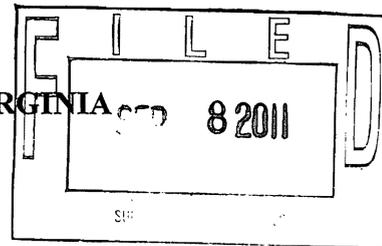


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1014



STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

v.

TERRY ALLEN BLEVINS,

*Defendant Below, Petitioner.*

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**BRIEF ON BEHALF OF THE RESPONDENT**

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---

**BRIEF ON BEHALF OF THE RESPONDENT**

---

Comes now the Respondent, the State of West Virginia, by counsel, Laura Young Assistant Attorney General, and files the within response brief.

**I.**

**STATEMENT OF THE CASE**

A jury convicted the Petitioner of two counts of murder in the first degree, and one count of first degree arson on April 14, 2010. Following denial of the post-trial motions, the Petitioner was sentenced in accordance with the verdicts to two consecutive terms of life in prison without the possibility of parole, and a consecutive term of two to twenty years for the arson. (App., vol I, 1-4.)

James Barton, murdered one day before his 75th birthday, and his wife Matred Delores Barton, also 74 when she was killed, died together on August 11, 2008, at their home in Princeton, West Virginia. Mrs. Barton was apparently beaten to death with a baseball bat, and was found in her home which had been set on fire. Her husband was found locked in an outbuilding beaten to

death with a hatchet or a crowbar. His shirt was burned, apparently in an effort to burn his body. (*Id.* at 19-21.)

Fire and rescue units responded to the Barton's home about 2:00 p.m. on August 11, 2008. Mrs. Barton's body had been removed from her home. Mr. Barton was found in the outbuilding. A neighbor had witnessed a stranger, and strange car in the neighborhood. Based upon the description of the car from the witness, the police were able to determine that the car belonged to the Petitioner. Upon initial questioning, the Petitioner denied ever being in the Barton's neighborhood. After being confronted with the witness' identification of the Petitioner having in fact been in the neighborhood, the Petitioner changed his story and admitted being there. The Petitioner agreed to take a polygraph test, but requested that questioning stop. The officers scrupulously honored that request and took the Petitioner to jail. The Petitioner then requested that he be permitted to speak to the police again. The Petitioner waived his Miranda rights and gave a statement that he was present when "Justin Stacy" killed the Bartons. The Petitioner's girlfriend told police that on August 11, 2008, the Petitioner returned to her home with blood on his face and that he burned his clothes in the backyard. Further, the Petitioner had called her from the Bartons at approximately the time they died. (*Id.* at 22-26.)

Before trial, the Petitioner moved for a change of venue. (*Id.* at 9.) A hearing was held on that motion on October 27, 2009. (App., vol. II, tab II, 3.) As evidence to support the motion, trial counsel submitted newspaper clippings and the result of a defense commissioned public opinion survey. No members of the petit jury were surveyed. (*Id.* at 26.) In sum, 79% of the people surveyed had some information about the murder case before they were surveyed. (*Id.* at 39.) The pollster acknowledged that the questions would have been framed differently if he had been aware

that the drug charge was severed from the other crimes. (*Id.* at 59.) Sixty percent of those surveyed stated they would adhere to the presumption of innocence. (*Id.* at 60.) Forty four individuals, or 22%, had no knowledge of the murders or Mr. Blevins. (*Id.* at 65.) Further, a majority of those surveyed indicated that Mr. Blevins could receive a fair trial. (*Id.* at 75.) Although no specific dates were mentioned in the hearing as to when the survey was performed, it was obviously after August 11, 2008, and before October 27, 2009. The prosecuting attorney pointed out that there had been very little media coverage of the murders since June, 2009, and that the prevailing standard for considering a change of venue was present hostile sentiment, or hostile sentiment at the time of trial. (*Id.* at 84.) The judge accurately noted that the inquiry was not whether prospective jurors heard of the case but whether or not they had such fixed opinions they could not be impartial. (*Id.* at 85.) The judge suggested the use of a jury questionnaire, and that if, based upon the response to the questionnaire, it appeared unlikely that an impartial jury could be selected, then he would readdress the motion for change of venue. (*Id.* at 88.)

The Petitioner, by counsel, also filed motions to suppress which were heard outside the presence of the jury in November, 2009. Those motions included a motion to preclude evidence found as a result of an inadequate search warrant, motion to suppress statements, and motion to suppress identification testimony. At that hearing, the Petitioner's girlfriend testified that she and the Petitioner lived together. (App., vol. II., tab III, 11.) She testified that on the afternoon of August 11, 2008, several police officers came to her house and she gave them full permission to search the residence. Additionally, there was later a second search of that residence. (*Id.* at 13.) Ms. Davis stated that she gave the police full permission to search again. (*Id.* at 14.)

Ms. Davis also testified that she was the recipient of telephone calls from the Petitioner while he was incarcerated. On cross examination, Ms. Davis related that on the afternoon of the murders she had received a telephone call from the Petitioner from a number she assumed was the victim's. Further, when the Petitioner came home that afternoon, he went straight to the shower and had blood on his face. The Petitioner changed clothes and burned the clothes he had been wearing. (*Id.* at 21-22.) She was the person renting the home and had the only legal interest in the property. (*Id.* at 28.) Also testifying at the suppression hearing was Sergeant Gary Woods of the Mercer County Sheriff's Department. Sergeant Woods testified that his department had been given a description of a suspicious vehicle in the neighborhood where the Bartons lived and were murdered. (*Id.* at 32.) Upon a canvas, Sergeant Woods found such a vehicle and approached the house where it was parked. When the door opened, Sergeant Woods saw items in plain view and smelled odors which led him to a reasonable suspicion that there was drug activity at the residence. (*Id.* at 33.) Sergeant Woods further testified that even though the tenant gave permission to search the house, that a search warrant was also obtained by other officers. (*Id.* at 35.) Sergeant Woods amplified that as a result of the search of the residence the police discovered a set of keys that fit locks at the crime scene and a pile of burned material, including shoes. (*Id.* at 50.)

Also testifying at suppression was Captain Mike Gills. Captain Gills observed the vehicle that Sergeant Woods had found, and spoke to the Petitioner at the residence of his girlfriend. (*Id.* at 57.) At the time of their conversation, the Petitioner was not handcuffed or restrained. The Petitioner stated that he had no idea of the area of the county that Captain Gills was referencing when he mentioned the address of the crime scene. (*Id.* at 58.) Later, after the Petitioner had been arrested, the Petitioner stated that he in fact had been "down in that area trying to help a friend get

her car started.” (*Id.* at 59.) Captain Gills later inquired whether the Petitioner wanted to take a polygraph, and the Petitioner assented. (*Id.* at 63.) Captain Gills administered the Petitioner’s Miranda Rights to him. He read the form to the Petitioner, had the Petitioner re-read the form, and initial it. The Petitioner signed a written waiver of rights. The Petitioner did not appear to be under the influence of drugs or alcohol, and appeared to understand his rights. (*Id.* at 63-65.) The Petitioner started the polygraph, and then requested that it cease so he could get some rest. Questioning ceased immediately and the Petitioner was taken to the jail to be held pending his arraignment on drug charges. (*Id.* at 66.) Although given the opportunity to rest, the Petitioner voluntarily requested to be returned to the station. Upon his return, Captain Gills refreshed the Petitioner’s Miranda warnings. (App., vol II, tab III, 67.) The Petitioner stated at that time that he had seen Justin Stacy kill the victims, had gotten scared, and had left the scene. (*Id.* at 68.) At a later date, the Petitioner stated to Captain Gills that the blood on his vehicle “didn’t look too good on him.” (*Id.*) Captain Gills further noted that the description of Justin Stacy was originally with short hair and a goatee, and later the Petitioner described the non-existent Stacy with longer hair and different features. (*Id.* at 69.)

