Appellant from receiving a fair trial. See *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

In regard to the existence of hostile sentiment against a defendant, this Court has said that “influences, even though silent, may so permeate a community as to make their impression upon the jury, and thus endanger the chances of a fair and impartial trial.” *State v. Weisengoff*, 85 W.Va. 271, 278 (1919). Furthermore, this Court has stated that “[f]ew juries can be found who are willing to defy public sentiment by rendering an unpopular verdict, especially in a doubtful case, and a fair trial entitled the accused to the benefit of all doubt.” (*Id.*) Also, this Court has keenly observed that “[t]he depth and extent of such prejudice can never be known from surface indications, but it may secretly extend to the bounds of the county through sympathy.” *State v. Manns*, 48 W.VA.480, 481 (1900). When such prejudice exists it has been said that jurors can be dangerous. (*Id.*)

During the hearing on the Appellant’s Motion for a Change of Venue, the Court noted a local case, *State of West Virginia v. Holcomb* (In the Circuit Court of Mercer County, West Virginia, Case No. 07-F-195-WS), which was granted a change of venue, but which had “lowered the bar” for cases, thereby lowering the statistical range for cases granted a change of venue.

(Defendant's Motion for Change of Venue Transcript, October 27, 2009, pgs. 44-45). The Circuit Court chose to eliminate the *Holcomb* statistics from the statistical research compiled by Don Richardson Associates, thereby causing the case at bar to fall to the lower end of cases granted a change of venue. It should be noted that, although the case fell within the lower end of the statistical range, the case at bar was well within the statistical range for cases in which change of venue motions were granted.

At trial in the above, of the 113 sitting jurors who attended orientation for this term of Court, approximately one-third (1/3) of them were eliminated from consideration prior to the start of the trial based on their responses to the jury questionnaire, thereby significantly reducing the number of potential jurors to empanel for trial in this matter.

B. The lower court erred in not suppressing products of searches performed under aegis of defective search warrants and questionable consent to search.

The Appellant asserts that the lower court erred in allowing evidence obtained via the search warrant at the Appellant's residence into trial as the search warrant was defective and the fruit of any such warrant should be suppressed. As previously noted, between the hours of 4:00 a.m. and 5:00 a.m., on August 12, 2008, Detective Gills attempted to obtain a search warrant of the Appellant's Washington Street residence. The Honorable William J. Sadler, Mercer County Circuit Court, 9th Judicial Circuit, initially denied the search warrant request, agreeing to authorize the warrant only after Detective Gills inserted a handwritten line on the warrant that stated the Appellant "has confessed to being at the residence [victims' residence] and had seen the two victims dead at the [victims'] residence." (*Id.* at 70).

"To constitute probable cause for the issuance of a search warrant, the affiant must set forth facts indicating the existence of criminal activities which would justify a search and, further, if there is an unnamed informant, sufficient facts must be set forth demonstrating that the information obtained from the unnamed informant is reliable." *State v. Hall*, 298 S.E.2d 246 (W.Va. 1982).

Appellant avers that such facts must be themselves duly and properly ascertained. In the case at bar, the one statement included to satisfy the "probable cause" requirement was itself obtained through illegal acts and, therefore, not duly and properly ascertained. Therefore, the Appellant's alleged "confession" should be set aside in consideration of the search warrant. Likewise, any fruit of any search conducted pursuant to the search warrant should be set aside.

Additionally, Appellant contends that there was no "consent to search" given by Brittany Davis regarding the Washington Street residence. "Whether a consent to a search is in fact voluntary or is the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *State v. Hambrick*, 350 S.E.2d 537, 177 W.Va. 26 (1986), quoting *State v. Craft*, 165 W.Va. 741, 272 S.E.2d 46 (1980). Clearly, Brittany Davis was in no position to refuse a search of the residence she shared with Appellant, as she was told by the police, indeed, by her own cousin, [Mercer County Sheriff's Deputy] Corporal Sommers, that certain charges in relation to the case would be dropped if she cooperated, or, in other words, "things would go better for her". (Trial Transcript, Vol. II, pp. 211-212). Brittany Davis was under duress to consent to the search, as it was implied that she would be facing charges of her own unless she did consent.

