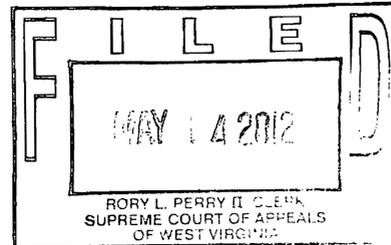


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
at
CHARLESTON, WEST VIRGINIA
No. 12-0120

STATE OF WEST VIRGINIA,
Plaintiff,

v.

WILLIAM R. JOHNSON,
Defendant.



OPENING BRIEF
ON BEHALF OF
WILLIAM R. JOHNSON

On Appeal from the
Circuit Court of Wood County, West Virginia
The Honorable Jeffrey B. Reed, presiding
Wood County Case #08-F-24

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William R. Johnson

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1. The court-below erred in failing to direct a verdict of not guilty upon Count II of the indictment, alleging a violation of West Virginia Code §61-8D-2, (Murder of a Child by a Guardian through his alleged failure or refusal to supply such child with necessary medical care) when there was insufficient evidence adduced by the State of West Virginia to support guilt beyond a reasonable doubt as to this charge.
2. The court erred as a matter of law by permitting the jury to find the Defendant guilty of Counts I and II of the indictment. The jury found the Defendant guilty of second degree murder and guilty of murder of a child by failing to provide medical care. These verdicts are factually inconsistent based upon the proof adduced by the State of West Virginia, and the court below erred in failing to correct this error when the jury questioned this inconsistency and advised the court of their confusion during its deliberations.
3. The Wood County Circuit Court erroneously denied the Defendant's "*Renewed Motion for New Trial*" in light of the post-trial discovery that Thomas Jackson, the "jailhouse snitch" who testified to incriminating statements allegedly made by Mr. Johnson had received extraordinarily special treatment in connection with his pending charges. The plea agreement with THOMAS JACKSON presented by the State of West Virginia during WILLIAM JOHNSON's trial was discarded and drastically modified from a felony plea with a seven-year sentence to a misdemeanor plea with credit for time served.

Former Wood County Prosecuting Attorney Ginny Conley changed the Plea Agreement after WILLIAM JOHNSON's conviction and sentencing and during her final hours as Wood County Prosecuting Attorney on December 31, 2008. The manipulation of the timing and presentation of this exceptionally favorable plea bargain granted to THOMAS JACKSON constitutes misconduct by the Wood County Prosecutor's Office which violated the due process rights of the Defendant.

4. The Court erred by denying the Defendant's motions for a mistrial following a spectator loudly declaring that Mr. Johnson was a "liar" while Mr. Johnson was testifying before the jury during the trial of this matter.
5. William Johnson's trial counsel failed to address the issue of mercy in any meaningful fashion during his closing argument.
6. The cumulative effect of the errors set forth herein was to deny the Defendant a fair trial and accordingly, the Defendant's conviction and sentence must be set aside and a new trial be granted herein. Those errors include the above-referenced matters, and as well as:

- a. The Court erred by permitting the introduction of evidence of other bad acts pursuant to Rule 404(b) of the West Virginia Rules of Evidence. It was error to allow the testimony of Timothy and Lera Caplinger regarding the "car seat incidents" in that the prejudicial effect outweighed the probative value of such evidence.
 - b. The court erred in failing to instruct the jury to disregard the unsolicited and prejudicial testimony of Coroner Michael St. Clair concerning finding a marijuana pipe in the Defendant's apartment despite the fact that trial counsel did not object or move to strike. This was particularly evident after this testimony prompted a question from a juror concerning the marijuana pipe during WILLIAM JOHNSON's testimony.
 - c. The Court erred in failing to grant the Defendant's motion to strike Juror Eric Reeder for cause.
 - d. The Court erred in admitting State's Exhibit 60.
7. The evidence was insufficient to convict WILLIAM JOHNSON.

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STATE OF WEST VIRGINIA,
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v.

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Defendant.

OPENING BRIEF
OF
WILLIAM R. JOHNSON

Now comes the Defendant-below and the Appellant herein, WILLIAM R. JOHNSON by and through his counsel, MICHELE RUSEN and pursuant to Rule 3 of the *Revised Rules of Appellate Procedure for West Virginia* and the *Amended Scheduling Order* of this Court files his “*Opening Brief*.” WILLIAM JOHNSON seeks the reversal of his convictions of three felony charges in connection with the death of J.W. Those convictions include second degree murder; murder of a child by a guardian or custodian by failure to provide necessary medical care; and death of a child by a guardian or custodian by intentional infliction of physical harm. The verdict was rendered in the Wood County Circuit Court, the Honorable Jeffrey B. Reed presiding, after a seven-day trial in August, 2008.

The Court thereafter sentenced the Defendant to forty (40) years in prison pursuant to his conviction upon Count I (Second Degree Murder); life without the possibility of parole pursuant to his conviction upon Count II (Murder of a Child by a Guardian or Custodian); and forty (40) years pursuant to the conviction upon Count III (Death of Child by a Guardian or Custodian). All sentences were imposed consecutively. (A.R. 284-286.)

Following the imposition of sentence in December 2008, the court-below also denied the Defendant’s *Renewed Motion for New Trial* following an evidentiary hearing conducted in May 2011. WILLIAM JOHNSON was then re-sentenced in September, 2011 in accordance with the original sentencing *Order*.

WILLIAM R. JOHNSON appeals the jury’s verdict finding of guilt upon each these offenses as well as the denial of the *Renewed Motion for New Trial* and cites numerous errors occurring during the trial below.

As the result of this conviction, WILLIAM R. JOHNSON must spend the rest of his life in prison with no possibility of parole.

I. Assignments of Error.

In challenge to his conviction and sentence herein, William R. Johnson assigns the following errors:

1. The court-below erred in failing to direct a verdict of not guilty upon Count II of the indictment, (Murder of a Child by a Guardian) in violation of West Virginia Code §61-8D-2, through his alleged failure or refusal to supply such child with necessary medical care when there was insufficient evidence adduced by the State of West Virginia to support guilt beyond a reasonable doubt as to this charge.
2. The court erred as a matter of law by permitting the jury to find the Defendant guilty of Counts I and II of the indictment. The jury found the Defendant guilty of second degree murder and guilty of murder of a child by failing to provide medical care. These verdicts are factually inconsistent based upon the proof adduced by the State of West Virginia, and the court below erred in failing to correct this error when the jury questioned this inconsistency and advised the court of their confusion during its deliberations.
3. The Wood County Circuit Court erroneously denied the Defendant's "*Renewed Motion for New Trial*" in light of the post-trial discovery that Thomas Jackson, the "jailhouse snitch" who testified to incriminating statements allegedly made by Mr. Johnson had received extraordinarily special treatment in connection with his pending charges. The plea agreement with THOMAS JACKSON presented by the State of West Virginia during WILLIAM JOHNSON's trial was discarded and drastically modified from a felony plea with a seven-year sentence to a misdemeanor plea with credit for time served plea. Former Wood County Prosecuting Attorney Ginny Conley changed the Plea Agreement after WILLIAM JOHNSON's conviction and sentencing and during her final hours as Wood County Prosecuting Attorney on December 31, 2008. The manipulation of the timing and presentation of this exceptionally favorable plea bargain granted to THOMAS JACKSON constitutes misconduct by the Wood County Prosecutor's Office which violated the due process rights of the Defendant.

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 - c. The Court erred in failing to grant the Defendant's motion to strike Juror Eric Reeder for cause.
 - d. The Court erred in admitting State's Exhibit 60.
7. The evidence was insufficient to convict WILLIAM JOHNSON.

II. Statement of the Case

At around noon on January 13, 2007, fifteen month old J.W. was transported via ambulance to Camden Clark Memorial Hospital after she was found unconscious and nonresponsive by her mother, STEPHANIE WHITE. (Tr. 1/24/07 at 3.)¹ At that time, J.W. resided with her mother, STEPHANIE WHITE, her two month-old step-sister S.J., and

¹ Counsel has followed this Court's practice of referring to juveniles by use of their initials.

WILLIAM R. JOHNSON at their apartment at 81 Powell Drive in Parkersburg, West Virginia. (Tr. 1/24/07 at 4-5; Trial Tr. at 506.)² J.W. and S.J. were both STEPHANIE WHITE'S children, WILLIAM JOHNSON's was S.J.'s father while J.W. had a different father. (Trial Tr. 524.)

WILLIAM JOHNSON was arrested in connection with J.W.'s death by the Wood County Sheriff's Department on January 15, 2007 and nine days later was indicted by the Wood County Grand Jury on January 24, 2007 in case 07-F-29. (A.R. 1-6; 16-17.) Following numerous pre-trial delays, Count II of the original indictment was dismissed by the State of West Virginia after a legal challenge to its sufficiency was argued. A superseding indictment was returned on January 24, 2008 in case 08-F-24. (Tr. 12/27/07 25-26; A.R. 124-126.) In the second three count indictment, WILLIAM JOHNSON was charged with First Degree Murder (West Virginia Code §61-2-1); Murder of a Child By a Guardian or Custodian (West Virginia Code §61-8D-2) and Death of a Child by a Guardian or Custodian (West Virginia Code §61-8D-2a.) (A.R. 16-17.)

A number of trials were scheduled following the return of the second indictment, including a trial scheduled for May 5, 2008. (See, Tr. 8/13/07; Tr. 9/21/07; Tr. 11/7/07; Tr. 12/27/07; Tr. 2/1/08; Tr. 2/20/08; Tr. 4/7/08' and Tr. 5/2/08.) However, on the eve of trial, the State of West Virginia disclosed that Thomas Jackson, a "jail-house snitch," had come forward and was prepared to testify to incriminating statements allegedly made by WILLIAM JOHNSON. (Tr. 5/2/08.) Accordingly, a final continuance was granted.

Trial thereafter was commenced on August 18, 2008 and a verdict was returned on August 26, 2008. (A.R. at 167.) Following this seven-day trial, the jury returned verdicts of guilty on the lesser included offense of Second Degree Murder upon Count I, and verdicts of guilty upon Counts II and III. Further, the jury did not recommend mercy upon Count II.

One of the primary witnesses who testified against WILLIAM JOHNSON was co-defendant, STEPHANIE WHITE, J.W.'s mother. Her trial testimony was undeniably contrary to the various statements given to law enforcement during the investigation of J.W.'s death.

² The various transcripts within the *Appendix Record* included by agreement of the parties have not been sequentially numbered and thus each such transcript is referred to by the date of the hearing and the page number except for the trial transcript. It is referred to as "Trial Tr." and the page number. All other documents included within the *Appendix Record* have been sequentially numbered and are referred to herein as "A.R." with a page number.

STEPHANIE WHITE discovered J.W. on the morning of January 13, 2007 after waking up at around 10:30 or 11:30 a.m. (Trial Tr. 516, 554-555.) After going downstairs, STEPHANIE WHITE went back upstairs to check on J.W. after she, WILLIAM JOHNSON and baby S.J. awakened. (Trial Tr. 517) Ms. White could not recall if the door to J.W.'S room was opened or closed, but she did remember that J.W. was laying on the floor in front of her bed, on her belly, on the right side of her face with one arm up around the top of her head and one down to her side. (Trial Tr. 517) This description was completely contrary, however, to Coroner Mike St. Clair's observations that all evidence of lividity showed that the blood had pooled in J.W.'s back, not in the front of her body, an inconsistency never explained at trial. (Trial Tr. 1013-1015.) J.W. was found near a pink bag lying near the futon bed. As Ms. White described, "[i]t was almost like she had just kind of rolled off and landed there." (Trial Tr. 518)

STEPHANIE WHITE ran over and picked up J.W. who was cold to the touch and wasn't breathing. (Trial Tr. 518) The only visible injuries were a "big purple bruise on the top of her head, an abrasion in the middle of her forehead and one on her nose and her mouth." (Trial Tr. 518.) There was also "brown stuff" on J.W.'s nose and lips. WILLIAM JOHNSON ran upstairs when he heard Ms. White screaming, but claimed she could not remember his reaction. STEPHANIE WHITE then took J.W. downstairs and called 911, stating that she wiped the brown substance from J.W.'s mouth with her tee shirt. (Trial Tr. 520.) Paramedics arrived shortly thereafter and took J.W. to the ambulance and tried to resuscitate her. (Trial Tr. 532) At the emergency room, medical personnel worked on J.W. for approximately twenty-five minutes in an effort to resuscitate her, but she was pronounced dead at 12:23 p.m. (Trial Tr. 532.)

According to her testimony at trial, STEPHANIE WHITE left the apartment on the evening before J.W.'s death to go to work at Sugar's Lounge in Parkersburg at around 6:00 o'clock p.m. (Trial Tr. 506-507.) J.W. and S.J. were left in the care of WILLIAM JOHNSON, the second such time WILLIAM JOHNSON had cared for both children following S.J.'s birth on November 3, 2006. (Trial Tr. 505-506, 509) The first time WILLIAM. JOHNSON had watched the children, STEPHANIE WHITE left work early and went home only because both children were sick. (Trial Tr. 510-511.)

On the evening of January 12, 2007, STEPHANIE WHITE stopped at the Speedway to pick up a twelve-pack of beer before going to the residence of Jamie Jayjohn and Tony Sharp,

who were friends of WILLIAM JOHNSON's. (Trial Tr. 593-594; 614-615.) As Tony Sharp was borrowing their car the next day, STEPHANIE WHITE asked Jamie Jayjohn to drive her to work, then to drop the beer she had purchased off at the Powell Street apartment. (Trial Tr. 520-511). This sequence of events was confirmed by Jamie Jayjohn.

According to STEPHANIE WHITE, when she left for work that evening, J.W. was fine and had only "two little bruises on either side – the inside of her palms on her thumbs from where she had been trying to climb out of the playpen and she had a little bruise on her right cheek" the latter occurring when J.W. slipped and fell while in the bathtub, as well as one "old scratch" on the back of her head. (Trial Tr. 512-513). However, this "old scratch" was not depicted in any photographs offered into evidence at the trial.³

After arriving at the WHITE/JOHNSON apartment, Jamie Jayjohn went upstairs to see the children, and saw S.J. on the bed in her parent's room. When she heard J.W. crying, she opened the door to her room. (Trial Tr. 599.) Ms. Jayjohn went in and picked J.W. up, and stood on the landing holding her for a few minutes before going downstairs. (Trial Tr. 600.) WILLIAM JOHNSON followed her back downstairs and mentioned that he needed to change J.W.'s diaper. Jamie Jayjohn asked if she could borrow a couple of DVDs and picked out three and after her twenty to thirty minute visit, left the residence. (Trial Tr. 606, 618)

At about 10:30 p.m., STEPHANIE WHITE called home and spoke with WILLIAM JOHNSON to check on the girls. (Trial Tr. 513) He reported that things were fine, and that J.W. was in the bathtub and he was bathing her while S.J. slept. (*Id.*) Later that evening at about 11:30 or so, Tony Sharp called WILLIAM JOHNSON because one of the movies he had borrowed wasn't working. (Trial Tr. 606, 618) According to Tony Sharp, WILLIAM JOHNSON talked about having a "buzz" and finishing some vodka; WILLIAM JOHNSON also told Tony Sharp that he was going to get off the phone so he could get the kids ready for bed. (Trial Tr. 619) As to the comments concerning drinking, WILLIAM JOHNSON's trial counsel put those comments in context as good-natured jibing between long-time friends, since Tony Sharp was on house arrest at the time and was not permitted to drink. Counsel inquired:

³ State's Exhibits 12 and 16 depicted a scratch, but when questioned about this particular scratch, Stephanie White denied that these photos showed the scratch J.W. had before her mother went to work that evening. (Trial Tr. 582.) Stephanie White also claimed that the bruises shown on J.W.'s hand in State's Exhibit 17 did not include the bruise she had seen earlier that day. (Trial Tr. 582-583)

Q: Mr. Sharp, you'd been around Mr. Johnson for – and known him for quite some time?

A: Yes.

Q: When he said that he had, I think you said a “helluva buzz,” did you think he did?

A: He didn't seem like he was really drunk. (Trial Tr. 619.)

Tony Sharp maintained that WILLIAM JOHNSON did not sound like he was under the influence of alcohol. (Trial Tr. 620.) He acknowledged that JOHNSON could have been joking with him when he made that comments at issue, and further, Sharp told detectives that for Mr. Johnson to become intoxicated he'd have to drink much more than a twelve pack. (Id.) This evidence was further undermined by the fact that as STEPHANIE WHITE acknowledged, now liquor was allowed at her home and she knew of no vodka in the apartment. (Trial Tr. 570) Additionally, during the subsequent search of the apartment, no vodka or vodka bottle was ever located despite a search of all trash receptacles. (Trial Tr. 1002.) Moreover, five to six cans of beer remained in the refrigerator the next day according to STEPHANIE WHITE. (Trial Tr. 591.)

