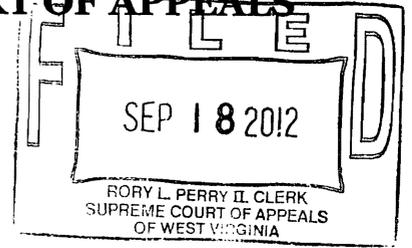


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
at
CHARLESTON, WEST VIRGINIA
No. 12-0120



STATE OF WEST VIRGINIA,
Plaintiff,

v.

WILLIAM R. JOHNSON,
Defendant.

REPLY 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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REPLY 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 “*Reply 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 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. As the Appellant shall further demonstrate herein, multiple grounds for the reversal of his convictions exist.

1. ***The State of West Virginia urges this Court to construe West Virginia Code §61-8D-2a by ignoring the element of causation of death due to failure to obtain necessary medical care.***

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(b). This statutory provision provides that:

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.)

Consistent with this statute, the jury was instructed that in order to convict WILLIAM JOHNSON of this offense, the State was required to prove that WILLIAM JOHNSON ***caused J.W.'s death*** by unlawfully, feloniously, maliciously and intentionally refusing to supply her with necessary medical care. (A.R. 202-203; Trial Tr. 1104-1106.) Notwithstanding the fact that the State argued throughout trial that the injuries to J.W. were severe, and were calculated to cause her death, the State also charged that the failure to seek medical care caused her death as well. (See, e.g., *Closing Argument*, Trial Tr. (1134-1135.)) Yet, as the Appellant has already established, none of the numerous medical personnel who testified on behalf of the State of West Virginia, not a single doctor, nurse, or paramedic was asked any question concerning whether prompt medical care could have saved this child's life, or offered any chance of survival. Thus, no proof was offered concerning the failure to provide medical care or the relation of this failure to causing the death of this child. In fact, the issue of providing medical care following these injuries or the medical significance of that failure was not addressed at all.

As Appellant's trial counsel correctly argued, 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 “completely failed to meet its burden with respect to that charge.” (Id.) Counsel for the State was forced to agree “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-below correctly observed, the gravamen of this offense is the failure or refusal to provide medical care causing 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 State of West Virginia now argues that causation doesn't really mean causation, but instead, causation can be ignored and guilt can be based upon the denial of medical care. Reasoning that other jurisdictions have upheld convictions in similar situations, the State urges this Court to ignore and eliminate the element of causation. In fact, the State of West Virginia reasons that the fact that J.W. may have briefly survived this assault is proof of guilt of this offense, notwithstanding the seriousness of the injuries which did in fact cause her death, and notwithstanding the State's theory and the jury's finding that the injuries were intentionally and maliciously inflicted by the Appellant.

A survey of the cases cited herein reveals that some courts have accepted the invitation to sidestep a logical analysis of causation while some have not. Previously discussed were State v. Muro, 269 Nebraska 703, 695 N.W.2d 426 (2005) where a similar causation element was upheld. In that case, the court required 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.) Ex parte, Leigh Ann Lucas, 792 So. 2d 1169 (Ala., 2000) and Commonwealth v. Barnhart, 345 Pa. Sup. 10, 497 A.2d 616 (1985) were also cited as instances where medical testimony as to the prognosis if prompt medical attention was elicited to establish that the lack of medical care caused death. (Tr. 11/3/08 at 7.)

In light of the rulings of other courts and in view of the crystal clear language of this statute, the court below quite rightly observed:

. 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.)

Despite its accurate observation concerning the proof necessary to meet the State of West Virginia's burden as to causation, the court-below nevertheless disregarded this element of the offense and adopted the argument now made by the State: if J.W. survived these injuries for any length of time, then the failure to seek medical treatment supports a finding of guilt as to this offense. Judge Reed ultimately stated:

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.)

* * *

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.)