As Judge Sadler specifically stated that the search warrant was inadequate regarding probable cause, and only signed it after Detective Gills included the information that the Appellant "confessed" to having seen the dead bodies, such search warrant was based on illegally obtained information and probable cause. Therefore, in accordance with Rule 12(b)(3) of the West Virginia Rules of Criminal Procedure, Appellant requests such evidence be suppressed as it was illegally seized from the Appellant.

C. The lower court erred in allowing Appellant's alleged statements into evidence as they were not voluntary and were in violation of Appellant's Fifth Amendment Rights, Miranda Rights and other Constitutional Rights.

Appellant contends that any statements made to the police with regard to seeing "the two victims dead" were made only after hours of interrogation and after a request by the Appellant to cease questioning to allow the Appellant to obtain some much needed rest. Appellant contends that such statements are in violation of his Fifth Amendment rights and were involuntarily obtained and were obtained without proper administration of his rights pursuant to Miranda. In the instant case, the Appellant was arrested at 5:45 p.m., on August 11, 2008, for Possession with Intent to Deliver Marijuana. Although he was in custody for Possession of a Controlled Substance, he was constantly and unrelentingly interrogated regarding an unrelated matter, the murder of an elderly couple. He was not Mirandized nor informed of his Constitutional rights for five (5) hours. Additionally, after being Mirandized at 10:40 p.m., on August 11, 2008, and 1:08 a.m., on August 12, 2008, he continued to maintain his innocence. It should be noted that, on both Miranda forms, the crime for which the Appellant was under arrest was Possession with Intent. Well after 1:00 a.m., on August 12, 2008, Appellant became so fatigued from the interrogation that he requested that questioning cease and he be allowed to obtain some much needed rest. On the way to said rest, he initiated a conversation with Detective Ruble regarding dead bodies. Although Detective Ruble knew Appellant had been Mirandized and that he was fatigued, Detective Ruble continued to ask Appellant questions to ascertain what Appellant meant by asking about dead bodies. Although Appellant had already claimed fatigue, the hours of questioning grew longer and the fatigue worsened. He was taken back to the Mercer County Sheriff's Department where interrogation continued until Appellant stated that he had seen the dead bodies and that he had been at the crime scene with a Justin Stacy. Said statement was highly prejudicial and subsequently led to the Appellant's arrest and the obtaining of a search

warrant for the Appellant's residence. From the totality of the circumstances, based upon the above-referenced incident, in that the Appellant was under arrest and therefore, not free to leave, he had already expressed his fatigue and needed rest, which was denied him repeatedly; therefore, the Appellant avers that his alleged "confession" was not made voluntarily and was obtained in violation of his Fifth Amendment, Miranda rights and other constitutional rights. This Court has previously held that "[w]hether an extrajudicial inculpatory statement is voluntary or the result of coercive police activity is a legal question to be determined from a review of the **totality of the circumstances**" (emphasis added). *State v. Milburn*, 204 W.Va. 203, 511 S.E.2d 828 (1998). In the case at bar, every action the police took during the long hours of August 11, 2008, through August 12, 2008, served to elicit such a statement. This is further evidence by the creative intertwining of questioning with the offer of a polygraph examination and the convenient timing of having a witness (Reed) identify Appellant out of photographic array during questioning. Additionally, Appellant had asked what was simply an innocuous question regarding how a police officer can handle the stress and shock of seeing dead bodies; however, rather than ending any conversation by reminding Appellant that he had been Mirandized and that anything he said could be used against him, Detective Ruble instead engaged Appellant in further conversation to draw out any statement that could be considered a "confession." Last, but certainly not least, Deputy Furches admitted to having shown the Appellant photographs of the victims during the course of the questioning (Motions Hearing, November 12, 2009, pg. 23). Such an act could serve no purpose other than that of trying to elicit some, indeed any, response from the Appellant.

