

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

2008 JUN -2 P 3: 56

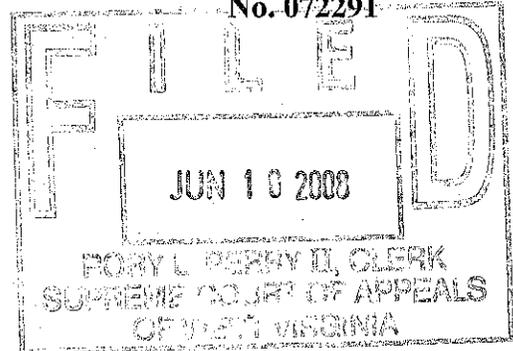
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STATE OF WEST VIRGINIA ex rel Mark Damron,
Plaintiff Below – Appellant,

v.

WILLIAM HAINES, WARDEN
Defendant Below – Appellee.

No. 072291



APPELLANT'S BRIEF

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Mr. Mark Damron, the Habeas Petitioner, was arrested, without warrant, on August 9, 2003 and charged with Arson. A Preliminary Hearing was held on August 20, 2003, at which time probable cause was found. A Cabell County Grand Jury returned a seven count indictment on September 19, 2003, formally charging Mr. Damron. The indictment included the following counts: Count 1 and 2, First Degree Arson; Count 3 and 4, Second Degree Arson; Count 5 and 6, Attempted First Degree Murder and Count 7, Breaking and Entering as contained in Indictment Number 03-F-215. On October 3, 2003, Kent Bryson, Esq. was appointed to represent Mr. Damron. On November 22, 2004, Mr. Damron requested new Counsel and John Laishley, Esq. was appointed to represent him.

Appointed Counsel, Jack Laishley, Esq., represented Mr. Damron through Trial and Post Trial Motions. Mr. Laishley, Esq. filed a Motion to Suppress Mr. Damron's statements given to Fire Marshal Steve Ellis on August 9, 2003 at the time of his arrest. The Trial Court conducted a Hearing on this Motion on January 21, 2005; the Court ruled that all the statements were admissible. On February 28, 2005, a Jury was selected, sworn in, and heard evidence in the case. On March 1, 2005, the Jury returned a guilty verdict on Count 2 of First Degree Arson and on Count 4, Second Degree Arson. Mr. Damron was acquitted on all other counts.

After Trial, Mr. Damron moved to set aside one or both counts of Arson on the grounds that he could not be convicted of both charges. Additionally, Defense Counsel filed a Motion for New Trial. The Court took up this issue of the verdicts and the Motion for New Trial at Mr. Damron's Sentencing Hearing held on May 26, 2005. The Court denied Mr. Damron's Motion to Set Aside the Verdicts as well as the Motion for New Trial. The Court proceeded to sentence

Mr. Damron to 20 years, the maximum, on Count II, and 10 years, the maximum, on Count IV. The said sentences were to run consecutively for a total of 30 years.

Mr. Damron, by Appellate Counsel, Douglas V. Reynolds, Esq., filed an Appeal to the West Virginia Supreme Court on November 7, 2005. This Appeal was refused on January 19, 2006. Mr. Damron then filed a Petition for Post-Conviction Habeas Corpus pursuant to W. Va. Code 53-4A-1 in the Circuit Court of Cabell County on February 9, 2006. Steve Bragg, Esq., was appointed by the Court to assist Mr. Damron with his Habeas Petition. On May 21, 2007, Mr. Damron and his Counsel Steve Bragg came before the Cabell County Circuit Court for his Post-Conviction Omnibus Habeas Corpus Hearing to determine whether Mr. Damron was entitled to any relief. Despite numerous assertions by Mr. Damron, the Cabell County Circuit Court on May 23, 2007, by Final Order, denied Mr. Damron Habeas Corpus relief finding that Mr. Damron was entitled to no grounds whatsoever for relief. It is upon that said denial that this Appeal is being sought.

