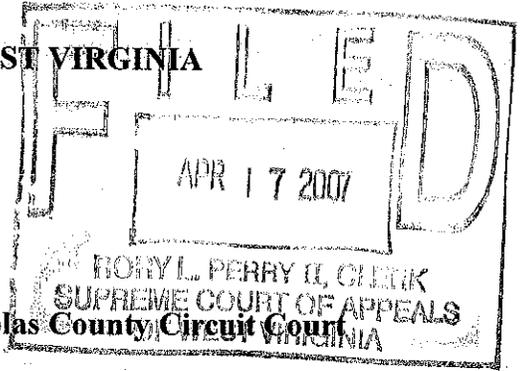


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston



STATE OF WEST VIRGINIA

v.

No. 33323

From the Nicholas County Circuit Court

ERIC FOSTER

APPELLANT'S MEMORANDUM
IN SUPPORT OF
PETITION FOR APPEAL

Now comes the Appellant and Defendant below, Eric Foster, by counsel, Margaret L. Workman, and files this Memorandum in Support of his Petition for Appeal.

I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

On 7th day of October, 2004, the Appellant Eric Allan Foster was convicted of two counts of second degree murder in the Circuit Court of Nicholas County, Honorable Gary Johnson presiding. On December 14, 2004, Appellant Foster was sentenced to two terms of forty years each to run consecutively for a total sentence of eighty years. This is a Petition for Appeal of those convictions. The Appellant asks this Court to reverse such convictions.

II. FACTS OF THE CASE

The facts which gave rise to these convictions are as follows:

The Appellant, Eric Allan Foster, is a 29 year-old man who is a lifelong resident of Nicholas County, West Virginia. He was a hard worker from an early age, completing high school at Nicholas County High School in 1996, also working since he was fifteen years old. Prior to his conviction, Eric was working at SMH Construction. Eric had never been in any

serious trouble and had never been charged or convicted of any offense of a violent nature. At the time of the incidents which gave rise to the charges which led to these convictions, he had suffered a serious work-related injury when a concrete barrier fell on his hand, and was on Workers Compensation and undergoing physical therapy. He and his girlfriend are the parents of a little girl, age 6.

On December 30, 2003, Eric was at the home of Matt Bush, a lifelong friend, working on Matt's well pump. That afternoon, Travis Painter came to Matt's residence to see Eric. The two men had had differences in the past; and on the day at issue, Travis started a verbal argument with Eric and then pulled a gun on him. Eric was successful in disarming Travis without being shot. Both Eric and a witness to the incident, Angela Nicholas, testified that at the conclusion of that incident, Travis stated that the continuing dispute was "ridiculous" and he invited Eric to come to the home he shared with his sister and brother-in-law, Diane and Mike Murphy, that evening to talk things out and resolve their differences.

That evening, as Eric prepared to go to Travis's home, Matt Bush decided that he would also go. Another individual, Jeff Stewart, who Eric had just met for the first time that evening also decided to accompany the pair to Mike's home. Eric took a shotgun with him for the ostensible purpose of "pawning" it with Mike Murphy.¹ Further, even had he not planned to pawn it, the evidence was that carrying guns was a routine part of everyday life in the rural settings that all these individuals grew up in. Had Eric been going up the hill for an altercation, it would make sense that he would also bring a firearm, but he did not. There was no dispute that

¹There was testimony from several witnesses that Mike Murphy regularly "pawned" or purchased items of property from others.

Eric did not take a weapon the scene, nor was there any evidence that he touched, possessed, or used a weapon at the scene of the subsequent shooting. In fact, there was absolutely no evidence presented demonstrating any intent on the part of the Appellant, either acting alone or in concert with Bush and Stewart, to engage in any violent conduct at the Murphy residence.

When the three men reached the property of Mike Murphy, the evidence was that Murphy and Painter came out of their camper with guns drawn. The state's evidence was that the initial shots originated from the truck. However, W. Va. State Police firearms expert Matthew White testified that there was evidence of gunfire emanating both from the truck and at the truck. The defense evidence was that Mike and Travis came out of the house with weapons drawn and brandished in a threatening manner. No matter who fired the first shots, Eric Foster was stunned at this turn of events, as he had not taken, nor did he have a weapon, and he had no intention whatsoever of engaging in a, and least of all a gunfight. He immediately fell to the floor of the truck, pulled the clutch in an effort to get the vehicle rolling back down the driveway. There was no evidence whatsoever that Eric fired or handled any weapon, or took any action to facilitate the persons who did. Nor did the State claim that he took or used a weapon. Further, the State presented no evidence whatsoever that Eric in any way planned or participated in the shooting, or that he in any way facilitated the shooting, except for driving the truck there that evening. Nor did the State present any evidence whatsoever of any intent on Eric's part to participate in an argument or fight with Travis Painter or Mike Murphy, both of whom ultimately died that evening as a result of gunshot wounds suffered in the ensuing shoot-out.

The evidence at trial was that Jeff Stewart, unbeknownst to Eric Foster, apparently had his own grudge against Travis. It should be noted that Mr. Murphy was Nicholas County's

largest drug dealer, and indeed the autopsies reflected that he and Travis had drugs in their systems. The blood and urine evidence reflected that Murphy had methamphetamine, the antidepressant fluoxetine, and the recent use of marijuana.

As soon as Eric could get the truck backed down and then out the road, he returned to the residence of Mr. Bush, to pick up his girlfriend, Tina Hartley. Although the evidence reflected that the gun used in the incident was found hidden between the mattresses of Mr. Bush's bed, there was no evidence at Eric had anything to do with hiding the weapon. Further, Eric Foster went into Mr. Bush's residence only long enough to wash his finger, which was bleeding from having been shot in the melee. Once Eric reached his own home, he called the police immediately and reported that his truck had been shot numerous times. Eric testified that he did not know that Murphy and Painter had been killed, as he was focused solely on avoiding getting shot and getting off the mountain once the shooting began.

Although the state attempted to imply that the Appellant made this report as a subterfuge for his alleged involvement in the shootings, the facts developed at trial demonstrated that the Appellant's conduct after the shootings stood in stark contrast to that of the person or persons who actually did the shooting. Immediately after the shootings, two witnesses to the shootings who had been at the Murphy residence, but who did not know who was in the truck, rushed to the Bush house to seek help and to report the shootings. Bush and Stewart not only forcibly forbade them from calling the police, but in fact held them hostage and ordered them that they were to leave West Virginia if they wanted to stay alive. There was no evidence that the Appellant participated in the kidnaping, or the restraint of liberty, of these two witnesses, or that he in any way attempted to intimidate or threaten either of them. Even so, the State for inexplicable

reasons, exercised its discretion in a poorly thought out manner by offering Bush a sweetheart deal² in exchange for his testimony against the other two defendants, Appellant and Mr. Stewart.

The state had **no evidence whatsoever of any conduct on the part of the Appellant** involving any violence on his part against the victims the night of the incident, or even of any conduct on his part which assisted the others in perpetrating the shootings. Nevertheless, the state proceeded on the theory that he had acted "in concert with" the other two defendants to perpetrate the murder, without any evidence or argument on exactly what Eric Foster did that could be described as acting "in concert with" the other defendants. Furthermore, no instruction was requested or given as to what is meant by the legal concept of "acting in concert with;" and no instruction was requested or given explaining the difference between a principal in the first degree and a principal in the second degree.

