

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

NO. 14-1037

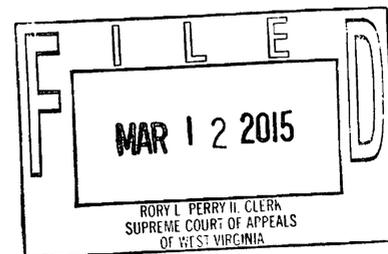
STATE OF WEST VIRGINIA,

*Plaintiff Below, Appellee,*

v.

DONALD DUNN,

*Defendant Below, Appellant.*



Appeal from a final order  
Of the Circuit Court of  
Raleigh County (13-F-225)  
(Honorable John A. Hutchison)

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**APPELLANT'S BRIEF**

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## **ASSIGNMENTS OF ERROR**

**I. THE COURT BELOW ERRED IN DENYING A DEFENSE MOTION FOR A CONTINUANCE OF THE TRIAL AND IN FAILING TO INSURE THE DEFENDANT'S COMPETENCE TO STAND TRIAL WHILE UNDER THE INFLUENCE OF HIGH-POWERED PAIN KILLERS.**

**II. THE COURT BELOW ERRED IN EXCLUDING THE TESTIMONY OF AN EXPERT WITNESS WHO OPINED THAT THE DEFENDANT'S CONDUCT WAS INFLUENCED BY THE CONSUMPTION OF SYNTHETIC MARIJUANA, ERRED IN PRECLUDING EVIDENCE GENERALLY RELATING TO THE SAME, AND ERRED IN RESTRICTING DEFENSE COUNSEL'S OPENING STATEMENT.**

**III. THE COURT ERRED IN PERMITTING THE STATE TO OBTAIN AND INTRODUCE EVIDENCE OF THE CONTENTS OF DEFENDANT'S PRIVATE TELEPHONE CONVERSATIONS IN CALLS MADE FROM THE JAIL, VIOLATING A HOST OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.**

**IV. THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL AFTER TWO JURORS ENGAGED IN A HEATED, ANIMATED DISCUSSION IN THE JURY BOX IN OPEN COURT, AND IN FAILING TO MAKE INQUIRY RELATIVE TO THE SAME.**

**V. THE COURT BELOW ERRED IN REFUSING A DEFENSE INSTRUCTION OUTLINING FACTORS FOR JURY CONSIDERATION ON THE ISSUE OF MERCY.**

## STATEMENT OF THE CASE

Twenty-five year old Beckley native Donald Dunn was convicted of first degree murder with the use of a firearm and attempted murder with the use of a firearm after a seven-day jury trial in the Circuit Court of Raleigh County, West Virginia, the Honorable John A. Hutchison presiding. The jury's verdict resulted in a sentence of life in the penitentiary without mercy and without the possibility of parole on the first degree murder conviction, to run consecutive to a sentence of three (3) to fifteen (15) years in the penitentiary on the attempted murder conviction.

Viewing the facts in a light most favorable to the State of West Virginia, as is required by the rules governing the matter at this stage of the proceedings, the evidence adduced at trial included the following:

The charges against Mr. Dunn arose from the May 25, 2013, shooting death of Mr. Dunn's step-father, Mark McDermott, a native Australian, and the attempted murder of his natural mother, Johanna, in their home on the outskirts of Beckley. The evidence indicated that Mr. Dunn's family expected him to graduate from Marshall University that day. However, Dunn had not been attending classes and was not in line to graduate.

The State's theory of the case indicated that Mr. Dunn decided that it was easier to kill his parents than to disappoint them by explaining that he had not been attending classes for the two years he'd spent in Huntington, West Virginia, living with his girlfriend who was also a native of Beckley and a Marshall student.

Dunn's father was shot twice in the head as he sat on the living room couch having his morning coffee and reading a book. When his mother arrived home later that

morning, Mr. Dunn told her to close her eyes, he had a surprise for her. After they joked about the nature of the gift, he then put his mother in a headlock and placed her pistol up to her temple. (App. Vol. II, pp 856-860). Fortunately, the weapon misfired. Attempting to extract herself from the situation, Mr. Dunn's mother suggested they tell authorities Mr. McDermott had committed suicide.