Thus, the offense at issue was defined not in terms of whether death was caused by a lack of medical treatment, but instead by the timing of the death. Despite acknowledging just a month before that the statute clearly required evidence that the failure to provide necessary medical care must have **caused the death**, the trial court simply side-stepped this issue. Instead, the trial court reasoned 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 offered 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 meaning of this statute could not be any clearer. The State 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. "A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." *Syl. Pt. 3, Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999). It is presumed that each word in a statute has a definite meaning and purpose. *State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979). "It is always presumed that the legislature will not enact a meaningless or useless statute." *Syl. Pt. 3, United Steelworkers of America, AFL-CIO, CLC v. Tri-State Greyhound, Park*, 178 W. Va. 729, 364 S.E.2d 257 (1987) (citing *Syl. Pt. 4, State ex rel. Hardesty v. Aracoma-Chief Logan No. 4523, V.F.W.*, 147 W. Va. 645, 129 S.E.2d 921 (1963)). Courts should favor the plain and obvious meaning of a statute as opposed to a narrow or strained construction. *Thompson v. Chesapeake & O. Ry. Co.*, 76 F.Supp. 304, 307-308 (S.D.W.Va. 1948)."

"A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Sizemore v. State Farm General Ins. Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998) (citation omitted). However, "[t]he fact that parties disagree about the meaning of a statute does not itself create ambiguity or obscure meaning." *T. Weston, Inc. v. Mineral County*, 219 W. Va. 564, 568, 638 S.E.2d 167, 171 (2006) (citation omitted). Moreover, "[c]ourts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed." *Syl. Pt. 1, State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).

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 *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), 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)

The State's contention that State v. Jenkins, 11-0362 (W.Va. 2012) compels a different result is misplaced. In Jenkins, a felony-murder prosecution, the Defendant argued that the State's evidence was insufficient to prove that delivering and providing oxycodone to his teenaged son. The Defendant argued that because his son's medical issues rendered him more sensitive to the effects of that drug, he did not cause the death and therefore he was not guilty of felony murder. This argument was rejected by this Court "because it [was] wholly unsupported by the felony murder statute, West Virginia Code §61-2-1 (1991), as well as . . . jurisprudence." This statute provides that murder committed "in the commission of a felony offense of manufacturing or delivering a controlled substance... is murder of the first degree." "In any case of homicide there must be proof of the identity of the deceased and causation of death." State v. Myers, 171 W.Va. 277, 280, 298 S.E.2d 813, 817 (1982). However, with regard to proof of causation for a felony murder, the State need only prove "the death of the victim *as a result of injuries* received during the course of such commission or attempt." State v. Williams, 172 W.Va. 295, 311, 305 S.E.2d, 251, 267 (1983). Thus, it is evident that the causation requirement, (the result) in cases of felony murder requires a lower threshold and less direct standard of proof than that imposed by the statute under consideration in the case at bar (death caused by failure to obtain necessary medical care.).

State v. Thornton, ___ W.Va. ___, 720 S.E.2d 572 (2011) also supports the reversal of this conviction. Defendant Thornton was charged and convicted of causing the death of her twenty-two month old child in violation of West Virginia Code §61-8D-4a, child neglect causing death. The State's theory was that Thornton should have sought medical treatment for her child's head injuries in the four to five days that he was ill before he died. 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 ___. The Chief Medical Examiner also opined that there was a possibility that the child would have survived if have had been immediately treated for his injuries.

Without evidence concerning whether J.W. would have survived or could 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. The very specific causation element in this statute, critical to the State's case, was completely ignored by the State of West Virginia in the presentation of its evidence and later by the trial court in upholding this conviction.

With regard to the cases cited by the State of West Virginia in its brief, while it is instructive to analyze cases from other jurisdictions, it is also difficult to compare many of those decisions because of the varying statutory schemes and factual scenarios. Nevertheless, other courts have upheld convictions under somewhat analogous situations. For instance, State v. Shane, No. A06-1581 (Minn.App.) 2008, an unpublished opinion from Minnesota involved a conviction for second-degree unintentional murder. Shane was acquitted of causing the injuries to her infant, but was convicted of causing her child's death while committing felony-child neglect, defined in that state as the willful deprivation of necessary health care or supervision appropriate to the child's age when the parent was reasonably able to make the necessary provisions. Shane's conviction was upheld based upon the medical testimony which established that the baby's brain injury would have yielded between a two and ten percent chance of survival after the injuries were inflicted. The court reasoned that Minnesota law regarding causing a death while committing a felony required only proof that the defendant's acts were a "substantial causal factor" in the child's death. Thus, the defendant's challenge to causation was rejected. The Minnesota Court also found that "Shane's failure to seek prompt medical attention ensured A.C.'s death and made it impossible to know if A.C. would have survived the injury." The court flatly stated that although the injury significantly reduced the child's chance of survival, this did not negate the duty to seek medical attention and deprived the child of any chance of survival.

