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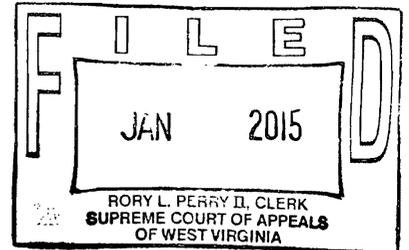
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA,**  
**Plaintiff Below, Respondent,**

vs.

No. 14-0876

**HOWARD CLARENCE JENNER.**  
**Defendant Below, Petitioner.**



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FROM THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

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**APPEAL BRIEF OF PETITIONER HOWARD CLARENCE JENNER**

HOWARD CLARENCE JENNER  
Petitioner

By Counsel

A handwritten signature in black ink, appearing to read "Harry A. Smith, III".

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## ASSIGNMENTS OF ERROR

I. **(Jury Misconduct):** The Court erred in denying “Defendant’s Motion for New Trial Based upon Jury Misconduct”, Petitioner having presented evidence: (a) of extra-judicial communications, during trial, between a juror and the State’s chief prosecution witness; and (b) of prohibited extra-judicial discussions during trial, between a juror and an alternate juror.

II. **(Introduction of Unfairly Prejudicial Evidence):** The Court erred in permitting the introduction, at the bifurcated sentencing/mercy the jury trial, of a booking photograph of Petitioner wearing a shirt containing an inflammatory message, and the Court further erring in permitting the introduction, at the sentencing phase, of a video game, the title of which had a potentially prejudicial effect.

III. **(Insufficiency of the Evidence):** The evidence at trial was insufficient to convict Petitioner of murder, attempted murder, or malicious assault.

IV. **(Denial of Post-Trial Motions):** Petitioner contends that the Court erred, in considering Petitioner’s post-trial motions, when it denied Petitioner’s motions for a new trial.

## STATEMENT OF THE CASE

This is a criminal action wherein Petitioner (who will be referred to hereafter as “Defendant”) was the subject of a three-count indictment returned on January 9, 2012 (Appendix, Vol. I [hereafter, App. I], 11). Defendant was indicted for murder of his aunt, attempted murder of his uncle, and malicious assault upon his uncle.

After a series of appointed attorneys, the undersigned, Harry A. Smith, III, was appointed to represent Defendant. Prior to the trial, an evidentiary hearing was held as to the admissibility of a statement allegedly made by Defendant; the Court ruled the statement admissible. Defendant was tried before a jury, the trial commencing on April 21, 2014. On April 23, 2014, the jury returned verdicts of “guilty” as to all three counts of the indictment (App. I, 235-240). The trial having been bifurcated as to the issues of guilt and sentencing (mercy/no mercy), on April 24, 2014, the jury returned a verdict of “no mercy” as to the murder conviction (App. I, 244).

After trial, Defendant filed two sets of motions - - “Defendant’s Post-Trial Motions” (App. I, 257-259) and “Defendant’s Motion for New Trial Based Upon Jury Misconduct” (App. I, 260-274). On August 4, 2014, the Court heard some evidence as to the jury misconduct motion and heard the arguments of counsel as to all post-trial motions. The Court refused to allow Defendant’s counsel to present the testimony of three jurors critical to the misconduct issue, each of whom had been subpoenaed to the motion hearing and who were present outside the courtroom.

At the conclusion of the motion hearing of August 4, 2014, the Court denied each of Defendant's motions. The Court then sentenced Defendant to life without mercy, followed by a consecutive term of three to fifteen years in the penitentiary. A Sentencing Order was entered by the Court on August 6, 2014 (App. I, 278-282). Although the Court orally denied Defendant's various post-trial motions, the Sentencing Order did not contain language memorializing the Court's said rulings, those rulings were contained in an Order, entitled "Motion Hearing", entered on November 25, 2014 (App. I, 288-290).

From the verdict and from the Court's denial of Defendant's post-trial motions, Defendant prosecutes this appeal.