STEPHANIE WHITE's shift ended at 3:00 a.m. and she left Sugar's at “right around 3:20 a.m.” on the morning of January 13, 2007 arriving back at her apartment at about 3:35 to 3:45 a.m. which was confirmed by the limousine driver who drove her home that morning. (Trial Tr. 513-514, 625.) After arriving home, STEPHANIE WHITE claimed that she went to bed without ever checking on her daughter, J.W. despite knowing that it was one of J.W.'s first nights sleeping by herself in the futon bed. (Trial Tr. 515, 556)

The version of events related by STEPHANIE WHITE at trial was a far cry from the statements made by STEPHANIE WHITE to the 911 operator, while at the hospital and to investigators. Within minutes of discovering J.W. on January 13, 2007, STEPHANIE WHITE reported to the 911 operator and others that the last time she had seen J.W. was at 1:00 o'clock a.m. (Trial Tr. 559.) Though STEPHANIE WHITE claimed that the 1:00 o'clock a.m. time came from WILLIAM JOHNSON, the 911 tape played to the jury did not support this contention and reflected no such conversation between STEPHANIE WHITE and WILLIAM JOHNSON. STEPHANIE WHITE also told paramedics and hospital personnel that she thought maybe J.W. had fallen. (Trial Tr. 561.)

At the hospital, STEPHANIE WHITE spoke to Detective Shawn Graham as he attempted to determine who had cared for J.W. during the last twenty-four hours before her death. (Trial Tr. 921, 953.) In her first statement to law enforcement at 3:15 p.m. that day, STEPHANIE WHITE told Detective Graham that she was at home all evening the night before and that she and WILLIAM JOHNSON had put J.W. to bed and she was fine at bed time. (Trial Tr. 922.) STEPHANIE WHITE noted that J.W. had a couple of bruises on her that night but nothing like those on her body at the time of her death. (Trial Tr. 930) STEPHANIE WHITE's only explanation for the injuries was that J.W. could have fallen off the bed. Later on January 13, 2007, STEPHANIE WHITE reiterated to Detective Camille Waldron that she was home the night before and that nothing out of ordinary occurred. According to STEPHANIE WHITE, the family had played, watched television and then she and WILLIAM JOHNSON had put J.W. to bed between 12:00 and 1:00. (Trial Tr. 931). However, the explanation offered for J.W.'s injuries didn't jibe with the injuries J. W. had suffered. Moreover, once a work schedule from Sugar's was found during a search of the apartment, STEPHANIE WHITE was questioned again about whether she worked the night before since the schedule indicated she was to work on January 12, 2007. (Trial Tr. 531; 564-565; State's Exhibit 60.) Nevertheless, STEPHANIE WHITE repeated that she had been at home, and stated that she had called off from work due to a problem with a tooth. (Trial Tr. 932, 941.)

STEPHANIE WHITE claimed she lied to the police on multiple occasions that night because she was scared and trying to protect WILLIAM JOHNSON. (Trial Tr. 534.) Whatever her motives for lying, STEPHANIE WHITE admitted that she and WILLIAM JOHNSON had not discussed anything about J.W.'s injuries or the investigation until after they left the hospital when WILLIAM JOHNSON asked her what she had told the police. (*Id.*) STEPHANIE WHITE told WILLIAM JOHNSON she'd lied to the police and said she'd been home all night and they'd put J.W. to bed at 1:00 a.m., prompting him to ask her why she had lied instead of telling the truth. (Trial Tr. 534, 566.) Incredibly enough, although STEPHANIE WHITE asserted she had done nothing whatever to harm her daughter, she also testified that she never once asked WILLIAM JOHNSON anything about what had happened to her daughter. She recalled however, that WILLIAM JOHNSON repeatedly said he was going to spend the rest of his life in prison for something he didn't do. (Trial Tr. 542.)

After leaving the hospital, STEPHANIE WHITE and WILLIAM JOHNSON went to her grandmother's at Walker where they remained for thirty to forty five minutes before going

back to their apartment where a police search was underway. (Trial Tr. 535.)⁴ Later that day, Detective Graham interviewed WILLIAM JOHNSON. (Trial Tr. 947) WILLIAM JOHNSON adamantly denied killing or harming J.W. in the one hundred thirteen page, two and one half hour statement. WILLIAM JOHNSON also told Detective Graham that STEPHANIE WHITE had been home that night and that they put J.W. to bed between 12:00 and 1:00 o'clock. When WILLIAM JOHNSON did not implicate himself, Detective Graham became furiously angry with WILLIAM JOHNSON, behaving in an admittedly threatening and unprofessional manner. Nevertheless, WILLIAM JOHNSON denied all wrongdoing throughout his interview. (Trial Tr.536-537; 949-950, 966.)

While WILLIAM JOHNSON was being interrogated, STEPHANIE WHITE went to Jamie Jayjohn's and asked her friend to drive her to Sugar's. Once there, STEPHANIE WHITE attempted to persuade her co-workers to tell the police that she had not worked the night before (Trial Tr. 538, 567.) When STEPHANIE WHITE realized no one was willing to lie for her, she called Jamie Jayjohn, who also refused to lie and encouraged STEPHANIE WHITE to tell the truth. Ms. Jayjohn then drove STEPHANIE WHITE to the Sheriff's Department to speak to Detective Graham and correct her lies. (Trial Tr. 539, 540, 567.)

STEPHANIE WHITE agreed that WILLIAM JOHNSON never ever asked her to say anything about J.W.'s death, and most particularly never asked her to lie to the police. (Trial Tr. 570) Finally, at 11:37 p.m. on January 13, 2007, STEPHANIE WHITE gave a third statement to the police acknowledging that she had lied about being at work the night before. (Id.) Of course, there was no way for STEPHANIE WHITE to deny she'd been working as the other employees including Amanda Squires a bartender and dancer at Sugars recounted that STEPHANIE WHITE worked the night of January 12, 2007 to January 13, 2007. (Trial Tr. 626-627.) Ms. Squires was also at Sugar's on the evening of January 13, 2007, when STEPHANIE WHITE came into bar and overheard her say "they're saying that Bill killed her and he didn't," while STEPHANIE WHITE said nothing whatever about her daughter, J.W.'s death. (Trial Tr. 630.)

During the trial, STEPHANIE WHITE was also questioned about her relationship with WILLIAM JOHNSON; she recalled that she'd met WILLIAM JOHNSON when J.W. was about a year old, and that they'd moved into Powell Apartments in February 2006 (Trial Tr.

⁴ Stephanie White and William Johnson consented to a search of their apartment and each signed State's Exhibit 59 indicating their consent to this search. (Trial Tr. 933-934.)

523-524.). STEPHANIE WHITE said that WILLIAM JOHNSON was jealous of her friendship with Justin Whited, J.W.'s father. (Trial Tr. 525.) Justin Whited had started "coming around" and visiting J.W. in September or October 2006. (Trial Tr. 526-527) While "Bill didn't say too much about it..." and ... "would talk to Justin," WILLIAM JOHNSON told STEPHANIE WHITE that if she wanted to be with Justin Whited, that he would leave. (Trial Tr. 528.) Between September and October 2006 and January 2007, Justin Whited visited his daughter five or six times. (Trial Tr. 529.) STEPHANIE WHITE was forced to acknowledge she had not provided this information to the police initially. As she described it "as far as the arguments and stuff they asked me about again, I didn't tell them the truth about that, as far as like jealousy problems between me and Bill; any arguments that we would have had that would have caused him to hurt J.W. or take it out on her. I didn't tell them about any of that. I still denied that." (Trial Tr. 541.) In fact, STEPHANIE WHITE offered no information about WILLIAM JOHNSON's alleged jealousy until her fourth statement to law enforcement given in August 16, 2007 and disclosed to the defense in September, 2007. (Trial Tr. 569; A.R.073; *Exhibit A* hereto.)

STEPHANIE WHITE was also questioned about other injuries that J.W. had sustained, including a leg fracture. The fracture resulted after J.W. had awakened at 1:00 a.m. screaming and WILLIAM JOHNSON went into her room and picked J.W. up before realizing her leg was stuck in the rails of her bed. (Trial Tr. 544, 552) WILLIAM JOHNSON did not at that moment realize that the child was injured, but did tell STEPHANIE WHITE that he had gotten up with J.W. the next morning. Several days later, while changing J.W.'s diaper, STEPHANIE WHITE noticed that one of J.W.'s calves was bigger than the other and asked WILLIAM JOHNSON if it looked swollen to him. They took J.W. to the hospital the next morning where they learned that J.W. had suffered a spiral fracture of her tibia which was about a week in age. (Trial Tr. 543-544.) During the subsequent CPS investigation, it was determined that the fracture occurred accidentally when WILLIAM JOHNSON went into J.W.'s room and picked her up on the morning she had been screaming. (Trial Tr. 544-545.) This explanation was deemed reasonable by STEPHANIE WHITE and by WVDHHR. (Trial Tr. 553).

STEPHANIE WHITE also recalled an incident where J.W. sustained a "goose egg" or knot with a couple of bruises on her forehead. (Trial Tr. 547.) This injury occurred when J.W. went over to a computer tower and attempted to pull herself up on it, but instead tipped

it over, causing a hard drive resting on the tower to fall down and hit her in the forehead. (Trial Tr. 547.) At the time, J.W. was a toddler learning to walk, and STEPHANIE WHITE had seen her crawling around the area where the computer tower was located. (Trial Tr. 552.) WILLIAM JOHNSON made no attempt to hide this incident from STEPHANIE WHITE, and his explanation of the injury seemed reasonable to her. (Id.)

In exchange for her testimony at trial, STEPHANIE WHITE received a plea agreement and whereby she pled guilty to child neglect resulting in death; and the State of West Virginia agreed not to prosecute her for any other offenses in connection with J.W.'s death. (Trial Tr. 576.) Thus, part of the consideration for accepting this plea and testifying was STEPHANIE WHITE's desire to avoid facing a potential murder charge. (Trial Tr.576)

The implausibility of STEPHANIE WHITE's explanation concerning her daughter's injuries quickly aroused suspicions. Detective Camille Waldron went directly to Apartment 31 at Powell apartments after leaving the hospital to search the apartment and began her search in J.W.'s bedroom. (Trial Tr. 730-731) Immediately upon entering the room, Detective Waldron smelled vomit. She observed a pink bag on the floor close to head of the futon bed, and noticed vomit on that bag. This bag contained lipstick, nail polish bottles, a bottle opener, three lip liners, one tampon, one photo, a pen, nail clipper, a Budweiser key ring and key, an emery board and one toenail clipper. (Trial Tr. 756-758) Thus, it was clear that this bag was not used as a diaper bag, and was used instead as a purse.

Only the bottom of the two-tiered futon bed had a mattress, and on it was a sheet with a baby's blanket on it. (Trial Tr. 732-733) Detective Waldron photographed the room, including the top rail or top bunk of the futon bed showing a layer of dust on rungs of bed since there was no mattress on top of bed. This layer of dust became significant during course of investigation after the possibility that J.W. had climbed up on top of bunk of futon bed and fallen off was raised. (Trial Tr. 735) However, the consistent settlement of dust clear across those rungs completely undisturbed belied this contention.

On the top rail of futon bed, Detective Waldron observed a small drop of blood which was later tested and found to be J.W.'s blood. (Trial Tr. 737, 799-800) This small amount of blood was found on the outer bottom of the outside of the rail, and was somewhat tacky in the center and not completely dried according to Detective Waldron. (Trial Tr. 741.) All parts of the futon bed were measured, and it was determined that the top of mattress on lower bunk to floor was six (6) inches while the tallest part of bed was three (3) feet, six and one-half (6 1/2)

inches from the floor (Trial Tr. 739-740) All reports concerning this evidence were of course disclosed to WILLIAM JOHNSON during the course of discovery.

The Medical Evidence

A number of treating and other health care experts were called by the State of West Virginia concerning J.W.'s medical condition on January 13, 2007 beginning with Dan Miller, a paramedic responding to the 9-1-1 call at Apartment 31, Powell Apartments (Trial Tr. 633.) When he touched J.W. after arriving at 11:44 a.m., she was cold, so he scooped her up and went straight to ambulance. (Trial Tr. 633). Once in the ambulance, he started to assess her and found that her extremities were cold; and that her abdomen and chest were "pretty cool" with "some warmth." (Trial Tr. 635, 640.) As far as her external injuries, he observed several bruises about her body, on her legs, as well as a couple on the arms and around the face. (Trial Tr. 635) He noted on her forehead an abrasion, "like maybe a rug burn or a carpet burn" in the center of a half dollar, or silver dollar size. (Trial Tr. 636.) He observed that both adults present were distraught, and that a male holding another baby seemed "very distraught, very upset" and was crying. (Trial Tr. 637-638.) He also recalled that "the mother" had said she thought the child had fallen out of the bed. (Trial Tr. 640.)

Despite stiffness in extremities, a sign of rigor mortis and death, the paramedics tried life-saving techniques. (Trial Tr. 638.) Attempts at intubation were unsuccessful because her jaws were clenched tight, and an attempt at inserting an IV also failed. (Trial Tr. 639.) The ambulance arrived at hospital at 11:54 a.m. and J.W. was placed on cardiac monitor although there was no pulse and no breathing. (Id.)

Pamela Tornes, the charge nurse was present at about 11:55 a.m. when J.W. was brought in to the pediatric trauma room. (Trial Tr. 643.) She did a brief assessment of her condition, applied a cardiac monitor while CPR was in progress. She similarly found J.W. cold to touch at all parts of her body, and observed "various stages of bruising." There was a second attempt to place an IV in her arm with no success. Dr. Anthony Kitchen the emergency room physician who assisted with the treatment of J.W. successfully placed an intraosseous in her tibia. (Trial Tr. 644.) Although he immediately ordered medications for resuscitation, they did not work. (Trial Tr. 657) After twenty five minutes with no sign of resuscitation, J.W. was pronounced dead at 12:23. p.m. Nurse Tornes remained with child until she was pronounced dead and then washed her face, her hands, her feet, put a warm blanket on her and prepared the body for viewing. (Trial Tr. 645)

After her death, STEPHANIE WHITE rocked J.W. and then said she “was done” and handed J.W. over to WILLIAM JOHNSON and left the room. (Trial Tr. 647.) WILLIAM JOHNSON also held J.W. close, but according to the nurse, was not emotional or crying, and was just looking down. (*Id.*) At very end, he stood up and he said, “I’m done with her. I have to leave.” (Trial Tr. 647)

In accordance with protocol, Nurse Tornes also took J.W.’s temperature rectally three different times, and her temperature did not register above 80 degrees. (Trial 652.) Nurse Tornes opined that the body temperature was below 80 degrees. She noted that J.W.’s extremities were stiff, and that her trunk was not as stiff. When she tried to move her arm for IV access, it was very difficult to move it. (Trial Tr. 652) Nurse Tornes acknowledged that body temperature depended a great deal upon outside factors such as outside temperature; she also opined that body temperature drops a degree every hour. (Trial Tr. 653.)