That course would be futile, Mr. Dunn explained, because he had shot Mr. McDermott *twice*. Thinking quickly, Mr. Dunn's mother then suggested she would tell police she had shot her husband and invoke a battered spouse defense. That idea was a good one, they agreed, and she dialed 911. Mr. Dunn listened as his mother told the 911 dispatcher that she had shot her husband.

When police arrived, the pair were separated. Mr. Dunn's mother came clean with the officers, but Mr. Dunn made a statement consistent with the plan, telling them he'd been in the shower and heard gunshots before going upstairs to find his mother holding the pistol and his step-father fatally wounded on the couch.

Later that afternoon, confronted with his mother's statement, and after having again been appropriately advised of his rights and executing a written waiver, Mr. Dunn gave a full confession.

As police later discovered, Mr. Dunn had prepared a suicide note, purportedly written by his mother, in which she took credit for shooting his step-father and explaining taking her own life.

Mental health professionals employed by both the prosecution and defense determined that Mr. Dunn was competent to stand trial and that he did not suffer from a

mental defect at the time of the commission of the offenses.

Dr. Clifford Hudson, a Charleston, West Virginia licensed forensic psychologist, opined, however, that he believed Mr. Dunn's actions at the time were influenced, at least in part, by reason of his use of synthetic marijuana. (App. Vol. II, pp 370).

Mr. Dunn took the witness stand on his own behalf and the jury heard a number of character witnesses who indicated they had never even seen Mr. Dunn lose his temper or become angry. That testimony was consistent with that of his mother. The jury did not accept Mr. Dunn's efforts to obtain mercy, however.

Mr. Dunn's trial commenced on August 5, 2014, and concluded with a jury verdict on August 14, 2014. Mr. Dunn's timely motion for a new trial was denied on September 5, 2014, and the sentence was imposed on that date. This timely appeal followed.

### **SUMMARY OF ARGUMENT**

A number of troubling errors are apparent in this record which conspired to deprive Donald Dunn a fair trial. For one facing conviction for the highest crime known to mankind, our justice system appropriately exercises strict and careful scrutiny to insure that a defendant's procedural and substantive constitutional and other rights are afforded.

Mr. Dunn first argues here that the Court should have granted a continuance of the trial when the State of West Virginia, at the last minute, dumped some seventy-five (75) hours, more or less, of recorded telephone calls in defense counsel's lap. This late disclosure, coupled with Mr. Dunn's questionable competence because he was being prescribed high-powered pain killers post-surgery to replace a broken plate in his right

arm, mandated a continuance of the trial. The court's failure to afford Mr. Dunn a brief continuance prejudiced him and was an abuse of discretion.

Secondly, Mr. Dunn asserts that the court below was wrong to preclude him from adducing evidence from a forensic psychologist that his conduct at the time of commission of the offenses of conviction was likely influenced by his use of synthetic marijuana. While admittedly not sufficient for purposes of a "diminished capacity" defense, the evidence was relevant on other issues and should have been admitted.

Third, Mr. Dunn argues that the court erred in permitting the State to use the contents of recorded telephone calls he made to his mother from the jail. This issue implicates the defendant's rights under the Sixth, Fourth and Fourteenth Amendments to the United States Constitution and the use of that evidence was prejudicial and unfair.

Fourth, Mr. Dunn contends that the court below allowed the trial to be tainted when it failed to make inquiry into what appeared to be two jurors arguing between themselves about the case in the jury box in open court during the course of jury deliberations. Their conduct, on its face, violated the juror's sworn duty to deliberate only in the presence of all other jurors in the jury room. The court failed to even make inquiry to determine what had occurred.

Fifth, it is Mr. Dunn's position that the court should have given a defense instruction outlining factors for the jury to consider on the issue of mercy in the case. Admittedly, this Court should change the law to mandate use of the instruction in cases where mercy is an issue.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Appellant believes oral argument is necessary in this case to effectively present the issues involved for resolution and is of the opinion that a colloquy with the Court is essential to achieve a well-reasoned result pursuant to Rule 19.