## SUMMARY OF ARGUMENT

### I.

#### Jury Misconduct

Defendant's counsel learned, at the conclusion of Defendant's trial, following the jury's finding of "no mercy", that a trial juror, throughout the four days of trial, was seen regularly, during smoke breaks and recesses, talking with Sherman Truax, husband of murder victim Beni Truax and a victim himself of attempted murder and malicious assault. Defendant also learned that a different trial juror and an alternate juror were overheard discussing the case before its submission, specifically discussing the trial juror's indecision. At a post-trial evidentiary proceeding, Defendant presented two witnesses to the juror's conversations with Mr. Truax; one of the witnesses also overheard the discussion between the two jurors. The Court heard the testimony of Defendant's witnesses, found them generally credible (App. I, 182, 206), but refused to permit Defendant to present the testimony of the three jurors, who had been subpoenaed and who were present outside the courtroom (App. I, 204). The Court denied Defendant's motion for a new trial, finding that Defendant had shown no prejudice sufficient to grant the motion or even to justify hearing the jurors' testimony. Defendant believes that the Court erred in denying the motion and that prejudice must be presumed when a trial juror socializes, throughout the trial, with a victim whose wife was allegedly murdered by Defendant.

## II.

### Unfairly Prejudicial Evidence

Defendant contends that the Court erred by permitting the admission, at Defendant's bifurcated "mercy" trial, of two exhibits which were unfairly prejudicial to Defendant - - (a) a photograph of Defendant wearing a shirt containing the words "May God Have Mercy on My Enemies Because I Sure as Hell Won't" (App. I, 368-369); and (b) a video game called "Assassin's Creed", found in Defendant's backpack. Defendant contends that there was no evidence to show that the shirt was worn by Defendant to convey a message, or that there was any connection whatsoever to the crimes which were charged. As to the video game, there was no evidence as to the content of the game, an apparently popular video game, nor was there any obvious connection to the crime.

## III.

### Insufficiency of the Evidence

Defendant contends that the evidence presented by the State was insufficient to prove Defendant's guilt beyond a reasonable doubt. Specifically, the State's evidence failed in several regards, including the following: misidentification, material inconsistencies in the testimony of the State's chief witness, exculpatory scientific analyses, lack of forensic firearm evidence, and apparent lapses in the investigatory process.

IV.

Denial of Post-Trial Motions

Defendant contends that the Court erred in denying his various post-trial motions, for the reasons set forth, above, in this Summary of Argument.

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

Defendant contends that oral argument is necessary and desirable. The parties have not waived oral argument. The appeal is not frivolous. The dispositive issues have not been authoritatively decided. The decisional process, Defendant believes, would be significantly aided by oral argument, considering, *inter alia*: Defendant's allegations, supported by affidavits, that members of the jury engaged in clear misconduct; the fact that Defendant is facing life imprisonment without mercy, based upon that jury's separate verdicts of guilt and of "no mercy"; and the need to clarify the law as it relates to such misconduct.

Defendant believes that Rule 19 oral argument is appropriate inasmuch as it involves alleged errors in the application of the law and procedural rules, the abuse of discretion by the Circuit Court, and the consideration of a fairly narrow issues of law.

## ARGUMENT

### I.

#### Jury Misconduct

Defendant filed a motion for new trial based upon jury misconduct (App. I, 260-275), addressing the brevity of the jury's deliberations and to two specific instances of jury misconduct.

Defendant's said motion contained two affidavits, one by counsel and one by Elizabeth Grindstaff, Defendant's sister. Ms. Grindstaff's affidavit (App. I, 272-274) stated that she was present, in and about the Upshur County Courthouse, during the four-day trial in this case. She was not present in the courtroom during trial because she had been listed as a potential witness. As Ms. Grindstaff observed various people in and about the Upshur County Courthouse, one of those she observed was Sherman Truax; Mr. Truax is the husband of the murder victim in this case, Beni Truax, and is, himself, a victim in the case - - of attempted murder and malicious wounding. As Ms. Grindstaff, during trial and noon recesses, went outside the courthouse to smoke, she observed Mr. Truax, on a daily basis, multiple times, conversing with a woman whose identity she did not know; she also once observed Mr. Truax's son, Nicholas Truax, with the same woman. Only after she was permitted inside the courtroom, at the conclusion of the trial, Ms. Grindstaff realized that the woman who had been conversing with Mr. Truax was in fact a juror in Defendant's trial.

Ms. Grindstaff, in her affidavit, also related that, during a mid-morning recess, on the third day of Defendant's trial, she sat across from two individuals, a man and a woman, who discussed how long they anticipated being in court, the woman telling the man that they "might get out early unless you're still undecided." Once she was permitted into the courtroom, Ms. Grindstaff realized that the woman and the man she overheard conversing were an alternate juror and an regular juror. Ms. Grindstaff advised defense counsel regarding the above at the conclusion of the "mercy" phase of the trial on April 24, 2014. She described the individuals referred to above by referring to specific identifying characteristics and, additionally, as to the woman talking to Mr. Truax, her location in the jury box.