Dr. Kitchen undertook a head to toe physical exam and starting at J.W.’s head, found a flattened area on the left, between the mastoid (the bump behind the ear), and the occiput (the pointy portion at the based of the skull.). (Trial Tr. 658.) He noted bruises, ecchymotic areas, on the left cheek about the size of a dime, and a larger bruise on the forehead across the front. (Trial Tr. 658) There were also bruises on the extremities, what appeared to be different ages, from the shin down. When he questioned the mother about the bruises, she said child was learning to walk and was falling a lot. (Trial Tr. 659.) STEPHANIE WHITE also told Dr. Kitchen that the last time she checked on the child was 1:00 a.m. and then again about 11:30 that morning. (Trial Tr. 659.) Dr. Kitchen did not provide a cause of death but did diagnose head trauma due to the physical findings and multiple bruises of different ages with cardiopulmonary arrest and then hypothermia. (*Id.*)

Michael St. Clair was called to the hospital after the child was pronounced dead in his capacity as Wood County Coroner although he also works as a full time paramedic. (Trial Tr. 671-672) He arrived at around 12:50 p.m. and gathered information from hospital personnel, reviewed ambulance run sheets and then did a strictly visual exam of the child. (Trial Tr. 672.) He accompanied law enforcement to the apartment at about 6:15 p.m. and left at 7:30 p.m. (Trial Tr. 673) St. Clair noted that the temperature of the apartment was 73 degrees Fahrenheit upon his arrival, and stated that no one adjusted the temperature controls while he was there. He had originally noted the temperature as 69 degrees and because he

must have read it wrong, marked through the incorrect temperatures and initialed his report. (Trial Tr. 674-675)

During the interview of STEPHANIE WHITE at 6:15 while at the apartment, she again repeated the lie that the last time child was seen was at 1:00 a.m. and told the coroner that she was the one who last saw the child. STEPHANIE WHITE also stated that she had discovered J.W. at 11:35 a.m. on January 13th and found her lying face down. (Trial Tr. 676) STEPHANIE WHITE went to so far as to explain that she had last fed the child on evening of January 12 at 9:30, and that J.W. had eaten spaghetti or ravioli and a container of milk. (Trial Tr. 677.) Mr. St. Clair's report noted that there was not any fluid or material on child's face, in her nostrils, on her mouth or on the bedding, information which was taken from the paramedics' report. (Trial Tr. 678.) Mr. St. Clair admitted that he did not recall a vodka bottle or beer cans anywhere, but volunteered that he did see a marijuana pipe. This improper and prejudicial testimony elicited no response or motion to strike from defense counsel. (Trial Tr. 679)⁵ St. Clair's report also noted possible blood on the upper rail of futon bed. (Trial Tr. 680,)

Iouri Boiko a former deputy chief medical examiner in West Virginia conducted the autopsy of J.W. (Trial Tr. 687) Dr. Boiko noted that J.W. weighed nineteen pounds, and was thirty-two inches tall. He recounted her external injuries, including injuries to her head on the front and rear part of the head, and on the right side and on the left side of the head. (Trial Tr. 692-693.) All of her bruises and injuries were characterized as "fresh injuries." (Trial Tr. 695)

The autopsy revealed a severe injury of the head, with a six by five inch skull hemorrhage extending from left temporal (lateral) parietal (top) of the to the occipital area. There was also a compound skull fracture measuring five and one half (5 1/2) inches extended also from left top of the skull to the mid-occipital bond and base of skull which resulted in an epidural hemorrhage five (5) by four (4) inches in diameter. (Trial Tr. 699.) There was also a six (6) inch in diameter subdural hemorrhage which extended to both sides on the left and the right of the brain and a contusion present in the occipital lobe of the brain. (Trial Tr. 699) This bleeding and bruising and injuries were caused by a severe impact to her head. (Trial Tr. 701)

⁵ This testimony led to a question from a juror as to whether Mr. Johnson was on drugs. (A.R. 237D.) The Court declined to address this question. (Trial Tr. 1078-1080.)

Although he found some evidence of bronchopneumonia, that was a minor change and was not the cause of death which was possibly due to the dying process. Dr, Boiko could not “say for sure how long time it was she was alive after injury. Short time.” (Trial Tr. 706) In this case, there was no positive iron stain in the bleeding, which meant the bleeding was fresh and the blood had not had time to break down into other components. (Trial Tr. 709)

As to estimating the time of death, Dr. Boiko acknowledged that this was not a precise science. (Trial Tr. 713.) Since the temperature of the body is constant, around 97 degrees F and when person dies, the body starts to cool from 97 degrees to the ambient temperature in the room, this information makes it possible to approximate the time of death. However Dr. Boiko noted that this estimation depends upon the ambient temperature or room temperature as well as a number of other factors.⁶ (Trial Tr. 713.) In this case, where the ambient temperature in apartment was 73 degrees and investigators reported that J.W.’S temperature at 11:57 a.m. was 80 degrees, Dr. Boiko calculated the difference to be 17 degrees and then divided by 1.5 to get the approximate time. (Trial Tr. 715.) The estimated time of death was “from 11:00 p.m. generally 12:00 to 4:00 a.m. generally certain. It’s approximation. That’s best what we can do according to all references.” (Trial Tr. 717) Dr. Boiko also opined that the extensive skull fracture was cause of death and that this was caused by a physical assault because if child had fallen down some steps or from the futon, he would expect there to be injuries to other parts of the body such as neck. (Trial Tr. 724)

Testimony of Thomas Jackson

“One of the most significant witnesses” of the trial according to then-Wood County Prosecutor Ginny Conley was Thomas Jackson. (Trial Tr. 482.) Thomas Jackson became an inmate at the North Central Regional Jail on November 6, 2007 after he deciding to turn himself in on the numerous outstanding warrants charging him with four felony counts of Fraudulent Schemes. (Trial Tr. 831-832.) Following WILLIAM JOHNSON’s trial and sentencing, and just hours before leaving office, Prosecutor Conley rewarded THOMAS JACKSON by dismissing all pending charges against him save a single misdemeanor charge. (Tr. 5/11/11.) THOMAS JACKSON then pled guilty to a single misdemeanor warrant in Wood

⁶ In a very cold environment, the cooling of the body understandably happens more quickly. If a body is covered by blankets or with a lot of excessive clothes, this will slow down cooling of body temperature. Nevertheless, according to Dr. Boiko the common opinion is that the body cools at the rate of approximately 1.5 degrees per hour, possibly two degrees in first hour and after twelve hours it can be 1 degree per hour. This also assumes that J.W.’s body temperature did not alter due to resuscitation, she was not put in hot tub, and nothing occurred to change body temperature. (Trial Tr. 716)

County Magistrate Court and was sentenced to time already served without ever setting foot in jail upon those charges again. (Tr. 5/11/11 55-57; A.R. 353-354.) This plea agreement differed radically from the one presented to the jury by the State at trial -- that THOMAS JACKSON was going to serve seven years in prison after pleading guilty to a felony charged in an Information already pending in Wood County Circuit Court case 08-F-48. (A.R. 520-521; 522-523; A.R. 335.)

WILLIAM JOHNSON was incarcerated at the North Central Regional Jail when Thomas Jackson arrived in November 2007 and had been there since January of that year. (Trial Tr. 831, 868.) When THOMAS JACKSON moved into the pod where the Defendant was housed, they were not cell mates at first. However, after JACKSON's cell mate left and WILLIAM JOHNSON's cell mate was likewise gone, JACKSON stated that he and the Defendant requested to be put into the same cell, a fact denied by WILLIAM JOHNSON and which was not shared with the police by JACKSON is his statement to them. (Trial Tr. 870, 1037.) During the last six weeks or two months JACKSON was incarcerated, he was in same cell with the Defendant and according to JACKSON, they got along fine. (Trial Tr. 837)

At the time he came forward to testify against WILLIAM JOHNSON, THOMAS JACKSON was hardly new to the criminal justice system. He was a convicted felon with a prior conviction from 2002 for fraudulent schemes. (Trial Tr. 827.) JACKSON said he used credit card numbers over the phone and internet to purchase gift cards to obtain cash, and he was at the time "only nineteen." The credit card numbers were obtained from a girl he knew who worked as a waitress. (Trial Tr. 828) Before it was all said and done, JACKSON had racked up convictions in Wood, Cabell and Kanawha counties and had served close to three years in jail and prison. (Trial Tr. 829.) This included his conviction in April 2004 for fraudulent schemes and use of an access device, a misdemeanor; his conviction in August 2003 for fraudulent schemes; and a June 2003 conviction in Wood County for fraudulent schemes. (Trial Tr. 873)

As far as the charges that landed him in jail in November 2007, according to JACKSON, his attorney George Cosenza received a letter outlining his plea deal on August 15, 2008, just days before the trial in this matter began although this plea deal had supposedly been reached in April 2008. (Trial Tr. 874) However, as the August 15, 2008 letter stated in the last paragraph: "As a result of your cooperation in the WILLIAM RYAN JOHNSON murder case, the plea hearing was continued." THOMAS JACKSON insisted that the terms

and conditions of his plea had not changed and he had not entered his plea simply because he did not want to be in jail at the time he testified. (Trial Tr. 875)

At the time THOMAS JACKSON became the State's star witness against WILLIAM JOHNSON, he had been arrested yet again for fraudulent schemes, this time, using credit card numbers obtained from his place of employment, the Expedia call center. (Trial Tr. 829.) His excuse this time was that his wife's pregnancy and the accompanying financial pressures forced him to start using credit card numbers to buy furniture for his house. (Trial Tr. 830) As he described it, after he "bailed out" a couple of times, he continued committing new and additional crimes, and new charges were filed. All in all, he accumulated four felony charges in Wood County as well as eight misdemeanor charges. (Trial Tr. 831.)

As of April 2008, Jackson testified he had worked out a plea deal with the Wood County Prosecutor's office and described his strategy:

Yeah, it was ongoing. Basically what I did was, when the new charges were lined – I stayed with my wife for a while. I didn't really run, I just didn't come in and turn myself in. And I came in and turned myself in at that time. I turned myself in willfully, and then just said I'm just going to go ahead and get my time started. And throughout that time, my attorney worked out a plea deal. I was supposed to plead to an information, so we had a deal in place before I ever came forward, right." (Trial Tr. 831-832.)

The Prosecuting Attorney went through the proposed plea deal in painstaking detail: Jackson was to plead guilty to a felony information, was to receive a seven year sentence, no recidivist information would be filed and his sentence was to run concurrently with the parole revocation that would be filed. Jackson also agreed not to seek an alternative sentence of any type and would receive credit for time served. (Trial Tr. 832.) Although this plea agreement was not committed to writing until shortly before trial in this matter was commenced, JACKSON's attorney said this was the deal and they would be back in court on it fairly soon. JACKSON was aware that the information had been filed by the State of West Virginia. (Trial Tr. 833) When the Wood County Prosecuting Attorney queried: "[y]ou have no promise of any better plea from the Wood County Prosecuting Attorney's Office?" THOMAS JACKSON replied, "No. I just got a letter outlining the deal." The Prosecutor pressed him stating, "Something could happen?" and JACKSON replied, "It could I guess." (Trial Tr. 836; 934)

Thomas Jackson acknowledged that WILLIAM JOHNSON had his discovery papers and file, including witness statements and reports in their cell. (Trial Tr. 839) According to Jackson, WILLIAM JOHNSON did not let anybody look at his file and was very nervous to

point of being paranoid about it. (Trial Tr. 840.) WILLIAM JOHNSON maintained his innocence throughout his incarceration according to Jackson until, at some point, JACKSON and WILLIAM JOHNSON both attended hearings on their on April 7, 2008. (Trial Tr. 840) After their hearings, JACKSON arrived back at the jail first. According to JACKSON, WILLIAM JOHNSON seemed very excited about the results of his hearing when he returned from court. (Trial Tr. 841) After lockdown that night, the guy who wouldn't show anyone his papers, and who had proclaimed his innocence for months began to spill his guts to THOMAS JACKSON, telling him about how nervous he was about getting out of jail what he was going to tell people. (Trial Tr. 843.) THOMAS JACKSON volunteered: "I'd been through that before. I'd been looking at getting out after two or three years and then wondered what am I going to tell anyone. So I told him he could talk to me about it." (Trial Tr. 844)

THOMAS JACKSON also helpfully tracked the jealousy angle of STEPHANIE WHITE's August 13, 2007 statement and her later trial testimony. WILLIAM JOHNSON discussed his ex-girlfriend STEPHANIE WHITE, with JACKSON who of course understood how women were, a reference to the problems in JACKSON's marriage that JACKSON said he's previously shared with WILLIAM JOHNSON. Trial Tr. 845.) JACKSON claimed that WILLIAM JOHNSON thought STEPHANIE WHITE was cheating on him, and that she left him alone with her daughter while pregnant with his child. (*Id.*) He believed that she was seeing her ex-boyfriend, J.W.'s father. Justin Whited, and was upset about it. WILLIAM JOHNSON said he knew what they were doing to him, and that STEPHANIE WHITE was using him and making a fool of him. (Trial Tr. 845)

THOMAS JACKSON then went through the computer incident and the leg fracture offering "confessions" from WILLIAM JOHNSON to each of the incidents outlined in the State of West Virginia's 404(b) notices. (Trial Tr. 846-847; A.R. 115-116.) JACKSON reported that on the night of J.W.'s injury, WILLIAM JOHNSON kept calling the club and STEPHANIE WHITE wouldn't answer, despite the fact that WHITE had no cell phone, and no one else from the club reported these numerous telephone calls. (Trial Tr. 849.) According to THOMAS JACKSON and contrary to any other evidence in this case, WILLIAM JOHNSON said STEPHANIE WHITE was drunk when she finally called him back and that made him mad. (Trial Tr. 849-850.) WILLIAM JOHNSON also told JACKSON that he was drunk that night and probably didn't have control of his emotions. (Trial Tr. 850.) THOMAS JACKSON then supplied an explanation of what WILLIAM JOHNSON had done to

J.W. to fit with the evidence previously disclosed to the defense. (Trial Tr. 850.) JACKSON said there was a single blow to J.W.'s head which hit the railing of the futon bed. (Trial Tr. 851.) WILLIAM JOHNSON then allegedly claimed he carried J.W. to the kitchen and put her in the sink, despite testimony that there were dishes in the sink. (Trial Tr. 951, 851.)

THOMAS JACKSON then added a clever touch of his own: recalling the Pine Sol bottle depicted in the kitchen in photographs, he concocted WILLIAM JOHNSON's alleged plan "to destroy the evidence" using Pine Sol. (Trial Tr. 851-852) WILLIAM JOHNSON supposedly "saturated his clothes" with Pine Sol, (although most of the Pine Sol remained visible in the bottle), and then decided that was not going to do him any good. (Trial Tr. 852; 1003.) WILLIAM JOHNSON also purportedly used the Pine Sol again to clean up the blood or whatever there may have been, and then took J.W. back in the room and laid her down in front of her bed, and then cut up his clothes and flushed them down the toilet. (Trial Tr. 852)

THOMAS JACKSON also attributed to WILLIAM JOHNSON the genius of saying nothing to STEPHANIE WHITE to "sort of let her try to come up with the idea" to lie to the police. Although STEPHANIE WHITE' denied it, WILLIAM JOHNSON allegedly took credit for saying they were home together the night before J.W.'s death. (Trial Tr. 857.) As an added touch meant to bolster the State of West Virginia's strategy in the case, WILLIAM JOHNSON allegedly claimed he was very proud of his approach, because as JOHNSON said, STEPHANIE WHITE would look like a liar. (Trial Tr. 853.)

THOMAS JACKSON called his lawyer the next day to report his good fortune, but it took him a long time to reach his attorney. (Trial Tr. 862) The Wood County Sheriff's detectives finally showed up on the first of May to take his statement. (Trial Tr. 864.) When asked why he got involved in this case, THOMAS JACKSON stated: "...the reason I came forward was because I didn't want to see anyone walk away for something like this. (Trial Tr. 864) However, as post-trial testimony showed, THOMAS JACKSON was well rewarded for his testimony with an extraordinary sweetheart deal,

William Johnson's Testimony:

WILLIAM RYAN JOHNSON, then thirty-two years of age, testified and confirmed that STEPHANIE WHITE had worked the evening of January 12, 2007, and had left the apartment at about six o'clock. Jamie Jayjohn had been at the home briefly that evening, and had delivered a twelve-pack of beer to him, and had borrowed several DVDs. (Trial Tr. 1017)

WILLIAM JOHNSON also explained that Kayla Bell, STEPHANIE WHITE's cousin had called at about 8:30 that evening, and that STEPHANIE WHITE had called at about 10:00 o'clock or so while J.W. was in the bathtub. (Trial Tr. 1018.) At that time, S.J., his daughter with STEPHANIE WHITE was two months old. (Id.)

At approximately midnight, WILLIAM JOHNSON's long-time friend Tony Sharp called with issues about a DVD that Jamie Jayjohn had borrowed earlier. They had a short conversation and afterward he put J.W. to bed, while S.J. was with him in his bedroom. (Trial Tr. 1019) After both kids went to sleep, he remained awake and played video games for a bit. After S.J. woke up, fed her, watched some television and got her back to sleep and then went to bed himself. (Trial Tr. 1020)

The next thing WILLIAM JOHNSON remembered was getting up, and showering. He then went downstairs with S.J. in his arms, while STEPHANIE WHITE put a pot of tea on stove. He proceeded to feed S.J. and STEPHANIE WHITE asked him if had checked on J.W yet. (Trial Tr. 1020) When he said no, she went upstairs and shortly after that, he heard her screaming. WILLIAM JOHNSON then ran upstairs with S.J. in his arms only to see STEPHANIE WHITE coming out of bedroom cradling J.W. in her arms. STEPHANIE WHITE ran downstairs and called 9-1-1, still holding J.W. while he continued to hold S.J. in his arms. (Trial Tr. 1021).