## STANDARD OF REVIEW

This Court evaluates the denial of a motion for a continuance for an abuse of discretion. Syl. Pt. 2 *State v. Bush*, 163 W.Va. 168, 169, 255 S.E.2d 539, 540 (1979). “A trial court’s evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.” Syllabus point 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998). “Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.” Syllabus point 1, *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995). “Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misle[d] by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.” *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995); *State v. Jett*, 220 W.Va. 289, 647 S.E.2d 725 (2007); *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996).

“Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.” Syl. Pt. 1, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995). ““The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.” Syllabus Point 6, *Helmick v. Potomac Edison Co.*, 185 W. Va. 269, 406 S.E.2d 700 (1991), *cert. denied*, 502 U.S. 908, 112 S. Ct. 301, 116 L. Ed. 2d 244 (1991).’ Syllabus point 1, *West Virginia Division of Highways v. Butler*, 205 W. Va. 146, 516 S.E.2d 769 (1999).” Syllabus point 1, *Watson v. Inco Alloys International, Inc.*, 209 W. Va. 234, 545 S.E.2d 294 (2001).

## ARGUMENT

### **I. THE COURT BELOW ERRED IN DENYING A DEFENSE MOTION FOR A CONTINUANCE OF THE TRIAL AND IN FAILING TO INSURE THE DEFENDANT’S COMPETENCE TO STAND TRIAL WHILE UNDER THE INFLUENCE OF HIGH-POWERED PAIN KILLERS.**

The matter was addressed at the pre-trial hearing on Monday, July 28, 2014, only seven (7) days prior to the commencement of trial on Monday, August 4. (App. Vol. II, pp 8-11; 30-35). The actual CD’s containing the calls were produced the following day. It simply was not humanly possible for counsel to review all of the calls to determine whether or not Mr. Dunn had made a comment germane to some issue in the case. Frankly, it was unfair to impose that obligation on defense counsel on the eve of trial, and the prosecution took full advantage of the information.

The prosecutor’s very first question to Mr. Dunn on cross-examination was: “You

agree that you and your mother have had over 400 telephone calls, while you've been in the Southern Regional jail, since you murdered your father and tried to murder your mother, correct?" (App. Vol. III, p 936).

Meekly, Mr. Dunn replied, "Yes Ma'am."

She then proceeded to question him about comments he'd made to his mother on the telephone from jail. Apparently, Mr. Dunn told his mother, "I may as well cost the State as much money as humanly possible" {by going to trial}. (App. Vol. III, p 936). Mr. Dunn explained that his comment was a joke, but it is not difficult to imagine the impact that statement had on twelve Raleigh County taxpayers serving on jury duty.

At another time during one of the more than 400 telephone calls, he allegedly made statements about escaping from prison. (App. Vol. III, p 937).

Coupled with the burden on counsel of dealing with sixty hours worth of recorded telephone calls, was Mr. Dunn's undisputed use of prescribed high-powered pain medication. In what came as a surprise to everyone, including, apparently, Mr. Dunn, jail officials took him for surgery on his broken right arm to replace the broken plate which had been surgically implanted three (3) days before the pre-trial hearing and he was administered "Lortab," a high-powered, narcotic pain medication. (App. Vol. I, p 4). The date and time of his follow-up appointment would not be disclosed by jail authorities, but was apparently to be made within the following two weeks.

Without further inquiry, the Court disposed of the motion for a continuance on the issue of Mr. Dunn's possible impairment by reason of the medication essentially based on a finding that "he looks OK to me." The Court stated: "The Court will make a finding

that, based upon the Court's observations of the defendant today, that the Court did not observe the defendant to be, in any way, sleepy, non-responsive, and/or he did not appear to the Court, through my own observations, to be impaired today." (App. Vol. I, p 69).

With respect to the unreasonable expectation that defense counsel deal with 400 fifteen minute telephone call recordings while otherwise attempting to prepare for a lengthy murder trial, it was apparently just tough stuff, but the court did direct that they be produced as soon as possible.