II. STATEMENT OF FACTS

“Fire Marshal! Stop. Freeze and put your hands where I can see them and get down on the ground.” (Order given by Deputy Fire Marshal Steve Ellis). *See* Trial Tr., Page 152 Line 13, through Page 153 Line 5 (hereinafter abbreviated to Trial Tr., P. L.). This was what Mr. Damron heard as he looked around at his next-door neighbor’s building in the early morning hours of August 9, 2003. While investigating an early morning fire, State Fire Marshal Devon Palmer and Deputy State Fire Marshal Steve Ellis saw the Mr. Damron in the vicinity. After asserting their authority by announcing themselves as Fire Marshals, Fire Marshal Steve Ellis then commanded Mr. Damron to freeze. The two Fire Marshals then pursued Mr. Damron down a street repeating, “Fire Marshal. Stop.” Trial Tr., P. 152 L. 22. Mr. Damron then stopped and

put his hands in the air. Fire Marshal Steve Ellis told Mr. Damron "to keep his hands where I could see them..." See Trial Tr., P.152 L.23-24. Fire Marshal Steve Ellis then ordered Mr. Damron "to get down on the ground" Trial Tr. P. 153 L. 10-11. Fire Marshal Steve Ellis then detained Mr. Damron.

Mr. Damron asserted he believed he was being held by gunpoint by Deputy Fire Marshal Steve Ellis due to something poking the back of his head while being pushed from behind. See Post-Conviction Habeas Corpus Hearing Transcript P. 28 L 2-5 (hereinafter abbreviated to Habeas Corpus Tr., P. L.). Deputy Fire Marshal Steve Ellis was in fact required to carry a gun. See Trial Tr. Page 170 Line 16.

While Mr. Damron was detained, Fire Marshal Steve Ellis questioned him as Fire Marshal Devon Palmer went to get his handcuffs to further secure the suspect, Mr. Damron. See Preliminary Hearing Transcript, Page 16, Lines 18-20 (hereinafter abbreviated to Preliminary Hearing Tr., P. L.). Mr. Damron was not given *Miranda Warnings*. *Id.* The *non-Mirandized* statements were ruled non-custodial by the Circuit Court and were introduced against Mr. Damron at his Trial. See Trial Tr., P. 154 L. 15-24.

The Huntington Police Department arrived at the scene and took Mr. Damron into custody. Once Mr. Damron was taken into custody by the Huntington Police Department, he continued to make statements until and after he was *Mirandized*. See Trial Tr., P. 215 L. 1-10. These statements before he was *Mirandized* were ruled to be spontaneous and were introduced against him at Trial. *Id.*

The only other piece of evidence connecting Mr. Damron to the fire was statement of a Mr. Mike Smith. This Mr. Smith had allegedly told Huntington Police Officer Sexton that a man with an abrasion to the forehead had broken into the building that later caught on fire. See

Trial Tr. P. 219 L.1-6. The officer took no information contact information of Mr. Smith and he was never found for the Preliminary Hearing, Grand Jury testimony nor did he ever testify at Trial.

The Court admitted this statement into evidence over repeated objections by the Defendant's Counsel; the Court ruled that this was not to prove the truth of the matter asserted but to establish probable cause for Officer Compton to make an arrest. *Id.* When the State rested, the Defendant moved for a directed verdict of acquittal on all counts, which Motion was denied *See* Trial Tr. P. 264. At the conclusion of Mr. Damron's evidence, the charge was delivered to the Jury, and closing arguments were made by Counsel. After deliberations, the Jury returned a verdict of not guilty on Count I (First Degree Arson), Count III (Second Degree Arson), Count V & VI (Attempted Murder), and Count VII (Breaking and Entering). The Jury returned a guilty verdict on Count II (First Degree Arson) and Count IV (Second Degree Arson). Defense Counsel filed a Motion to Set Aside the Verdicts and Motion for New Trial.

The Court took up the Motions to Set Aside the Verdict at his Sentencing Hearing on May 26, 2005. Defense Counsel asserted that the verdicts were either inconsistent or were in fact a conviction for the greater crime (First Degree Arson) as well as the lesser (Second Degree Arson), thus constituting Double Jeopardy *See* Post Trial Tr. P. 4 L. 13-20. The State argued that this was exactly the same as the sexual abuse and sexual abuse by parent or guardian. *See* Post Trial Tr. P. 5 L. 8-13. The Court, without making any finding of fact or conclusions of law, simply stated, "I believe that the Jury did a very conscientious job on behalf of Mr. Damron." *See* Post Trial Tr. P. 7 L. 9-11. The Court continued on and sentenced Mr. Damron to 20 years on Count II, the maximum proscribed by law, to run consecutively with 10 years on Count IV also the maximum sentence.