Captain Gills stated on cross examination that the Petitioner had given verbal consent to search his vehicle. (*Id.* at 80.) A search warrant was also obtained for the car. He testified as to the mechanism of preparing the photo array and stated he attempted to get similar photos. (*Id.* at 100.) Despite the repeated suggestion from Petitioner’s counsel that the Petitioner was very fatigued, Captain Gills testified that the Petitioner never appeared tired. (*Id.* at 114.) The Petitioner was arrested for the murder around 6:00 a.m., and arraigned on the drug charges at around 9:00, and arraigned on the murder charges at 1:00 p.m. (*Id.* at 115.) Captain Gills recovered keys from Ms.

Davis' residence. The remote on the key chain and the keys fit the victims' vehicles. (*Id.* at 120.)

A key also fit the outbuilding where Mr. Barton was found. (*Id.* at 121.)

It was clarified that Mercer County does not have magistrates on duty twenty four hours a day, and that Captain Gills had no contact with the Petitioner until after the magistrates had gone off duty. Further, even though the magistrate typically calls in between 6:00 and 10:00 p.m., the Petitioner had not been arrested for the murder at that time, and in fact had made no formal statement. (*Id.* at 128-129.) Captain Gills stated that in preparing the photo array, he looked for individuals of the same race, same length of hair, similar ears. Further, the Petitioner's tattoo was rendered as inconspicuous as possible in the array. (*Id.* at 131-132.)

Sergeant Centeno of the state police testified that he showed the photo array to Mr. Reed, the witness who had noted an individual and vehicle in the Barton's neighborhood. Captain Gills provided Sergeant Centeno with the array and asked the sergeant to show the array to an individual. Sergeant Centeno stated that he explained that he told the individual he did not have to identify anyone. The witness pointed to one photo, and initialed stating that he had seen that person near his residence. Sergeant Centeno also spoke with Ms. Davis and obtained her consent to search her residence for evidence regarding drug crimes and any other crimes. (*Id.* at 135-138.) Sergeant Centeno opined that it was not clearly a tattoo on the Petitioner's neck in the photo array and that at least one other photo had dark shading underneath his throat. (*Id.* at 141.)

Another witness at the suppression hearing was Corporal Ruble of the Mercer County Sheriff's Department. Corporal Ruble was one of the officers at Ms. Davis' residence the afternoon of the homicides. She was asked if they could search, and she said yes. Corporal Ruble found what he believed to be marijuana, currency and scales in an upstairs bedroom. (*Id.* at 151.) Sometime

after midnight, Corporal Ruble transported the Petitioner to Bluefield and the Petitioner stated that “I–I seen them two people dead.” This was not in response to any questioning. The Petitioner also requested to speak with Captain Gills again. (*Id.* at 152-153.) Corporal Ruble participated in a later search of Ms. Davis’ residence and located a set of car keys. (*Id.* at 153.)

Sergeant Smith of the state police was the polygraph examiner. Prior to any attempted polygraph, Sergeant Smith went over the Miranda and waiver for the polygraph, explained the process, and ascertained whether the Petitioner was intoxicated or sleepy. (*Id.* at 172.) The Petitioner was not under the influence of drugs nor did he appear fatigued. (*Id.* at 173.) Sergeant Smith went over the Miranda form, and the Petitioner actually corrected him by pointing out the he, the Petitioner was under arrest for possession of a controlled substance. Mr. Blevins agreed to waive his rights and signed a waiver form. (*Id.* at 174-176.) Mr. Blevins requested the interview cease, which it did. However, upon Mr. Blevins’ voluntary return to the police department, Sergeant Smith went over the Miranda warnings again. No threats or promises were made to induce the Petitioner to speak. The Petitioner admitted to Sergeant Smith that he was present at the victim’s home. (*Id.* at 177-178.) He stated he saw the bodies. (*Id.* at 179.) Sergeant Smith saw no indication of fatigue, and opined that the Petitioner was fully capable of taking the test. He had the physical ability to stay awake and understand the test. (*Id.* at 188.)

At the continuation of the motions hearing, the trial was continued until April, 2010. (*App.*, vol. II, tab V, 6.) Officer Furches testified, when testimony on the motion resumed, that he prepared the affidavit for the search warrant based upon his own personal knowledge and information that came from his fellow officers. (*Id.* at 24.) The parties clarified that the only items which would be introduced at trial would come from the search of the residence which resulted both from Ms. Davis’

repeated consents to search and also from a search warrant. That evidence would be the burned clothes, including the shoe, and the keys of the victims. (*Id.* at 28.)

The court found that Ms. Davis gave a valid consent to search, and that search revealed the victim's keys, the burned material, including shoes. (*Id.* at 60, 62.) The Petitioner had no legal interest in the property. (*Id.* at 63.) The array shown to Mr. Reed was a good array, with similar photographs. The witness had a clear chance to view him. The lineup was not suggestive. The court ruled that the array, the out of court identification, and an in court identification would be permitted. (*Id.* at 64-65.) As to the Petitioner's statements, made at Ms. Davis' house that he didn't even know where the victim's house was located was ruled admissible. (*Id.* at 66.) Further, the statement where the Petitioner changed his story and admitted being at the murder scene to help a friend start her car was admissible because the Petitioner had voluntarily waived his Miranda rights. (*Id.* at 68.) The court found no violation of the prompt presentment rule because the delay, if any, in taking the Petitioner to the magistrate was not to obtain a statement. (*Id.* at 69.) The court determined that the statement about seeing the dead bodies was admissible because the Petitioner blurted out the statement, and that the statements made to the polygraph examiner were admissible because the Petitioner had again voluntarily waived his Miranda rights. (*Id.* at 70.)

A further hearing was held on the admissibility of the contents of certain phone calls placed by the Petitioner while in jail to his girlfriend. Lieutenant Bunting testified that the procedure was that every inmate received a handbook when he arrived at jail, and that the handbook contains a warning which states that all calls except to attorneys may be monitored and recorded. Further, signs are physically posted above each telephone to warn the inmate that the call would be monitored and recorded, and on the telephone call itself, a recorded voice states that calls are monitored and

recorded. (App. vol II, tab V, 4-6.) The court determined that the Petitioner knew he was being recorded. Each of the phone calls was placed between August 12 and August 15, 2008. Among the conversations to be admitted were the Petitioner asking about whether his black bag that the keys were found in was still at the house. Further, the Petitioner told Ms. Davis to throw a camera, if she found one, away immediately, but not at the house. (*Id.* at 13-18.) The Petitioner requested her to finish burning “that one spot.” (*Id.* at 19.) Another conversation was the Petitioner checking to see if the burning had been finished, so that “they don’t have no solid pieces of nothing.” (*Id.* at 21-22.) The court found the information more probative than prejudicial. The next conversation was the Petitioner stating that he wanted to talk to the detective that he told them “I’d seen him do it” and that the Petitioner had possession of the victim’s keys because he picked them up. (*Id.* at 25.) The court found the statements to be statements against interest, and that the Petitioner was clearly warned his calls were monitored and recorded. (*Id.* at 26.)

As to the motion for change of venue, 113 questionnaires were returned. Although a majority of the responses indicated knowledge of the crime, fewer than 20% revealed present hostile sentiment, and only 9 questionnaires revealed community rumors. The state and defense agreed to exclude some 40 individuals, leaving a potential pool of more than 70 people. (*Id.* at 27-28.) The court noting that simple knowledge of the case would not disqualify one unless that person had a fixed opinion, refused the change of venue. The court disqualified 28 based upon their answers, and that the rest would be subject to voir dire, leaving open the possibility of a change of venue through voir dire. (*Id.* at 32.) The court granted individual voir dire. (*Id.* at 40.)