Multiplying the Appellant's problems was the appointment of counsel, Gregory Hurley. Appellant was extremely discouraged when he smelled alcohol on his lawyer almost every day of this criminal trial. Unbeknownst to the Appellant, the records of the State Bar (examined by undersigned counsel in the preparation of this appeal) reflect that trial counsel had at the time of Appellant's trial already had numerous ethics complaints filed against him for ineffective assistance of counsel, several of which involved charges that Mr. Hurley was drinking alcohol while acting as a lawyer in court proceedings.³ Although Appellant understands that ineffective assistance is generally more properly the subject of a Petition for Habeas Corpus, it will be one of the Appellant's contentions herein that certain acts and omissions on the part of defense counsel

²Mr. Bush was permitted to plead to a lesser charge and is serving a lesser sentence.

³Counsel's drinking during trial will be the subject of a petition for habeas corpus relief.

are so clearly not within the realm of trial tactics or strategy as to be clear as a matter of law to be deficient, and as such constitute *per se* ineffective assistance of counsel, and that such *per se* ineffective assistance in a capital criminal case is sufficient as a matter of law for this Court to reverse his convictions. Appellant contends that the trial court should never have appointed Mr. Hurley, with his well-known track record in the Nicholas County Bar, to represent someone charged with first degree murder and facing a possible life sentence. Appellant further contends that, even if his appointed counsel had been competent, that it is the better practice in West Virginia and the policy in many circuits for two counsel to be appointed for defendants facing potential life in prison; and asks this Court to examine this issue and issue guidance to the circuit courts..

The evidence upon review will demonstrate that Eric Foster was in the wrong place at the wrong time, which is not a crime in West Virginia. Despite the lack of evidence, and due to both the lack of proper and complete instructions of law, and the failures of his counsel, Eric Foster was convicted of two counts of second degree murder. Despite his young age and not having a prior record, he now is serving what is tantamount to a life sentence.

III. ASSIGNMENTS OF ERROR

1. The lower court erred by giving an instruction to the jury on second degree murder, thereby giving the jury the option to convict the Appellant on two counts of second degree murder, because there was insufficient evidence as a matter of law to support the giving of such instruction and verdict option. Although no objection was made by trial counsel, this error was of such magnitude as to constitute plain error.

2. The lower court erred in denying the Appellant's Motion to Dismiss/Motion for

Judgment of Acquittal on the charges of first and second degree murder because the State's evidence was insufficient as a matter of law to prove beyond a reasonable doubt that Appellant had the requisite state of mind to show malice and/or that the Appellant acted in concert with the other defendants in perpetrating the offenses of second degree murder.

3. The lower court erred in failing to give an instruction which was incomplete with regard to the meaning and requirements of the legal concept "acting in concert with," upon which the Defendant was convicted, and of failing to explain to the jury what was required in order to be convicted as a principal in the second degree.

4. The lower court erred in empaneling a juror who had recently been represented in domestic court by the actual prosecutor who was representing the State in Appellant's criminal trial, and the relationships of the jurors as a whole with individuals involved in the case cumulatively resulted in a tainted panel.

5. There are certain acts and omissions of criminal trial counsel that constitute *per se* ineffective assistance, without need for the evidentiary hearing normally required in a habeas corpus proceeding⁴, when they are so egregious as to deprive a defendant of the right to a fair

⁴Appellant contends that there are numerous other grounds for ineffective assistance of counsel more appropriately reserved for a habeas corpus proceeding, and by asserting those regarded as *per se* ineffective herein, Appellant does not waive the right to seek habeas corpus relief on any acts or omissions constituting ineffective assistance of counsel. *State v. Frye*, 2006 WV Lexis 3 (Feb.17, 2006) held that: An incarcerated individual who raises an issue on direct appeal that was not the subject of a previous petition seeking post-conviction relief under West Virginia Code § 53-4A-1 (1967) (Rep.Vol.2000) is not prohibited from seeking habeas corpus relief following the issuance of an opinion by the West Virginia Supreme Court of Appeals where the decision on the appeal does not contain any ruling on the merits of the issue, as no final adjudication within the meaning of West Virginia Code § 53-4A-1 has resulted. Consequently, Appellant reserves the right to pursue habeas corpus relief on any portion of the issues set forth herein wherein the Court deems that a fuller record is needed.

trial. Trial counsel's performance qualifies as ineffective *per se* in the following respects:

- A. Trial counsel's failure to argue the intent issue, failure to argue the "acting in concert with" issue; and failure to argue the malice issue were *per se* ineffective. All of these issues were crucial to the Appellant's right to a fair trial, as all were necessary elements to convictions for second degree murder.
- B. Trial counsel's voluntary waiver of the Appellant's right to assert self-defense as an alternative defense was error *per se* in light of the fact that the very nature of the state's "acting in concert with" theory necessarily hinged any criminal responsibility on the Appellant only as an adjunct to that of co-defendants Stewart and Bush.
- C. Trial counsel's failure to offer an instruction explaining what is required to be convicted as a principal in the second degree under the "acting in concert with" theory or to make any argument to the jury thereon was *per se* ineffective.
- D. Trial counsel's closing argument was *per se* ineffective, in that it cannot be deemed to have passed even minimal standards for effective persuasion or elucidation of the issues, both with regard to quantity and substance.

6. Although there is no legal requirement for the appointment of two counsel for criminal defendants facing life imprisonment, it is time for this Court to examine this issue and to establish that standard for West Virginia.

7. The convictions should be reversed by this Court based on cumulative error.

8. The sentence imposed on the Appellant was constitutionally impermissible in that it shocks the conscience and offends fundamental notions of human dignity, and thereby violates

the W. Va. Constitution, which prohibits a penalty not proportionate to the character and degree of the offense

IV. STANDARD OF REVIEW

A. Sufficiency of the Evidence

Syllabus Point 2, *State v. Ladd*, 557 S.E.2d 820 (W.Va. 2001) states:

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. Syllabus Point 3, *State v. Guthrie*, 461 S.E.2d 163 (W.Va. 1995).

B. Instructions

The absence of a specific objection at trial is not fatal to argument on appeal where the issue is so fundamental and prejudicial as to constitute plain error. *State v. Lease*, 472 S.E.2d 59 (W.Va. 1996), citing *State v. Miller*, 459 S.E.2d 114 (W.Va. 1995). This Court further provided in *Lease*, as follows:

[W]e review a trial court's failure to give a requested instruction or the giving of a particular instruction under an abuse of discretion standard, but where a question is posed regarding whether the jury instructions failed to state the proper "legal standard," our review is plenary. *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163, 177 (W.Va. 1995). In Syllabus point four of *Guthrie*, we explained as

follows:

A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. 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 misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its adequacy. 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 working of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion. *Id.*

C. Challenges to Findings and Rulings of Lower Court

Pullin v. State of West Virginia, 605 S.E.2d 803 (W.Va. 2004), states:

In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Pullin at 805, quoting Syllabus Point 3, *State v. Vance*, 535 S.E.2d 484 (W.Va. 2000)

D. Plain Error

Syllabus Point 1, *State v. Bolen*, 2006 W.Va. LEXIS 52 (June 16, 2006), states:

Plain error review creates a limited exception to the general forfeiture policy pronounced in Rule 103(a)(1) of the West Virginia Rules of Evidence, in that where a circuit court's error seriously affects the fairness, integrity, and public reputation of the judicial process, an appellate court has the discretion to correct error despite the defendant's failure to object. This salutary and protective device recognizes that in a criminal case, where a defendant's liberty interest is at stake, the rule of forfeiture should bend slightly, if necessary, to prevent a grave injustice." Syl. Pt. 1, *State v. Marple*, 197 W.Va. 47, 475 S.E.2d 47 (1996).