Accompanying the motion for new trial was counsel's affidavit (App. I, 269-271), noting that counsel observed, during the course of the trial, that the Court permitted the jurors to leave the jury room, the courtroom, and the courthouse during recesses. Counsel noted also that, during recesses, he observed jurors outside the courtroom, in the courthouse annex, and outside the courthouse. Counsel observed that jurors were in the same areas, inside and outside the Courthouse, as were members of Defendant's family and the general public. Counsel's affidavit noted further that no members of Defendant's family, including Ms. Grindstaff, were allowed to be in the courtroom until the conclusion of the evidence in the case. The undersigned, based upon Ms. Grindstaff's statements to him regarding the identity of the juror talking to Mr. Truax, determined that juror was Diana Crites. Based upon the

undersigned's analysis of Ms. Grindstaff's statements, the undersigned concluded that the two jurors discussing the case with each other were juror Edward Zickefoose and alternate juror Samantha Ryan.

The Court instructed the jurors, preliminarily, not to discuss the case among themselves until the case was submitted and not to discuss it except in the jury room.<sup>1</sup> It appears clear that alternate juror Ryan was aware of juror Zickefoose's "undecided" status hours before closing arguments. If it was thus obvious to one juror that juror Zickefoose was "undecided", it must have been obvious to the others as well. Moreover, it is more than likely that the case must have been discussed not only by jurors Ryan and Zickefoose but by the twelve jurors at large, including the alternates (who should never have participated in any discussion whatsoever, unless called upon to replace regular jurors).

More egregious, however, than the conduct of jurors Ryan and Zickefoose is the contact between Sherman Truax and juror Crites over the course of the trial. There is simply no excuse for the juror's behavior. This contact violates every principle of fairness available to a criminal Defendant, notwithstanding the content of any conversations between the juror and Mr. Truax.<sup>2</sup> Such socializing or fraternization is just not permissible, is completely

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<sup>1</sup> The Court instructed the jurors, preliminarily, as follows: "You should not discuss the case among yourselves during the trial, either here in the courtroom or beyond the Courthouse. Wait until the trial is concluded and you have retired to your room to consider of your verdict, when all 12 of you are present at the same time acting as a body - as a jury" (App. I, 370).

<sup>2</sup> The Court instructed the jurors, preliminarily, as follows: ". . . you should not permit anyone not a member of the jury to approach you and converse with you while you are in and about the Courthouse during the trial, whether the conversation concerns the trial or not. \*\*\* If anyone tries to talk to you about the trial, tell him or her that his or her conduct is improper. \*\*\* In order to avoid the opportunity for others

inexcusable, and cannot be tolerated. Compounding the mischief is the fact that Nicholas Truax was also present for one of the many times that juror Crites engaged in her wrongful discourse with Sherman Truax.

“Any challenge to the lack of impartiality of a jury assaults the very heart of due process.” *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995). “The inevitable result of misconduct on the part of a juror is to cast suspicion on the impartiality of the verdict rendered by a jury of which he is a member.” *Legg v. James*, 126 W.Va. 757, 30 S.E.2d 76 (1944). See also *State v. Dellinger*, 225 W.Va. 736, 696 S.E.2d 38 (2010): “It is axiomatic that a criminal Defendant has a fundamental and constitutional right to trial by an impartial and objective jury”, citing *State v. Peacher*, 137 W.Va. 540, 280 S.E.2d 559 (1981).

*Sutphin, supra*, involved a juror’s discussion with a state witness (not a victim) after that witness testified. Although the Court found the juror’s conduct “reprehensible”, it accepted the trial court’s finding of no prejudice to the Defendant. The case at bar, however, is wholly distinguishable from *Sutphin* in that the ongoing, multi-day, contact between juror Crites and Mr. Truax was between a juror and an individual who was a victim (whose wife was killed and who, himself, had suffered severe injuries). It is hard to imagine a scenario more prejudicial to a Defendant than to have one of his jurors socializing, during trial, with the victim of the alleged crimes of attempted murder and malicious assault, a victim who is

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to innocently approach you and attempt to engage you in conversation while attending the court as a juror, you should go directly to your room. . . and not linger in the Courthouse corridors, grounds or environs” (App. I, 373-374).

also the grieving husband of a woman allegedly murdered by the Defendant.