Trial commenced April 14, 2010. The court denied the change of venue, and after jury selection explained his reasons for the denial. The court noted that he excused jurors liberally, and

that of the jurors qualified to serve, from whom the petit jury was selected, none expressed any bias. (App. vol. III, tab VI, 6-7.) The actual voir dire was not included in the record.

Robert Bailey, an assistant state fire marshall responded to the crime scene. When he arrived, the house was still on fire. For all practical purposes the house was destroyed. Mr. Bailey determined that there were at least two points of origin for the fire within the house and that they were separate fires. Mr. Bailey stated that two points of origin indicated that the fire was intentionally set. A third fire was discovered in a rear storage building, where part of Mr. Barton's body had been burned. That fire was also intentionally set. Without objection, Mr. Bailey stated that the fires were intentionally, wilfully and maliciously set. (*Id.* at 35-39.) Mr. Bailey also was present when a set of keys was recovered from the house where the Petitioner lived. Mr. Bailey witnessed a police officer unlocking one of the victim's cars with the remote on those keys. (*Id.* at 42.)

Detective Combs of the Mercer County Sheriff's Department responded to a call of a structure fire with a possible homicide near Kegley, West Virginia. Detective Combs observed the body of Mrs. Barton with what appeared to be severe head injuries. Detective Combs took possession of a piece of a ball bat which was found inside the home. Detective Combs cut the lock from an outbuilding and saw another body. He photographed that scene. He observed blood spatter everywhere. Detective Combs believed a hatchet found in the outbuilding might have been the murder weapon, or perhaps a crowbar also found there. Detective Combs observed what appeared to be blood on the crowbar. (*Id.* at 44-56.) Detective Combs observed a large pool of blood in the entryway of the victim's house. During an objection, the court noted that "Nobody on your side of the table disputes that these two people were killed right?" and counsel for the Petitioner answered "right." (*Id.* at 59-60.)

Corporal Sommers of the Sheriff's Department also was a volunteer fireman, and responded to the structure fire in his capacity as a fireman. (*Id.* at 89.) Corporal Sommers lived not far from the victims. When he arrived, he saw Mrs. Barton lying in the yard with a severe laceration to her head covering part of her ear. (*Id.* at 91.) Upon entry to the house, Corporal Sommers found a large puddle of blood and a fragment of a baseball bat. (*Id.* at 92.) Corporal Sommers was related to Brittany Davis, the Petitioner's girlfriend. The night of the murder, he ran into his cousin at the courthouse and asked her permission to search her residence. Ms. Davis gave consent to search. (*Id.* at 94-95.) Corporal Sommers was also present at Ms. Davis' residence earlier in the day and witnessed her giving her consent to search her residence at that time as well. (*Id.* at 97.)

John Reed lived next door to the Bartons. On the evening before the murder he saw a car in the neighborhood broken down by his father's mailbox, which was towed away. (*Id.* at 101.) Mr. Reed identified the Petitioner as an individual with whom he spoke the morning of the murders, about the car which had been towed. He described the Petitioner including a tattoo on his neck. (*Id.* at 102-103.)

David Miller of the state police laboratory testified that he found blood on the hatchet and crowbar recovered from the crime scene. Additionally, blood was found on bat recovered from the burning house. (*Id.* at 129-132.)

Dr. Kaplan, the chief medical examiner, testified about the autopsies performed. He was not the actual doctor who performed those examinations. Petitioner's counsel did object to his testifying. Again, the judge noted that "there is no question from anybody that these two folks are dead, right?", and Petitioner's counsel answered "No, sir." Further, "And is there any real question that they were murdered?", to which counsel also answered no. (*Id.* at 156.) Following an in camera

meeting, which was not objected to by Petitioner's counsel, the judge determined that the medical examiner who had performed the autopsy was not fired for any reason regarding his competence. (*Id.* at 160.) Petitioner's counsel then stated that as the testimony of the doctor was confined to the information contained in the autopsy report, then no objection would be made to Dr. Kaplan testifying. (*Id.* at 161.) Dr. Kaplan testified that Mrs. Barton died as a result of blunt force and sharp force injuries. The manner of death was homicide. She sustained fatal head and neck injuries, with multiple injuries to her person. She suffered a skull fracture and multiple blows to the face. Some of the blows were consistent with a baseball bat. She had eight stab wounds, seven of which to her head and neck. She also exhibited defensive wounds to her arms. Dr. Kaplan opined that she suffered greatly. (*Id.* at 167-171.) Mr. Barton exhibited four chop force injuries sustained by the use of a hatchet like weapon, consistent with the hatchet recovered from the scene. Mr. Barton received chop injuries strong enough to cut into his brain tissue, along with cut wounds to his hands and arms, and multiple blows to his head and neck. Mr. Barton also had burn injuries to his body which happened after death. (*Id.* at 171-177.)

Sergeant Woods testified that on August 11, 2008, he received information to be on the look out for a particular automobile. In the course of attempting to locate one of the victims' sons, Sergeant Woods went to a particular location, and found the suspect car. (*Id.* at 190-191.)

Brittany Davis testified that she lived on Washington Street, where the car was found, and that at that time, she was the Petitioner's girlfriend. (*Id.* at 197.) He placed a phone call to her from a landline telephone number, which she did not recognize. At approximately 1:00-1:30, he returned to her home. He did not have the clothes on that he had on when he left her house, but was dressed only in a pair of athletic shorts. The Petitioner went straight to the shower. He told Ms. Davis that

his clothes were in the car. When she offered to retrieve them, he refused. Additionally, he had a streak of blood on his face. (*Id.* at 201.)

She testified that after his arrest, the Petitioner called her. He directed her to make sure that everything in the burn pile was destroyed. He directed her to find and get rid of a camera, which she did. She stated that she gave the police consent to search her house. (*Id.* at 202-204.)

Christopher Smith of the state police stated that he became involved in the case just after midnight, August 12, 2008. (*Id.* at 221.) Sergeant Smith met the Petitioner and used a standardized Miranda form before beginning his interview. Sergeant Smith testified that he informed the Petitioner he had the right to remain silent, that he did not have to answer questions, and that he had the right to an attorney. The Petitioner appeared to understand his rights. He initialed and signed the form, and agreed to speak to Sergeant Smith. (*Id.* at 222-223.) No threats or promises, or physical force was used to induce the Petitioner to waive his rights. (*Id.* at 224.)

Sergeant Smith testified that the Petitioner made several different statements. He first denied being on the Bartons' land at all. The Petitioner requested that the interview cease, which it did. (*Id.* at 225-226.) The Petitioner voluntarily returned for the interview. At that time, Sergeant Smith refreshed his Miranda rights. He went over the form again, which the Petitioner re-initialed, and the Petitioner further agreed to continue the interview. (*Id.* at 226-227.) The Petitioner stated that he went to the Bartons' home, looked in the door and saw a lady dead on the floor, so he got scared and ran. At that time, the Petitioner did not mention that he had seen a man there. (*Id.* at 227.) The Petitioner stated that the house was not on fire, so the killer must have returned later and set this house ablaze. When Sergeant told the Petitioner that he thought the Petitioner was lying, the Petitioner said that he had lied, and that he had been to the Bartons before, and had a conversation

about a water pump. The Petitioner said he left and returned and saw Mrs. Barton dead on the floor of the house, and Mr. Barton dead in the building. The house was not on fire, and the Petitioner saw no one else. He said that he got no blood on him. (*Id.* at 228-229.)

Then, the Petitioner stated that he saw a guy beating Mrs. Barton. He stated that he got blood on his clothes because he tried to perform CPR on Mr. Barton and then tried to help Mrs. Barton. The Petitioner then changed his story yet again, and said that he hadn't seen a person beating the Bartons, but didn't want people to think badly of him because he failed to help the victims. When Sergeant Smith confronted the Petitioner that he had in fact just stated that he had tried to help the Bartons, the Petitioner said "I forgot." (*Id.* at 229.) When confronted again about his participation in the murder, the Petitioner stated good luck proving it, laughed, and said his bloody clothes were probably long gone. (*Id.* at 230.)