Syllabus Point 2, *Bolen*, *supra*, further provides:

To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Additionally, Syllabus Point 4, *Bolen, supra*, provides:

In determining whether the assigned plain error affected the "substantial rights" of a defendant, the defendant need not establish that in a trial without the error a reasonable jury would have acquitted; rather, the defendant need only demonstrate the jury verdict in his or her case was actually affected by the assigned but unobjected to error. Syl. Pt. 3, *State v. Marple*, 197 W.Va. 47, 475 S.E.2d 47 (1996)

E. Ineffective Assistance of Counsel

The standard of review for claims of ineffective assistance of counsel is as follows: "An ineffective assistance of counsel claim presents a mixed question of law and fact; we review the circuit court's findings of historical fact for clear error and its legal conclusions *de novo*." The Court continued: "This means that we review the ultimate legal claim of ineffective assistance of counsel *de novo* and circuit court's findings of underlying predicate facts more deferentially." *State ex rel. Ballard v. Painter*, 582 S.E.2d 737 (W.Va. 2003), quoting Syllabus Point 1, *State ex rel. Vernatter v. Warden*, 528 S.E.2d 207 (W.Va. 1999).

This Court further provided in *Ballard* that claims of ineffective assistance of counsel are to be governed in West Virginia courts by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), as follows: (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Ballard* at 739.

Finally, this Court further stated in *Ballard* that in addressing the ineffective assistance

claims in that case, it followed the standard announced in Syllabus Point 1, *Burnside v. Burnside*, 460 S.E.2d 264 (W.Va. 1995), as follows:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Because the Appellant herein claims *per se* ineffective assistance, he asks this Court to determine as a matter of law that his counsel was ineffective. As such, the standard of review by this court is *de novo*.

V. ARGUMENT

A. **There Was Insufficient Evidence to Support Appellant Eric Foster's Convictions for the Felony Offenses of Murder in the Second Degree in That the State's Evidence Failed as a Matter of Law to Prove Beyond a Reasonable Doubt That Appellant Had the Requisite State of Mind to Show Malice and There Was Insufficient Evidence as a Matter of Law to Support His Conviction under the Concerted Action Principle**

1. Introduction

There was no evidence that the Appellant Foster ever had a weapon in his possession at **any time** during the shoot-out, nor evidence that he ever touched or fired a weapon. The evidence was that Appellant did his best to leave the scene as soon as the outbreak of shooting began, and that he actually reported it to the law as soon as he got to a place where he could.

There was **no evidence, direct or indirect**, of any planning or participation in planning on the Appellant's part, prior to going to the Murphy residence, or of perpetrating any crime in concert with the two individual(s) who actually pulled the trigger. A witness verified the Appellant's testimony that Travis Painter had invited Appellant Foster to his residence that

evening to try to work out any differences they might have in a peaceful manner. There was absolutely no evidence of any words or conduct on the Appellant's part which would indicate that Appellant went to the Murphy residence looking for trouble or seeking in any way to perpetrate any crime, either alone or in concert with anyone else. Common sense would indicate that he certainly would not go unarmed if he knew a shoot-out was going to take place.

Furthermore, the evidence was that the Appellant also did not participate in the criminal activity which occurred **after** the shoot-out. Stewart and Bush, the actual shooters, restrained the liberty of witnesses to the shooting, threatened them, and concealed the murder weapon. There was no evidence whatsoever that the Appellant had anything to do with any of these criminal activities. For inexplicable reasons, however, the prosecutorial authorities selected out Matt Bush, one of the gunmen, who participated in the shooting, concealment, and witness intimidation for favorable treatment.

Although the State made much of the fact that in the Appellant's statements to authorities there were some minor inconsistencies, he was consistent throughout all police interrogation in proclaiming that he did not go to the Murphy property for a fight, that he had no intention to participate in a gunfight, and that indeed he did nothing to aid or abet those who did the shootings. The undisputed evidence that he neither carried nor fired a weapon lends strong support to his claims.

Furthermore, while the lower court provided the jury with a fairly thorough instruction of the concept of malice as an essential element of the offense of second degree murder, the court failed to rule at the conclusion of the evidence that there was an insufficiency of evidence in light of the fact that there was no evidence whatsoever presented from which the jury could have

concluded that the Appellant demonstrated malice towards either decedent. Further, the lower court erred when it failed to rule that there was no evidence to support the state's concerted action theory.

Although one asserting insufficient evidence to sustain a criminal conviction has a heavy burden, the Appellant contends that the record in this case easily meets that burden.

2. Relevant Jury Instructions

The lower court failed to give complete and proper instructions with regard to the elements of second degree murder. The court gave this instruction:

“that the defendant, **acting in concert with** Matthew Wayne Bush and Jeffrey Wayne Stewart, willfully, intentionally, deliberately, premeditatedly, maliciously, and unlawfully killed Travis Laine Painter.” (Emphasis added)

The only further explanation as to what the legal concept of “acting in concert with” means was that under that principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole person committing the crime. The court went on to instruct the jury that it was not necessary for them to find that the Appellant did any particular act constituting any element of the crime of Murder in order to be found guilty so long as he was present at the scene, shared criminal intent and acted together with the other defendants pursuant to a common plan or purpose.

It was error for this instruction to be given for several reasons. First of all, it is an incomplete instruction of law. Justice Miller in *State v. Fortner*, 182 W. Va. 345, 387 S.E. 2d 812 (1990), explained the concepts of principal in the first degree, principal in the second degree,

accessories before and after the fact, and the acting in concert with concept. *Fortner* made clear that while it is not necessary for a defendant to do any particular act constituting at least part of the crime, yet and still the evidence must be sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. In *Fortner*, the defendant was convicted of ten counts of second-degree sexual assault and ten counts of first degree sexual abuse. On sixteen of these counts, he was found guilty as an accessory or an aid and abettor. The defendant in the appeal contended that the evidence was not sufficient to support these convictions.

Courts have held that the intent requirement is relaxed somewhat where the defendant's physical participation in the criminal undertaking is substantial. *United States v. Miller*, 552 F.Supp. 827 (N.D.Ill.E.D.1982), aff'd, *United States v. Matook*, 729 F.2d 1464 (7th Cir.1984). In the instant case, however, there was no evidence of the Appellant having any physical participation in the shootings. Nor was there any evidence in the instant case of any participation by Eric Foster in any common plan or purpose to commit the crime. Thus, the intent requirement should not have been relaxed as it was in the instruction given by the court. Clearly, *Fortner* actually reiterated the legal concept that mere presence at the scene of a crime, even with knowledge of the criminal purpose of the principal in the first degree, is not, alone sufficient to make the accused guilty as a principal in the second degree.

Fortner held that it is not necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime **and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant**

to a common plan or purpose to commit the crime. This concept (in bold) was omitted from the court's instruction in the instant case. Thus, it is the claim of the Appellant that such instruction was not only complete, but it should not have been given at all in that there was no evidence to support it.