In *Dellinger, supra*, bias was presumed, and felony convictions reversed, when a juror exhibited a lack of candor in responding to *voir dire* questions, although no actual bias was proven. The case at bar presents a case more compelling than *Dellinger*, in requiring a presumption of bias.

Considering the circumstances of the contact between jurors Crites and Mr. Truax, prejudice and bias have to be presumed. Assuming, *arguendo*, that the many conversations between juror Crites and Mr. Truax involved nothing more innocent than the weather, the mere fact that these two individuals met regularly during smoke breaks raises a presumption which cannot possibly be rebutted. It is inconceivable that a juror could deliberate impartially, honoring all of a defendant's procedural protections, after engaging in repeated conversations with a victim who is the widower of the woman allegedly murdered. West Headnote No. 3 in *Sutphin* states that "prejudice is presumed when interested party is involved (and unless rebutted by proof, verdict will be set aside), but when misconduct was induced by stranger or person having no interest in litigation, manifest prejudice must be proved by clear and convincing evidence."

§62-3-6, *West Virginia Code*, is also helpful in considering the issue of juror misconduct. That section provides, *inter alia*, that "(a)fter a jury has been impaneled, *no sheriff or other officer shall converse with, or permit anyone else to converse with, a juror unless by leave of court (emphasis added).*" Obviously, the clear mandate of this section has

been violated by the contact between juror Crites and Mr. Truax.

During the evidentiary hearing (as to the jury misconduct motion) conducted by the Court on August 4, 2014, Ms. Grindstaff testified that she observed Sherman Truax talking with a woman, unknown to her, but who “looked like she was in her fifties, sixties” (App. I, 146). She observed them talking on a daily basis, several times a day, throughout the trial, identifying the precise location of the conversations (App. I, 145-147). Mr. Grindstaff realized, only when she was allowed into the courtroom, that the woman talking to Mr. Truax was a member of the jury (App. I, 147-148). Ms. Grindstaff testified that the same person who was observed by her to be a juror talking to Mr. Truax, was also observed outside the courtroom on August 4, 2014 (App. I, 148-149).

Ms. Grindstaff testified also, on August 4, 2014, that she overheard a conversation between two individuals, one of whom stated that whether he would call off work “depends on how long we are here”, to which the other individual responded “well, maybe we won’t be here for long - that is, unless you are still undecided” (App. I, 150-151). Ms. Grindstaff identified the man as being a juror, identifying him as being in the back row of the jury box and walking with a cane (App. I, 151). She also identified the other individual as being present outside the courtroom, on the day of the evidentiary hearing, as being the same person she observed talking to Mr. Zickefoose during the course of the trial App I, 151-152). Although the Court challenged Ms. Grindstaff regarding her identification of the alternate juror, the Court making a point that Ms. Grindstaff “didn’t see her in the jury box”, the

Court's finding is misdirected inasmuch as the alternates were actually not in the jury box and because Ms. Grindstaff specifically identified the subpoenaed juror as being the person talking to Mr. Zickefoose during the trial (App. I, 160-161).

At the evidentiary hearing, Defendant also enlisted the testimony of Mary Branham, Defendant's mother, who also observed Mr. Truax talking with "a gray haired woman" (App. I, 176), that same woman was observed by Ms. Branham in the courtroom as a juror, at the trial's conclusion (App. I, 176-177). Ms. Branham confirmed that the juror in question was also in the hallway (having been subpoenaed by the undersigned) on August 4, 2014 (App. I, 177). Ms. Branham noted correctly that the juror in question (Ms. Crites) was "on the front row" of the jury box, but she could not remember exactly which was her seat (App. I, 178).

The Court, citing *State v. Daugherty*, 221 W.Va. 15, 260 S.E.2d 15 (2006), refused to permit Defendant to present the testimony of the three witnesses (Crites, Zickefoose, and Ryan) who had been subpoenaed by Defendant (App. I, 181). The Court stated that "the most that I've heard here today is that they were out there on smoke breaks and nobody knows what they talked about and I think that *the witnesses testified truthfully to that matter*, but all - that you have proved is that there was an opportunity to influence the jury and that's - - being totally insufficient (emphasis added)" (App. I, 182). The Court minimized the effect of the juror/alternate juror conversation stating, contrary to the evidence, that there was "no indication that that's an indication that they were talking about their verdict, who was, you know, undecided, and it, to me, is not even clear that that

conversation took place” (App. I, 182). The Court further questioned “why would I bring him [a juror] in to ask him that, when I don’t think you’ve even put on enough evidence to really to - I mean, I’m reluctant to begin, you know, after every trial, bringing the jurors and start this questioning process of them” (App. I, 184). The Court stated that “if the witness had come and said, ‘I heard them talking about the case’, that would be a very easy hurdle to meet, but the witness said ‘I don’t know what they talked about, they sat out there and they smoked together” (App. I, 184-185).