D. Appellant's prompt presentment rights were violated.

Appellant contends that any statements made after he should have been presented to a magistrate for arraignment on the drug charges for which he was being held are invalid as he was being detained (for purposes of obtaining a confession) and such statements were involuntary. Mercer County uses an on-call arraignment system, whereby police who have arrestees in need of arraignment call between the hours of 6:00 p.m. and 10:00 p.m., to arrange for the magistrate to come to court at 10:00 p.m. (November 12, 2009, Court Order, p.3). Thus, Appellant could have been arraigned on the drug charges at approximately 10:00 p.m. However, Appellant was not arraigned on the drug charges until 9 or 9:30 a.m., the following morning. Although the Appellant had not as of yet been charged with the crimes of the instant matter, he was being held pending arraignment on another matter (Possession with Intent to Deliver Marijuana). Because of this status, the Appellant was not free to leave questioning (custodial interrogation).

"In Syllabus Point 1 of *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984), we held "[t]hat the delay in taking a defendant to a magistrate may be a critical factor [in the totality of the circumstances making a confession involuntarily 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* Syllabus Point 1, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613(1986). We further instructed in Syllabus Point 2 of *Humphrey* that: Our prompt presentment rule contained in W. Va. Code, 62-1-5, and Rule 5(a) of the West Virginia Rules of Criminal Procedure, is triggered when an accused is placed under arrest. Furthermore, once a defendant is in police custody with sufficient probable cause to warrant an arrest, the prompt presentment rule is also triggered." *State v. Milburn*, 204 W.Va. 203, 511 S.E.2d 828 (1998).

There is no question in the case at bar that the sole purpose of deputies delaying in taking the Appellant before a magistrate under the prompt presentment rule was in order to obtain a confession.

E. The lower court erred in allowing the State to introduce into evidence recorded telephone conversations from the Southern Regional Jail and to introduce evidence relating to alleged murder weapons, which were subject to interpretation and their probative value was substantially outweighed by the prejudice to the Appellant.

"The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syl. Pt. 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds by State ex rel. R. L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994). *State v. Doonan*, 2006 W.Va. (33052); Syl. Pt. 2.

The Appellant asserts and argues that the recorded telephone conversations from the Southern Regional Jail offered into evidence in the instant matter should not have been allowed because they were in violation of the Appellant's right to privacy and were subject to interpretation such that their probative value was substantially outweighed by the prejudice to the Appellant. Additionally, Appellant asserts and argues that the photographs and weapons offered into evidence by the State were so inflammatory as to incite the trier of fact and that the probative value was substantially outweighed by the prejudice to the Appellant.

" Rules 402 and 403 of the West Virginia Rules of Evidence direct the trial judge to admit relevant evidence, but to exclude evidence whose probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Syllabus Point 4, *Gable v. Kroger Co.*, 186 W.Va. 62, 410 S.E.2d 701 (1991).

This Court has also stated that "the seminal West Virginia case on Rule 403:

Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that **although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice,**

confusion, or undue delay is disproportionate to the value of the evidence." (emphasis added.)

State v. Donley, 607 S.E.2d 474, 216 W.Va. 368 (2004) at S.E.2d pg. 482, quoting *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Further, "this Court explained that in order to perform a "Rule 403 balance, we must assess the degree of probity of the evidence, which, in turn, depends on its relation to the evidence and strategy presented at trial in general." "*State v. Donley*, 607 S.E.2d 474, 216 W.Va. 368 (2004) at S.E.2d pg. 482, quoting *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Finally, according to this Court:

"The mission of Rule 403 is to eliminate the obvious instance in which a jury will convict because its passions are aroused rather than motivated by the persuasive force of the probative evidence. Stated another way, the concern is with any pronounced tendency of evidence to lead the jury, often for emotional reasons, to desire to convict a defendant for reasons other than the defendant's guilt." (*Id.*)