WILLIAM JOHNSON was shocked and heartbroken, and wanted to know what had happened to J.W. as he had no idea how she sustained any injuries. (Trial Tr. 1022.) WILLIAM JOHNSON overheard STEPHANIE WHITE say she last saw J. W. at 1:00 a.m., which he knew was not the truth. (Trial Tr. 1022.) JOHNSON confirmed that at no time had he ever told STEPHANIE WHITE her to make such a statement, or to lie on his behalf. (Trial Tr. 1022) Additionally, WILLIAM JOHNSON did not know she was going to make up a story to tell at the hospital. (Trial Tr. 1023.) WILLIAM JOHNSON rode to the hospital in a separate ambulance, holding S.J. in his lap, while STEPHANIE WHITE rode with J.W. (Trial Tr. 1023.)

WILLIAM JOHNSON remembered STEPHANIE WHITE telling paramedics that J.W. may have fallen off the bed, but that was all he knew at that point. (Trial Tr. 1024.) As he and STEPHANIE WHITE were not alone at the hospital, they had no opportunity to conspire to make up any story. (Trial Tr. 1024-1025.) When STEPHANIE WHITE came out after her interview with detectives, they were instructed that they could leave, but that they should be

back at their apartment in approximately an hour. (*Id.*) At that point, WILLIAM JOHNSON left the hospital with STEPHANIE WHITE and her parents, Debbie and Eddie Lockhart. (*Id.*)

Once in the car, STEPHANIE WHITE related her conversation with detectives, and WILLIAM JOHNSON promptly asked her why she didn't tell the truth. (Trial Tr. 1025.) At this point, an unidentified spectator in the courtroom loudly stated, "liar." (Trial Tr. 1025.) After the proceedings were halted, this spectator left the courtroom, stating that she could not "listen to this." (Trial Tr. 1026.) The Court directed that this spectator could not return to the courtroom and instructed the jury to disregard this event. (*Id.*) The court also denied the Defendant's motion for a mistrial. (Trial Tr. 1048-1050.)

During the ride from the hospital, STEPHANIE WHITE also told WILLIAM JOHNSON that she thought an accident had caused J.W.'s death, and WILLIAM JOHNSON had no reason to believe otherwise. (Trial Tr. 1028.) WILLIAM JOHNSON went along with STEPHANIE WHITE's story about being home that evening because he didn't want her to get into trouble for lying. (Trial Tr. 1028.) When during the interview, Detective Shawn Graham told WILLIAM JOHNSON that STEPHANIE WHITE had changed her story, JOHNSON didn't believe the detective. (Trial Tr. 1029.) Moreover, despite the manner in which Shawn Graham treated him during the end of his interview, WILLIAM JOHNSON told Graham multiple times during the interview, that he did not hurt J.W. (Trial Tr. 1029-1030.) JOHNSON also acknowledged laughing at one point during the interview because he found Shawn Graham's accusations so ludicrous. (Trial Tr. 1030.)

As far as the suggestion that WILLIAM JOHNSON was intoxicated that night, he was not. JOHNSON recalled Tony Sharp's call, and stated that he told his friend that had finished off a bottle of vodka and beer and had "helluva buzz" to tease and taunt him because Tony Sharp was on house arrest for DUI and could not drink. (Trial Tr. 1033-1034.) Moreover, there was no vodka at the home because STEPHANIE WHITE did not allow liquor at her home, and he had none hidden.⁷ In fact, WILLIAM JOHNSON had consumed only five or six beers over the course of the entire evening, a fact supported by the fact that there were four or five beers left in the refrigerator the next day. (Trial Tr. 591, 1032.) When STEPHANIE WHITE called him from Sugars at around ten that evening, he was not having any difficulties with J.W. or S.J. then, and did not have any difficulty with them afterwards.

⁷ The testimony also established that WILLIAM JOHNSON had no opportunity to conceal or dispose of any vodka bottle since he was not at his apartment by himself at any time after leaving at 11:35 a.m. that morning. (Trial Tr. 1032.)

(Trial Tr. 1035.) WILLIAM JOHNSON did not call Sugars that night, and the only time he spoke to STEPHANIE WHITE after she left that Friday was when she phoned him at 10:00. (Trial Tr. 1036.)

While THOMAS JACKSON was in his section at the North Central Regional Jail for four or five months before they met him, WILLIAM JOHNSON did not want him as a cell mate and did not ask anybody to assign him to be cell mate as it was understandably far preferable to have a cell to himself. (Trial Tr. 1037) WILLIAM JOHNSON further explained that he had been provided all discovery documents his in case which he kept in his cell at the foot of his bed which included everything from medical reports to statements given, photographs, and “basically everything pertaining to case” except for photos of J.W. and autopsy and medical photos. (Trial Tr. 1038.) When he was not in his cell, JOHNSON left his information at the foot of his bed. (Trial Tr. 1038.)

WILLIAM JOHNSON denied confessing to THOMAS JACKSON or anyone else. WILLIAM JOHNSON did not cut up his clothes and flush it down the toilet after soaking it in Pine Sol; and did not use the Pine Sol that night. (Trial Tr. 1039-1040.) He did not even remember seeing the Pine Sol bottle on the high chair, as it had been kept under the sink with other cleaning supplies. (Trial Tr. 1040, 571.) However, State’s Exhibit 19, provided by the State of West Virginia in discovery was a photograph of a high chair in the kitchen of the apartment and plainly depicted a bottle of Pine Sol on the high chair. (Trial Tr. 588)

As far as WILLIAM JOHNSON’s relationship with STEPHANIE WHITE, he met her in November 2005 and she and her daughter moved in with him almost immediately, and they were together until his arrest. (Trial Tr. 1041) WILLIAM JOHNSON helped raised J.W. and it had been very difficult for him to lose her even though she was not his child. (Trial Tr. 1042.) He was allowed to make funeral arrangements but was not allowed to attend J.W.’s funeral and was not able to pay his final respects. (Trial Tr. 1042) While WILLIAM JOHNSON was angry that a better investigation was not done in this case, he was adamant that he did not kill J.W. or commit the other offenses with which he was charged. (Trial Tr. 1043)

As for J.W.’s prior injuries, WILLIAM JOHNSON acknowledged that J.W. suffered an injury to her leg six months or so before: As he explained at the time, he had just put J.W. to bed that evening probably after midnight and laid her down in the futon bed. After she started screaming he went into room and he noticed she had her leg twisted down in the bars

of the frame. WILLIAM JOHNSON pulled her up and noticed her leg was maybe a little red. After he quieted her down, he put her back to bed, having no idea that her leg was fractured. (Trial Tr. 1044) Although he picked her up while her leg was stuck, he did not intentionally break or harm her leg, and further, he told STEPHANIE WHITE about the crying incident the very next morning. (Id.)

The goose-egg on J.W.'s head happened when a computer tower a friend asked him to work on was torn apart and was leaning against the wall and with the hard drives on top of it. (Trial Tr. 1045.) When he answered a telephone call from his mother, J.W. grabbed the computer tower trying to pull herself up and the hard drive slipped and hit her on her forehead. (Trial Tr. 1045-1046.) He immediately told STEPHANIE WHITE about this injury. (Trial Tr. 1046.)

Following the close of evidence, the jury was instructed and closing arguments were made. (Trial Tr. 1089-1178.) During deliberations, the jury posed the following question:

If we find the defendant guilty of a lesser charge within Count No. 1. does that preclude us from a finding of guilty on Count 2? (Trial Tr. 1181; A.R. 237F..)

After a great deal of discussion as to how the court should respond to this question, the court-below advised the jury as follows:

The instructions that the Court read to you and that you all were provided contain what the law calls "elements" of those offenses. It says – the part in those instructions is where it says, you know, "[t]o find the defendant guilty, the State must establish beyond a reasonable doubt – overcome the presumption of innocence and establish beyond a reasonable doubt that: the defendant; in Wood County..." okay, those are the elements.

If you read that, you will see that the elements for Count I and Count II, that they each have separate elements. Count II, just generally speaking, is what we refer to as a general murder charge, okay? If anybody kills anybody, they can be charged under that offense.

Count II is a very specific crime where there need to be that relationship of guardian or custodian, plus, you know, additional elements for that offense. So you need to look at the elements as set out in the instructions.

It is possible to find someone guilty of both Count I and Count II. It is also possible to find someone guilty of a lesser of Count I, lesser degree offense than murder in the first degree, and Count II, as long as you are satisfied beyond a reasonable doubt that the elements of those offenses have been established by proof beyond a reasonable doubt.

Now if that doesn't answer your question – we didn't know exactly what the question meant. We think that addresses the question. If it does not, let us know and we will attempt to address it again. (Trial Tr. 1181-1190.)

An hour and one-half later, the jury returned verdicts of guilty as to all three counts of the indictment, and declined to recommend mercy as to the questioned count, Count II. (Trial Tr. 1191-1192.)

III. Summary of Argument

1. The court-below erred in failing to direct a verdict of not guilty upon Count II of the indictment, alleging a violation of West Virginia Code §61-8D-2, (Murder of a Child by a Guardian through his alleged failure or refusal to supply such child with necessary medical care) when there was insufficient evidence adduced by the State of West Virginia to support guilt beyond a reasonable doubt as to this charge.
2. The court erred as a matter of law by permitting the jury to find the Defendant guilty of Counts I and II of the indictment. The jury found the Defendant guilty of second degree murder and guilty of murder of a child by failing to provide medical care. These verdicts are factually inconsistent based upon the proof adduced by the State of West Virginia, and the court below erred in failing to correct this error when the jury questioned this inconsistency and advised the court of their confusion during its deliberations.
3. The Wood County Circuit Court erroneously denied the Defendant's "*Renewed Motion for New Trial*" in light of the post-trial discovery that Thomas Jackson, the "jailhouse snitch" who testified to incriminating statements allegedly made by Mr. Johnson had received extraordinarily special treatment in connection with his pending charges. The plea agreement with THOMAS JACKSON presented by the State of West Virginia during WILLIAM JOHNSON's trial was discarded and drastically modified from a felony plea with a seven-year sentence to a misdemeanor plea with credit for time served.

Former Wood County Prosecuting Attorney Ginny Conley changed the Plea Agreement after WILLIAM JOHNSON's conviction and sentencing and during her final hours as Wood County Prosecuting Attorney on December 31, 2008. The manipulation of the timing of this exceptionally favorable plea bargain granted to THOMAS JACKSON constitutes misconduct by the Wood County Prosecutor's Office which violated the due process rights of the Defendant.

4. The Court erred by denying the Defendant's motions for a mistrial following a spectator loudly declaring that Mr. Johnson was a "liar" while Mr. Johnson was testifying before the jury in the trial of this matter.
5. William Johnson's trial counsel failed to address the issue of mercy in any meaningful fashion during his closing argument.
6. The cumulative effect of the errors set forth herein was to deny the Defendant a fair trial and accordingly, the Defendant's conviction and sentence must be set aside and a new trial be granted herein. Those errors include the above-referenced matters, and as well as:
 - a. The Court erred by permitting the introduction of evidence of other bad acts pursuant to Rule 404(b) of the West Virginia Rules of Evidence. It was error to allow the testimony of Timothy and Lera Caplinger regarding the car seat incident in that the prejudicial effect outweighed the probative value of such evidence. It was also error to permit the testimony of Thomas Jackson and Stephanie White regarding other injuries to the child.
 - b. The court erred in failing to instruct the jury to disregard the unsolicited and prejudicial testimony of Coroner Michael St. Clair concerning finding a marijuana pipe despite the fact that trial counsel did not object or move to strike. This was particularly evident after this testimony prompted a question from a juror concerning the pipe.
 - c. The Court erred in failing to grant the Defendant's motion to strike Jurors Eric Reeder for cause.
 - d.. The Court erred in admitting State's Exhibit 60.
7. The evidence presented was insufficient as a matter of law to support the convictions herein.

IV. Statement Regarding Oral Argument and Decision

The principal issues in this case have not been authoritatively decided by this Court and accordingly oral argument in this case is necessary. This case is not appropriate for Rule 19 argument and disposition by memorandum decision.

V. Argument

- (1) The court-below erred in failing to direct a verdict of not guilty upon Count II of the indictment, alleging a violation of West Virginia Code §61-8D-2, (Murder of a Child by a Guardian through his alleged failure or refusal to supply such child with necessary medical care) when there was insufficient evidence adduced by the State of West Virginia to support guilt beyond a reasonable doubt as to this charge.

In addition to charging WILLIAM JOHNSON with murder in Count I of the indictment and with causing her death by intentionally inflicting physical harm in Count III, the State also charged WILLIAM JOHNSON with a violation of West Virginia Code 61-8D-2 in Count II as follows:

That on or about the ____ day of January, 2007, in Wood County, West Virginia, WILLIAM RYAN JOHNSON unlawfully, feloniously, maliciously and intentionally caused the death of J.M.W. by failing to provide the child, J.M.W. with necessary medical care, at a time when WILLIAM RYAN JOHNSON was guardian or custodian of J.M.W. and J.M.W. was under his care, custody and control, against the peace and dignity of the State. (A.R. 124.)

Consistent with the law outlining this offense, the jury was instructed that in order to convict WILLIAM JOHNSON of this offense, the State was required to prove that WILLIAM JOHNSON while a custodian or guardian of J.W. **caused her death** by unlawfully, feloniously, maliciously and intentionally refusing to supply her with necessary medical care. (A.R. 202-203; Trial Tr. 1104-1106.)⁸

Although numerous medical personnel testified on behalf of the State of West Virginia, not a single doctor, nurse, or paramedic was asked any questions concerning whether a

⁸ West Virginia Code §61-8D-2(a) provides: If any parent, guardian, or custodian shall maliciously and intentionally **cause the death** of a child under his or her care, custody or control **by his or her failure or refusal to supply such child with** necessary food, clothing shelter or **medical care**, then such parent, guardian or custodian shall be guilty of murder in the first degree. (emphasis added.)

failure to provide medical care had caused the death of this child. Accordingly, after the State of West Virginia rested its case, counsel for WILLIAM JOHNSON moved for a directed verdict of acquittal as to Count II of the indictment. (Trial Tr. 1004-1006.) This motion was renewed following the conclusion of all evidence, and on both occasions, the court-below denied the motion to direct a verdict of acquittal as to the charge contained within Count II of the indictment. (Trial Tr. 1004-1006; 1081.)

After the verdict, a hearing to consider post-trial motions and to impose sentence was conducted before Judge Reed on November 3, 2008. (Tr. 11/3/08.) Despite the trial court's cursory rejection of the concerns raised at trial relative to the proof adduced upon Count II of the indictment, the court-below immediately questioned the sufficiency of the evidence supporting a verdict of guilty of causing the death of J.W. due to failure or refusal to supply necessary medical care. (Tr. 11/3/08 at 3.) As Defendant's counsel had correctly argued during trial, there was no "evidence that Mr. Johnson refused to supply [J.W.] with necessary medical care. There was no opinion testimony with respect to that from Dr. Boiko, from Dr. Kitchen, or anybody else." (Trial Tr. 1005.) Thus, the state had "completely failed to meet its burden with respect to that charge." (*Id.*)

Counsel for the State agreed "that there must be some evidence that the failure or refusal to provide medical care was the cause of death..." (Tr. 11/3/08 at 3.) As the court observed, the gravamen of this offense was that the failure or refusal to provide medical care caused the death, not the infliction of the injury itself, as with Counts I and III. (Tr. 11/3/08 at 4.) The court went on to observe:

Now my notes don't reflect that there was any such [medical] evidence presented to the jury and the State doesn't cite or quote any such testimony, but I certainly don't want to grant such a motion without giving both sides an opportunity to specifically address this issue. (*Id.*)

The court-below cited State v. Muro, 269 Nebraska 703, 695 N.W.2d 426 (2005) where a similar causation element was held to require proof beyond a reasonable doubt that but for the delay in seeking medical treatment, the decedent would have survived her pre-existing head injury. (Tr. 11/3/08 at 6.) The trial court also discussed Ex parte, Leigh Ann Lucas, 792 So. 2d 1169 (Ala., 2000) and Commonwealth v. Barnhart, 345 Pa. Sup. 10, 497 A.2d 616 (1985) and noted that in all three of these cases, medical testimony had been elicited as to what would have happened if there had been prompt medical attention to establish that the lack of medical care caused death. (Tr. 11/3/08 at 7.)

In light of these very legitimate concerns, another hearing was scheduled to allow a fully briefing and discussion of this issue, but not before the court below offered its analysis of this issue:

. I just – you know, the issue, as I see it is, given the traumatic event that occurred, if the child was taken directly to the hospital, could the child have been saved? Because if the answer is no, then I don't know that you can commit this crime, because the crime is not the act of committing the physical beating, but the act of failing to take the child for medical care. And if medical care wouldn't have made a difference, then I don't know that you can commit the crime." (Tr. 11/3/08 at 7, 10-11; A.R. at 261-262.)