III. ASSIGNMENTS OF ERROR

1) The Lower Court erroneously denied Mr. Damron Habeas Corpus relief due to improperly allowing Mr. Damron's statements to Fire Marshal Steve Ellis into evidence which violated the Defendant's Fifth Amendment Rights under the United States and West Virginia Constitution

2) The Court at Mr. Damron's Habeas Hearing erroneously concluded the statements included in Officer Sexton's report and given to Officer Compton was not testimonial in nature and therefore not subject to the strictures of *Crawford* due to the statements being taken in the course of interrogation and not in an on-going emergency.

3) The Court at Mr. Damron's Habeas Hearing erroneously ruled that Mr. Damron's conviction for First and Second Degree Arson, and sentences of 20 years and 10 years, consecutively, violate the Double Jeopardy Clause of the 5th Amendment to the United States Constitution and Article III, Section V of the West Virginia Constitution by subjecting Mr. Damron to multiple punishments for the same offense.

IV. POINTS AND AUTHORITIES RELIED UPON

STATUTORY PROVISIONS

Rules

5th Amendment to the United States Constitution 6, 11, 24, 33

6th Amendment to the United States Constitution 23

Article III, Section V of the West Virginia Constitution..... 6, 24, 33

W. Va. Code §29-3-12(h) 16

W. Va. Code §29-3-12(h) (1)..... 16

W. Va. Code § 53-4A-1 3

W. Va. Code § 61-3-1 29

W. Va. Code § 61-3-1(b) (1)..... 29

W. Va. Code § 61-3-2 30

W. Va. Code §61-3-4 23

CASELAW

U.S. Supreme Court

Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932)..... 30, 31

Bowles v. Mahoney, 202 F.2d 320, 326, 91 U.S.App.D.C. 155, 161 (1952)... 32

Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221 (1977) 31

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004) 6, 18, 19, 22, 24, 33

Davis v. Washington, 547 U.S 125, 126 S. Ct. 2266 (2006)..... 18, 19, 22

Hammon v. Indiana, 126 S. Ct. 2266, 547 U.S. ____ (2006)..... 18, 19

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct.1602 (1966) 4, 11, 12, 13, 14, 15, 26

Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980)..... 13

Yarborough v. Alvarado, 541 U.S. 652, 124 S. Ct. 2140 (U.S. 2004). 11

West Virginia

Board of Educ. of County of Wood v. Airhart, 212 W.Va. 175, 182, 569 S.E.2d 422, 429 (2002) 32

State ex rel. Humphries v. McBride, 220 W. Va. 362, 647 S.E.2d 798 (2007). 11

State v. Barnett, 168 W. Va. 361, 284 S.E.2d 622 (1981). 27

State v. Byers, 159 W.V. 596, 224 S.E.2d 726 (1976). 16

State v. Gill, 187 W. Va. 136 (1992). 25

State v. Golden, 175 W.Va. 551, 336 S.E.2d 198 (1985). 23,24

State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000). 30

State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)..... 14, 17

State v. Hamrick, 160 W.Va. 673, 236 S.E.2d 247 (1977). 11

State v. Jones, 174 W.Va. 700, 329 S.E.2d 65 (1985). 25

State v. Mechling, 219 W.Va. 366, 633 S.E.2d 311 (2006). 22

State v. Middleton, 220 W. Va. 89, 640 S.E.2d 152, (2006). 11, 12, 13

State v. Mullins, 181 W.Va. 415, 383 S. E.2d 47 (1989)..... 24, 25, 26, 27, 28, 29