3. There Was Insufficient Evidence to Support Appellant's Conviction Under the Concerted Action Principle

The issues presented in this case are remarkably apposite, both factually and legally, to that decided by this Court in the case of *State v. Mayo*, 443 S.E.2d 236, 241 (W.Va. 1994), which stated, quoting *Brown v. State*, 302 S.E.2d 347, 349 (Ga. 1983), as follows: **"Presence at the scene of a crime is not sufficient to show that a defendant is a party to the crime . . . Even approval of the act, not amounting to encouragement, will not suffice."** Emphasis added.

In reversing the conviction in *Mayo*, the Court viewed the evidence in the light most favorable to the prosecution, and found that the State did not prove beyond reasonable doubt that appellant acted as an aider and abettor to second-degree murder and unlawful wounding, even though the appellant in that case did bring a gun to the scene of the crime.

This discussion by the Court ensued:

First, there appears to have been no common design to commit a criminal offense. Mr. Berry and Mr. Kirkland were regular customers of W.D. Tire Sales. They went to the store in an effort to resolve the dispute in regard to the overdue bill. No criminal venture or plan to commit a crime was formulated before they arrived at the store. Although Mr. Berry carried a gun, as did the defendant, neither of them were allowed to stay outside the car. Mr. Kirkland was Mr. Berry's stepfather. His discussion with Dickie Rhodes was centered on payment of the bill. This discussion took place inside the store. Witnesses indicated the matter was amicably resolved and Mr. Kirkland returned to and entered his car. Although there is some disagreement as to whether the Kirkland car had actually started to back out of the store lot, there is nothing to suggest any criminal conduct up to this point. It was not until Mr. Berry, who was seated on the

passenger side of the car, shouted a curse in defiance to Dickie Rhodes that the latter moved to the car and struck Mr. Berry, who then shot Dickie Rhodes. These unlawful acts on the part of Mr. Berry cannot be attributed to the defendant. Up until the moment they occurred, the matter had been peacefully handled by Mr. Kirkland. Everyone was inside the car, and the car was beginning its return journey. There was no evidence to suggest that the killing of Dickie Rhodes and the subsequent wounding of his son were part of any concerted plan.

Id. at 240.

One of the primary differences between *Mayo* and the instant case from a factual standpoint is that the defendant in *Mayo* actually carried a gun to the scene. The Appellant did not. Thus, the Appellant's argument on this point in the instant case is even stronger than Mayo's in the case where his conviction was reversed.

The *Mayo* Court also discussed another related case, *People v. Taylor*, 614 N.E.2d 79 (Ill. 1993), where the defendant was convicted of first degree murder on an aider and abettor accountability theory, stating as follows:

Three of the defendant's friends came to his home and picked him up in their car. One of the men told the defendant that he was searching for and wanted to kill the victim because the victim had been in a fight with the man's younger brother. They drove around and found the victim. The man who had been looking for the victim got out of the car and shot him. They fled from the scene, but then drove back and fired a shot in the air. When the police arrived, the four men fled. The trial court found the jury's verdict of murder was correct because the defendant got into the car knowing that one of the men in the car was seeking the victim to murder him. The appeals court reversed the conviction due to insufficiency of the evidence, stating:

In this case, the evidence provided by the State proved that defendant did nothing more than ride in a vehicle in which the shooter was present. While defendant gave conflicting testimony regarding his knowledge of why Kendrick drove to the scene of the shooting, and whether Kendrick had a gun, it is clear that defendant did not participate in any act which attributed to the shooter's objective of murdering Otha Smith. The record is clear that defendant did not have a weapon, did not participate in

planning or executing any plan to murder Smith or provide instruments in furtherance of that plan.

Mayo at 241-242, quoting *Taylor* at 83.

In *State v. Kirkland*, 447 S.E.2d 278 (W.Va. 1994), a case involving the same shooting incident as *Mayo*, this Court held that evidence was insufficient to attribute unanticipated actions of the principal in the first degree (who shot the proprietor of a repair shop in a dispute over payment) to appellant, even though appellant knew that there was a gun in the glove compartment of the car, where there was no evidence indicating that appellant willingly participated in the criminal venture. The Court held that the appellant did not encourage, assist or facilitate the shooting. The appellant argued that the facts failed to show any unified and single purpose among the co-defendants; any encouragement or aid given by the appellant to the alleged principle; or any complicity on the part of the appellant. *Id.* at 284. The Court concluded that "due to the lack of evidence by the State that the shooting was the result of concerted criminal plan or venture which included the Appellant. We simply cannot attribute Mr. Berry's unanticipated actions as a principal in the first degree to the Appellant."

The instant case also bears resemblance to *State v. Haines*, 192 S.E.2d 879 (W.Va. 1972), where the defendant was convicted of aiding and abetting an armed robbery. The evidence showed that the defendant and his companion, a Mr. Lafollette, were traveling on an icy rural road. They encountered another vehicle being driven by a Mr. Greer. The two vehicles stopped because the road was narrow. Mr. Lafollette got out of his vehicle and pushed on the Greer car. According to Mr. Greer, there was sufficient room for the other car to pass. However, Mr. Lafollette demanded money and struck Mr. Greer, whereupon the defendant intervened and got

Mr. Lafollette back into his car. A few minutes later, Mr. Lafollette got out of the car and came over to Mr. Greer again demanding money. Eventually, Mr. Greer gave Mr. Lafollette money when Mr. Lafollette struck Mr. Greer while searching for his wallet. The defendant again told Mr. Lafollette to get into the car, which he did. The Court concluded that there was insufficient evidence to convict the defendant, stating: “[N]or is there any evidence that he consented, abetted or encouraged by act or word the commission of the crime. **Mere presence is not enough without some form of participation.**” (Emphasis added)

This Court also dealt with an aider and abettor to larceny from a barge in *State v. Hoselton*, 371 S.E.2d 366 (W.Va. 1988). The defendant in *Hoselton* had gone onto the barge with some friends. The friends proceeded to the other end of the barge and broke into a storage unit. The defendant could see what they were doing, went to the unit, and saw them remove certain pieces of equipment. He left them and proceeded off the barge. The defendant got into the automobile that had been driven to the barge. His friends returned with the equipment but did not keep any of it. When asked at trial, if he was a “look-out,” the defendant replied, “You could say that I just didn’t want to go down in there.” *Id.* at 368. He also testified that he had no prior knowledge of his friends’ intentions to steal anything. The Court found the evidence to be insufficient to warrant a conviction for aiding and abetting.

Other jurisdictions have ruled in a similar fashion. For instance, the Appellant’s case bears similarity to *Brown v. State*, 302 S.E.2d 347 (Ga. 1983), where two brothers attended a party at a cabin. An argument ensued and they were both beaten up and left the party. Shortly thereafter, they discovered they had left a pair of expensive boots behind. Fearful of a renewal of the fighting upon their return, they took a shotgun with them. As they entered the area where the

cabin was located, they encountered a vehicle coming from the direction of the cabin. They stopped the vehicle by pointing the shotgun at it and asked the driver of the car to tell them who was left at the cabin. They then let the car proceed. When the brothers arrived at the cabin, an argument ensued with some of the people who came out of the cabin. The defendant's older brother started out of the car with the shotgun. He claimed that he felt threatened by an individual who was coming toward him in the dark and shot causing the victim's death. The older brother was convicted of murder, as was the younger brother on the basis that he was an aider and abettor. On appeal, the Georgia Supreme Court reversed both convictions, giving this cogent summary of its law: **"Presence at the scene of a crime is not sufficient to show that a defendant is a party to the crime . . . Even approval of the act, not amounting to encouragement, will not suffice."** *Brown* at 349. (Citations omitted). Emphasis added.