When asked again what happened, the Petitioner stated that he saw Mr. Barton, and Mrs. Barton dead, and left. The Petitioner was asked if he made a phone call from the house, he first denied placing such a call, and then admitted it. He couldn't remember whether the Bartons were dead or alive when the phone call was made. (*Id.* at 231.)

Corporal Ruble testified that he transported the Petitioner from the police station to Bluefield for holding. During the drive, the Petitioner asked how the corporal dealt with seeing dead people. The Petitioner stated "I seen them." (*Id.* at 237.) Mr. Blevins then requested that he wanted to talk to Captain Gills, so he was returned to the station. (*Id.* at 238.)

Captain Gills also testified. He witnessed the lock being cut off the outbuilding, and identified the lock at trial. (*Id.* at 255.) He met Mr. Blevins standing outside of Ms. Davis' residence. He noted that Mr. Blevins had a spot in his eye, which Mr. Reed also had noted. Mr.

Blevins stated that he was not familiar with the area where the arson and murders occurred. (*Id.* at 259.) Although Ms. Davis had given consent to search her residence, Captain Gills also obtained a search warrant. (*Id.*) He saw the victims keys in Ms. Davis' residence. (*Id.* at 260.) Captain Gills took the keys to the victim's house, where the key fob opened one of the victim's cars. Further, one of the keys fit the victim's truck, and another key, a different automobile. Another key opened the padlock that was locked and cut from the building where Mr. Barton's body was found. (*Id.* at 265-266.) The padlock was of the sort that the key had to be in the lock in order to lock it. (*Id.* at 266.)

Captain Gills also received CD's of the Petitioner's jail phone calls. The audio recordings were played for the jury. Among the conversations admitted were the Petitioner asking about whether his black bag that the keys were found in was still at the house. Further, the Petitioner told Ms. Davis to throw a camera, if she found one, away immediately, but not at the house. The Petitioner requested her to finish burning "that one spot." Another conversation was the Petitioner checking to see if the burning had been finished, so that "they don't have no solid pieces of nothing." Further, one conversation was of the Petitioner stating that he wanted to talk to the detective that he told them "I'd seen him do it" and that the Petitioner had possession of the victim's keys because he picked them up. (This synopsis is taken from the suppression hearing, as the tapes were not transcribed into the trial record.)

Mrs. Barton's drivers' license was found on Brick Yard. Brick Yard is on a route from Kegley to Washington Street in Princeton. (*Id.* at 288.) On cross examination, Captain Gills testified that he attempted to identify Justin Stacy, and the only Justin Stacy identified was a man in his seventies. (*Id.* at 299.) The court had ruled, prior to trial, that Captain Gills could not go into the Justin Stacy conversations with the Petitioner because he was not Mirandized. However, since

Petitioner's counsel opened the door by attempting to paint Stacy as the real killer, the prosecution was permitted to inquire. Captain Gills stated that the Petitioner told him that Justin Stacy was involved in the murders, and that Stacy was a white male in his upper 20's with short hair and a goatee. When the Petitioner asked Captain Gills if Stacy had been located, the Petitioner stated that Stacy was a white male with long hair, and did not mention a goatee. (App. vol. III, tab VII, 43-44.) Captain Gills related his efforts to find Justin Stacy, or anyone who knew of a Stacy, without success.

The Petitioner elected not to put on evidence. Following instructions by the court and argument, the jury retired to deliberate. The jury did have a question regarding the length of sentences possible. (*Id.* at 121.) The jury returned verdicts of guilty in the first degree, without a recommendation of mercy, for each of the two victims, and guilty of first degree arson.

The Petitioner was sentenced in accordance with the jury verdicts. This appeal ensued.

## II.

### SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in failing to grant the Petitioner's motion for a change of venue. Although there certainly was publicity about the double homicide, the jury was not empaneled until eighteen months after the crime. Additionally, although some jurors may have had some knowledge of the crime, there is no evidence of record that there was a pervasive, hostile sentiment against the Petitioner rendering selection of an impartial jury impossible.

Ms. Davis had legal authority over her house, where the Petitioner stayed for a while. He does not assert that she did not have dominion over the property. Rather, he states that the search warrant was invalid, and that her consent to search was coerced. The evidence shows clearly that

Ms. Davis twice, and both times voluntarily, gave the police “full permission” to search. The possessor of the property having given voluntary consent to search the premises, the items taken were not subject to a motion to suppress, and were properly admitted at trial.

The Petitioner’s statements were properly admitted into evidence. He was repeatedly given his Miranda warnings, and repeatedly agreed to continue speaking with the police. Further, when the Petitioner requested questioning cease, it did. The Petitioner initiated conversation with the police after that cessation in questioning. There is no evidence of record that the Petitioner was incapable of understanding his rights and no evidence of record that his waiver of those rights was not voluntary. Further, the Petitioner’s right to be presented promptly to a magistrate was not violated, and his statements were not inadmissible because of a prompt presentment violation.

The Petitioner had no reasonable expectation of privacy in the content of the jail telephone calls. The calls clearly evidenced his knowledge of guilt, and his desire to cover up his crime. No objection was made to the admission of the hatchet, crowbar, and ball bat. Each of those items was found in close proximity to the victims, who exhibited blunt force trauma and chop type injuries. The keys were relevant and admissible, and were sufficiently identified as both having been in the possession of the Petitioner and belonging to the victims

The trial court properly denied the motion for a directed verdict for acquittal. Further, the evidence was sufficient for the jury to conclude, beyond a reasonable doubt, that the Petitioner murdered Mr. and Mrs. Barton, and then attempted to cover up his crime by burning down their house, and their bodies.

The photographic array shown to the witness John Reed, was not impermissibly suggestive. The techniques used to display the array to Mr. Reed were equally non-suggestive. As the out of

court identification was not impermissibly suggestive, then the in court identification that Mr. Reed made of the Petitioner as having been the individual present in the Kegley area at a time reasonably close to the homicide was properly admitted.

The pathologist who performed the autopsy did not testify at trial. Petitioner's counsel actually withdrew their objection to the substitute testimony. Assuming however, that such testimony violated the confrontation clause of the Constitution, any error was harmless beyond a reasonable doubt. There was no real dispute that the Bartons died as a result of a violent attack, suffering multiple wounds. Their bodies, and the conditions thereof, were noted and testified to by lay witnesses. Nothing in the report, nor in Dr. Kaplans's opinion specifically tied the Petitioner to the crime.

The Petitioner's life sentences are not disproportionate to the offenses. Additionally, counsel asserts generally that there was plain error in the trial. The state refutes such assertion, and notes that any error in the trial was not plain, and further, did not result in miscarriage of justice.

### **III.**

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The respondent believes that the dispositive issues have been authoritatively decided and that the facts and legal arguments are adequately presented in the briefs and record on appeal. The decisional process would not be significantly aided by oral argument. However, if the matter is scheduled for argument, the respondent wishes to participate. Either a memorandum decision or full opinion would be appropriate in this matter.

## IV.

### ARGUMENT

#### A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO GRANT A CHANGE OF VENUE.

The murders of Mr. and Mrs. Barton occurred on August 11, 2008. Sometime after those murders and before October, 2009, a public opinion survey commissioned by Petitioner's trial counsel revealed that a substantial number of individuals—none of whom were members of the petit jury pool—had heard or seen some of the news coverage about the crime. The margin for error of the survey was plus or minus 7%. A large majority of those polled said they could not consider mercy in a double homicide. Sixty percent of those polled said they could presume innocence. Twenty one percent of the people polled had no knowledge of the case prior to the survey. A majority of those surveyed believed there could be a fair trial. As to ongoing news coverage before trial, it appears as if there were only three articles about the double homicide between July 2009 and October 2009. Further, it is unclear as to how much, if any, ongoing news coverage continued between the pre-trial hearing and the actual selection of the jury.