Additionally, during the course of the recorded conversations, the Appellant did not make any direct admission that he had committed a crime. Further, testimony of David Miller of the West Virginia State Police Forensic Laboratory (Trial Transcript, Vol. II, pgs 134-145) revealed that through analysis of all three weapons none of the weapons could be linked to the Appellant through DNA or other means, as no biochemistry test, although available, was performed. Such a test should have been performed. (Trial Transcript, Vol. II, pg. 178). Additionally, no evidence either from the State Police Laboratory or the Medical Examiner's Office could link these weapons to the wounds inflicted on the victims. This information could possibly have been elicited from Dr. Belding, if he had appeared at trial. Therefore, testimony regarding the recorded conversation and entering the weapons and related photographs into the trial as exhibits is highly prejudicial and served to inflame the jury.

Further, the Appellant avers that any testimony regarding the keys should have been omitted, since there was some question as to whether they were truly found at the Appellant's home. Co-counsel for the Appellant objected to the chain of custody regarding the same, which was overruled. (Trial Transcript, Vol. II, pp. 262 - 263).

F. The lower court erred in not dismissing the action at the Appellant's Counsel's verbal motion at the close of the State's case in chief.

G. Appellant was convicted on two counts of murder-first degree and one count of arson despite insufficient evidence at trial of same.

The argument and authorities on both points of the instant matter are substantially the same. For clarity, both issues will be addressed together.

"A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syl. Pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Syl. Pt. 6 *State v. McCracken*, 2005 W.Va. (32665).

The Appellant was convicted on two counts of first degree murder and one count of arson-first degree. The evidence offered at trial was insufficient as to each of these charges.

According to this court, "a criminal defendant ...takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond reasonable doubt. As we have cautioned before, appellate review is not a device for this Court to replace a jury's finding with

our own conclusion. On review, we will not weigh the evidence or determine credibility. Credibility determinations are for a jury and not an appellate court. On appeal, we will not disturb a verdict in a criminal case unless we find that reasonable minds could not have reached the same conclusion. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.” *State v. Guthrie*, 194 W.Va. 657, 669-70, 461 S.E.2d 163, 175-76 (1995) (incorporating federal standard for insufficiency of evidence claims).

In the case at bar, there was no evidence of malice, premeditation, or deliberation, as required for first degree murder convictions. According to *Guthrie*, “there must be some evidence that the defendant considered and weighed his decision to kill in order for the State to establish premeditation and deliberation...” (*Id.* at 675, 181). In the absence of an admission by the accused of planning or prior design, the Court noted three categories of evidence that could support a jury’s finding:

“As examples of what type of evidence supports a finding of first degree murder, we identify three categories: (1) “planning” activity—facts regarding the defendant’s behavior prior to the killing which might indicate a design to take life; (2) facts about the defendant’s prior relationship or behavior with the victim which might indicate a motive to kill; and (3) evidence regarding the nature or manner of the killing which indicate a deliberate intention to kill according to a preconceived design” (*Id.* at fn 24).

In the case at bar, the State offered no evidence supporting such deliberation or premeditation. In fact, there was no direct evidence linking the Appellant to the murders at all. There is no conclusive evidence that Appellant even committed these acts as all of the State’s evidence is open to interpretation and can be arguably explained by Appellant’s presence at the

scene **without any involvement in the crimes**. Even if reasonable persons could have believed that he committed the acts, there is absolutely no evidence of planning activity, a preconceived design or some sort of motive to kill. Thus, even if the Court believes that the jury could have reasonably found involvement in the homicides, there was no evidence for a first degree murder conviction. Similarly, for the same reasons enumerated above, there was no evidence of first degree arson, because the State did not prove that Appellant committed the act, as opposed to merely being at the scene of the indicted offenses.

H. The lower court erred in allowing the photographic array and subsequently Witness John Reed's testimony due to the use of a tainted photographic array for identification purposes.