Similarly in People v. Knapp, 113 A.D.2d 154 (3d Dept. App. Ct. N.Y.) 1985, the Court upheld Knapp's conviction for second degree manslaughter based upon proof that the Defendant had abandoned the seriously injured victim in an isolated area where she later died. The prosecution offered evidence that death was not instantaneous, and that the victim could have possibly survived with prompt medical care. On this basis the reviewing court concluded that "the jury was free to credit the testimony of the People's expert that the victim did not die instantly and that prompt medical attention could possibly have saved her." *Id.* at

164. Thus, the court concluded that the prosecution had sustained its burden of proving that the defendant's actions "were a sufficiently direct cause of the ensuing death."

In a third case, a conviction for involuntary manslaughter was upheld where medical testimony concluded that had a child been taken for treatment four hours earlier, medical attention would have been effective in saving that child's life. State v. Cacchiotti, 568 A.2d 1026 (R.I. 1990). Thus, the mother of a child was held to account for failing to seek medical help for her child after her boyfriend severely and repeatedly beat him. ¹

Unlike Thornton, unlike Muro and all the other cases cited by both the State of West Virginia and the Appellant, the State of West Virginia herein offered 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 during the trial of this matter. In fact, the only evidence at trial concerning J.W.'s condition 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. In fact, during closing argument pertaining to this offense, the State of West Virginia briefly addressed this offense, arguing simply that the Defendant had not called 911 and gotten help and the baby had died. (*Trial Tr. III at 1133.*) At no time did the State of West Virginia ever attempt to argue that a failure to obtain medical treatment caused this child's death.

In this case, the evidence was insufficient for any rational trier of fact to find that the State of West Virginia proved, beyond a reasonable doubt, all of the essential elements of the crime charged in Count II. By the explicit and clear terms of West Virginia Code §61-8D-2(a), the State had to 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, in order to sustain this conviction, the State had to establish not only that J.W. was injured, and that no

¹The State of West Virginia has also cited a 2005 Iowa Law Review article entitled "Criminal Liability for Lost Chance," 91 Iowa L. Rev. 59 which collects and analyzes these cases. As noted in the abstract of that article, "[c]ases of this kind, which are known among tort scholars as "lost chance" or "loss of chance" cases, do not satisfy the criminal law's traditional requirement of "but for" causation.

medical care was provided, but additionally and critically also had to prove that this failure to provide medical care caused her death. The fact that the child did not die instantaneously and that medical treatment was not obtained 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 manipulation of the timing of Thomas Jackson's Plea Agreement is disturbing*

It is undisputed that in her final hours in office as Wood County Prosecuting Attorney on December 31, 2008, former Prosecutor Ginny Conley rewarded THOMAS JACKSON for his testimony against WILLIAM JOHNSON with a "get out of jail free" card. In asserting that no error exists as to this matter, the manipulation of the timing of this exceptionally favorable plea bargain granted to THOMAS JACKSON as well as the manner in which it was presented to the jury is completely ignored by the State.

After counsel for WILLIAM JOHNSON discovered this sweetheart deal, Ginny Conley, the former Wood County Prosecutor was eventually examined and asked to explain how the sweet-heart deal for THOMAS JACKSON came to pass. (Tr. 9/28/09 at 6.) Nearly two years later, testimony resumed and it became clear that no satisfactory or plausible explanation was forthcoming save one: the State of West Virginia wanted the jury to believe that THOMAS JACKSON faced seven years in prison notwithstanding his assistance to the State of West Virginia in obtaining a conviction against WILLIAM JOHNSON while the hope of a better deal could be dangled in front of witness THOMAS JACKSON throughout these proceedings. Thus, the State's star witness, a prior felon with four pending felony charges and eight misdemeanor charges, also facing a parole revocation was presented as a good citizen with no reason to come forward other than his desire to do good when all concerned knew full well he would never see a jail cell again. (Tr. 5/11/11, 72; A.R. 558.)

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.) This plea deal

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.)

Despite the existence of a negotiated Plea Agreement which had been pending for a number of months, 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.) During the trial, 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:

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.

The letter referred to by THOMAS JACKSON at trial was written on August 15, 2008, just days before trial in this case began. (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 not to 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 was 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.)

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 never took place; further after writing the August 15, 2008 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.)

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.