While counsel is cognizant that a ruling on a motion for a continuance of trial rests within the sound discretion of the trial court, Mr. Dunn simply posits that the Court abused that discretion by reason of the facts and circumstances here. This Court has opined:

we structure our review in accordance with four salient factors that appellate courts consider when reviewing denials of requests for a continuance. First, we consider the extent of [Petitioner Father's] diligence in [his] efforts to be present and to ready [his] defense prior to the date set for the hearing. Second, we consider how likely it is that the need for a continuance could have been met if the continuance had been granted. Third, we consider the extent to which granting the continuance would have inconvenienced or been contrary to the interests of the circuit court, the witnesses, and the other litigants, including the public interest in the prompt disposition of these types of proceedings. Finally, we consider the extent to which [Petitioner Father] might have suffered harm as a result of the circuit court's denial.

*In re Tiffany Marie S.*, 196 W.Va. 223, 235, 470 S.E.2d 177, 189 (1996). "A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syl. Pt. 2 *State v. Bush*, 163 W.Va. 168, 169, 255 S.E.2d 539, 540 (1979).

Here, the relevant factors weigh heavily in Mr. Dunn's favor since he was obviously prejudiced by counsel's inability to prepare to meet the unbelievable volume of evidence disclosed at the last minute. Further, we are left to speculate whether the defendant was impaired during all or part of his trial. A far better course would have been to remove the issue entirely by granting a continuance of the trial. The court's failure to do so was erroneous and prejudiced Mr. Dunn such that a new trial is warranted.

**II. THE COURT BELOW ERRED IN EXCLUDING THE TESTIMONY OF AN EXPERT WITNESS WHO OPINED THAT THE DEFENDANT'S CONDUCT WAS INFLUENCED BY THE CONSUMPTION OF SYNTHETIC MARIJUANA, ERRED IN PRECLUDING EVIDENCE GENERALLY RELATING TO THE SAME, AND ERRED IN RESTRICTING DEFENSE COUNSEL'S OPENING STATEMENT.**

Charleston Forensic Psychologist Clifton R. Hudson, Ph.D. examined Mr. Dunn extensively and determined that he was competent to stand trial and that he did not suffer from a mental disease or defect at the time of the offense. However, Dr. Hudson did hold the opinion that Mr. Dunn's admitted use of synthetic marijuana had an impact upon his conduct at the time of the offense. He stated, "...{Y}es, I do believe that it is reasonable to state that the consumption of synthetic marijuana affected his capacity for rational thought at the time of the offense." (App. Vol. I, p 17).

For his part, Mr. Dunn described his heavy use of the over-the-counter legal "marijuana" substances. (App. Vol. III, pp 926-931). Of course, no one really knows what kind of chemicals are utilized by the substance's manufacturer. Mr. Dunn stated the drug gave him a "zombified feeling." (App. Vol. III, p 933).

While the defense here must concede that Hudson's testimony alone is

insufficient to support a diminished capacity defense in this case, the testimony should have been admitted for other purposes. In footnote nine (9) in *State v. Joseph*, 214 W.Va. 525, 590 S.E.2d 718 (2003). this Court noted:

We likewise find that the testimony of Drs. Beard and Hughes should have been admitted insofar as it established that Mr. Joseph suffered from a mental impairment for which he required hospitalization and treatment. While the testimony provided by these two doctors, in and of itself, was inadequate to negate the State's evidence of the intent element of the murder for which Mr. Joseph was charged, their testimony was relevant in establishing that Mr. Joseph suffered from a mental impairment for which he was hospitalized a short time prior to committing the murder, and which affected his cognitive abilities, i.e. his ability to reason and think things through.

Id. at n 9. That is precisely the point in the matter at bar. The court below rejected that rationale and refused to admit the testimony.

The state of the record here is directly analogous to the court's treatment of the battered spouse defense. *Cf.*, *State v. Harden*, 223 W.Va. 796, 679 S.E.2d 628 (2009); *State v. Steele*, 178 W.Va. 330, 359 S.E.2d 558 (1987).