The Appellant asserts and argues that the lower court erred in allowing Witness John Reed's testimony due to the use of a tainted photograph array for identification purposes. As previously noted, witness John Reed gave a description to officers on the day of the crime. Several hours later he was summoned to the Sheriff's Department in Princeton, West Virginia, to participate in a photo-line up. The description of the Appellant included such details as "mid-twenties, white male", "tattoos on the neck area", "shorter", (November 10, 2009, Suppression Hearing Transcript, pgs 94-95). In *State v Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981), the court held that a photographic array which is unduly suggestive, be it based on clothing, the holding of an arrest card or any other detail which could suggest to the victim that the person depicted in the photographic array is currently under suspicion is impermissible. Appellant avers that the photographs contained in the photographic array for lineup purposes were impermissibly suggestive in that the Appellant's height (short) and tattoos were obvious in his photograph, while not present in the others included in the array. Photographs from the array were compiled by Detective Gills and other officers.

Q.[By Appellant attorney Kelley]: You didn't administer the lineup, you just prepared the lineup.

A.[By Detective Gills]: I—not the whole—

Q. The array of work?

A. No, not the whole thing. I'm not sure how many people were involved in that. I remember obtaining a few of the photos.

Q. Were you—did you obtain [Appellant's] photo?

A. Yes, I think so. (November 10, 2009, Suppression Hearing Transcript, pgs 94-95).

With regard to the obvious photographic array defect concerning Appellants short stature, Detective Gills testified: (*Id.* at 97-98):

Q. [By Kelley] Okay. Now let's go over this thing carefully. I notice that all six individuals are up against a wall that depicts their height. Is that – is that fair to –

A. [By Gills] Yes, they're actual mug – mug shots that we keep on file at our office.

Q. Okay. The reason I'm asking you that is because that would seem to suggest to the participant the height of the individual, would it not?

A. Yes.

Q. I mean, would not – wouldn't it be better just to have the individuals standing up against the wall with no lines so that – in other words, I'm saying this is a short person. Wouldn't it be good to have six people that we don't know their height at all?

A. Yes.

Q. And I notice that [photograph] number 1, you have a line that goes all the way across to six feet, one that goes all the way across to five feet and all [photographs] numbers 1, 2, 3, 4, and 5, are well above the five foot line. Only [Appellant] has a number going directly across through his head of exactly five feet. In other words, it shows – matter of fact is shows sixty inches exactly going right through the middle of his head. Don't you find that suggestive as to his height? We know he's [Appellant] 5'6" tall. Mr. Reed [witness] identified him as a short gentleman. Do you find that suggestive at all?

A. Sort of, but these are just photos that we use. These – they are photos that we have in our possession to use for this.”

And, concerning Appellant's obvious tattoos around his neck: (*Id.* at 99-100)

Q. [By Kelley] Tell me why you would compile six photographs and only one have tattoos on his neck?

A. [By Gills] That's all I could obtain. I mean, there's not – very rarely people that have tattoos on their necks.

Further, the Appellant argues that, as his photograph was the only photograph in the array to show any tattoos, it was unfair in that it suggested to the Witness, John Reed, which suspect to identify:

[BY MR. KELLEY]: "And I would argue that it's so suggestive, it goes to such (inaudible) to the case law, the Simms and the Harless case, that not only should the photo spread, or the line-up out of court be suppressed, but it so taints -- it's so suggestive that it would invariably taint any subsequent in-court identification by Mr. Reed at this particular time (inaudible)" (November 12, 2009, Motions Hearing Transcript, Vol. II, pg. 44). Unfortunately, the Circuit Court disagreed: [BY THE COURT]: "And I think the photo array is admissible, so I'm going to let it be admitted. And if the gentleman can identify him in court, I'm going to let him identify him in court." (*Id.* at pg.65).

Pursuant to *State v. Casdorff*, 159 W.Va. 909, 230 S.E.2d 476 (1976) and *Neil v. Biggers*, 409 U.S. 188 (1972), any evidence derived from the use of a photo array should be suppressed. Specifically, as previously noted, it was only after Detective Gills informed the Appellant that he had been identified by a witness as having been in the area of the crime that the Appellant agreed he had been there in the early morning hours. (*Id.* at 100.) Such information was the direct result of a defective photographic line up.