Reserving his ruling on the change of venue, the trial judge opted to use a jury questionnaire, which was prepared by and agreed to by both parties. Out of 113 questionnaires, the judge excused some 28 simply because of their answers. He granted individual voir dire. Interestingly, Petitioner's counsel has not included the voir dire in the Appendix. However, it does not appear from the record as if there was any difficulty in actually picking a jury from the available venire.

The standard for granting a change in venue in West Virginia is not whether there has been widespread news coverage about a particular event. Syllabus Point 1 of *State v. Gangwer*, 169 W.

Va. 177, 286 S.E.2d 389, (1982) states that “[w]idespread publicity, of itself, does not require change of venue, and neither does proof that prejudice exists against an accused, unless it appears that the prejudice against him is so great that he cannot get a fair trial.” Further, the trial court’s ruling on a motion for change of venue rests in its discretion, and will not be disturbed unless such discretion has been abused. (*Id.* at Syl. Pt. 2.)

The burden rests upon the defendant to show good cause for a change of venue. As stated in Syl. Pt. 3 of *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731, (1994), the inquiry is not whether the community had heard about the case, but whether the jurors had such fixed opinions they could not judge impartially the guilt or innocence of the defendant. Ordinarily, a change of venue should be granted only when it is shown that there is a present hostile sentiment against the accused, extending throughout the entire county. Syllabus Point 1, *State v. Goodmon*, 170 W. Va. 123, 290S.E.2d 260 (1981).

The Petitioner has failed to provide any evidence that there was a pervasive, hostile sentiment against him so that it was impossible, or even difficult, to empanel an impartial jury. The only evidence put forward to support the motion for a change of venue was one witness who testified that he heard a local radio talk show program suggesting that the person who committed the Barton homicide should be hanged, and the aforementioned public opinion survey. While that survey does indicate that a number of persons stated that they would not give mercy to one convicted of first degree murder, it did not demonstrate that at the time of the taking of the survey there was a pervasive sentiment against the Petitioner.

As noted, the judge preliminarily denied the motion in October, 2009, but stated that he would reconsider the motion after the return of the jury questionnaires and the individual voir dire.

After the jury had been selected, the court noted that it had excused everyone from the pool that the Petitioner had reservations about, and still had a panel of some 70 potential jurors. The judge liberally excused people from the jury. The judge noted that during voir dire he was listening for personal bias and that “I really didn’t hear anything like that from anybody.” (App. vol. III, tab VI, 6.) The judge added that there were a few people that said they shouldn’t serve and the judge excused them. The judge stated that it was a very fair representative jury who was going to give the defendant a fair trial. (*Id.* at 7.) Petitioner’s counsel did not take exception to the judge’s finding that the jury as selected was a fair one, which would give the Petitioner a fair trial.

As the Petitioner has failed to demonstrate that there was such sentiment existing in Mercer County that the Petitioner could not receive a fair trial, the judge did not abuse his discretion in denying the motion for change of venue. At most, the public opinion survey indicated that a majority of those surveyed believed in the presumption of innocence and that a fair trial was possible. Therefore, the panel did not have fixed opinions about the Petitioner’s guilt and a change of venue was not warranted.

**B. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO SUPPRESS ITEMS FOUND DURING THE SEARCH OF BRITTANY DAVIS’ HOME.**

Ms. Davis was the Petitioner’s girlfriend at the time of the homicide. She was the tenant, and he lived there with her. He had no legal interest in the property whatsoever. Ms. Davis twice gave verbal consent to search *her* home. There is no evidence whatsoever that any coercion was used against her to force her to consent. Additionally, there was no evidence taken on the issue of whether or not the search warrant obtained from the magistrate was valid or not.

In Petitioner's brief it was stated that the search warrant was only granted after additional information was added that the Petitioner had stated that he had been at the residence and had seen the dead bodies. Although the brief characterizes that statement as the fruit of illegality, in fact, all of the Petitioner's inculpatory statements were ruled voluntary, and all were eventually admitted at trial. Therefore, the warrant itself, although unnecessary, and not relied upon by the judge in ruling on the motion to suppress, was valid.

Further, Ms. Davis was the tenant of the house and its possessor. There is no assertion that any area searched, or indeed any area of the house or backyard itself, was an area that was not in her domain and was exclusively the province of the Petitioner. It was her house. She was asked twice if officers could search her house. She freely gave her consent.

In general, Fourth Amendment rights are personal, and the Petitioner must show that the challenged state conduct infringed upon his constitutional rights. Cleckley, *Handbook on Criminal Procedure*, 2010 Cumulative Supplement, I-177. As noted, the Petitioner does not state that he had dominion or control over the area searched, does not assert a possessory interest in the rental property, does not assert a privacy interest in the burn pile. Rather, he speculates that Ms. Davis "must" have been coerced into agreeing to a search of her own home.

An occupant can consent to a search of where a criminal defendant resides. Syllabus Point 1 of *State v. Hambrick*, 177 W. Va. 26, 350 S.E.2d 537, (1986), notes that a search may be conducted in the absence of a warrant, where an individual voluntarily consents to a search of his premises. Syllabus Point 3 of that same decision notes that the court must decide if the consenting party had authority over the premises to be searched.

At the suppression hearing, Ms. Davis testified that when the police came to her home, they knocked on the door and asked permission to search, and she gave them full permission. She further stated that she gave her cousin, a police officer, the keys to her house, and permission to conduct another search. She stated that her reason for agreeing to the search was that she did not want any problems. She was not asked, nor did she state that her consent was in any way anything other than voluntary.

In its ruling the trial court noted that the evidence to be introduced as a result of Ms. Davis' home were the burn pile and the car keys. The court determined that Brittany Davis was the individual who had dominion over the property, and voluntarily twice consented. The Petitioner was in no legal position to object to that search, and had no expectation of privacy in that residence or the burn pile. Having no personal constitutional right to assert, and lacking any evidence whatsoever that the individual who had dominion of the property did not validly and voluntarily consent to the search, the trial court did not err in admitting into evidence the items found at Ms. Davis' residence and yard.

**C. DEFENDANT'S STATEMENTS WERE VOLUNTARY AND ADMISSIBLE. THEREFORE, THE LOWER COURT DID NOT IN ADMITTING THOSE STATEMENTS.**

"A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syllabus Point 1 *State v. Jones*, 220 W. Va. 214, 640 S.E.2d 564, (2006.), quoting Syl. Pt. 3, *State v. Vance*. Further, when an appellate court reviews the ruling on a motion to suppress, all facts should be construed in favor of the State, as it prevailed below. Particular deference is given to the findings of the circuit court because it had the opportunity to observe witnesses and hear testimony. Factual findings are

reviewed for clear error. Syl. Pt. 3, *Jones*. Whether a statement is voluntary is determined from a review of the totality of the circumstances. Syl. Pt. 4, *Jones*.

Here, the Petitioner elected not to present affirmative evidence on the issue of the voluntary nature of his waiver of his Miranda warnings and subsequent inculpatory statements. Rather, he attempted, on cross examination to elicit evidence that the Petitioner was so overborne with fatigue that he could not waive his rights. There simply is no evidence of record to support that rampant speculation and unwarranted conclusions.

It is uncontroverted that the Petitioner spent a significant amount of time at the police station. He was arrested for a drug charge in the late afternoon of August 11, 2008. At the time of his arrest on the drug charge, the police lacked any specific information linking the Petitioner to the murder save his lies to the police that he was utterly unfamiliar with the area where the homicides had occurred.