The State presented the testimony, at the evidentiary hearing, of Laura Queen, the victim advocate in the Upshur County Prosecuting Attorney’s Office. Although Ms. Queen was presented for the purpose of showing that Mr. Truax was not even present during each of the four days of trial, cross-examination disclosed that Mr. Truax was in fact present on each and every day of the four-day trial (App. I, 198).

The Court, after hearing the testimony of Ms. Queen, decided that there was not clear and convincing evidence “that there has been more than the mere opportunity to come into contact with the jurors and there has been no evidence about what was discussed, so that is how the Court is going to rule” (App. I, 203-204), the Court declining to permit Defendant’s counsel to examine the subpoenaed jurors, notwithstanding the fact that the Court found that the Defendant’s witnesses “*appeared to testify truthfully* (emphasis added)” (App. I, 206).

The Court’s reliance on *State v. Daugherty, supra*, was misplaced. Initially, *Daugherty* involved discussions among jurors, during deliberations, and not potential

external influence as in the case at bar. Secondly, the trial court in *Daugherty* took the testimony of each of the jurors in the case; only then, after considering severely contradicting evidence, did the Court deny the motion for new trial. The instant case is significantly different from *Daugherty* and presents facts which, on their face, would call the integrity of the jury's deliberations into question. If, in fact, juror Crites had conversed with Mr. Truax on a daily basis, regardless of the content of their discussions, Ms. Crites could not conceivably perform as an objective disinterested juror. The mere fact that she so blatantly ignored the Court's instructions would call into question her motives and impartiality.

The Court's refusal to permit Defendant to take the testimony at the post-trial evidentiary hearing, of jurors Crites, Zickefoose and Ryan (even though each had been subpoenaed and each was present outside the Courtroom) constitutes error. Rule 606(b), *West Virginia Rules of Evidence*, permits juror testimony "on the question whether extraneous prejudicial information was improperly brought to the juror's attention or whether any outside influence was improperly brought to bear upon the juror." It appears that Rule 606(b) would, therefore, permit the testimony of at least juror Crites, if not the testimony of jurors Zickefoose and Ryan, as to the serious issues raised by Defendant's post-trial motion.

As a backdrop to the allegations of juror misconduct, Defendant raised, in his post-trial jury misconduct motion, the brevity of the jury's deliberations in both the case-in-chief and the "mercy" trial. Both verdicts were returned after unusually short periods of deliberation. The verdict in the case-in-chief was returned after less than thirty minutes of

deliberation (ten minutes of deliberation, a brief recess, and approximately ten additional minutes of deliberation). The trial involved the testimony of almost twenty witnesses, including two forensic experts, one physician, and a forensic pathologist. The trial involved almost fifty exhibits, including voluminous medical records, multiple photographs, tangible evidence (firearm, bullet fragments, shell casings, a disk of a statement made by Defendant), an autopsy report, a coroner's report, logs from a local taxi company, 911 call sheets, technical school records, etc. Notwithstanding the number of witnesses, the voluminous exhibits, and extensive instructions and arguments, the jury returned its verdict without any conceivable opportunity for review of the testimony, the exhibits, the instructions, or the arguments.

During the sentencing (mercy) phase of the trial, the jury heard evidence from five witnesses and retired to the jury room at approximately 11:09 a.m. Thirty minutes later, at approximately 11:39 a.m., the jury requested a lunch break, which was granted, and was advised not to discuss the case among themselves. At approximately 1:00 p.m., the jury reassembled in the jury room; at approximately 1:04 p.m., four minutes later, the jury announced that it had reached a verdict (Appendix, Vol. II [hereafter, App. II], 556-557). The jury's deliberations took less than thirty-five minutes total.