This issue was again considered by the trial court on December 8, 2008. Consistent with State v. Larock, 196 W.Va. 294, 470 S.E.2d 613 (1996), the evidence was evaluated "in the light most favorable to the verdict, in the light most compatible with the verdict" and "all credibility disputes [were resolved] in the verdict's favor. " with an inquiry "as to whether a rational jury could find guilt beyond a reasonable doubt." (Tr. 12/8/08 at 4.)

And just to clarify, this Court has not required that the standard – or requirements of the statute be satisfied only with medical evidence. The three cases that I cited earlier all discussed the medical evidence that was presented at trial and whether that medical evidence satisfied the requirements of that particular statute. But I am not ruling that the standard could not be met by lay testimony. But you know just in terms of what medical treatment is available, whether the medical treatment that's available could save the life of a particular victim, you know, I think that that would just about have to be by medical testimony, although you know, there may be a circumstance where lay testimony could satisfy that requirement.

The Court would find, given the standard and taking the evidence in the light most favorable to the state, that the motion and/or judgment of acquittal be denied as to Count II and this is based upon the type of injuries that were inflicted, the fact – and, again, this is inferences all in favor of the verdict, that the time of death could be as late as 4:00 a.m. And therefore, the jury could have found that she was alive – that [J.W.] was alive for several hours after the injuries. (Tr. 12/8/08 at 7-8.)

The court also specifically cited and relied upon the testimony of THOMAS JACKSON in upholding the conviction upon Count II.

Clearly based upon the testimony of Thomas Jackson, the time – and, of course, I know that his testimony was attempted to be impeached, but, again, you're suppose to find all the evidence in the light most favorable to supporting the verdict – that at the time that the injury was inflicted or injuries, that [J.W.] was still breathing, and therefore was still alive. *And so*

the jury could have concluded that if medical treatment had been sought immediately, that [J.W.] would not have died. And for those reasons and others appearing on the record, the Court would find that the motion as it relates to Count II is denied. (Tr. 12/8/08 at 8.) (Emphasis added.)

Despite acknowledging just a month before that evidence that the failure to provide necessary medical care **caused the death** of J.W. was required as the statute provided, the trial court simply side-stepped this issue. Instead, the trial court determined that because the evidence suggested that the child may not have immediately passed away, the State of West Virginia had satisfied its burden of proof. While the jury quite obviously did conclude that the State's proof was sufficient, this nevertheless begs the question of whether sufficient evidence was elicited to establish beyond a reasonable doubt the causation element of this offense. Further, the jury's conclusion is directly contrary to the statute and to the cases cited by the trial court at the initial post-trial hearing on this issue.

The standard of review for addressing the sufficiency of the evidence in a criminal case was summarized by this Court in Syllabus Point 1 of State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995):

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

WILLIAM JOHNSON respectfully submits that in this case, the evidence was insufficient for a rational trier of fact to find the State proved, beyond a reasonable doubt, all of the essential elements of the crime charged in Count II. By the explicit terms of West Virginia Code §61-8D-2(a), the State must prove that a parent, guardian, or custodian maliciously and intentionally **caused the death** of a child under his or her care, custody or control **by his or her failure or refusal to supply such child with** necessary food, clothing shelter or **medical care** in order to sustain its burden of proof.. (emphasis added.) Thus, the State was not required to prove the identity of the person who fatally injured J.W. to prove Count II but was required to prove that WILLIAM JOHNSON maliciously and intentionally refused to seek necessary medical care, and that the lack of medical care caused J.W.'s death.

To sustain a criminal conviction, the State is required to prove each and every element of the crime beyond a reasonable doubt. This basic rule not only is incorporated in this Court's sufficiency of the evidence standard articulated in Syllabus Point 1 of Guthrie, but also was more specifically stated by this Court in Syllabus Point 3 of State v. Clay, 160 W.Va. 651, 236 S.E.2d 230 (1977):

In a criminal prosecution the burden is on the state to prove beyond a reasonable doubt every essential allegation of the indictment. *Syl Pt. 1, State v. Murphy*, 93 W.Va. 477, 117 S.E. 147 (1923).

This fundamental rule of criminal law has a constitutional basis, as explained by the United States Supreme Court: "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 365, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)

Turning to this Court's consideration of the causation issue, although this statute was promulgated in 1988, no West Virginia case has yet examined sub-section 2(a) of article 8D, chapter 61. Nevertheless, two West Virginia cases warrant mention.

State v. Wyatt, 198 W.Va. 530, 482 S.E.2d 147 (1996) concerned West Virginia Code §61-8D-2(b), and a conviction for causing a death of a child by allowing another to refuse or fail to provide necessary medical care. In reversing this conviction and remanding for a new trial based on instructional error, the constitutionality of this statute was upheld after it was attacked claiming vagueness of the term "custodian." However, no discussion of the sufficiency of the evidence or the issue of causation was undertaken in this case.

A more recent decision dealing with a similar statute was State v. Thornton, ___ W.Va. ___, 720 S.E.2d 572 (2011). Defendant Thornton was charged and convicted of the death of her twenty-two month old child in violation of West Virginia Code §61-8D-4a, child neglect causing death, under the theory that she should have sought medical treatment for her child more quickly. To support this claim, the State of West Virginia elicited testimony from medical providers and the chief medical examiner to establish that had the child been brought to the hospital sooner, he could have been saved. State v. Thornton, supra, 720 S.E.2d at ___. On appeal, the Defendant attacked the sufficiency of the evidence and argued that no witness testified that the child would have survived but for the failure to seek medical treatment sooner, this Court rejected that claim and upheld the conviction.

Defendant Thornton cited State v. Muro, 269 Neb. 703, 703, 695 N.W.2d 425 (2005) also cited by the trial court herein. In Muro, the medical provider testified that the child might have survived with earlier treatment. Such testimony was insufficient to support proof beyond a reasonable doubt that the child would have survived with earlier treatment. This Court distinguished Muro, observing that the medical testimony offered at Thornton's trial while conflicting, was nevertheless sufficient to support the jury's verdict. Thus, Thornton's conviction for negligently causing the death of her child was upheld.

While the applicability of State v. Muro, 269 Neb. 703, 703, 695 N.W.2d 425 (2005) was rejected in the Thornton case, it is nevertheless dispositive of the instant case. Ms. Muro was charged and convicted pursuant to a statute that made it a crime to knowingly and intentionally permit a child to be deprived of necessary care. State v. Muro, *supra*, 269 Neb. At 708. The Nebraska statute also provided for lesser included offenses, such as negligently refusing to provide medical care as was the case in Thornton. Muro was convicted of the more serious felony charge due to the State's contention that she had intentionally, not negligently, failed to provide necessary medical care resulting in death. The Nebraska court determined that while the evidence supported a negligence theory of guilt, it did not support the more serious felony charge.

In evaluating the proof in the case, the Nebraska court focused on a question similar to that initially enunciated by the trial court in the instant case: "...[D]oes the evidence support a finding that [the] death would not have occurred had [the defendant] not failed to seek medical treatment for [the child]?" *Id.* To answer this question, the Nebraska court painstakingly analyzed the medical testimony for proof that Muro's conduct was the proximate cause of the death.

Unlike the instant case, in Muro, medical providers had testified that earlier treatment *might have* provided a chance of survival, and that survival was possible but not probable. However, no medical witness opined that the child *would have* survived if treatment had been sought sooner. State v. Muro, *supra*, 269 Neb. at 713.

Thus to establish that Muro's unlawful conduct was a proximate cause of Vivianna's death, the State was required to prove beyond a reasonable doubt that but for Muro's delay in seeking medical treatment, Vivianna would have survived her preexisting traumatic head injury. We agree with the dissenting judge that the State did not meet this burden. The State proved only the possibility of survival with earlier treatment. Such proof is insufficient to satisfy even the lesser civil burden by proof by a preponderance of the evidence.

Similarly, in Johnson v. State, 121 S.W.3d 133 (Tex.Ct.App. 2003), the defendant was convicted of causing injury to a child by failing to seek medical treatment. One of the medical experts testified that the injuries to the child probably occurred within an hour of the child being declared dead, but could not testify if the injuries were several hours old or perhaps only minutes old. In setting aside this conviction, the Texas Court of Appeals, 121 S.W.3d at 136, held:

While the evidence may or may not show that Appellant could have sought medical treatment faster than she did, such evidence is not sufficient to support a finding that Appellant either intentionally or knowingly *caused* serious bodily injury to the child by any delay in seeking medical treatment. Because the evidence fails to satisfy the causation element of the offense, the evidence is legally insufficient to support the judgment. (Emphasis added).

In Lucas v. State, 792 So.2d 1169 (Ala. 2000), also cited by the trial court below, the defendant was convicted of failing to obtain medical treatment for her son, causing his death. Neither of the State's medical experts testified that earlier medical treatment would have prevented the child's death. In setting aside this conviction and entering a judgment of acquittal, the Alabama Supreme Court, 792 So.2d at 1173, held, "...the record does not contain evidence tending to prove that, *but for* Lucas's failure to seek prompt medical treatment for her injured son, he would have survived, or survived longer. Accordingly, the State failed to prove the essential element of causation." *See also State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006)(Trial counsel's failure to challenge sufficiency of the evidence in case involving failure to provide medical treatment, resulting in death of a child, constituted ineffective assistance of counsel because the State's medical expert could not state earlier treatment would have prevented the death); Johnson v. State, 121 S.W.2d 133 (Tex. App. [2nd] 2003)(State was required to prove that Appellant intentionally caused serious bodily injury to child by denying the child reasonable medical treatment and proof of failing to provide medical care alone would not satisfy the State's burden of causation.)

Unlike Thornton, unlike Muro and all other cases cited, not one single shred of medical evidence concerning the effect of or need for medical treatment in terms of preventing or causing J.W.'s death was elicited. In fact, the only evidence at trial concerning J.W.'s condition after the infliction of these serious injuries came from the medical examiner during

his questioning by the prosecutor, when Dr. Boiko volunteered that he “could not say for sure how long time it was she was alive after injury” but that it was only a “short time” certainly implying that medical intervention would have been futile. (Trial Tr. 706.) At no time did counsel for the State of West Virginia ever inquire further about obtaining medical treatment for J.W. and how it would have or could have, if at all, impacted J.W.’s chances for survival. Without evidence concerning whether J.W. would have survived if she had been taken to the hospital after her injury, or that medical intervention would have prevented death, there is reasonable doubt. This very specific causation element in this statute, critical to the State’s case, was completely ignored by the State of West Virginia and by the trial court.

In fact, the focus of the State’s case throughout trial was that the injuries to J.W. were severe, and were inflicted and calculated to cause her death. (*See, e.g.*, Closing Argument, Trial Tr. (1134-1135.)) The medical examiner painstakingly described each and every external mark on J.W.’s body, commenting on the “fresh bruising”. (Trial Tr. 692-697.) He described the severe injury to her head and the compound skull fracture. (Trial Tr. 699, 701, 703, 710.) Dr. Boiko noted that the “cause of death was certainly injury to the head.” (Trial Tr. 706.) All indications were that the injury to the head and the bleeding and swelling of the brain were new and recent injuries. (Trial Tr. 709.) Moreover, contrary to the trial court’s opinion, the fact that the child may have survived her injuries for some brief period of time does not support a finding beyond a reasonable doubt that the failure or refusal to provide medical care resulted in her death. Inasmuch as there is no evidence in the record establishing this critical causal link beyond a reasonable doubt, a judgment of acquittal for WILLIAM JOHNSON on this charge is warranted.

2. The Court erred as a matter of law by permitting the jury to find the Defendant guilty of Counts I and II of the indictment. The jury found the Defendant guilty of second degree murder and guilty of murder of a child by failing to provide medical care. These verdicts are factually inconsistent based upon the evidence in this case, and accordingly, the court below erred in failing to correct this error when the jury questioned this inconsistency and advised the court of their confusion during its deliberations.

Closely related to the argument above, and further supporting the Defendant’s contention that the proof adduced as to Count II of the indictment is insufficient, the convictions upon Counts I and III further undermine and are inconsistent with that in Count

II. This inconsistency was revealed by the jury's confusion and question concerning whether it was possible to convict the Defendant of Counts I and II when the jury posed the following question during deliberations:

If we find the defendant guilty of a lesser charge within Count No. 1. does that preclude us from a finding of guilty on Count 2? (Trial Tr. 1181, A.R. 237F.)

After a great deal of discussion as to how the court should respond to this questions, the court-below answered the question:

The instructions that the Court read to you and that you all were provided contain what the law calls "elements" of those offenses. It says – the part in those instructions is where it says, you know, "[t]o find the defendant guilty, the State must establish beyond a reasonable doubt – overcome the presumption of innocence and establish beyond a reasonable doubt that: the defendant; in Wood County..." okay, those are the elements.

If you read that, you will see that the elements for Count I and Count II, that they each have separate elements. Count I, just generally speaking, is what we refer to as a general murder charge, okay? If anybody kills anybody, they can be charged under that offense.

Count II is a very specific crime where there need to be that relationship of guardian or custodian, plus, you know, additional elements for that offense. So you need to look at the elements as set out in the instructions.

It is possible to find someone guilty of both Count I and Count II. It is also possible to find someone guilty of a lesser of Count I, lesser degree offense than murder in the first degree, and Count II, as long as you are satisfied beyond a reasonable doubt that the elements of those offenses have been established by proof beyond a reasonable doubt.

Now if that doesn't answer your question – we didn't know exactly what the question meant. We think that addresses the question. If it does not, let us know and we will attempt to address it again. (Trial Tr. 1181-1190.)

It may be true that under some set of facts and circumstances, it would be possible to find an individual guilty of some degree of homicide as well as causing a death by failing to provide necessary medical care when acting as a guardian or custodian. That cannot be said, however, given the evidence in this case. The jury was undoubtedly confused because the State of West Virginia prosecuted a charge against WILLIAM JOHNSON in Count II that was not consistent with its theory of the case or with the evidence at trial.

As has been demonstrated infra., the State offered no proof in support of the charge in Count II. Instead, the State relied and played upon the emotions of the jury that such a case as this always evokes. No evidence whatsoever was adduced by the State of West Virginia that a failure to provide medical care caused J.W.'s death. This was no doubt because any inquiry into that aspect of proof would undoubtedly have revealed that J.W.'s death was not caused by a lack of medical treatment as the brief comments volunteered by the medical examiner reveal: this child was not going to survive given the severe injuries that she sustained. Every piece of medical evidence introduced by the State of West Virginia supported that conclusion. The burden of proof to establish each and every element of the offense charged is upon the State of West Virginia. *Syl Pt. 1, State v. Murphy*, 93 W.Va. 477, 117 S.E. 147 (1923). It was not incumbent upon the Defendant to disprove the cause of death. That being the case, the State cannot now argue that a lack of medical care caused J.W.'s death.

In setting aside a verdict of guilt upon in very similar circumstances the Texas Appellate Court observed, "[t]he wanton killing of a young child is always tragic. No person of reasonable sensibilities could feel anything but anger and grief. But we are bound by the law and the record before us " *Johnson v. State*, 121 S.W.3d 133, 138 (2003). Similarly, in the instant case, based on the plain terms of the statute and the absence of any evidence to support Count II, the verdict of guilty as to that count cannot be sustained.

3. The Wood County Circuit Court erroneously denied the Defendant's "*Renewed Motion for New Trial*" in light of the post-trial discovery that Thomas Jackson, the "jailhouse snitch" who testified to incriminating statements allegedly made by Mr. Johnson had received extraordinarily special treatment in connection with his pending charges. The plea agreement with THOMAS JACKSON presented by the State of West Virginia during WILLIAM JOHNSON's trial was discarded and drastically modified from a felony plea with a seven-year sentence to a misdemeanor plea with credit for time served plea.

Former Wood County Prosecuting Attorney Ginny Conley changed the Plea Agreement after WILLIAM JOHNSON's conviction and sentencing and during her final hours in office as Wood County Prosecuting Attorney on December 31, 2008. The manipulation of the timing of this exceptionally favorable plea bargain granted to THOMAS JACKSON as well as the manner in

which is was presented to the jury constitutes misconduct by the Wood County Prosecutor's Office which violated the due process rights of the Defendant.

After sentencing, Attorney William Merriman asked permission to withdraw from this case and requested that appellate counsel be appointed. (Tr. 12/8/08 at 22.) This motion was granted and thereafter, the undersigned was appointed to represent WILLIAM JOHNSON. (A.R. at 280.) In the course of investigation of matters on behalf of WILLIAM JOHNSON, it was discovered that THOMAS JACKSON had been the beneficiary of an incredibly favorable plea bargain after WILLIAM JOHNSON's trial, after post-trial motions were ruled upon and after sentencing was concluded. Based upon this discovery, Defendant filed an extensive *Renewed Motion for New Trial* citing this discovery as yet another ground for a new trial. (A.R. 293-434.) Pursuant to *Order* of the court-below, the State responded. (A.R. 437; 438-470.)