The Georgia Court then proceeded to give this factual analysis of the case:

The mere fact that he participated in the act of bringing the shotgun and shells along or that he may have pointed the shotgun at (the driver) on the road does not constructively supply any intent to shoot Michael Thigpen. There is no direct evidence of his participation and no circumstantial evidence aside from his presence. 250 Ga. at 864, 302 S.E.2d at 349.

As this court held in *State v. Fortner*, 387 S.E.2d at 823:

...mere presence at the scene of the crime, even with knowledge of the criminal purpose of the principal in the first degree, is not, alone, sufficient to make the accused guilty as a principal in the second degree.
(Emphasis added)

Accordingly, following the analysis of the Court in *Mayo*, *Kirkland* and the other cases discussed above, the State failed to establish that Appellant Foster possessed the same criminal intent as that of the shooters, or that he acted in any manner in concert with them. There was no

evidence that the shooting of Travis Painter or Mike Murphy was part of any concerted plan. There was no evidence that Appellant Foster encouraged, assisted or facilitated the shootings. To the contrary, evidence established that Appellant Foster did his best to leave the scene as soon as the outbreak of shooting began, and he reported the incident to law enforcement authorities as soon as he got to a place where he safely could. There was insufficient evidence that Appellant encouraged or incited the murderous conduct. Thus, the shooters' unanticipated actions as the absolute perpetrators of the Painter/Murphy killings cannot be attributed to Appellant.

In consequence of the lack of sufficiency of evidence, it was error for the court to present to the jury an instruction on second degree murder and the option of finding the Appellant guilty of two counts of second degree murder. Further, in light of the insufficiency of evidence, it was also error for the lower court to deny the Appellant's Motion to Dismiss and/or Motion for Judgment of Acquittal on the charges of second degree murder because the State's evidence was insufficient as a matter of law to prove beyond a reasonable doubt that Appellant had the requisite state of mind to show malice and/or that the Appellant acted in concert with the other defendants in perpetrating the offenses of second degree murder.

Principles of Double Jeopardy Bar Re-Trial

Under constitutional double jeopardy principles, these convictions should be reversed and the State should be foreclosed from retrying the Appellant. This double jeopardy bar was announced in *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and it was adopted into West Virginia jurisprudence in Syllabus Point 4 of *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979):

The Double Jeopardy Clause of the Federal and this State's Constitutions

forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. (Emphasis added.)

See also *State v. Tanner*, 181 W.Va. 210, 382 S.E.2d 47 (1989); *State v. Breeden*, 174 W.Va. 705, 329 S.E.2d 71 (1985); Syllabus Point 3, *State v. Milam*, 163 W.Va. 752, 260 S.E.2d 295 (1979).

4. The Lower Court Failed to Give an Adequate Instruction Explaining the Concept of "Acting in Concert," and Failed to Explain to the Jury Requirements for Principal in the Second Degree

The Appellant's convictions for second degree murder hinged on the jury finding that he had acted "in concert with" Matthew Bush and Jeff Stewart, the actual shooter(s). However, the jury was left with an incomplete explanation as to what that legal concept meant. Nor was the jury given any instruction on the various means by which a person can be assigned criminal culpability, i.e. principal in the first degree v. principal in the second degree, etc. Further vitiating the Appellant's right to a fair trial was his trial counsel's complete failure to attempt to elucidate this concept to the jury or to even use it in argument before the jury.

This Court held in Syllabus Point 2 of *State v. Bartlett*, 177 W.Va. 663, 355 S.E.2d 913 (1987) (overruled on other grounds) that

2. A term which is widely used and which is readily comprehensible to the average person without further definition or refinement need not have a defining instruction.

However, the term "acting in concert with" is not a term so widely used that the average person understands the legal concept. Although the law as enunciated in *Macy* and *Fortner* is that mere presence at the scene of the crime, even with knowledge of the criminal purpose of the principal in the first degree, is not, alone, sufficient to make the accused guilty as a principal in the

second degree, Eric Foster was convicted on the basis of nothing more than his mere presence at the scene of the crime. His presence, together with his girlfriend's asking him not to go at all that night, was about the only evidence the state offered against the Appellant.

The concept of "acting in concert with" requires evidence that the defendant was acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose. See *Fortner*.

This Court recognized in *State v. Miller*, 459 S.E.2d 114, 126 (W.Va. 1995) that "without [adequate] instructions as to the law, the jury becomes mired in a factual morass, unable to draw the appropriate legal conclusions based on the facts." *State v. Lease*, 472 S.E.2d 59,64 (W.Va. 1996), quoting *Miller*. Certainly, the inclusion of the term "acting in concert with" without further explanation by the Court rendered the Nicholas County jury incapable of drawing "appropriate legal conclusions based on the facts" of this case.

5. There Was Insufficient Evidence to Support Appellant's Conviction Under Counts One and Two of the Indictment for the Felony Offense of Murder in the Second Degree in that the State's Evidence Failed to Prove Beyond a Reasonable Doubt that Appellant Foster had the Requisite State of Mind to Show Malice

As discussed previously, Appellant Foster had no weapon in his possession at any time during the shootings which resulted in the deaths of Painter and Murphy. He fired no weapon, and he did his best to leave the scene as soon as he outbreak of shooting began. Further, not only was there no evidence presented in this case that Appellant fired either of the guns that killed Travis Painter or Mike Murphy, but there was also no evidence that Eric Foster in any other manner acted in concert with the shooters to plan or perpetrate the shootings.

As stated in *State v. Miller*, 476 S.E.2d 535 (W.Va. 1996), "a trial court must prohibit the jury from finding any inference of malice from the use of a weapon until the jury is satisfied that the defendant did in fact use a deadly weapon." Thus, it would have been impermissible for the jury to infer malice "from the intentional use of a deadly weapon" in this case in that the record is devoid of evidence that Appellant ever used or even touched a deadly weapon.

The State's evidence specifically failed to show malice on the part of your Appellant pursuant to *State v. Brant*, 252 S.E.2d 901 (W.Va. 1979), which provides in Syllabus Point 1 that "[m]alice is an indispensable element of murder in the second degree." See also *State v. Scott*, 522 S.E.2d 626, 633 (W.Va. 1999), which states: "In order to convict the defendant of second degree murder, the prosecution was required to prove malice."

Clearly, the facts of the case do not present sufficient evidence that Appellant Eric Foster had the requisite state of mind to show malice, so as to support his conviction of second degree murder. The unrefuted evidence was that he went to the Murphy property at Travis Painter's invitation to work toward peace, not for purposes of seeking a fight, and that once at the scene, that he took no aggressive action whatsoever.

6. The Circuit Court's Instruction on Second Degree Murder Should Not Have Been Given Because the State's Evidence Was Insufficient to Support a Finding of Malice Which Is Essential for a Conviction of Second Degree Murder.

Appellant Foster brings this assignment of error as a corollary to the previous arguments asserting that there was an insufficiency of evidence to support his conviction for the felony offense of murder in the second degree in that the State's evidence failed to prove beyond a reasonable doubt that Appellant Foster had the requisite state of mind to show malice.