State v. Neider, 170 W.Va. 662, 295 S.E.2d 902 (1982). 25

State v. Peacher, 167 W.Va. 540, 280 S.E.2d 559 (1981)..... 23

State v. Potter, 197 W. Va. 734, 478 S.E.2d 742 (1996). 11

State v. Preece, 181 W.Va. 633, 383 S.E. 2d815 (1989)..... 12

State v. Rogers, 209 W.Va. 348, 547 S.E.2d 910 (2001)..... 33

State v. Ruddle, 170 W.Va. 669, 671, 295 S.E.2d 909, 911 (1982). 25

State v. Smith, 156 W. Va. 385, 193 S.E. 2d 550 (1972)..... 14

State v. Stanley, 168 W.V. 294, 284 S.E.2d 367 (1982). 17

<i>State v. Thompson</i> , 176 W.Va. 300, 308, 342 S.E.2d 268, 276 (1986)	25
<i>State v. Zaccagnini</i> , 172 W. Va. 491, 308 S. E. 2d 131 (1983).....	27, 28, 31
<i>Teller v. McCoy</i> , 162 W.Va. 367, 395, 253 S.E.2d 114,130-131 (1978).....	32
Other Jurisdictions	
Final Order	14
F. O. p.7	15, 16, 17
F. O. p.8	15
F.O. p.9	18, 19, 21, 32
F. O. p.10	19
F. O. p.12	27, 28
Post- Conviction Habeas Corpus Hearing Transcript	
HC Tr. p.27-28.....	17
HC Tr. p.28 L. 2-5	4, 13
Post Trial Transcript	
PT Tr. p.4 L. 13-20	5
PT Tr. p.5 L. 8-13	5
PT Tr. p.7 L. 9-11	5
Preliminary Hearing Transcript	
PH Tr. p.15 L. 25	13
PH Tr. p.16 L. 10-18.....	12
PH Tr. p.16 L. 12-22.....	13
PH Tr. p.16 L. 18-20.....	4
PH Tr. p.16 L. 3	13

Trial Transcript

T. Tr. p.81 L. 8-11..... 20

T. Tr. p.82 L. 11..... 20

T. Tr. p.85 L. 6-7..... 20

T. Tr. p.85 L. 8-14..... 20

T. Tr. p.97-98..... 22

T. Tr. p.152 L. 13..... 3

T. Tr. p.152 L. 22..... 3

T. Tr. p.152 L. 23-24..... 4

T. Tr. p.152-155..... 12

T. Tr. p.153 L. 10-11..... 4

T. Tr. p.153 L. 5..... 3

T. Tr. p.154 L. 15-24..... 4

T. Tr. p.170 L. 13-16..... 15

T. Tr. p.170 L. 16..... 4

T. Tr. p.173 L. 18-20..... 12

T. Tr. p.214 L. 18-24..... 22

T. Tr. p.215 L. 1-10..... 4

T. Tr. p.219 L. 1-6..... 4, 5

T. Tr. p.264..... 5

T. Tr. p.312-313..... 21

T. Tr. p.313 L. 2-5..... 21

V. STANDARD OF REVIEW

HABEAS CORPUS

In reviewing challenges to the findings and conclusions of the Circuit Court in a Habeas Corpus action, Supreme Court of Appeals reviews the Final Order and the ultimate disposition for abuse of discretion, the underlying factual findings for clear error, and questions of law de novo. *State ex rel. Humphries v. McBride* 220 W. Va. 362, 647 S.E.2d 798 (2007).

VI. ARGUMENT

1) The Lower Court erroneously denied Mr. Damron's Habeas Corpus relief due to improperly allowing Mr. Damron's statements to Fire Marshal Steve Ellis into evidence which violated the Defendant's Fifth Amendment Rights under the United States and West Virginia Constitution.

The West Virginia Supreme Court, as well as the United States Supreme Court, has held that the right to Counsel attaches when a suspect is subjected to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966); See also *State v. Hamrick*, 160 W.Va. 673, 236 S.E.2d 247 (1977). To determine whether a person is in custody for *Miranda* purposes, one must objectively look at the totality of circumstances and inquire, "Would a reasonable person in Defendant's position have considered his freedom of action restricted a degree associated with formal arrest." *State v. Potter*, 197 W. Va. 734, 478 S.E.2d 742 (1996). The United States Supreme Court recently clarified this issue by laying out a two-part test to examine the custodial nature of questioning. First, the Court should look at the circumstances surrounding the questioning. Second, the Court should inquire if a reasonable person would have felt free to leave. See *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140 (U.S. 2004).