The initial hearing upon the *Renewed Motion for New Trial* was held on September 28, 2009. Counsel for WILLIAM JOHNSON called Ginny Conley, the former Wood County Prosecutor as a witness to explain how the sweet-heart deal for THOMAS JACKSON came to pass. (Tr. 9/28/09 at 6.) After brief testimony, Assistant Prosecutor Jodie Boylen interrupted the presentation of evidence and advised the court-below that it appeared that she was "going to be a witness in this matter" and asking to reschedule the matter so that another attorney from the Wood County Prosecutor's Office could represent the State of West Virginia. (Tr. 9/28/09; A.R. 467-468.)

A hearing in December 2009 was later continued by the court. Next, the Wood County Prosecutor's Office notified the Defendant and the court that the Office was seeking disqualification and the appointment of a Special Prosecutor, thus delaying a hearing scheduled in January 2010. (A.R. 471-473.) Following more wrangling, the Wood County Prosecutor was finally disqualified after a hearing on May 17, 2010 and the matter was sent to the West Virginia Prosecuting Attorney's Institute for assignment of a Special Prosecutor. (A.R. 469-470; 474-487.) Thereafter, the Pleasants County Prosecutor was appointed to handle this matter. (A.R. 479-480.) Following a two and one half year delay, the evidentiary hearing was finally resumed on May 11, 2011.⁹

⁹ Following the appointment of the Pleasants County Prosecutor's Office, then Prosecuting Attorney Timothy Sweeney was appointed as Circuit Judge and a new Prosecutor was appointed to that post which caused some additional delay in scheduling this matter for hearing.

At the May 11, 2011 hearing, Ginny Conley, former Wood County Prosecutor; Jason Wharton, current Wood County Prosecutor; and George Cosenza, THOMAS JACKSON's defense attorney were called as witnesses on behalf of WILLIAM JOHNSON to attempt to unravel this miraculous plea agreement.

It was undisputed that THOMAS JACKSON had come forward with his much needed assistance for the prosecution shortly after a pre-trial hearing in the JOHNSON case held on April 7, 2008. At this hearing, the State of West Virginia had moved to withdraw its Rule 404(b) evidence against WILLIAM JOHNSON. (Trial Tr. 4/7/08 2-3.). No explanation for this move was given, and the State of West Virginia later offered and was permitted to introduce the exact same 404(b) evidence at trial.

At the time THOMAS JACKSON came forward with the alleged confession of the Defendant, JACKSON was incarcerated at the North Central Regional Jail in lieu of bond upon the following pending criminal offenses in Wood County, West Virginia:

- a) False pretenses in case 06-M-4775 (dismissed by State on 5/6/08). (A.R 661-679.)
- b) Fraudulent use of an access device in case 07-F-289. (A.R. 680-692.)
- c) Fraudulent use of an access device in case 07-F-279. (A.R. 693-699.)
- d) Fraudulent use of an access device in case 07-F-288. (A.R. 700-710.)
- e) Unauthorized use of access device in case 07-F-239 (A.R. 711-713.)
- f) Worthless check in case 07-M-2501 (A.R.714-717.)
- g) Worthless check in case 07-M-2631 (A.R.718-721.)
- h) Worthless check in case 07-M-2632 (A.R.722-724.)
- i) Worthless check in case 07-M-3150 (A.R.725-727.)
- j) Worthless check in case 07-M-3151 (A.R. 728-730.)
- k) Worthless check in case 07-M-3152 (A.R. 731-733.)
- l) False pretenses in case 07-M-2172 (A.R. 734-736.)
- m) Fraudulent use of an access device in case 08-F-48, an information filed by the State of West Virginia in Wood County Circuit Court on April 8, 2008 (A.R.741-776.)

In addition to the four pending felony charges and eight misdemeanor charges, Thomas W. Jackson also faced a parole revocation upon his prior felony conviction in Wood County case 03-F-42 for the offense of Fraudulent Schemes. (Tr. 5/11/11, 72; A.R. 558.) His past criminal history also included a misdemeanor conviction in case 04-F-17 in the Circuit Court of Cabell County. (Tr. 5/11/11, 27; 32-33; 72; A.R.337-340s-348.)

Before THOMAS JACKSON came forward, the State of West Virginia had already bypassed presenting his case to a grand jury and had filed an Information against him in Wood County Circuit Court case 08-F-48. (A.R. 741.) Jackson was charged in that Information with one felony count of fraudulent use of an access device in violation of West Virginia Code §61-3C-13(c), filed by Jason Wharton, the Assistant Prosecuting Attorney overseeing the prosecution of Thomas Jackson in April 2008. (Tr. 5/11/11, 7.) Mr. Wharton recalled that a plea agreement had been reached with Thomas Jackson on the day of Mr. Jackson's preliminary hearing in Wood County Magistrate Court. (Tr. 5/11/11, 9; A.R. 302-309.) Court documents from Wood County Magistrate Court in cases 07-F-239; 07-F-279; 07-F-288 and 07-F-289 also indicate that Thomas Jackson was to plead guilty to a felony charge in Wood County Circuit Court. (A.R.678.)

On March 4, 2008, Thomas Jackson's Attorney George Cosenza wrote to Assistant Prosecutor Jason Wharton and inquired about when Mr. Wharton would have the plea agreement ready in Mr. Jackson's case and further stated that his client was "anxious" to bring his cases to an "expeditious conclusion." (Tr. 5/11/11, 88.) On March 10, 2008, Assistant Prosecutor Jason Wharton responded to Mr. Cosenza and stated that he was "currently working on [Mr. Jackson's] file" and that he would fax a copy of the plea agreement and the information he anticipated filing to Mr. Cosenza as soon as those documents were completed. (Tr. 5/11/11, 88.)

On April 7, 2008, Jason Wharton wrote to Mr. Cosenza and informed him that the Information against Mr. Jackson had been filed, and that he would notify Mr. Cosenza of the judge to which the case had been assigned as soon as he determined that fact. (Tr. 5 /11/11, 89.) On that same date, a status hearing was conducted concerning State v. Thomas W. Jackson in case 07-B-5 in which the court was advised that an Information against Mr. Jackson had been filed and a plea agreement was anticipated. (Transcript of hearing in State v. Thomas Jackson, 07-B-5 and Order, *Exhibits B and C to "Motion for Judicial Notice"* A.R.508-513; 514, 777-781.)

Jackson agreed that “in April of ’08, before [he] talked to anyone in this case . . . [he had] worked out a plea with the Wood County Prosecutor’s Office;” and he was pleading to an Information charging him with a felony. (Trial Tr. 831-832.) The plea was “basically” that he would plead guilty to one felony count of fraudulent use of an access device, eleven other pending charges would be dismissed, the state would not file a recidivist charges, he would make restitution, and he would be sentenced to a seven-year sentence to run concurrently with his parole revocation. Further, Jackson agreed he would make no request for probation or other alternative sentence. (Trial Tr. 832.) This deal had been “worked out” with the State of West Virginia, but had not been “committed to writing,” and it was anticipated that Jackson would “go back to court on it fairly soon.”

On May 2, 2008, shortly after giving a statement to deputies implicating WILLIAM JOHNSON, bond in case 08-F-48 / 07-B-5 was reinstated in the amount of \$2500 without objection by and with the cooperation of the State of West Virginia and Jackson was released from jail. (*Exhibit D to “Motion for Judicial Notice”* .A.R. 515, 745.) Prosecutor Conley stated that she believed that Mr. Jackson could have posted bond at any time he wished before that day. (Trial Tr. 877; Tr. 5/11/11, 46.)

As of the date he appeared to testify in the trial of State v. William Johnson, THOMAS JACKSON had not entered his plea of guilty “as a result of his cooperation in the William Ryan Johnson murder case.” (Trial Tr. 874-875.) Jackson stated that his plea had not been entered “because [he] didn’t want to be in jail at the time that [he] was going to be testifying in a murder case.” (Trial Tr. 876.) The State repeatedly reiterated that THOMAS JACKSON was facing spending seven years in prison to run concurrently with his parole revocation, less any credit for good time. (Trial Tr. 882-883.)

In her opening statements to the jury, counsel for the State of West Virginia also outlined the status of Thomas Jackson’s plea agreement and pending charges:

Now after that happened, after this conversation in the jail that night after lockdown, Thomas Jackson got in touch with the Wood County – with his attorney, and his attorney contacted our office for him to give this information. And the interesting thing about Mr. Jackson is, he already had had a plea bargain worked out with the cases that he was working on. He was staying in jail to work off some of his time, because he knew he was going to serve time, and he had been in there for seven or eight months.

The plea had already been arranged. When he sat and gave the statement in this case, he did not ask for anything else. He said he just wanted to tell the truth about this case and about what this defendant did to this baby. He also – Thomas Jackson also has a small child, Marcus. So there --- he sat and gave this statement without anything in exchange. (Trial Tr. 486.)

Jackson informed the jury that his “deal [hadn’t] changed at all. (Trial Tr. 833, 834.) In return for his statement, Jackson claimed he had “no promise of any better plea from the Wood County Prosecutor’s Office.” With regard to the hope of a better offer, the following exchange occurred:

BY MS. CONLEY

Q: But as you gave your statement and as you sit there today, you have no promise of any better plea from the Wood County Prosecutor’s Office?

BY THOMAS JACKSON:

A. No. In fact, my lawyer just received a letter yesterday or the day before that had the same exact plea that you just read that I had long before I ever came forward.

Q: But you’re a smart guy, you’ve been through this system before, right?

A: Once, yeah.

Q: And you know that the State can come in and change that plea right up until the time the judge accepts the plea, correct?

A. I guess so, yeah.

Q: Okay. No promises have been made, but I want the jury to know and for you to confirm with them that that is something that could happen?

A. It could, I guess, yeah. (Trial Tr. 835.)

During closing argument, counsel for the State of West Virginia again argued extensively concerning Thomas Jackson’s testimony and how it supported a conviction in this case. (Trial Transcript, Vol. III, 1127-1133, 1169-1171.) This argument included the following comments:

Let’s talk about Thomas Jackson. Thomas Jackson came forward as a convicted felon, and the State presented him to you as a witness in this trial. And Thomas Jackson, you all get to decide the credibility of Mr. Jackson. You get to decide, based on what you’ve heard in the courtroom, his

forthrightness, his history, you get to make that decision. But before you make that decision, I want to make sure you understand that what Mr. Jackson said to you in the courtroom, a lot of it was corroborated with other evidence in this case. (Trial Tr. 1127.)

* * *

And he gave that statement with no incentive to lie and no promise for anything beyond when he gave that statement. He became a snitch without any promise beyond that. He had his plea bargain, it had been worked out with the State before he came forward, and as he sat there today and testified for you, he has no other indication, other than he is going back to prison for a seven-sentence.

* * *

And the confession to Jackson, you guys have to decide that. His detail, the gaps he filled and the corroborating make Jackson believable. **And there is no hidden agenda from the State of West Virginia** and the lynch mob that I run that anything but what you heard in this courtroom is the case. The bottom line is, he gave the statement with the plea that he already had, and **we have made in perfectly clear that after this case his plea could be changed and he knows it could be.** And that is for you to know the truth of what the State has said about this case. But as far as he's concerned, he's going to prison for seven years, just like he sat in jail for seven or eight months to work off his time. (Trial Tr. 1171.)

The letter referred to by THOMAS JACKSON at trial was written on August 15, 2008. Just days before trial in this case began, the Wood County Prosecutor's Office sent this letter outlining the terms of the plea agreement reached between the State of West Virginia and THOMAS JACKSON to his lawyer, George Cosenza. (A.R. 737-738.) According to Jason Wharton, the plea offer set forth in this letter included and resolved all pending Wood County charges against Mr. Jackson as set forth in paragraph 2; and was the same agreement struck with Thomas Jackson at his preliminary hearing. (Tr. 5/11/11, 16, 27.) In fact, Ms. Conley informed counsel and the court that the plea "had not been put in writing," but "for purposes of the jury, I put that letter in writing just so we had a document to actually look at." (Trial Tr. 73.) She also acknowledged that "the hearing for Mr. Jackson was continued on his information as a result of him coming forward." (*Id.*)

Jason Wharton further testified about this letter as follows:

The way I recall the letter coming into place, he was – Mr. Jackson was going to be a witness. Ms. Conley asked me to give her a copy of the plea agreement that had been reduced to writing, and it hadn't been reduced to writing at that point in time in a formal form to provide to Mr. Cosenza. So I wrote that letter, and then I was asked to include the final paragraph which is included on the second page. (Tr. 5/11/11, 21.)

The final paragraph of the August 15, 2008 letter to George Cosenza (Thomas Jackson's attorney) was included at the request of Wood County Prosecuting Attorney Ginny Conley and stated:

As a result of Mr. Jackson's cooperation in the William Ryan Johnson murder case, the plea hearing in this matter was continued. Please contact this office to discuss the plea further and to set up another hearing date. (Tr. 5/11/11, 21, 49; A.R. 738.)

When asked what she intended to convey by the final sentence in the letter, Ms. Conley stated:

I'm thinking, you know, what's going to happen from there. I mean, like plea hearing, or you know, he's testifying, you know, that kind of thing. Just to discuss it further, what was going to happen from there. (Transcript 5/11/11, 51.)

Ms. Conley decided that she would not allow Thomas Jackson to enter his plea before testifying in the murder trial of William Johnson. (Tr. 5/11/11, 52.) When asked why Stephanie White had in fact pled guilty before testifying against William Johnson, when Thomas Jackson had not, Ms. Conley denied that she trying to "keep [her] options open with Mr. Jackson," but "just wasn't finalizing the plea until the trial was over. (Tr.5/11/11, 53.) When pressed further, Ms. Conley stated:

Because part of --- I don't know. I really thought we would have him testify, and when he sat on the witness stand he was look(ing) at seven years, I think, and I wanted the jury to know exactly what his situation was. I wanted them to know the whole picture. And I feel like we explained that to the jury probably more than people on my side of the table would have liked for me to, but that's why. (Tr. 5/11/11, 53-54.)

By contrast with the State of West Virginia's position and Mr. Jackson's testimony, George Cosenza stated that "there was no signed plea agreement" and "there were communications. . . but a formal plea agreement had [not] been reached." (Tr.5/11/11, 75.) Mr. Cosenza persisted in this position despite the fact that the letter of August 15, 2008 explicitly stated that "this [letter] serves to confirm the plea agreement reached..." (Transcript 5/11/11, 76.)

A hearing scheduled by the Court in State v. Thomas Jackson, 08-F-48 for November 18, 2008 did not take place. Neither Mr. Wharton nor Mr. Conley could explain why. (Tr. 5/11/11, 28-29, 55, 744.) George Cosenza testified that the November 18, 2008 hearing was

cancelled at his request, but stated that the reasons for cancelling the hearing were covered by the attorney / client privilege. (Tr. 5/11/11, 76-66.) On November 18, 2008, George Cosenza wrote to Prosecutor Conley and asked her to “please contact [him] so [they could] discuss the ... the Jackson matter.” Attorney Cosenza further wrote that he wished to “resolve both these cases before [Ms. Conley left] office” at the end of 2008. (Transcript 5/11/11, 81.)

The plea agreement set forth in the letter of August 15, 2008 between Thomas Jackson and the Wood County Prosecutor’s Office was never finalized and Mr. Jackson did not plead guilty to the Information filed in case 08-F-48. Further, after writing this letter, Jason Wharton was not involved in the prosecution of Thomas Jackson. (Tr. 5/11/11, 28, 78.) Mr. Wharton agreed that the original plea agreement was “a pretty tough plea” which was warranted given Mr. Jackson’s two prior felony convictions and his parole status when the twelve new offenses outlined herein were committed. (Tr. 5/11/11, 26.)

Mr. Wharton was unsure who was overseeing the prosecution of Thomas Jackson’s case between August 2008 and December 2008. (Tr. 5/11/11, 25.) However, on December 29, 2008, Attorney Cosenza’s office faxed a letter to Prosecutor Conley’s office asking her to “please send [him] the plea agreement on Tom Jackson today so [they could] arrange a hearing before January 1st.” (Tr.5/11/11, 82; A.R. 787.) Thus, sometime between November 18, 2008 and December 29, 2008, Attorney Cosenza and Prosecutor Conley had additional discussions concerning Mr. Jackson’s plea agreement. (Tr.5/11/11, 82.) Pursuant to the new *Plea Agreement* of December 31, 2008 and faxed by Prosecuting Attorney Conley to Attorney Cosenza on that date, and promptly accepted by Thomas Jackson, Mr. Jackson pled guilty to a single misdemeanor charge. (A.R. 522-523; 785-786.) While there was no agreement as to sentencing, Jackson was sentenced to time already served, or approximately eight months already spent in jail. He was also required to pay restitution. (Tr. 5/11/11, 24, 79; A.R. 785-786.)-

Jason Wharton stated that following his election as Wood County Prosecuting Attorney in 2008, a handful of cases had been left for completion by his predecessor, Ginny Conley. Mr. Wharton explained:

---there were a handful of cases that Ginny resolved. I want to say it was in her last week in office, because when I came in and started trying to organize the office, there were some letters in the conference room where she had resolved some cases resulting in some pleas that I really wasn’t sure if I was going to honor them or not... (Tr. 5/11/11, 23.)