It has long been a rule of this jurisdiction that the giving of an instruction not supported by evidence is prejudicial error. *State v. Brant*, 252 S.E.2d 901 (W.Va. 1979), citing *State v. Ponce*, 19 S.E.2d 221 (W.Va. 1942). Citing prior decisions, this Court provided in *State v. Clayton*, 277 S.E.2d 619 (W.Va. 1981), that "[w]here in a trial upon an indictment for murder there is no evidence showing malice, it is error to instruct the jury that it may find defendant guilty of murder either in the first or second degree."

The *Clayton* Court further quoted from *State v. Hurst*, 116 S.E. 248 (W.Va. 1923), providing as follows:

In addition to holding in Syllabus Point 3 that, in the absence of a showing of malice, it is erroneous to instruct the jury regarding either degrees of murder, the Court also held that:

Where the verdict of a jury is wholly without evidence on a point essential to a finding, or the evidence is plainly insufficient to warrant such finding by the jury, the verdict should be set aside and new trial awarded; this rule applies, whether it be a civil or criminal case. *State v. Hurst*, *supra*, Syllabus Point 1.

Clayton at 623.

Thus, the circuit court committed reversible error in giving an instruction on second degree murder in its Charge to the Jury.

B. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN EMPANELING A JUROR WHO RECENTLY HAD BEEN REPRESENTED IN DOMESTIC COURT BY THE PROSECUTOR IN APPELLANT FOSTER'S CRIMINAL TRIAL AND IN EMPANELING OTHER JURORS WHO HAD PERSONAL RELATIONSHIPS WITH MANY OF THE STATE'S WITNESSES, THUS CUMULATIVELY CONTAMINATING THE ENTIRE PANEL

It is the Appellant's contention that the lower court erred in empaneling a juror who had recently been represented in domestic court by the actual prosecutor who was representing the state

in the Appellant's criminal trial. Furthermore, the numerous relationships of the jurors who were empaneled as a whole with individuals involved in the case cumulatively resulted in a tainted panel.

With regard to juror Selbe (the prosecutor's domestic client⁵), the following exchange occurred during voir dire:

THE COURT: Do any of you know any of them from any business, any other business or social relationships?

(Prospective Juror Selbe so indicates.)

THE COURT: Yes, ma'am.

PROSPECTIVE JUROR SELBE: I had a case with my husband.

THE COURT: Okay. Come up and tell us about it

(Prospective Juror Selbe joins counsel, and Defendant, at benchside.)

PROSPECTIVE JUROR SELBE: It was a domestic battery case.

THE COURT: Okay, and --

PROSPECTIVE JUROR SELBE: It was him.

THE COURT: Mr. McMillion represented you in that --

PROSPECTIVE JUROR SELBE: Yes.

THE COURT: -- or against you?

PROSPECTIVE JUROR SELBE: No. He represented me. It was a month ago, I guess.

THE COURT: Is it over with?

PROSPECTIVE JUROR SELBE: Yeah, it's done over with.

THE COURT: The fact that the State represented you in that case, would that in any way cause you to favor or disfavor the State?

PROSPECTIVE JUROR SELBE: No.

MR. HURLEY: What kind of case was the, ma'am?

PROSPECTIVE JUROR SELBE: A domestic.

MR. HURLEY: Domestic battery and he represented you?

PROSPECTIVE JUROR SELBE: Uh-huh (yes), he represented me.

MR. HURLEY: How long did this case go on? Was it fairly brief, or was --

PROSPECTIVE JUROR SELBE: Yes, it was fairly brief.

MR. HURLEY: Is that the only occasion that you had hired Mr. McMillion?

PROSPECTIVE JUROR SELBE: Well, he --

THE COURT: He represented the State; it was a criminal case.

MR. HURLEY: Okay. How long ago was that?

PROSPECTIVE JUROR SELBE: A month and a half or two months maybe.

MR. HURLEY: Do you think your work with him would cause you to favor his position more

⁵It is not clear whether the prosecutor represented Ms. Selbe in connection with her being a victim of criminal conduct or whether he represented her in connection with a petition for domestic violence, but in either case the principles remain the same.

than someone on the defense?

PROSPECTIVE JUROR SELBE: No.

THE COURT: Okay, thank you, ma'am. You may go back.

(Prospective Juror Selbe returns to jury box.)

In *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983), this Court discussed the standards for disqualification of a prospective juror for cause based upon the juror's relationship with law enforcement or prosecutorial agencies or their employees. This Court held in Syllabus Point 6 of *Beckett* that

A prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a per se disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a party has a right to obtain individual voir dire of the challenged juror to determine possible prejudice or bias arising from the relationship.

The issue involving juror Selbe is different, in that the juror enjoyed far more than a social or even consanguineal relationship with the prosecutor. The juror's interests were represented by the actual prosecutor handling the Appellant's case in court proceedings. Further, the matter on which her interests were represented by the prosecutor were in connection with a very personal matter, domestic battery, and the representation occurred at a time very close to the time of the Appellant's trial.

The importance of an attorney-client relationship (and the relationship between a prosecutor and the victim of a crime is every bit as close, even though a prosecutor is technically representing the state) cannot be underestimated in this context. As this Court held in an analogous context in *State ex rel. Bailey v. Facemire*, 186 W.Va. 528, 413 S.E.2d 183 W.Va. (1991),

In the event a prosecuting attorney agrees to represent a private client in a domestic proceeding and no conflict of interest is apparent but subsequently

arises, the prosecuting attorney must seek appointment of a special prosecuting attorney and remove himself from the case in all respects.

In *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 W.Va.(1996) authored by Justice

Cleckley, this Court held that

a juror is impartial if he or she can lay aside any previously formed impression or opinion of parties on merits of case and can render verdict based on evidence presented at trial; **however, trial court should not rely simply on jurors' subjective assertions of their own impartiality.**

In the instant situation, the trial court and defense counsel posed the very limited question of whether the juror could remain impartial and relied on her own subjective response without any further meaningful inquiry. That was simply inadequate.

The jury panel was further contaminated in a cumulative manner by a host of other jurors having relationships of one sort or another with many of the state's witnesses:⁶

>Juror Neff previously lived in an adjoining trailer with victim Travis Painter's family and was acquainted with them. Juror Neff also stated that "Angela Nichols (also a witness) is my second cousin."

>Juror Dorsey knew the prosecutor on a first-name basis, stating that "I know Keith (Keith McMillion, the prosecuting attorney handling the case) from a friend of mine, Eddie McMillion; they're cousins. I would not be prejudiced."

>Juror Williams also knew the prosecutor on a first-name basis, stating "I work with Keith and Mr. Hurley (defense counsel). I won't favor one or the other."

⁶Although Nicholas County is a small area, the array of relationships that jurors had with participants in the trial was way beyond the flexibility that might be afforded in jury selection in a small community.

>Juror Jackson stated "I'm friends with Deputy Robinson. I've known him my whole life - he and my dad worked in coal mines and I've known him all my life." She acknowledged that she still "sees him now and then."

>Juror Sparks stated that he was neighbors with Deputy Paul Kutcher, also one of the state's witnesses, and that they have shot bows together.

>Juror Hall stated that he was married to Deputy Paul Kutcher's ex-wife.