Furthermore, when addressing the issue of custody with respect to the *Miranda Warning*, the West Virginia Supreme Court has given a list of factors, which a Trial Court must consider when determining "whether a custodial interrogation environment exists." *State v. Middleton*,

220 W. Va. 89, 640 S.E.2d 152, (2006). (Citing *State v. Preece*, 181 W. Va. 633, 383 S. E 2d 815 (1989) (Overruled on other grounds)). The examples the *Middleton* Court suggested include, "location and length of questioning; nature of questioning as it relates to suspected offense; number of police officers present; use or absence of force or physical restraint by officers; suspect's verbal and nonverbal responses to officers; and length of time between questioning and formal arrest." *Id.*

In the case at hand, when objectively looking at the totality of the circumstances, it is obvious that Trial Court clearly erred when it determined that Mr. Damron was not in custody for *Miranda* purposes. Respecting the factors set forth in *Middleton*, Deputy Fire Marshal Steve Ellis chased Mr. Damron down an alley, which was in the vicinity of an ongoing Arson investigation. During the pursuit, Deputy Fire Marshal Steve Ellis repeatedly shouted and asserted his authority vested by the State to West Virginia, "Fire Marshal. Stop. Freeze. Keep your hands where I can see them." Trial Tr., Page 152-155. Moreover while pursuing Mr. Damron down the ally, Deputy Fire Marshal Steve Ellis was simultaneously radioing for the Huntington police Department for back up. *See Preliminary Hearing Tr., P. 16, L. 10-18.*

When Mr. Damron stopped, Deputy Fire Marshal Steve Ellis then ordered him to get down on the ground. While laying face down on the ground, Deputy Fire Marshal Steve Ellis testified that he had the subjective intent to keep him detained while Fire Marshal Devin Palmer went back to his car to get his handcuffs. *See Preliminary Hearing Tr., P. 16, L. 10-18*, and thus the subjective intent to further or permanently deprive the Petitioner freedom of movement. When asked about this by Defense Counsel at Trial: "But in any event, you had the suspect, for a lack of a better word, stopped?" Answer: "Yes, sir." *See Trial Tr., P. 173 L. 18-20.* Furthermore, Deputy Fire Marshal Steve Ellis also testified that Mr. Damron was "on the ground

to keep him from running”. See Preliminary Hearing Tr., P. 15, L. 25. Additionally, once Deputy Fire Marshal Steve Ellis had Mr. Damron detained on the ground, he quickly radioed to send the Huntington Police Department stating, “We have a suspect.” *Id.* at P. 16, L. 3.

Furthermore, Mr. Damron testified at his Habeas Corpus Hearing that he subjectively believed Deputy Fire Marshal Steve Ellis had his State required firearm pointed at Mr. Damron. Specifically, Mr. Damron testified: “I’m assuming it was a Glock. The word is now today that the officers carry Glock nines. There was something poked in the back of my head as I was being pushed from behind”. Habeas Corpus Hearing Tr. P. 28, L. 2-5.

Additionally, while Mr. Damron was being detained, Deputy Fire Marshal Steve Ellis began asking Mr. Damron questions, which were “likely to elicit an incriminating response from the suspect”. *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682 (1980). The law is clear that “for *Miranda* purposes, the term “interrogation” refers to any words or action on the part of the police, other than those normally attendant on arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Id.* Looking at the facts, Deputy Fire Marshal Steve Ellis detained Mr. Damron on the ground; radioed to send the Huntington Police Department stating, “We have a suspect” (Preliminary Hearing Tr. P. 16, L. 3.), and only asked Mr. Damron questions regarding his intentions and why he was at the scene. See Preliminary Hearing Tr. P. 16, L. 12-22.

In looking at the totality of the circumstances according to the *Middleton* factors, there is ample evidence to determine as a matter of law that Mr. Damron was a part of a custodial interrogation pursuant for *Miranda* purposes. First, the location of the questioning was clearly coercive. Mr. Damron was detained in a back alley near a smoldering building alone with an armed representative that had previously chased him down due to suspicious activity. The very

basis of *Miranda* goes to the fact that statements in this very type of environment are so inherently coercive. Second, the nature of the questioning was clearly to elicit incriminating statements due to the fact that it was Deputy Fire Marshal Steve Ellis' profession to investigate fires to determine if the fire was a result of Arson and he clearly stated he had a "suspect" under his control. Third, the nature of the questions as they relate to the offense, were clearly established by the Fire Marshal's radio call to request police assistance. Fourth, although the facts are disputed as to the use of actual physical force, it is undisputed that there was a clear threat of the use of deadly force due to the fact that Deputy Fire Marshal Steve Ellis was required to carry a gun and Mr. Damron believed he was utilizing his weapon when he had Mr. Damron on the ground. Furthermore, these representations were sufficient to stop the Defendant, cause him to lie down and put his hands behind his back in a manner, which Mr. Damron felt he was not free to leave nor was he able to leave.