In what may be generously characterized as an unconventional ruling, the court below restricted defense counsel's ability to include the defendant's anticipated testimony regarding synthetic marijuana use. The prosecutor objected to any mention of substance abuse until after Mr. Dunn testified, telling the court that the danger of making a "promise too easily not kept" was of overriding concern. In other words, she feared that counsel would represent to the jury on opening statement that the defendant would testify and then not put him on the

witness stand. Despite assurances to the contrary, and notwithstanding *strenuous* objection, the Court still precluded defense counsel from making comments on opening statement indicating that Mr. Dunn would testify about his synthetic marijuana use, its impact on him, and its contribution to his behavior at the critical moments which were the subject of the trial.

Thus, Mr. Dunn was precluded from effectively presenting his defense in opening statement - the part of the trial where a case is often won or lost. (See, Spence, Gerry, "Winning Your Case on Opening Statement"). Counsel was not able to tell the jury the facts of the case that he anticipated proving at trial.

Surely that ruling is reversible error. It essentially tied counsel's hands behind his back and pushed him out in front of a jury of twelve fine men and women who had no idea they didn't get to hear the whole story.

The sole basis for the ruling appears to be that counsel might attribute anticipated testimony to Mr. Dunn which might not then be produced.

**III. THE COURT ERRED IN PERMITTING THE STATE TO OBTAIN AND INTRODUCE EVIDENCE OF THE CONTENTS OF DEFENDANT'S PRIVATE TELEPHONE CONVERSATIONS IN CALLS MADE FROM THE JAIL, VIOLATING A HOST OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.**

As discussed hereinabove, the court below, over strenuous objection, the State was permitted to obtain and utilize at trial recordings of Mr. Dunn's private telephone conversations with his mother. Obviously, some of his comments were extremely

prejudicial.

The accessibility and use of this material implicates a variety of constitutional concerns, including, but perhaps not limited to, his rights to privacy, his Fourth Amendment rights to be secure in his papers and effects, his Sixth Amendment right to counsel, and his Fifth Amendment right against self-incrimination.

It is first noteworthy that the State failed to lay a proper evidentiary foundation for obtaining the materials here. Although testimony was adduced asserting that all inmates are given, and sign for, an inmate handbook advising them that all of their telephone calls would be monitored, the evidence failed to establish that *Mr. Dunn* was given said handbook. Certainly, no signature acknowledging receipt was offered.

Further, the manner in which the regional jail officials handle attorney-client calls is sketchy at best. Apparently, attorneys - at least some of them - are advised to give their telephone numbers to "Global Tell-Link" or some such outfit which then somehow screens out those calls from review or capture.

Although it appears there is a dearth of caselaw dealing with the matter, some guidance may be gleaned from the United States Supreme Court decision in *Turner v. Safley*, 482 U.S. 78 (1987), where the Court considered the monitoring of inmate mail. The Court appears to have held that monitoring inmate correspondence was not unconstitutional because of legitimate safety concerns.

As a practical matter, the statute which purports to authorize prosecutors in West Virginia to obtain and use the information, W.Va. Code 31-20-5e affords virtually no restriction on disclosure whatsoever.

The process whereby inmate telephone calls are monitored and recorded - and disclosed and used as evidence - is unconstitutional inasmuch as the process violates an inmate's right to privacy, essentially eviscerates his right to counsel, and renders Miranda meaningless. *Cf. Massiah v. United States*, 377 U.S. 201 (1964). *Massiah* holds that the Sixth Amendment prevents the government from eliciting incriminating statements from a criminal defendant once adversarial proceedings have commenced and the defendant has a lawyer.

While the circumstances are obviously distinguishable inasmuch as the State is not actively "soliciting" statements and information, it still must be recognized that we are dealing with a captive audience. If an incarcerated inmate wants to communicate via telephone with the outside world, the or she has no choice but to do it on a monitored line.

This Court should require a modicum of precautions to prevent the random collection and dissipation of an inmate's private communications. The use of Mr. Dunn's recorded conversations in the matter of instance concern were highly prejudicial, were not probative of any fact in issue in the case, and were simply used to make him look bad. Those circumstances obtain, unfortunately, far too often in the courts of this state.