>Juror Bush stated that he previously worked with Matt Bush (a co-defendant)'s mother. She also acknowledged that her husband was distantly related to Matt Bush.

Even though Nicholas County is a small community, surely it is not necessary that a jury hearing a capital criminal case should be so replete with personal relationships among the jurors and the witnesses and even the co-defendants! Most important, the blanket assertion by such potential jurors that they can be fair, without further inquiry, is not sufficient to ensure a fair, impartial panel, especially in a criminal case where there is a potential life sentence at stake.

With the exception of juror Selbe, any one of these other jury conflicts might alone be inadequate to constitute grounds for reversal; however, the cumulative effect was that the Appellant had a tainted jury panel. A trial court must grant a challenge for cause if a prospective juror's actual prejudice or bias is shown. *State v. Ashcraft*, 172 W.Va. 640, 647, 309 S.E.2d 600, 607 (1983), quoting *State v. McMillion*, 104 W.Va. 1, 8, 138 S.E. 732, 735 (1927). It has also been held that a trial judge "has a serious duty to determine the question of actual bias[.]" See *Dennis v. United States*, 339 U.S. 162, 168, 70 S.Ct. 519, 521, 94 L.Ed. 734, 740 (1950). Actual bias can be shown either by a juror's own admission or by proof of specific facts which show the juror has such a prejudice or connection with the parties at trial that bias is presumed. Here, the trial court and

counsel failed to conduct a thorough examination of the prospective jurors regarding their potential for bias. When asked, the prospective jurors at issue indicated they would be able to view the evidence and decide the case without bias. But it would be a rarity that a potential juror, responding in the presence of the entire venire, would actually acknowledge that he or she possessed biases such that he or she could not render a fair verdict. Although all human beings harbor biases and prejudices based on their own life experience, for the average person such an admission would be tantamount to admitting that you were not a fair person. That is why it is so important for lawyers and judges to conduct individual voir dire follow-up in a manner and in a setting where a potential juror can feel at ease and free to discuss his true thoughts and feelings. That was not done in the instant case.

C. APPELLANT'S TRIAL COUNSEL WAS *PER SE* INEFFECTIVE IN FAILING TO ARGUE CRITICAL ISSUES, IN VOLUNTARILY WAIVING APPELLANT'S RIGHT TO ASSERT SELF-DEFENSE AS AN ALTERNATIVE DEFENSE, IN FAILING TO OFFER AN INSTRUCTION REGARDING THE CONCERTED ACTION PRINCIPLE, AND IN DELIVERING A CLOSING ARGUMENT SUB-STANDARD AS A MATTER OF LAW.

Although it is quite clear that the preferred method generally of seeking relief for ineffective assistance of counsel is by means of habeas corpus filed before the trial court, there are certain acts and omissions of criminal trial counsel that are ineffective *per se*, without need for an evidentiary hearing normally required in a habeas corpus proceeding,⁷ when they are so egregious as to deprive

⁷Appellant contends that there are numerous other grounds for ineffective assistance of counsel more appropriately reserved for a habeas corpus proceeding, and by asserting those regarded as *per se* ineffective, Appellant does not waive the right to seek habeas corpus relief on any acts or omissions constituting ineffective assistance of counsel. *State v. Frye*, --- S.E.2d ---, (2006) held that: An incarcerated individual who raises an issue on direct appeal that was not the subject of a previous petition seeking post-conviction relief under West Virginia Code § 53-4A-1 (1967) (Repl.Vol.2000) is not prohibited from seeking habeas corpus relief following the

a defendant of the right to a fair trial as a matter of law. The Appellant herein asserts that trial counsel's performance qualifies as ineffective *per se* in the following respects:

A. Trial counsel's failure to argue the intent issue, failure to argue the "acting in concert with" issue; and failure to argue the malice issue were *per se* ineffective. All of these issues were crucial to the Appellant's right to a fair trial, as all were necessary elements to convictions for second degree murder.

A brief review of the trial counsel's arguments in closing to the jury demonstrate that he lawyer failed as a matter of law to argue to the jury the most basic concepts, including malice, intent, the means of "acting in concert with," and even the legal principle that mere presence at the scene of a crime does not equal criminal responsibility. These concepts were an integral part of his defense, yet not even mentioned by trial counsel.

B. Trial counsel's voluntary waiver of the Appellant's right to assert self-defense as an alternative defense was error *per se* in light of the fact that by the very nature of the state's "acting in concert with" theory, criminal responsibility on the Appellant necessarily hinged on criminal responsibility on the part of one or both co-defendants.

During the early stages of the trial, the state made a motion in limine seeking to have the defendant precluded from asserting self-defense as a defense at trial, and trial counsel readily agreed. This was *per se* ineffective assistance of counsel for this reason: The Appellant contended that he had no involvement in the shootings which resulted in the deaths of the two victims. The

issuance of an opinion by the West Virginia Supreme Court of Appeals where the decision on the appeal does not contain any ruling on the merits of the issue, as no final adjudication within the meaning of West Virginia Code § 53-4A-1 has resulted. Consequently, Appellant reserves the right to pursue habeas corpus relief on any portion of the issues set forth herein wherein the Court deems that a fuller record is needed.

State, however, claimed that the Appellant was guilty of "acting in concert with" the shooters. Because there was no evidence of any involvement whatsoever on the part of the Appellant in the planning and execution of the shootings, his first line of defense was that he could not be held criminally responsible under that theory. However, because his role in the incident, and his consequent criminal responsibility, if any, was under the state's theory derivative of the individual(s) who actually shot the victims, counsel clearly should have preserved the right to invoke self-defense of a derivative nature as a fallback defense. In other words, if a jury concluded that one or both of the shooters killed in self-defense,⁸ then any conduct on the part of the Appellant "in concert with" the two actors would also be excused under a theory of self-defense.

C. Trial counsel's failure to offer an instruction explaining what is required to be convicted as a principal in the second degree under the "acting in concert with" theory was *per se* ineffective.

In *State v. Dellinger*, 178 W.Va. 265, 358 S.E.2d 826 (1987), this Court noted that defendant's counsel had neither requested nor offered an instruction on sexual abuse. He did, however, raise the issue in his motion to set aside the verdict and award a new trial. Generally "(u)nder Rule 30, W.Va.R.Crim.P.... an alleged error must be raised in the trial court to be considered on appeal and unless a particular instruction is fundamental to a defendant's theory of the case, the trial court is not required to act *sua sponte*." *State v. Schofield*, 175 W.Va. 99, 331 S.E.2d 829 (1985). However, the Court in this case decided that an instruction on sexual abuse was justified under the evidence and was fundamental to the defendant's case. The Court held that the failure of defense counsel to offer a sexual abuse instruction was such plain error that the trial court

⁸There was unrefuted evidence that the decedents came out with guns drawn. Consequently, there was evidence upon which to base the defense of self-defense on the part of the actual shooters.

ought to have intervened to avoid clear prejudice to the defendant. See *State v. Dozier*, 163 W.Va. 192, 255 S.E.2d 552 (1979). Similarly, in the instant case, the failure of trial counsel to offer any instruction on the meaning of the concept of “acting in concert with” in the context of the Appellant’s case was *per se* ineffective assistance, and the trial court should have noticed such failure and acted *sua sponte* to give such an instruction. The failure to have done so constitute plain error on appeal.