There is nothing in the record that reflects that the Petitioner was subjected to constant, unceasing and relentless interrogation while at the detachment. In fact, there is nothing that reflects that the Petitioner was handcuffed or restrained in any way while at the detachment. There is nothing to suggest that he was not permitted to use the bathroom, to smoke if he chose, to get a drink, to have something to eat, or even to take a nap if he wished.

What evidence is present in the record indicates that both Captain Gills and Sergeant Smith administered the Miranda warnings to the Petitioner on at least three separate occasions. Captain Gills had contact with the Petitioner at his girlfriend's residence. In is undisputed that the Petitioner was not in custody at the time, and that he stated he was not familiar with the Kegley area.

Later that evening at either 9:45 p.m., or 10:40 p.m., Captain Gills inquired of the Petitioner whether he would take a polygraph. The Petitioner agreed. There is no evidence of record that indicates the Petitioner was subject to any sustained questioning before the form was reviewed. The state did agree that the Petitioner had made some statements about a “Justin Stacy” which might not have been covered by any Miranda warning. Therefore, those statements were not admissible in the case in chief, and were only admitted after Petitioner’s counsel broached the name of “Justin Stacy” as a possible suspect during its cross examination of some of the police witnesses. The trial court then permitted the state to examine Captain Gills as to the “Justin Stacy” material.

Captain Gills stated at the time of the first reading of the Miranda rights the Petitioner did not appear to be under the influence of drugs or alcohol, nor did he have trouble following his rights. When the Petitioner later stopped the polygraph stating he needed rest, the interview stopped immediately, and only upon the Petitioner’s affirmative request that he wished to resume questioning was he returned for further interviews with Sergeant Smith.

Despite the invitation of Petitioner’s counsel for Captain Gills to agree with the speculation that the Petitioner was being sequestered in the interview room being hounded by incessant questioning by numerous police officers incensed by the double homicide, Captain Gills noted that the Petitioner was only in the interview room “once or twice.” (App. vol. II, tab III, 89.) Captain Gills refuted the suggestion that there were any confrontations between the Petitioner and angry police officers. He stated specifically that Terry Blevins did not appear to be fatigued. (*Id.* at 114.)

Sergeant Smith of the state police readvised the Petitioner of his Miranda rights when he arrived to administer the polygraph. Mr. Blevins did not appear intoxicated or too fatigued to answer questions. In fact, Mr. Blevins was sufficiently aware of his circumstances to correct Sergeant Smith

when Sergeant Smith noted that Mr. Blevins was not under arrest. Mr. Blevins corrected the officer so that the form reflected, accurately, that Mr. Blevins was under arrest for the drug charges. The Petitioner appeared to understand his rights and voluntarily waived them. Shortly after the first time Sergeant Smith reviewed the rights, the Petitioner stated he was tired and wanted to do the test later. Sergeant Smith immediately ceased the test, and the Petitioner was taken to the Bluefield City jail, per procedure, to rest. On the trip there, the Petitioner made statements about seeing the victims, dead. Those statements were not as the result of questioning. The Petitioner additionally requested to be returned to Princeton to speak to Captain Gills.

Upon his return, Sergeant Smith again reviewed the Miranda rights and waiver form. He participated in the interview freely and voluntarily, without threats or coercion. Sergeant Smith testified that the Petitioner requested the questioning stop, but that to Smith's observation, Mr. Blevins did not appear fatigued. Sergeant Smith stated that he evaluated the Petitioner's suitability to sit for the polygraph, and did not note any signs of the Petitioner falling asleep or having trouble staying awake. Physically, Sergeant Smith noted that the Petitioner had the ability to complete the test, and that he was not too tired to understand the process and submit to the exam. (*Id.* at 187-188.)

Therefore, since the Petitioner freely and voluntarily, without threats or coercion, or promises of leniency validly waived his Miranda rights—at least three times—and agreed to speak to the police, and further since there is no evidence that the Petitioner was so tired that he could not understand what he was doing, his waiver and the statements made were properly admitted at trial.

#### **D. THERE WAS NO PROMPT PRESENT VIOLATION**

The facts in this matter may be regarded as somewhat analagous to those in *State v. Milburn*, 204 W. Va. 203, 511 S.E.2d 828 (1998). In *Milburn*, an individual confessed to arson, after which

the police had probable cause to arrest her. That was at approximately noon. However, the police continued to question her about a murder charge. She agreed to take a polygraph, and confessed to the murder at about 7:30 p.m. She was taken before a magistrate at about 10:00 p.m.

In the case at bar, the Petitioner was arrested on the drug charges at about 5:45 p.m. He was questioned by police from time to time about the murders. It is unclear at what time probable cause actually existed to charge the Petitioner with the murders, but probable cause did not exist until after the Petitioner made an incriminating statement to Corporal Ruble while being transported, and then made incriminating statements to Sergeant Smith. This was no earlier than 3:00 a.m. Mercer County does not have an on-call magistrate. A magistrate was not available to arraign the Petitioner after 10:00 p.m. The Petitioner was not interviewed about the murders after he was arrested for the murders. No statement regarding the drug charges was ever heard by the jury.

In *Milburn*, the court concluded that the several hour delay between the time that probable cause existed to arrest Ms. Milburn for arson, and her presentment to a magistrate was not a violation of the prompt presentment statute. The Court noted that the delay was not to obtain a confession for the crime for which the police had probable cause, but to question her about a separate crime for which they did not presently have probable cause. Further any additional delay after her statement was obtained did not violate the prompt presentment rule, because no magistrate was available.

In the case at bar, the delay, if any, was not to obtain a confession to the drug charges, but to investigate the murders and to question the Petitioner about a separate crime for which they did not have probable cause to arrest him. As noted, then, in *State v. Gray*, 217 W. Va. 591, 619 S.E.2d 104, (2005), referencing earlier decisions, delay is permitted where the suspect wishes to make a statement. The record in the case at bar provides no evidence of “unnecessary delay” between the

time that the Petitioner could legally have been arrested for murder and his presentment to an available magistrate. The Petitioner was informed repeatedly that he did not have to make a statement, exercised his right to cease talking to the police when he said he was tired, and then voluntarily reinitiated contact with the police and voluntarily continued speaking to them after being transported to Bluefield. No statement obtained from the Petitioner which was introduced at trial was obtained in contravention of the prompt presentment statute.

**E. THE TELEPHONE CONVERSATIONS, THE BAT, THE CROWBAR, THE HATCHET AND THE KEYS WERE ALL PROPERLY ADMITTED INTO EVIDENCE.**

The Petitioner had no expectation in privacy in telephone calls he placed from the Regional Jail to his girlfriend, Brittany Davis. The evidence at trial revealed that every inmate, presumably including the Petitioner, is presented with a Handbook regarding rules and procedures when he is admitted into jail. The handbook clearly states that all telephone calls, save for those to attorneys, are subject to monitoring and recording. There are signs posted above every telephone in the jail that warn the inmate that telephone calls are subject to monitoring and recording. Lastly, on the recordings of the actual telephone calls placed by the Petitioner to his then girlfriend during which conversation ensues, a recorded voice states clearly that the calls are monitored and recorded. The Petitioner chose to make phone calls despite ample warning that such calls were not private.

As to the conversation on those phone calls being inadmissible because, as stated in Petitioner's brief they are "subject to interpretation", that is an argument which may go to the weight to be placed upon the content of the phone calls, not to their admissibility. Ms. Davis identified the Petitioner as the caller. Among the conversations admitted were the Petitioner asking about whether his black bag that the keys were found in was still at the house. Further, the Petitioner told Ms.