While standing alone, the brevity of the jury's deliberations may possibly appear to be defensible, *State v. Scotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981); the deliberations, however, must be viewed in a different light when the clear taint of juror misconduct is also

factored in. While considering their verdict on the substantive offense, the jury did not even ask to see the murder weapon. They could not have reviewed even a tiny fraction of the exhibits. They could not have discussed, even superficially, the testimony of the many witnesses, some of whose testimony was technical and complicated. The instructions permitted consideration of a total of 14 verdicts, and as to each count of the indictment, there were multiple elements upon which findings had to be made. The jury could not have responsibly considered the evidence, the elements, and the potential verdicts in the space of a half-hour.

The “no mercy” verdict is, on its face, so bizarre as to be reversible *per se*. After being out for a half-hour, and after a subsequent 80-minute lunch break, it is incomprehensible that a four-minute deliberation could then have reflected a conscientious consideration of the facts.

The jury, in rendering each of these suspect verdicts, has unconscionably abdicated its responsibility. To devote a *total* of just approximately one hour: (1) to the consideration of the most serious criminal offense in the State (plus two other serious offenses), *and* (2) to the imposition of the harshest punishment permitted by the West Virginia criminal justice system can only indicate that this jury simply did not care about what it did and made a sham and mockery of what is a very serious responsibility of the citizens of this State. The jury’s total lack of integrity is typified by the defiant and blatant violations committed by jurors Ryan and Zickefoose on the last day of trial, and by Ms.

Crites throughout the trial.<sup>3</sup>

Considering all of the above, it is apparent that The Court erred in denying Defendant's post-trial motion for new trial based on juror misconduct. Jurors should not be talking to attempted murder victims (or the spouse of a murder victim) during the course of the trial on those issues. The content of their discussion does not matter. Juror Crites knew full well that Mr. Truax was the State's main witness, Mr. Truax having testified as the State's first witness. Any communications were improper, violative of the Court's instructions, and inherently prejudicial. The Court, in denying Defendant's efforts to elicit the testimony of the subpoenaed jurors, denied Defendant the ability to address critical issues bearing upon integrity of the jury's verdict. Defendant contends that he is entitled to a new trial based upon the Court's error in both prohibiting the testimony of the subpoenaed jurors and in denying the motion for a new trial, based upon jury misconduct.

## II.

### Unfairly Prejudicial Evidence

After the verdict of guilty as to first-degree murder, the Court conducted, on the following day, a trial as to the issue of whether the Defendant would receive mercy. While the Court did not permit the introduction, during the case-in-chief, of photographs of

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<sup>3</sup> Perhaps the jury's complete failure to maturely approach its gravely important obligations is best exemplified by one juror's tee-shirt, flagrantly worn on the second day of trial, flippantly containing the following message, in large print: "It's not that I don't understand, it's just that I don't care" (App. I, 264)

Defendant, when arrested, wearing a shirt with inflammatory language, the Court, at the mercy trial, did permit its introduction. The back of the shirt stated the following: “May God Have Mercy on My Enemies Because I Sure as Hell Won’t.” No evidence was presented, or proffered, to the effect that Defendant selected this shirt on the day of the crimes or that it had any connection whatsoever to the crimes which were charged (App. II, 536-537). It is clear that the introduction of this photograph would not withstand the scrutiny of an analysis under Rule 403, *West Virginia Rules of Evidence*, its prejudicial effect clearly outweighing its probative value. In addition to presenting the photograph, the State introduced a video game, found in Defendant’s backpack, entitled “Assassin’s Creed.” While the State clearly had no knowledge of the content or nature of the video game (App. II, 535, 536), the Court nonetheless permitted its introduction. The fact that the video game contained the word “assassin” was again unfairly prejudicial under Rule 403; without context or foundation, the introduction of both items of evidence was merely inflammatory and, Defendant contends, acted to offset the detailed testimony of psychologist Robert J. Rush, Ph.D. (App. II, 483-508) and that of Defendant’s sister, Elizabeth Grindstaff (App. II, 509-524), both of whom painted a different picture of Defendant. Dr. Rush described a young man of low-average intelligence, with developmental issues, a loner, but not an evil person. Ms. Grindstaff described Defendant as a loner, a loving and caring brother and son, without any predisposition to violence or anger. The detailed and insightful testimony of Dr. Rush and Ms. Grindstaff were, however, overshadowed by the inflammatory nature of the shirt and the

video game, neither of which were shown to have any connection to the crime or to the Defendant's personality. The jury, in imposing the harshest criminal penalty in this State, should have considered only evidence which was not unfairly prejudicial.