In reviewing sufficiency of jury instructions, Supreme Court of Appeals traditionally has asked whether the instructions adequately stated the law and provided the jury with an ample understanding of the law; whether the instructions as a whole fairly and adequately treated evidentiary issues and defenses raised by parties; whether the instructions were a correct statement of the law regarding the elements of the offense; and whether the instructions meaningfully conveyed to jury correct burdens of proof. In view of the vital importance of the applicability or non-applicability of the concept of the “acting in concert with” theory, the failure of the trial counsel to propose any instruction explaining that concept and its requirements is *per se* ineffective assistance of counsel.

D. Trial counsel’s closing argument was *per se* ineffective, in that it cannot be deemed to have passed even minimal standards for effective persuasion or elucidation of the issues, both with regard to quantity and substance.

By agreement, the trial court provided the each side forty minutes each to argue the case. In fact, however, counsel for the Appellant spent only an estimated 8.4 minutes arguing the

Appellant's case.⁹ He did not address any of the concepts necessary for the state to acquire a conviction for second degree murder, including malice and intent; nor did he make any effort to explain to the jury what was required in order for the Appellant to be convicted under an "acting in concert with" theory.

Certainly, pursuant to the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), (1) Appellant's trial counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. The Appellant herein contends that the fact that counsel failed to make even minimal legal arguments on the requirement of malice and the necessity for evidence showing concerted activity, demonstrates ineffectiveness as a matter of law and meets the *Strickland* requirement that, absent such failure, there is a reasonable probability that the result of the proceeding would have been different. In other words, had the jury been properly instructed and heard even minimally proper argument with respect to the concepts that presence at the scene of a crime is not sufficient to support a conviction; and with regard to the requirement of malice as an element of second degree murder, the Appellant would not have been convicted of two counts of second degree murder.

Although this Court has repeatedly stated that a habeas corpus hearing before a trial court with the chance to develop a record is the generally preferred method of addressing a claim of ineffective assistance of counsel, these decisions have generally been in the context of issues which

⁹This estimate of time spent by defense in closing argument was calculated based on the fact that the record shows the state spent 23 of its forty minutes in the opening portion of closing. That 23 minutes occupied 19 pages of the transcript. Assuming for the sake of the estimate that both lawyers spoke at a comparable speed, the space in the transcript occupied by the entire defense argument would be approximately 8.4 minutes.

arguably could relate to trial strategy. The Appellant has numerous other bases for claiming ineffective assistance, but sets forth in this appeal only those which he believes constitutes *per se* ineffective assistance of counsel, or those that can be decided as a matter of law based on the record before this Court.¹⁰

D. WEST VIRGINIA LAW SHOULD REQUIRE APPOINTMENT OF TWO COUNSEL FOR DEFENDANT IN CAPITAL CASE

Although there is currently no legal requirement for the appointment of two counsel for criminal defendants facing life imprisonment, it is time for this Court to examine this issue and to establish that standard for West Virginia. In addition, there should be consistency among the circuits with respect to the policy that is observed on this question. For instance, in Kanawha County, 13th Judicial Circuit, it is the practice to appoint two lawyers for a criminal defendant facing a potential life sentence. In Nicholas County, however, where the instant case arose, no such practice exists.

After Appellant Eric Foster was charged with two counts of first degree murder, attorney Gregory Hurley was appointed to represent him. Unbeknownst to the Appellant, Mr. Hurley had already had numerous ethics complaints filed against him, including several involving allegations of drinking alcohol while participating as a lawyer in court proceedings. In view of the fact that the Nicholas County bar is so small, it is the Appellant's contention that the bench and bar were aware of Mr. Hurley's deficits. Despite those deficits and despite the fact that the Appellant was facing

¹⁰When issues can be decided as a matter of law, they should be, rather than observing a policy often described by Justice Neely as "death by due process." The Appellant, despite no evidence that he in any way participated in the planning and execution of these killings has now served almost three years time. If issues affecting his rights and freedom can be decided as a matter of law, they should be, and he should be restored to his freedom.

what was tantamount to a life sentence, Hurley was appointed as the only lawyer to represent the Appellant, which in this case resulted in grievous consequences for your Appellant.

E. THE RECORD SHOWS THAT THE CUMULATIVE EFFECT OF NUMEROUS ERRORS PREVENTED THE APPELLANT FROM RECEIVING A FAIR TRIAL AND HIS CONVICTIONS SHOULD BE SET ASIDE.

This Court has held on numerous occasions that the cumulative effect of numerous errors can prevent a criminal defendant from receiving a fair trial, and in such case his conviction should be set aside. In the instant case, the cumulative effect of numerous jurors having personal relationships with parties and witnesses in the trial, the failure of the court to, *inter alia*, give an adequate instruction on the concept of concerted activity, the gross failures of defense counsel as set forth herein constitute sufficient error to have created a cumulative effect of denying the Appellant a fair trial.

F. THE SENTENCE IMPOSED ON THE APPELLANT WAS CONSTITUTIONALLY IMPERMISSIBLE IN THAT IT SHOCKS THE CONSCIENCE AND OFFENDS FUNDAMENTAL NOTIONS OF HUMAN DIGNITY, AND THEREBY VIOLATES THE W. VA. CONSTITUTION, WHICH PROHIBITS A PENALTY NOT PROPORTIONATE TO THE CHARACTER AND DEGREE OF THE OFFENSE.

Eric Foster had never been convicted or a prior felony. He was a high school graduate, a young man, a father, and an employed worker. The state was unable to provide any evidence that he participated in the shootings or that he played any role other than being present at the scene. However, on December 14, 2004, the lower court imposed the maximum sentence permitted by law on the Appellant, e.g. forty years for each count, each such sentence to run consecutively, effectively incarcerating Eric Foster for the rest of his life. This Court has held that a sentence of incarceration, even though not cruel or unusual, can be held unconstitutional if the sentence is so

disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. *State v. Richardson*, 589 S. E. 2d 552 (WV 2003). In the *Richardson* case, this Court also provided factors that should be considered, including the age of the defendant, statements of the victim, and evaluations and recommendations made in anticipation of sentencing. In consideration of the sentence imposed and all factors and circumstances concerning both the offense and the record and circumstances of the defendant, Appellant submits that the sentence of eighty years failed to meet constitutional muster under this standard.

VI. CONCLUSION

In consequence of all of which, Appellant Eric Foster asserts that evidence was manifestly inadequate and a grave injustice has been done. Appellant respectfully requests that this Court reverse the convictions against him in Nicholas County Circuit Court and direct that such charges against him be dismissed.

Respectfully Submitted,
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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston**

STATE OF WEST VIRGINIA

v.

No. 33323

From the Nicholas County Circuit Court

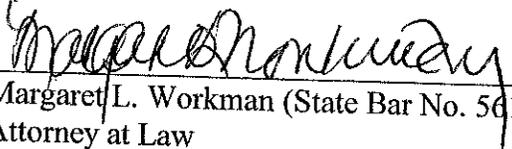
ERIC FOSTER

Certificate of Service

I, the undersigned counsel for the Appellant in the above-styled case, hereby certify that on the 17th day of April, 2007, I served a true copy of the foregoing **Appellant's Memorandum in Support of Petition for Appeal** on the Prosecuting Attorney of Nicholas County and the Attorney General of West Virginia, by depositing a true copy thereof into the U. S. Mail first class postage prepaid, addressed as follows:

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