Thomas Jackson's case was one of those cases where a plea agreement was struck and prepared just as Prosecuting Attorney Ginny Conley was leaving office at the end of December, 2008. Ms. Conley acknowledged that "it was right before [she] left office that [she] made a final decision" about Mr. Jackson's plea agreement. (Tr. 5/11/11, 23; 55.) Jackson's new *Plea Agreement* was finalized on February 9, 2009 (although the date on the agreement is February 9, 2008) in Wood County Magistrate Court case 09-M-952. (Tr.5/11/11, 85; A.R. 785-786.) No plea was ever entered by Thomas Jackson in case 08-F-48 charging him with a felony; in fact, this Information was dismissed on May 21, 2009. (Tr. 5/11/11, 29, 743.) No parole revocation proceeding ever occurred with regard to Thomas W. Jackson. (Transcript 5/11/11, 27; A.R. 654.)

The trial court rejected the Defendant's claim that the Prosecutor's conduct violated his due process rights due to any failure to disclose the plea arrangement with Thomas Jackson. (A.R. 572-609.) As there was not a more lenient plea agreement "formal or informal" other than what was disclosed during the trial, no due process violation was determined. (A.R. 604-605.) However the blatant manipulation of the timing of Thomas Jackson's plea bargain by the State of West Virginia during and after the trial of this matter received no comment and apparently was not considered by the court-below whatsoever.

It is evident that any jury evaluating the credibility of a cooperating witness would perceive the witness in one manner if informed that the witness was facing seven years in prison with no promise of anything else versus being told that the witness would never see the inside of a jail cell again. By permitting the State of West Virginia to construct the fiction that THOMAS JACKSON was to receive no consideration whatsoever from coming forward to assist with this prosecution, the court below permitted the State to avoid its ethical obligations of fair dealing by making no explicit promises to Jackson before the trial, by preparing and parading an obviously "pretend" plea agreement before the jury and then making a vague assertion to the jury that the plea might change. It was obvious that the Prosecuting Attorney had every intention of making a sweetheart deal and that she chose to wait until WILLIAM JOHNSON's trial was concluded before she did so. This manipulation and course of behavior at trial smacks of prosecutorial misconduct.

The importance of a prosecutor's duty to deal fairly with an accused has been repeatedly recognized by this Court. "The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid

the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law." *Syl. Pt. 3, State v. Bond*, 160 W. Va. 234, 233 S.E.2d 710 (1977); *Syl. Pt. 2, State v. Kendall*, 219 W. Va. 686, 639 S.E.2d 778 (2006); *Syl. Pt. 5, State v. Bolen*, 219 W. Va. 236, 632 S.E.2d 922 (2006). "In the criminal arena, the prosecutor is the guardian of the State's interest in the fairness and integrity of our criminal justice system." *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 415, 624 S.E.2d 844, ____ (2005). "In keeping with this position, he . . . must deal fairly with the accused as well as other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality[.]" *Syl. Pt. 3*, in part, *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977). *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 415, 624 S.E.2d 844, ____ (2005).

As this Court explained in *State v. Moose*, 110 W. Va. 476, 158 S.E. 715 (1931), "a prosecutor may prosecute vigorously, as long as he or she deals fairly with the accused; but he should not become a partisan, intent only on conviction". *State v. Hamrick*, 216 W. Va. 477, 481, 607 S.E.2d 806 (2004). While "[a] prosecutor may argue all reasonable inferences from the evidence in the record, [i]t is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw. *Syl. Pt. 7, State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988); *State v. Critzer*, 167 W. Va. 655, 280 S.E.2d 288 (1981). As was stressed in *England*, the underlying objective of this rule is to prevent "the use of the prosecutor's status as a means to bolster witness credibility." 180 W. Va. at 351, 376 S.E.2d at 557.

In this case, the jury was informed repeatedly by the prosecutor that THOMAS JACKSON had no promise of a better plea, yet maybe, possibly, perhaps the door was open for some future, undefined and amorphous agreement. The Defendant had no way whatsoever to counteract such a ploy, as the possibilities for modification of a plea agreement are too numerous to conjure. Thus, the *Critzer* and *England* rule was violated by the prosecutor's presentation and strategy in this case, such that "manifest injustice has resulted through prosecutor's comments and that [WILLIAM JOHNSON] was prejudiced thereby." *State v. Ocheltree*, 170 W. Va. 68, 73, 289 S.E.2d 742, ____ (1982); *State v. Sulick*, No. 11-0043 (W. Va. Feb. 2012.) Thus, "...there is a strong possibility that the jury's evaluation of the evidence [elicited from Thomas Jackson] may have been tilted toward a finding of guilt

beyond a reasonable doubt through inappropriate prosecutorial comment” concerning Mr. Jackson’s plea agreement. State v. Hamrick, 216 W.Va. 477, 482, 607 S.E.2d 806 (2004).

“Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.” *Syl Pt 6, State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995). While prosecutorial misconduct may not always warrant a new trial, when improper remarks and conduct of the prosecution in the presence of a jury which clearly prejudice a defendant or result in manifest injustice will result in a reversal.. State v. Beckett, 172 W. Va. 817, 310 S.E.2d 883 (1983); State v. Buck, 170 W. Va. 428, 294 S.E.2d 281 (1982).

The jury was completely misled about what would happen to Mr. Jackson, whose dramatic reversal of fortunes could not possibly have been envisioned based upon the vague comments made by the prosecutor concerning her ability to change the deal. These remarks were extensive, covering opening statement, the testimony of Mr. Jackson, the cross-examination of WILLIAM JOHNSON and culminating in closing argument. Absent the testimony of Thomas Jackson, a “most significant witness” the State’s case was extremely questionable. Of note is the fact that the State had such concerns with its evidence on April 7, 2008 that the State withdrew its anticipated Rule 404(b) evidence. Finally, the prosecutor’s comments were quite deliberately placed before the jury in an effort to convince the jury of Mr. Jackson’s sincerity and truthfulness in the face of a seven year sentence that the Prosecutor had absolutely no intention of enforcing.

While it is certainly true “that prosecutors have broad latitude concerning entering into plea agreements, this latitude is not unbridled.” A prosecutor occupies a “unique role in the criminal justice system.” State ex rel. Skinner v. Dostert, 166 W. Va. 743, 278 S.E.2d 624, 631 (1981). Moreover, “[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions

normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.” State ex rel Hamstead v. Dostert, 173 W.Va. 133, 138, 313 S.E.2d 409 (1984).

In connection with this duty to prosecute, it is well settled that, that the prosecuting attorney is vested with discretion in the control of criminal causes, which is committed to him for the public good and for the vindication of the public interest.” State ex rel. Skinner v. Dostert, 166 W. Va. 743, 278 S.E.2d 624, 631 (1981). This extends to determining the charge to be sought in a particular case. As was stated in Skinner, 166 W. Va. at 752, 278 S.E.2d at 631: “[T]he prosecutor in his discretion may decide which of several possible charges he will bring against an accused.” Nonetheless, this discretion has limits. The prosecuting attorney can choose not to prosecute a case or, may dismiss a case already filed, “when in good faith and without corrupt motivation or influence, he thinks that the guilt of the accused is doubtful or not capable of adequate proof.” *See generally*, Annot., 155 A.L.R. 10; 63 Am.Jur.2d, *Prosecuting Attorneys* § 26 (1972).

“While the prosecutor has discretion in the control of criminal cases, he must exercise that discretion so as to fulfill his duty to the people. W. Va. Const. art.3, §2. The courts of the State are open to all who seek redress of grievances. W. Va. Const. art.3, §17. As criminal offenses are offenses against the State which must be prosecuted in the name of the State, W. Va. Const. art.2, §§6,8; W. Va. Code §62-9-1(1977 Replacement Vol.); Moundsville v. Fountain, 27 W. Va. 182 (1885), the prosecutor, as the officer charged with prosecuting such offenses, has a duty to vindicate the victim's and the public's constitutional right of redress for a criminal invasion of rights. The "spirit of the law" has long been and it has long held that “[t]he public has rights as well as the accused, and one of the first of these is that of redressing or punishing their wrongs.” Ex parte Santee, 2 Va.Cas. 363 (1823). State ex rel. Skinner v. Dostert, 166 W. Va. at 752-753, 278 S.E.2d at 631.:

Based upon these facts and circumstances, the *Plea Agreement* produced by the State of West Virginia on August 15, 2008 and represented to the jury to be the *Plea Agreement* that the State of West Virginia and Thomas Jackson had agreed upon was inaccurate and misleading. In reality, Thomas Jackson received far more lenient treatment in exchange for his testimony than was provided to the Defendant, to the Court and to the jury.

As is obvious from this detailed recitation of events, the State of West Virginia manipulated the timing of THOMAS JACKSON's plea to present the most favorable picture of possible of this witness before the jury. Knowing full well that the plea bargain presented to the jury at trial was not going to go forward, the State of West Virginia nevertheless permitted the jury to believe that in all likelihood THOMAS JACKSON was going to serve seven years for his criminal activities. This is a far cry from pleading guilty in magistrate court to a single misdemeanor charge and serving zero time. Thomas Jackson was rewarded by the Prosecuting Attorney for his testimony with a misdemeanor plea in the very last hours of her term as Prosecuting Attorney. The manipulation of the timing of this "deal" renders the representations made by the State of West Virginia at trial inherently unfair. As a result, William Johnson has been deprived of due process of law.

4. William Johnson's trial counsel failed to address the issue of mercy in any meaningful fashion during his closing argument.

The jury empanelled in WILLIAM JOHNSON's trial was asked to consider the issue of mercy as to two of the three counts in the indictment – both as to Count I and as to Count II. The Defendant decided not to seek a bifurcated trial, thus, it was imperative that his counsel address the issue of mercy during his closing.

In this regard, WILLIAM JOHNSON's trial counsel stated as follows:

You have an issue of mercy on two of these charges. We don't believe that the State has met its burden of proof in this case on any of these charges, and I'll tell you why in a little bit. But I have to address that issue, and we want you to consider that if you have to. And I'm obligated to say that. (Trial Tr. 1138.)

While trial counsel did an outstanding job of arguing with regard to the evidence in this case, the issue of mercy was never again mentioned during closing argument, nor were any arguments given in that regard. This Court has previously recognized in a number of cases that a failure to argue mercy constitutes ineffective counsel to fail to address the issue of mercy in closing argument. Schofield v. West Virginia Department of Corrections, 185, W.Va. 199, 406 S.E.2d 425 (1991); State v. Painter, 221 W.Va. 578, 655 S.E.2d 794 (2007.) "The determination of whether a defendant should receive mercy is so crucially important that justice for both the state and defendant would be best served by a full presentation of all

relevant circumstances without regard to strategy during trial on the merits.’ Schofield, 185 W. Va. at 207, 406 S.E.2d at 433.

Absent any meaningful argument regarding mercy, particularly in a case where the jury could consider mercy with regard to two of the three charges requires reversal of the Defendant’s convictions herein.

5. The Court erred by denying the Defendant’s motions for a mistrial following a spectator loudly declaring that Mr. Johnson was a “liar” while Mr. Johnson was testifying before the jury in the trial of this matter.

At trial, WILLIAM JOHNSON made the decision to take the witness stand and testify on his own behalf. While testifying and during a critical point in his testimony where he was relating his conversations with STEPHANIE WHITE and was explaining how he had asked her why she had lied to the police, an unidentified spectator loudly stated, “liar.” (Trial Tr. 1025.) After the proceedings were halted briefly, this spectator left the courtroom, stating that she could not “listen to this.” (Trial Tr. 1026.) The Court directed that this spectator could not return to the courtroom and instructed the jury to disregard this event. (Id.) The court also denied the Defendant’s motion for a mistrial. (Trial Tr. 1048-1050.)

It is true that “[t]he decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. A trial court is empowered to exercise this discretion only when there is a “manifest necessity” for discharging the jury before it has rendered its verdict. This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court’s discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.” State v. Lowery, 222 W.Va. 284, 288, 664 S.E.2d 169 (2008). However, the facts of Lowery are distinguishable from those herein. In Lowery, a spectator yelled out “you bastard” as the victim gave her testimony to the jury. In this case, the truthfulness of WILLIAM JOHNSON as to an important aspect of his defense was impugned. In a case already fraught with emotion and tension, such an outburst can hardly be ignored by a jury notwithstanding the court’s admonition to ignore it. Accordingly, Lowery does not support the trial court’s conclusion herein.

6 The cumulative effect of the errors set forth herein was to deny the Defendant a fair trial and accordingly, the Defendant's conviction and sentence must be set aside and a new trial be granted herein.

Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." *Syl. Pt. 5, State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972).

Due to the numerous errors already argued herein, the Defendant has been deprived of a fair trial. In addition to those errors, there were other errors including:

- a. The Court erred by permitting the introduction of evidence of other bad acts pursuant to Rule 404(b) of the West Virginia Rules of Evidence. It was error to allow the testimony of Timothy and Lera Caplinger regarding the car seat incident in that the prejudicial effect outweighed the probative value of such evidence. It was also error to permit the testimony of Thomas Jackson and Stephanie White regarding other injuries to the child.

At trial, the State of West Virginia offered evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence commonly referred to as evidence of other bad acts. This evidence was adduced from several witnesses including TIMOTHY and LERA CAPLINGER. This evidence at issue concerned the allegedly "rough" treatment of a child by WILLIAM JOHNSON when putting a child into a car seat "really hard" and purportedly observed by neighbors at Powell Apartments at least four times.

As is required, the trial court conducted an *in camera* hearing on this issue. *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986). As this Court has indicated, after hearing the evidence and arguments of counsel, the trial court must find that it is satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is

admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted.

At hearings concerning 404(b) evidence held on August 4, 2008 and on August 18, 2008, the court admitted virtually all of the evidence offered by the State of West Virginia except for observations that J.W. had been pushed against a car or “thrown” into the car. (Trial Tr. 66-67.) With that distinction, the testimony of TIMOTHY and LERA CAPLINGER to the effect that WILLIAM JOHNSON had grabbed a child by the arms and forcibly put her into a car seat was permitted. (Trial Tr. 67.) The “lack of specificity of the evidence” of another witness was accordingly used as the basis to exclude some, but not all of this testimony concerning the car seat and a child. Problematically, however, although TIMOTHY CAPLINGER could identify WILLIAM JOHNSON, his testimony was at best confusing as to the identities of the children living at the apartment since he stated there were two children who were one and three years old. (Tr. 8/4/08, 29, 35.) Thereafter, TIMOTHY CAPLINGER simply referred to “the child” without further specification of which child he observed until during cross-examination, it appeared that the witness was discussing the three year old child. (Tr. 8/4/08, 30-31.) Later he said the child in question was the “youngest one.” Of course, J.W. was the oldest of the two children in the home and was only fifteen months old at the time of her death, and therefore would have been perhaps a year old at the time of TIMOTHY CAPLINGER’s observations. Similarly, LERA CAPLINGER testified concerning “the child” although she testified that the female child was thirteen or fourteen months old with light colored hair. (Tr. 8/4/08, 45.)

At trial, TIMOTHY CAPLINGER testified concerning “the little girl” although he did explain that she “was just learning how to walk, [and had] blond or the light hair, the real light hair.” (Trial Tr. 805,811.) LERA CAPLINGER could not identify WILLIAM JOHNSON at trial, and her testimony concerning these matters was abruptly ended. (Trial Tr. 820.)

Following this testimony, a limiting instruction was given at the time the evidence was offered, and this instruction was also included in the trial court’s general charge to the jury at the conclusion of the evidence as required by State v. McGinnis, 193 W. Va. 147, 455 S.E.2d 516 (1994). (Trial Tr. 821, 1109-1110.) Nevertheless, the evidence concerning the car seat was improperly admitted, was confusing and inconsistent, and its prejudicial effect outweighed its probative value, particularly when considered in conjunction with the other evidence of bad

acts admitted at trial concerning the leg fracture and the goose-egg. Accordingly, it was error to admit this evidence.

- b. The Court erred in failing to grant the Defendant's motion to strike Jurors Eric Reeder for cause.