I. The lower court erred in allowing the testimony of Chief Medical Examiner, James Kaplan, although he had no first-hand knowledge of the matter at hand, and had not been present at the examination of the victims.

At the April 9, 2010, Motions Hearing, it was disclosed that the medical examiner in the above matter was no longer employed by the State Medical Examiner's Office. At that hearing, the Court was advised by the Prosecutor that the medical examiner was disgruntled as he was unjustly fired by the Medical Examiner's Office. THE COURT: "'Disgruntled" doesn't mean unavailable." (Transcript Motions Hearing, April 9, 2010, pg. 70). Although the Circuit Court ruled that the autopsy reports seemed to be admissible from an evidentiary standpoint, pursuant to West Virginia Code Section 61-12-13, it did not abrogate the Appellant's right to cross examine the medical examiner who actually performed the autopsies. The Court Ordered the State to, therefore, subpoena Robert C. Belding, the Deputy Medical Examiner.

On April 14, 2010, the prosecutor attempted to produce Chief Medical Examiner, James Kaplan, to testify regarding the autopsy reports prepared by Dr. Belding. Again, the Appellant renewed his objection to having Dr. Kaplan testify "in place" of Dr. Belding, as it was a violation of Appellant's right to confrontation and cross examination. It should be noted that Dr. Belding was not unavailable, but would not appear unless paid a witness fee in the amount of Two Thousand Five Hundred Thirty-six Dollars (\$2,536.00). (Trial Transcript, Vol. II, at pg. 152).

The Circuit Court determined through an *in camera* hearing with Dr. Kaplan that the reasons for Dr. Belding's dismissal would in no way affect the autopsy results. The autopsy reports and Dr. Kaplan's testimony were admitted into evidence and Dr. Belding was not produced for the trial.

"The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement. The unavailability prong of the Confrontation Clause inquiry is only invoked when the challenged extrajudicial statements were made in a prior judicial

proceeding." *State ex rel. Humphries v. McBride*, 2007 W. Va. LEXIS 21 (Apr. 19, 2007).

In *Crawford v. Washington*, 541 U.S. 36, 125 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court held that the Confrontation Clause bars the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at pg. 62.

Subsequently, the Circuit Court relied upon *State v. Kennedy*, 517 S.E.2d 457, 205 W.Va. 224 (1999), to justify the admission of Dr. Kaplan's testimony:

[THE COURT]: "Again, I also look at *State versus Kennedy*. And I'm looking at Syllabus Point 3 that says "any physician qualified as an expert may give an opinion about physical and medical cause of injury or death. This opinion may be based in part on an autopsy report." So I think he's entitled to use that under several scenarios." (Trial Transcript, Vol. II, pg. 162).

However, the Circuit Court erred in relying upon *Kennedy*, since the United States Supreme Court overturned that rule in *Crawford v. Washington*, when it said that "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation." (See the Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004), at pg. 36).

Further, the Supreme Court illustrated its point succinctly in Syllabus Point (a) of *Crawford*:

"The Confrontation Clause's text does not alone resolve this case, so this Court turns to the Clause's historical background. That history supports two principles. [First omitted here] Second, the Framers would not have allowed admission of testimonial statements of a witness who did not appear at

trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination... And the “right...to be confronted with the witnesses against him,” Amdt. 6, is most naturally read as a reference to the common-law exceptions established at the time of the founding. See *Mattox v. United States*, 156 U.S. 237, 243. Pp. 42-56.” (*Id.*, Syl. Pt. (a)).

Two years later, this Honorable Court itself looked to the *Crawford* decision:

“Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.” Syl. Pt. 6, *State v. Mechling*, 633 S.E.2d 311 (2006).