Obviously, the credibility of a cooperating witness is perceived quite differently when that witness is facing seven years in prison instead of a witness who is granted nearly complete exoneration as the result of his cooperation. By permitting the State of West Virginia to construct the fiction that THOMAS JACKSON would 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 and sentencing were concluded before she did so. Moreover, this fiction coupled with the assertion that the State "might" change its mind in the future as represented to the witness at the trial certainly provided this witness the incentive to give the State what it needed at trial. 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).

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. Additionally, the not so subtle threat/promise was put out there for Mr. Jackson that in the future, if he performed well, he could walk away a free man.

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.

3. *The duty to argue mercy in this case is too critical to be considered a matter of trial tactics and strategy.*

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 this case in other respects, 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.

The State of West Virginia apparently does not contest the inadequacy of this argument, but rather, argues that “strategy” of this lack of argument must be inquired into. According to the State of West Virginia, this issue must wait for a review upon a writ of habeas corpus to determine if there were strategic reasons for the failure to address mercy in any meaningful fashion. However, the Appellant asserts that the record is so clear on the

need for such argument under the facts and circumstances of this case that reversal is required.

It is true that allegations that allegations made on appeal that trial counsel was ineffective and that such resulted in his conviction, must be proven by a preponderance of the evidence. State v. Thomas, 157 W. Va. 620, 203 S.E.2d 445 (1974). In the instant case, the Appellant faced a situation where the jury would consider mercy with regard to not one, but possibly two very serious charges. 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, or at a minimum a new trial for the penalty phase of this proceeding. See, State v. Painter, 221 W.Va. 578, 655 S.E. 2d 794 (2007).

4. *The spectator's loud comment declaring that Mr. Johnson was a "liar" while Mr. Johnson was testifying before the jury in the trial of this matter warranted a mistrial.*

At trial, WILLIAM JOHNSON testified on his own behalf. 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.)

While "[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, it is rare that a comment is made that so obviously can influence proceedings, at a time that is so critical to the Appellant's case. It is difficult to think of a more damning statement: that WILLIAM JOHNSON was a liar, being shouted during his testimony

Under these circumstances, a "manifest necessity" for declaring a mistrial existed. The trial court failed to exercise its discretion appropriately. State v. Lowery, 222 W.Va. 284, 288, 664 S.E.2d 169 (2008), while addressing this issue, is completely distinguishable from the case 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 do so. Accordingly, Lowery does not support the trial court's conclusion herein.

5. *This case is so riddled with errors, the Defendant has been denied 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). These cumulative and substantial errors are chronicled herein as well as within the *Opening Brief of William Johnson*. It is evident that as a result of these many errors, WILLIAM JOHNSON was deprived of a fair trial, and reversal is warranted.

6. *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)

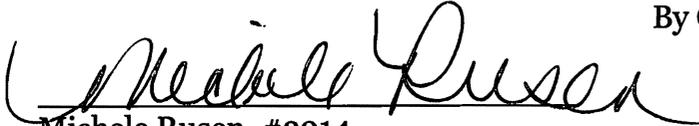
There was no direct evidence that WILLIAM JOHNSON did anything whatsoever to J.W., and moreover, the evidence supported a conclusion that STEPHANIE WHITE had every opportunity to commit the crimes charged herein. The State of West Virginia has failed to address this assignment of error, and pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, it should be assumed that the Respondent agrees with the Petitioner's view of the issue.²

² The Appellant does not abandon Assignment of Error #2 with regard to the inconsistency of a verdict of Second Degree Murder and Causing Death Due to a Failure to Provide Medical Care and reasserts the arguments set forth in his Opening Brief in that regard.

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,

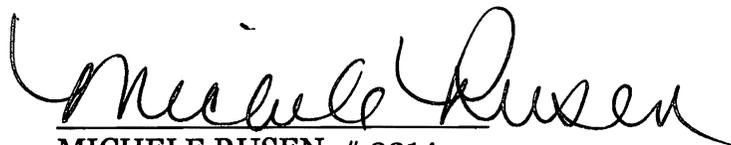


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CERTIFICATE OF SERVICE

This 17th day of September 2012, the undersigned certifies that the enclosed “*Reply Brief of William 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:

Thomas W. Rodd, Assistant Attorney General
State of West Virginia, Office of the Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301

A handwritten signature in cursive script, reading "Michele Rusen". The signature is written in black ink and is positioned above the printed name and contact information.

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