During jury selection, juror Eric Reeder was questioned and indicated that he recalled hearing about this case on “television especially.” (Trial Tr. 119.) While Mr. Reeder did not remember “specific details,” he did remember “the feelings” he had had at the time he heard this story. (Id.) In response to the court’s question about the nature of those feelings, Juror Reeder went on to state:

You know, just – you know, I can’t believe, you know, that that can – especially just disbelief. That’s terrible, especially that there were children involved. Those sorts of things.

I’m a youth pastor, and so when it affects, you know, kids, it makes a difference somewhat. But just, you know, you like to think that our area is – you know, there’s crime, but there’s not a lot of crime. And so when something like that happens – and I think I remember feeling – that there were a couple, three things significant, you know, bad things, crimes that had happened during that time period. I think I remember that. I thought, “Man what’s going on?” you know, that sort of thing. Just general kind of, you know, thoughts that way.

Pressed concerning those feelings, Mr. Reeder said he believed he could be fair because he liked to believe that he could always be fair. (Trial Tr. 120.) He went on to state, however, “But I have to be honest that there may be some not personal emotion involved, but that there’s children involved. You know, that definitely – I don’t know if a person’s human how that couldn’t – they couldn’t feel something about that.” (Trial Tr. 121.) Although Mr. Reeder finally stated he could set aside his emotions and base his verdict solely on the law and evidence, WILLIAM JOHNSON moved to strike this juror for cause “based upon his apparent feelings and his connection with children with respect to what he just has stated.” (Trial Tr. 122-124.) This motion was opposed by the State and the Court denied the motion. (Trial Tr. 125.) Thereafter, the Defendant was forced to strike this juror for cause. (A.R. 188.) WILLIAM JOHNSON contends the court below abused its discretion in refusing to strike this juror for cause.

“The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.’ *Syllabus point 4, State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996)”; *Syl. Pt. 3, State v. Hughes*, 225 W. Va. 218, 691 S.E.2d 813 (2010). Additionally, “[a]ctual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed. *Syllabus point 5, State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).”

"Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair." *Syllabus Point 5, O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002). "When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror." *Syllabus Point 3, O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002); *Syl. Pt. 5, State v. Newcomb*, 223 W. Va. 843, 679 S.E.2d 675 (2009).

Juror Reeder was concerned about his emotional response to a case involving the death of a child. He expressed that he was particularly susceptible to such feelings due to the fact he was a youth pastor at a local church. That being the case, any doubt about his fairness and impartiality should have been resolved in favor of excusing him. Notwithstanding the attempts to rehabilitate him as a potential juror, it was an abuse of discretion for the court below to fail to strike him for cause.

- c. Trial counsel failed to object when Coroner Michael St. Clair volunteered that he had found a marijuana pipe during a search of the apartment. The court below nevertheless should have ordered such testimony stricken. It is evident that this testimony was prejudicial to WILLIAM JOHNSON's case since a juror posed a question during WILLIAM JOHNSON's testimony as to whether he was "on drugs" that night since a marijuana pipe had been found.

During the cross examination of Wood County Coroner Michael St. Clair, the following exchange occurred concerning the search of WILLIAM JOHNSON's apartment on January 13, 2007:

BY MR. MERRIMAN:

Q: You went – and the jury's been there. You went into the house, you saw the kitchen?

BY WITNESS ST. CLAIR:

A: Yes.

Q: Saw the living room?

A: Yes.

Q: You then went upstairs and looked around in the bedrooms and the bathroom?

A: Yes.

Q: Did you see any vodka bottles sitting around anywhere?

A: I don't recall. I do recall a marijuana pipe in one of the bedrooms. (Trial Tr. 678-679.)

This remark was offered by the State's witness who was testifying concerning his assistance of Wood County deputies in the search of the apartment. This statement was not in any manner solicited by defense counsel. Moreover, it was non-responsive to the question posed and accordingly does not constitute any invited error. Attorney Merriman made no comment or objection at the time this improper and prejudicial remark was offered by the State's witness. The prejudicial effect of this remark became more apparent when a juror posed the following question during the testimony of WILLIAM JOHNSON:

Was he on any drugs at time of babies death (the night of)
(pot pipe found)

(Trial Tr. 1078-1079; A.R. 237D.) After some discussion of these questions, it was decided that no answer would be given.

Quite obviously, the State's witness volunteered this nonresponsive testimony in an effort to prejudice the defendant and constituted evidence of a collateral criminal matter. As such, his counsel should have objected to this statement and asked the court to instruct the jury to disregard the same. That did not occur, and accordingly, additional prejudice to the Defendant occurred during the course of this trial which warrants a reversal of these convictions.

"The exceptions permitting evidence of collateral crimes and charges to be admissible against an accused are recognized as follows: the evidence is admissible if it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial." *Syl. Pt. 12, State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445, (1974). "Ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error." *State v. Hamric*, 151 W. Va. 1, 151 S.E.2d 252 (1966). However, in the absence of any such curative instruction being requested, it was nevertheless incumbent upon the trial court to ensure that the prejudicial introduction of this issue into the trial of this case was properly dealt with in a manner which protected the defendant's right to a fair trial and it was plain error for the court to fail to do so.

This Court can apply the "plain error doctrine" if the record is sufficiently developed for such analysis. *State v. Hutchinson*, 176 W. Va. 172, 177, 342 S.E.2d 138, 142 (1986). "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." *Syl. Pt. 7, State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995); *State v. Spence*, 182 W. Va. 472, 481, 388 S.E.2d 498, 507 (1989).

Quite evidently, the jury was given the impression that there were or may very well have been drugs at the apartment. This was an extraneous matter, and was unduly prejudicial as indicated by the juror's question. Accordingly, this error also contributes to the requirement that these convictions be vacated and set aside for a new trial.

d. The Court erred in admitting State's Exhibit 60.

State's Exhibit 60 purported to be a work schedule for STEPHANIE WHITE.

According to Detective Shawn Graham, this document was found during his search of the Powell Street apartment on January 13, 2007. The following occurred at trial concerning this particular exhibit:

BY MS. BOYLEN:

Q: And I'm going to show you an exhibit, which I've marked as State's Exhibit No. 60, and ask you if you can identify this?

BY DETECTIVE GRAHAM:

A: Yes ma'am. This is a work schedule for Sugar's. It was from the dates January 8th 2007 through the 14th of '07, and—

Q: Wait a minute. Does that accurately depict how the exhibit looked when you received it that night?

A: It does.

MS. BOYLEN: I would move into admission State's Exhibit No. 60.

MR. MERRIMAN: Objection, Your Honor. It contains hearsay, and there's not a foundation for it.

MS. BOYLEN: Your Honor, I'm not introducing it for the truth of the matter asserted that that is the actual schedule, but for the purpose of showing why Mr. Graham continued his investigation and questions additional people.

THE COURT: All right. State's Exhibit 60 is admitted for the limited purpose. Ladies and gentlemen, this exhibit is not admitted for the truth of the information contained within it, but simply as something that this detective saw, and then I'm assuming through further questioning we will see why this was important to the detective and why he did something as a result of what was in that document.

While the trial court's instruction dealt with the issue concerning hearsay, it did not address or cure the objection as to the complete lack of foundation as to this exhibit. Moreover, several witnesses called at trial, such as STEPHANIE WHITE and AMANDA SQUIRES could no doubt have been asked about this document so that a proper foundation could have been provided for its admission into evidence, but they were not. Thus, no proper foundation was provided for the admission of this document, Exhibit 60.

"`Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' State v. Louk,171 W. Va. 639, [643,]301 S.E.2d 596,599, (1983)." Syllabus Point 2, State v. Peyatt,173 W. Va. 317,315 S.E.2d 574(1983). Nevertheless, absent some foundation about this document, it was error to admit Exhibit 60.

7. The evidence was insufficient to convict WILLIAM JOHNSON.

Finally, WILLIAM JOHNSON contends that the evidence as a whole was insufficient to base his convictions for any of the crimes herein. This is particularly important given the tainted testimony of THOMAS JACKSON as well as the other errors alleged herein. While the Defendant recognizes that he has a "heavy burden" to sustain in making this argument, WILLIAM JOHNSON contends that a careful reading of the record herein reveals that the State of West Virginia did not sustain its burden of proof. Syl. pt. 1,State v. Guthrie,194 W. Va. 657,461 S.E.2d 163(1995)

There was no direct evidence that WILLIAM JOHNSON did anything whatsoever to J.W., and moreover, the evidence supported a conclusion that STEPHANIE WHITE had every opportunity to commit the crimes charged herein.

VI. Conclusion and Prayer

For all of the reasons set forth herein, WILLIAM JOHNSON respectfully prays that this Court enter an *Order* reversing his convictions; that this matter be remanded to Wood County Circuit Court for a new trial; that the Wood County Circuit Court be directed to enter a verdict of acquittal upon Count II of the within indictment; and for such further and other relief as this Court may deem appropriate.

WILLIAM R. JOHNSON
By Counsel,

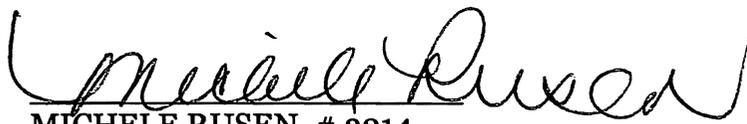


Michele Rusen, #3214
Rusen & Auvil, PLLC
1208Market Street
Parkersburg, WV 26101
(304) 485-6360

CERTIFICATE OF SERVICE

This 14th day of May 2012, the undersigned certifies that the enclosed “*Opening Brief on Behalf of William R. Johnson*” in case No. 12-0120, *State of West Virginia v. William R. Johnson* was served upon the following person, by delivering a true and accurate copy thereof to:

C. Casey Forbes, Assistant Attorney General
State of West Virginia, Office of the Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301

A handwritten signature in black ink, appearing to read "Michele Rusen". The signature is written in a cursive style with a large initial "M".

MICHELE RUSEN, # 3214
1208 Market Street
Parkersburg, WV 26101
(304) 485-6360

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

vs.

CR. CASE NO.: 07-F-29
Judge Jeffrey B. Reed

William Ryan Johnson,
Defendant.

**STATES SIXTH RESPONSE TO DEFENDANT'S
REQUEST FOR DISCOVERY**

In response to the Defendant's Request for Discovery which was filed by the Defendant pursuant to Rule 16 in the West Virginia Rules for Criminal Procedure, the State responds as follows:

1. Statements of Witnesses:

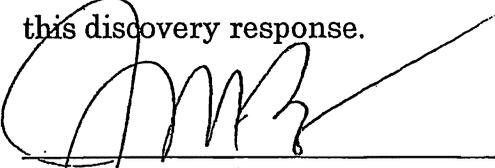
An additional statement was taken from Stephanie White on August 16, 2007 along with her counsel, Eric Powell. Attached hereto is a copy of that statement. Defendant can hear the audio memorialization upon request.

2. EXPERT WITNESSES:

Dr. I.G. Boiko, M.D.

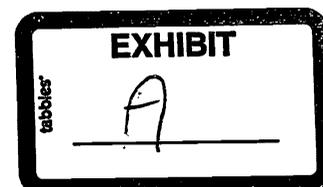
Previously disclosed. Attached hereto is a letter written August 15, 2007, containing additional information of what Dr. Boiko will testify to along with the underlying basis for such testimony.

The State acknowledges it's obligation to continue to update discovery as such evidence comes into it's possession and reserves the right to continue to supplement this discovery response.



Jodie M. Boylen
Assistant Prosecuting Attorney
Wood County Prosecutor's Office
Judicial Annex Building, Rm 436
#2 Government Square
Parkersburg, West Virginia 26101

STATE OF WEST VIRGINIA
BY COUNSEL



CERTIFICATE OF SERVICE

I, Jodie M. Boylen, hereby certify that on the 7th day of September, 2007, I served a true copy of the foregoing STATE'S SIXTH RESPONSE TO DEFENDANT'S REQUEST FOR DISCOVERY upon the Defendant by fax to:

**WILLIAM MERRIMAN
P.O. Box 167
Parkersburg, WV 26104**



Jodie M. Boylen
Assistant Prosecuting Attorney
Wood County Prosecutor's Office
Judicial Annex Building, Rm 436
#2 Government Square
Parkersburg, West Virginia 26101

STATE OF WEST VIRGINIA VS. WILLIAM RYAN JOHNSON
CASE NO: 07-F-29



OFFICE OF THE
Wood County
PROSECUTING
ATTORNEY

JUDGE DONALD F. BLACK COURTHOUSE ANNEX
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PARKERSBURG, WV 26101

304.424.1776
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WWW.WOODCOUNTYWV.COM

GINNY CONLEY
PROSECUTING ATTORNEY

August 15, 2008

George J. Cosenza
Attorney at Law
515 Market Street
Parkersburg, WV 26102

RE: STATE VS. THOMAS JACKSON

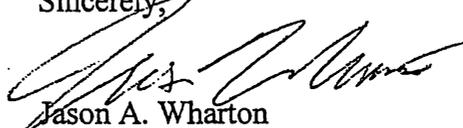
Dear George:

This letter serves to confirm the plea agreement reached that resulted in the filing of Information on April 7, 2008.

1. The Defendant shall plead to a violation of W.Va. Code 61-3C-13(c) "Fraudulent Use of an Access Device"
2. All other pending charges in Wood County shall be dismissed
3. The State of West Virginia shall not seek to enhance the Defendant's sentence by way of a recidivist information
4. The Defendant shall make restitution on all pending charges
5. The Defendant shall be sentenced to a seven year sentence to be run concurrently with the Defendant's parole revocation
6. The Defendant shall not make any request for probation or other alternative sentence
7. The Defendant will receive credit for the time he has served on the above-described charge which is approximately six months as of the writing of this letter. His dates of incarceration are November 6, 2007 through May 2, 2008 according to the Regional Jail Authority.
8. The seven paragraphs numbered above represent the entire agreement between the State of West Virginia and the Defendant.

As a result of Mr. Jackson's cooperation in the William Ryan Johnson murder case the plea hearing in this matter was continued. Please contact this office to discuss the plea further and to set up another hearing date.

Sincerely,



Jason A. Wharton
Assistant Prosecuting Attorney

IN THE MAGISTRATE COURT OF WOOD COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF,

VS.

///

CASE NO. 09-M- 952

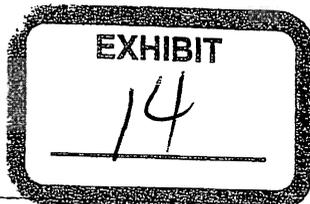
THOMAS JACKSON,

DEFENDANT.

PLEA AGREEMENT

Come now the Defendant, THOMAS JACKSON, in person and by George Cosenza, his attorney, and the State of West Virginia, by Ginny Conley, Prosecuting Attorney, and submit to the Court the following Plea Agreement in the above styled matter:

1. The Defendant agrees to the filing of a complaint in Magistrate Court charging him with the offense of False Pretenses, Misdemeanor.
2. The State agrees that it will not pursue any more charges out of the misuse of credit cards of at Krogers in October, 2006, or the credit cards of Jody Laughery or Thomas Heckel.
3. The defendant agrees to pay restitution to all victims listed in Paragraph 2.
4. There is no agreement as to sentencing other then he shall receive credit for time served.
5. This Agreement constitutes the entire Agreement between the Defendant and the State.

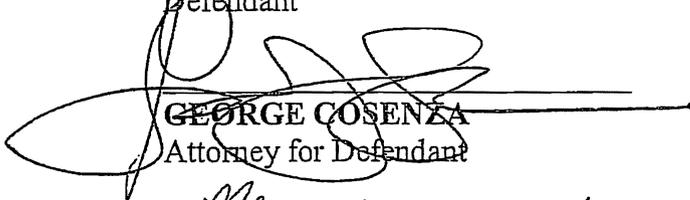


△ Ex 3
9-28-09

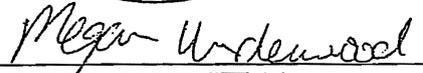
Agreed to this 9 day of February, 2008.



THOMAS JACKSON
Defendant

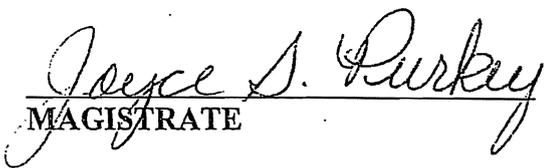


GEORGE COSENZA
Attorney for Defendant



~~GINNY CONLEY~~ Megan Underwood
Prosecuting Attorney

APPROVED BY THE COURT:



MAGISTRATE

Thomas Hecksel \$400.
5327 Emerson Apt. 20
Parkersb

Gift cards
\$500.00 \$400.00