Davis to throw a camera, if she found one, away immediately, but not at the house. (*Id.* at 13-18.) The Petitioner requested her to finish burning “that one spot.” (*Id.* at 19.) Another conversation was the Petitioner checking to see if the burning had been finished, so that “they don’t have no solid pieces of nothing.” (*Id.* at 21-22.) The court found the information more probative than prejudicial. The next conversation was the Petitioner stating that he wanted to talk to the detective that he told them “I’d seen him do it” and that the Petitioner had possession of the victim’s keys because he picked them up. (*Id.* at 25.) The court found the statements to be statements against interest, and that the Petitioner was clearly warned his calls were monitored and recorded. (*Id.* at 26.) From those conversations, the jury was entitled to infer that the Petitioner had acquired the victim’s keys from the victim’s house and placed them in his duffle bag. The jury also could infer a worry about incriminating evidence not being destroyed by his request to her to make sure everything was burned, to finish burning if necessary, and to throw away a camera, if she did. Such conversations entitled the jury reasonably to infer that the Petitioner’s requests and conversations showed guilty knowledge and a desire not to be caught.

No objection was made to the admission of the hatchet, the crowbar, or the ball bat. The serologist testified that each of those items had blood on them. The detective testified that each item was found in proximity to the body of one of the murder victims. The victims died from chop type injuries, blunt force trauma, and lacerations. The physical items, although not characterized as “the” weapon, were each probative on the issue of how the victims died. This Honorable Court cogently noted in *State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995), that “the failure of a litigant to assert a right in the trial court likely will result in a procedural bar to an appeal of that issue.” Not only however, was no objection imposed so that error in admission of those items may not be

asserted on appeal, the items were relevant and admissible under any standard. Under the plain error doctrine, “appellate courts will notice unpreserved errors in the most egregious circumstances. Even then, errors not seasonably brought to the attention of the trial court will justify appellate court intervention only where substantial rights are affected.” *State v. LaRock* 196 W. Va. 294 at 316, 470 S.E.2d 613 at 635.

To satisfy the plain error standard, there must be error which was plain or obvious, and that error must affect substantial rights, in that the error must be prejudicial and not harmless. Upon such a showing a court may correct the error if it affects the fairness of the underlying proceedings. (*Id.* at 316-317, 470 S.E.2d at 635-636.) The plain error rule should be exercised only to avoid a miscarriage of justice, that is conviction of an innocent person. “Aside from preventing such miscarriages of justice, the standard to apply is whether the error ‘seriously affects the fairness, integrity or public reputation of judicial proceedings.’” (*Id.* at 317, 470 S.E.2d at 636.)

“One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result in the imposition of a procedural bar to an appeal of that issue.” *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128, quoting *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir.1994) (en banc), cert. denied, 513 U.S. 1196, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995). Our cases consistently have demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights. Recently, we stated in *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996): “The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.” (Citation omitted). When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complain at a later time. The pedigree for this rule is of ancient vintage, and it is premised on the notion that calling an error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs. There is also an equally salutary justification for the raise or waive rule: It prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the

seed as a guarantee against a bad result). In the end, the contemporaneous objection requirement serves an important purpose in promoting the balanced and orderly functioning of our adversarial system of justice.

*State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996).

Further, the keys were properly admitted. The testimony was unclear as to where in the house the keys may have been originally located. However, the Petitioner admitted in the telephone calls that he picked the keys up at the victim's house and placed the keys in his duffle bag. The keys were sufficiently identified by the police officers as being the ones they found at Ms. Davis' house based on the color coding, and those keys not only operated the victims' cars, they also fit the locked padlock that had to be cut off the outbuilding where Mr. Barton was found. In *State v. Young*, 183 W. Va. 1, 311 S.E.2d 118 (1983), the Court noted that absent an abuse of discretion, the decision to admit an item of physical evidence will not be tampered with on appeal. Further, the item is admissible if it is in substantially the same condition as when the crime was committed, and whether it is likely it was tampered with. The keys were taken from the house in which Petitioner was staying, placed into evidence storage, and remained there except when examined by attorneys. There was no suggestion they were tampered with. Therefore, they were properly admitted into evidence.

**F.&G. THE EVIDENCE WAS SUFFICIENT TO JUSTIFY THE DENIAL OF THE MOTION FOR JUDGMENT OF ACQUITTAL, AND FURTHER WAS SUFFICIENT FOR THE JURY TO FIND THE PETITIONER GUILTY, BEYOND A REASONABLE DOUBT.**

Syllabus Point 1 of *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), notes that "The function of an appellate court when reviewing the sufficiency of the evidence is to examine the evidence . . . to determine whether such evidence, if believed, is sufficient to convince a reasonable

person of the defendant's guilt beyond a reasonable doubt." The syllabus point and opinion make it clear that the evidence is viewed in the light more favorable to the prosecution. Further,

when a criminal defendant undertakes a sufficiency challenge, all the evidence, both direct and circumstantial must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt.

Syl. Pt. 2, *State. v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

Without belaboring in unnecessary detail the already cumbersome statement of facts proffered earlier in this brief, it is clear that the prosecution presented evidence on each element of each offense for which the Petitioner was convicted to show his guilt beyond a reasonable doubt.

Mrs. Barton died as a result of multiple blunt force injuries as a result of numerous blows and lacerations. Mr. Barton died as a result of multiple chop type injuries and blunt force trauma. Mrs. Barton was found dead in her house, which was burning. The fire was arson, as demonstrated by it having two separate points of origin. Mr. Barton was found partially burned, after death.

A witness had seen the Petitioner's vehicle in the neighborhood, and the Petitioner had engaged in a face to face conversation about, among other things, life in Chicago, Illinois. That witness was able to supply the police with a description of that stranger and his car.

The police found the car, which belonged to the Petitioner. The Petitioner then began incriminating himself. He lied to the police stating he was never in the neighborhood of the crime scene and didn't even know where it was. When told he had been identified as being in the neighborhood, he said he had been there but only to have a conversation with Mr. Barton about fixing a water pump or hot tub. He then spontaneously volunteered that he had seen the dead bodies.

After waiving his Miranda rights, he stated that he saw Justin Stacy murder the victims, but gave two conflicting descriptions of Justin Stacy. He stated that he only saw the victims dead, but did not see them die. He said he tried to give CPR. He said he didn't go in the house. He admitted to his girlfriend picking up the keys which were found at her house. He came home dressed only in athletic shorts, no shoes, had blood on his face and immediately took a shower. He asked Brittany Davis to destroy evidence for him. Ashes and a pair of shoes were found in the burn pile.

Further, as to the elements of premeditation and deliberation, the jury was entitled to infer that the Petitioner had sufficient time to reflect on his actions between every blow he inflicted upon the defenseless, elderly victims, and between the crimes, as the victims did not die simultaneously. His butchery of the victims demonstrated a heart fatally bent on mischief, utterly devoid of social conscience. He killed them, intentionally, maliciously, premeditatedly and deliberately, and then burned down the house—first degree arson—to cover up his crime. The evidence was more than sufficient for the jury to find the Petitioner guilty beyond a reasonable doubt.

**H. NEITHER THE PHOTOGRAPHIC ARRAY NOR THE TECHNIQUES USED TO DISPLAY THE ARRAY TO THE WITNESS WERE UNDULY SUGGESTIVE. THEREFORE, THE IN COURT IDENTIFICATION WAS NOT TAINTED.**

The victim's next door neighbor, John Reed, was able to give the police a description of an individual and his automobile that Mr. Reed noticed in the neighborhood at a time reasonably in proximity to the homicides. Based upon the description of the vehicle, the police came into contact with the Petitioner. They noted that the Petitioner fit the description of the individual Mr. Reed saw. In accordance with procedure, Captain Gills prepared the photographic array, and Sergeant Centeno displayed the array to the witness.