*State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), provides that the mission of Rule 403 is to eliminate the obvious instance in which a jury will convict because its passions are aroused rather than motivated by persuasive force of probative evidence. The instant case is a clear example of the State attempting to arouse the passions of the jury inducing a "no mercy" verdict, rather than persuading the jury by evidence that is simply probative as to the issue of Defendant's sentence. The Court erred in permitting the jury to consider this evidence and a new trial should be granted, upon Defendant's motion, to rectify this error. The Court's error amounted to an abuse of discretion justifying reversal. See *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596 (1983).

### III.

#### Insufficiency of the Evidence

The evidence at trial was insufficient to convict. The failure of the evidence included, *inter alia*, the following:

1. The lone eyewitness (the surviving victim), Mr. Truax, providing a description of the assailant's clothing that was totally inconsistent with what Defendant was wearing at the time of the crime. Mr. Truax stated that the assailant was wearing blue jeans and a black

hoodie (App. II, 47); the evidence, however, was that Defendant was wearing , according to Chief Deputy Virgil Miller, “insulated coveralls . . . full length, has long sleeves, has a collar, you step into it and zip it up” (App. II, 327), at the time of his arrest, shortly after the crime.

2. The fact that the State did not prove that Defendant’s rifle was the murder weapon. The two shell casings found at the crime scene were never analyzed; even though the State had the Defendant’s rifle in evidence, no effort was made to determine whether the shell casings found near the body of victim Beni Truax were fired in Defendant’s rifle (App. II, 326).

3. The fact that a gunshot residue test disclosed no evidence of residue on Defendant’s person (App. II, 295-296). A gunshot residue test was performed on Defendant’s hands and face, resulting in no evidence that he had shot a firearm just a few hours before the test.

4. The fact that many shell casings were missing from the crime scene, this fact being inconsistent with the surviving victim’s testimony and with hard evidence of multiple shots fired (App. II, 280), into the victim’s house. The State presented evidence that some six shots had been fired, allegedly by Defendant, but only two shell casings were located, next to the body of the murder victim (and, as noted, they were not analyzed) (App. I, 285).

5. The fact that Mr. Truax’s testimony was further inconsistent, in that his original 911 report was that his wife and son had been killed and were lying dead in the yard (App. II, 328); in fact, his son had not even returned from school when the shooting occurred and

was not injured (App. II, 52).

6. The failure of the State to provide analyses of Defendant's laptop computer or cell phone (App. II, 326-327).

7. The unexplained 27-minute gap in Defendant's "statement." The State could not explain why the officers' digital recording device had failed, for 27 minutes, when it needed no batteries then, had never failed before, and has never failed since (App. I, 243).

8. The fact that no footprint impressions or photographs were taken, even though the State presented testimony as to the assailant's alleged escape path from the crime scene (App. II, 85).

Although Defendant is fully aware of the heavy burden he has in challenging the insufficiency of the evidence, *State v. Prophet*, 234 W.Va. 33, 762 S.E.2d 602 (2014); *State v. Blevins*, 231 W.Va. 135, 744 S.E.2d 245 (2013), the factors cited above, when coupled with the apparent jury misconduct, take on increased significance, which should have been considered by the Court. The Court committed error in denying this post-trial motion.

#### IV.

##### Denial of Post-Trial Motions

For the reasons stated above, Defendant contends that the Court erred in denying his post-trial motion for new trial based upon jury misconduct, his post-trial motion for new trial based upon the admission of unfairly prejudicial evidence, and his post-trial motion for new

trial based upon insufficiency of the evidence. The reasons justifying Defendant's post-trial relief, and the Court's errors in denying of that relief, are set forth, and fully discussed, in the previous Argument sections herein.

## **CONCLUSION**

For the reasons stated herein, and in the record as a whole, Defendant (Petitioner herein) prays that this Court: (1) reverse the judgments of the Circuit Court of Upshur County, denying Defendant's post-trial motions for new trial; and (2) remand this case to the Circuit Court of Upshur County for a new trial.

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served a true copy of the *APPEAL BRIEF OF PETITIONER HOWARD CLARENCE JENNER* upon all other parties to this action by:

\_\_\_\_\_ Hand delivering a copy hereof to the parties listed below:

or by

  X   Depositing a copy hereof via fax and in the United States Mail, first class postage prepaid, properly addressed to the parties listed below.

Dated at Elkins, West Virginia, this 6<sup>th</sup> day of January, 2015.



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