**IV. THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL AFTER TWO JURORS ENGAGED IN A HEATED, ANIMATED DISCUSSION IN THE JURY BOX IN OPEN COURT, AND IN FAILING TO MAKE INQUIRY RELATIVE TO THE SAME.**

After the jury reported that perhaps it was hung on the issue of mercy, while all twelve were returned and sitting in the jury box, His Honor left the bench to retrieve a

document. During his absence, the jury who apparently was the lone “mercy” dissenter and the juror seated in front of her engaged in a heated, animated conversation, presumably about their dispute on the verdict and the issue of a recommendation of mercy. *Cf., State v. Dellinger*, 225 W.Va. 736, 696 S.E.2d 38 (2010).

The defense moved for a mistrial. (App. Vol. III, pp 1131-1133).

It is axiomatic that the Court should have made inquiry as to the nature and details of the “deliberations” outside the jury room by two of the twelve jurors. The Court simply brushed off the matter and made no inquiry whatsoever.

At the very least, Mr. Dunn is entitled to a new trial because all of the deliberations in his case did not occur amongst all twelve jurors - a basic instruction given in every criminal case. While our jurisprudence is devoid of decisional law on this precise issue, the error is a basic one and should afford Mr. Dunn an avenue to obtain a new trial.

**V. THE COURT BELOW ERRED IN REFUSING A DEFENSE INSTRUCTION OUTLINING FACTORS FOR JURY CONSIDERATION ON THE ISSUE OF MERCY.**

This Court has observed: In *State v. Miller*, 178 W.Va. 618, 621, 363 S.E.2d 504, 507 (1987) (citations omitted), we noted that in first degree murder cases, a “finding of guilt automatically results in a life sentence” and that the only issue on sentencing before a jury is whether the defendant should ever be eligible for parole. We then discussed at length the issue of whether a jury should be instructed on what it should—and should not—consider in reaching a decision on mercy. Our

review in *Miller* included how courts in other jurisdictions have addressed similar issues. Based on that review, we held in *Miller* that “[a]n instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given.” *Id.*, at Syllabus Point 1. *See also* Syllabus Point 7, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992) (“The recommendation of mercy in a first degree murder case lies solely in the discretion of the jury. Therefore, it would be improper for the trial court to set aside a jury verdict of first degree murder without a recommendation of mercy in order to give a recommendation of mercy.”).

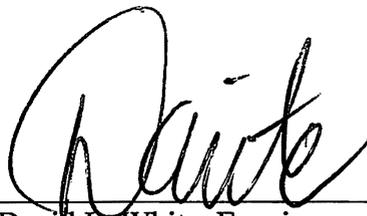
Mr. Dunn respectfully suggests it is time to revisit that rule and afford West Virginia juries the benefit of guidance on their consideration of the issue of mercy in appropriate cases. Particularly where, as here, the sole issue for jury deliberation is perhaps whether to afford mercy or to withhold such a recommendation, it is appropriate to instruct jurors by highlighting matters worthy of consideration in reaching a verdict.

### CONCLUSION

Based upon the foregoing, or for reasons otherwise apparent to the Court, Appellant respectfully prays that the Court will enter an Order directing that this case be remanded with directions to vacate his convictions and award him a new trial.

DONALD DUNN,

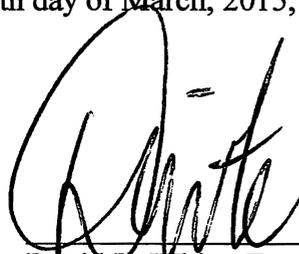
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### **CERTIFICATE OF SERVICE**

I, David L. White, do hereby certify that I served true copies of the foregoing “Petitioner’s Brief” upon counsel for the Respondent, Kristen Keller, Raleigh County, West Virginia, Prosecuting Attorney, by depositing a true copy thereof in the United States mail, first-class postage pre-paid, on this 12th day of March, 2015, addressed to her at 112 North Heber Street, Beckley, WV 25801.



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