Captain Gills had been informed in a general way of the description of the individual which included a white male, shorter, with tattoos on his neck. Captain Gills stated that the photograph used in the array were standard photographs already in possession of the police when the array was assembled. Captain Gills could find no other individuals who had tattoos on his neck, and therefore, as noted by the Court, the tattoos were covered as much as possible, resulting in a dark spot under the neck. One of the other photographs also had a dark smudge at the neck. Captain Gills noted that they tried to assemble similar photographs. Further, he stated he tried to get individuals with similar hair and similar type ears. Sergeant Centeno testified that he actually showed the array to Mr. Reed. Captain Gills gave him the lineup without identifying the suspect in the array. Sergeant Centeno showed the array to Mr. Reed stating that he, Centeno, had not seen and did not know who the person might be, and that the witness did not have to identify anyone and should not feel forced to identify anyone. Mr. Reed picked out the Petitioner's photograph, stating that he had seen the individual at his residence. Sergeant Centeno stated that the Petitioner's tattoos were not visible in the array, and that the identification was immediate. The judge found that "It's a pretty darn good photo array and five out of the six looked similar." (App. vol II. tab IV, 64.) He also noted that the Petitioner had voluntarily given himself a distinguishing feature—the tattoos.

Mr. Reed was able to identify the Petitioner in court as the individual who had come to his house. Mr. Reed stated that he had a conversation lasting some five or ten minutes, face to face, with an individual. He described him as short, short hair, and tattoos on his neck. He had a blood spot in his eye. He described the topic of conversation including small talk about Chicago and about the broken down car.

In determining whether an out of court identification is so tainted so as to require suppression of an in court identification, the court looks to the totality of the circumstances, including the opportunity of the witness to view the person, the accuracy of the description, the level of certainty, and the length of time between the observation and the confrontation. Syllabus Point 1, *State v. Audia*, 171 W. Va. 568, 301 S.E.2d 199, (1983).

Mr. Reed had ample opportunity to observe the Petitioner, face to face, for at least five minutes. He described him as a shorter white male, with short hair, and neck tattoos. He identified the Petitioner from the array the same day he saw him. No suggestions were made to him about which photograph to pick, or even that there was of necessity, a suspect in the array. His identification of the Petitioner's photograph in the array was immediate. His in court identification was similarly immediate and certain. There being no impermissible suggestibility in either the array or its display, Mr. Reed's out of court and in court identifications of the Petitioner as having been in close proximity to the homicide scene was properly admitted.

**I. ERROR, IF ANY, IN THE ADMISSION OF THE TESTIMONY OF DR KAPLAN WAS HARMLESS BEYOND A REASONABLE DOUBT**

Dr. Belding, who performed the autopsy, was no longer employed by the state medical examiner's office at the time of trial, and demanded a fee to appear and testify. Relying on the West Virginia Rules of Evidence, which permit an expert witness to testify about conclusions he reaches based upon another's report, Dr. Kaplan was permitted to testify to the contents of the autopsy reports, and further opined that the bat, crowbar, and hatchet were consistent with the wounds suffered by the victims. He testified as to the number of lacerations found on the body as contained

in Dr. Belding's report, the presence of defensive wounds, and that the manner of death was homicide.

*Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011) makes it clear that the prosecution may not introduce a forensic laboratory report made for the purpose of proving a fact through the in court testimony of a different scientist. Therefore, it would appear as if to permit the testimony of Dr. Kaplan was error. However, the objection to Dr. Kaplan's testimony was withdrawn by Petitioner's counsel. Further, the judge, on more than one occasion inquired of Petitioner's counsel as to whether there was any real issue regarding the fact that the Bartons were dead, and had been murdered, and counsel answered in the negative. The first responders and the police who arrived at the burning house saw a large pool blood inside the house, and Mrs. Barton in the yard with evident injuries (plural) and trauma to her head and face. Those witnesses also saw Mr. Barton, locked in the shed, with blood spatter on walls of that shed, and he, too, had obvious injuries, plural to his face and head. Therefore, the testimony of the medical examiner that the victims died from blunt force, chopping force and stab injuries, if error at all was harmless beyond a reasonable doubt. If one removes Dr. Kaplan's testimony from the record there is still ample evidence from which the jury could find that the victims died as a result of homicide, and ample evidence for the jurors to conclude that the Petitioner was the perpetrator of those crimes.

**J. THE SENTENCE IS NOT DISPROPORTIONATE TO THE OFFENSES**

The penalty for murder in the first degree is life in the penitentiary. It is up to the jury to decide, in a murder trial, whether or not to recommend mercy. If the jury recommends mercy, an individual is eligible for parole consideration after he has served a minimum of fifteen years.

In the case at bar, the court imposed the sentences consecutively. The court had no option but to impose the life sentences. The judge described the crimes as “indescribable . . . the words that come to mind are evil, malicious, cruel, senseless, horrible, wicked monstrous perverted . . . cruelty of the worst order.” (App. vol IV, tab VIII, 35.) He further described it as the worst he had ever seen. (*Id.* at 36.) Petitioner’s counsel describes the sentence as shocking to the court because Mr. Blevins is young man, one whom the jury never got to meet. In fact, the jury did meet Terry Blevins. They met him in his butchery of a devoted couple. They met him in his lies. They met him in his desperation to get rid of evidence. Terry Blevins put himself in prison for the rest of his life, and that sentence is appropriate for the heinous offenses of murder of Matred Dolores Barton, and James Barton. As noted by the survivors, the Barton family lost their loved ones, their possession, their memories, and even their cats. The legislature, as is its prerogative has mandated that the ultimate price one can pay for a criminal offense in West Virginia is life in prison. The jurors were instructed that they could consider mercy, and found this Petitioner utterly unworthy of the exercise of that merciful grace. Nothing in the record suggests that the jury verdict was incorrect.

**K. THERE IS NO JUSTIFICATION FOR APPLYING THE PLAIN DOCTRINE**

Under the plain error doctrine, “appellate courts will notice unpreserved errors in the most egregious circumstances. Even then, errors not seasonably brought to the attention of the trial court will justify appellate court intervention only where substantial rights are affected.” *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

To satisfy the plain error standard, there must be error which was plain or obvious, and that error must affect substantial rights, in that the error must be prejudicial and not harmless. Upon such a showing a court may correct the error if it affects the fairness of the underlying proceedings. (*Id.*

at 316-317, 470 S.E.2d at 635-636.) The plain error rule should be exercised only to avoid a miscarriage of justice, that is conviction of an innocent person. “Aside from preventing such miscarriages of justice, the standard to apply is whether the error ‘seriously affects the fairness, integrity or public reputation of judicial proceedings.’” (*Id.* at 317, 470 S.E.2d at 636.)

It is clear that the error in this matter, if any, including but not limited to the testimony of Dr. Kaplan did not affect the fairness integrity or public reputation of these proceedings, nor was an innocent person convicted.

## V.

### CONCLUSION

Based upon the foregoing statement of facts and legal arguments, the respondent respectfully requests that this Honorable Court affirm the jury verdict finding the Petitioner guilty of murder in the first degree, two counts; and arson in the first degree, all felonies, and further affirm the judgement of the Circuit Court of Mercer County sentencing the Petitioner to incarceration for the rest of his natural life without the possibility of parole, and an indeterminate term of two to twenty years in the penitentiary, to run consecutively with one another, as reflected in an order entered May 27, 2010.

Respectfully submitted,

STATE OF WEST VIRGINIA  
Plaintiff Below, Respondent

*by counsel,*

DARRELL V. MCGRAW, JR.  
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**CERTIFICATE OF SERVICE**

I, Laura Young, Assistant Attorney General and counsel for the Respondent herein, do hereby certify that I have served a true copy of the *Brief on Behalf of the Respondent* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 8<sup>th</sup> day of September, 2011, addressed as follows:

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LAURA YOUNG