Appellant's co-Counsel, Paul Cassell, voiced concerns that Dr. Kaplan would therefore be testifying to only the contents of the autopsy reports, which was subsequently confirmed by the Circuit Court, without objection. (Trial Transcript, Vol.. II, pg. 161). However, Appellant avers that Dr. Kaplan's testimony regarding the possibility that the physical evidence offered by the State matched the victims' wounds, when no such biochemistry testing was done on the weapons to confirm the same. (Trial Transcript, Vol. II, pp. 173 - 174). Appellant's objection was overruled. Thus, Appellant avers that Dr. Kaplan's testimony was not a sufficient substitute for that of Dr. Belding and should, therefore, have been excluded.

J. The sentence imposed upon the Appellant violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution.

In determining whether a sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, two tests are employed.

The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test[.] *State v. Cooper*, 172 W. Va. 266, 272, 304 S.E.2d 851,857 (1983).

The objective test was set forth in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 166 W.Va. 523 (1981):

In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

The jury was never "introduced" to Appellant, Terry Blevins, as a person, thus the jury was given no background information on him. Appellant was only twenty-three years of age at the time of his arrest. Further, Appellant was convicted on nothing more than circumstantial evidence, without any indication that he had a motive to commit this heinous crime. To be sentenced to twenty years in prison for Arson - First Degree, and particularly to be facing the possibility of spending the rest of his life in prison, with no hope of mercy, is certainly disproportionate to the offenses for which Appellant was convicted. It shocks the conscience to picture such a young man never being given the chance to contribute to society.

K. Defense Counsel's Failure to object to errors of law at the Trial Court level constituted plain error.

Plain error is usually defined as error that is so obvious that failure to notice it would seriously affect the fairness, integrity, or public reputation of the judicial proceedings and result in a miscarriage of justice. The Court has stated that "an error will not be considered on appeal under the 'plain error' doctrine when no objection is initially made in the trial court unless it is of a Constitutional dimension or it is necessary to prevent manifest injustice or clear prejudice to the party" (emphasis added). *State v. Ketchum*, 169 W.Va. 9, 289 S.E.2d 657 (1981).

In the middle of the trial on Wednesday, April 14, 2010, the Appellant and his Counsel were initially notified that the prosecution's witness, Dr. Robert Belding, had not honored his

subpoena. Appellant avers that his counsels' lack of knowledge and preparation for this event resulted in plain error, by not having made a more thorough objection. West Virginia has now adopted the *Olano* standard of plain error (see *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)). "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

VI. CONCLUSION

For the foregoing reasons, this matter should be reversed and a new trial granted to the Appellant with instructions set forth by this Honorable Court.

Respectfully submitted this the 13th day of June, 2011.

TERRY ALLEN BLEVINS,
By Counsel,



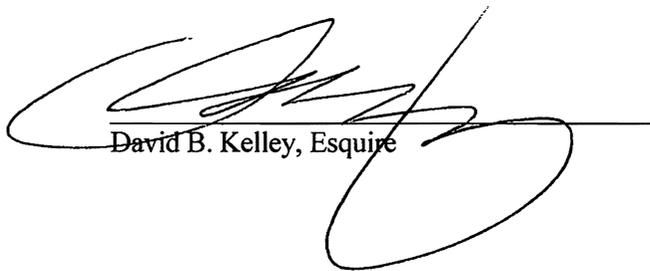
DAVID B. KELLEY, ESQUIRE (Bar # 1996)
THE KELLEY LAW FIRM
520 Virginia Avenue
Post Office Box 632
Bluefield, Virginia 24605
(276) 326-2110



PAUL R. CASSELL, ESQUIRE (Bar # 7142)
HODGES & CAMPBELL, PC
340 West Monroe Street
Wytheville, Virginia 24382
(276) 228-5566

CERTIFICATE OF SERVICE

I, David Kelley, the undersigned, do hereby certify that I have served a true copy of the foregoing pleading upon counsel for the State of West Virginia, via hand-delivery, to Scott Ash, Prosecuting Attorney, 120 Scott Street, Suite 200, Princeton, West Virginia, 24740 on this 13th day of June, 2011.



David B. Kelley, Esquire