Furthermore, Mr. Damron is entitled to have his Habeas Petition reinstated due to the numerous errors committed by the Lower Court. The West Virginia Supreme Court has stated, "Where the record of a criminal Trial shows that the cumulative effect of numerous errors committed during the Trial prevented the Defendant from receiving a fair Trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error". *State v. Guthrie*, 194 W.Va. 657, 686, 461 S.E.2d 163, 192 (1995); *See Also* Syl. pt. 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

For purposes here, the Trial Court had numerous errors of judgment. The Trial Court admitted that some errors did in fact occur but merely interpreted them as being harmless error. *See* Final Order. Particularly, one of the most severe errors by the Trial Court was finding there was no custodial interrogation, which then confirmed that Mr. Damron was not subject to

Miranda Warnings. The Court underwent several erroneous decisions to conclude Mr. Damron was not subject to *Miranda Warning*. Specifically, the Lower Court erred in its reasoning in the following findings by the Trial Court:

- 1) Deputy Fire Marshal Steve Ellis' questioning was entirely consistent with that of an ordinary citizen concerned for his own safety inquiring of a person running from the scene as to his intentions. *See* Final Order P. 7
- 2) Deputy Fire Marshal Steve Ellis did not use physical force to subdue or stop Mr. Damron and his only questions related to the new fire that he just seen burning. *See* Final Order P. 7
- 3) The Court found that Mr. Damron would not have believed himself to be under arrest. If the Petitioner felt that he was not free to leave, it would have a result of his own guilty conscious, not because of any act or words of the Deputy. *See* Final Order P. 7
- 4) The Court's finding that while it appears that there was some inconsistency in the statement that Mr. Ellis did not have a firearm, as Mr. Ellis testified at Trial that he was authorized to carry a firearm. However, the Petitioner testified that he never saw one. In light of this testimony, the Court does find that any error in the order reflecting that Mr. Ellis did not carry a gun was harmless. As it was not used against the Petitioner, the outcome of the Suppression Hearing would have been the same. *See* Final Order P. 7
- 5) The Court's determination that "surely, the words of Deputy Ellis were not likely to elicit an incriminating response to the original fire, but were merely an attempt to determine the situation concerning the new fire. *See* Final Order P. 8
- 6) Finally, even if there were any error, it would be harmless in light of the fact that he was arrested moments later, given his *Miranda Warnings* and still gave an inculpatory statement. *See* Final Order P. 8

Looking at the Trial Court's findings above, it is clear that the Trial Court committed numerous errors. This is evident due to the fact that logical reasoning and pure common sense will differentiate between the questioning of ordinary citizens concerned for their own safety and a Deputy Fire Marshal who is investigating a fire. Clearly, looking at the full situation, one could determine an ordinary citizen who was concerned for his own safety would not chase after a suspect while shouting orders under color of authority. Deputy Fire Marshal Steve Ellis had been clearly acting under color of authority due to the fact that he was required to carry a gun. *See* Trial Tr., P. 170 L. 13-16. If anything else, the West Virginia State Code clearly defines

why Deputy Fire Marshal Steve Ellis actions were not consistent with an ordinary citizen.

Specifically, W.Va. Code §29-3-12(h) and W. Va. Code §29-3-12(h) (1) state:

(h) *Arrests; warrants.* -- The state fire marshal, any full-time deputy fire marshal or any full-time assistant fire marshal employed by the state fire marshal pursuant to section eleven of this article is hereby authorized and empowered and any person deputized pursuant to subsection (j) of this section may be authorized and empowered by the state fire marshal:

(1) To arrest any person anywhere within the confines of the state of West Virginia, or have him or her arrested, for any violation of the Arson-related offenses of article three, chapter sixty-one of this Code or of the explosives-related offenses of article three-e of said chapter: *Provided*, That any and all persons so arrested shall be forthwith brought before the magistrate or Circuit Court.

Furthermore, the Trial Court was clearly in error when it found Deputy Fire Marshal Steve Ellis did not use physical force to subdue Mr. Damron; that Mr. Damron would not have believed himself to be under arrest; and if Mr. Damron "felt that he was not free to leave, it would have a result of his own guilty conscious, not because of any act or words of the Deputy."

Final Order P. 7

The West Virginia Supreme Court has consistently ruled that an arrest is the taking, seizing, or detaining of the person of another (1) by touching or putting hands on him; (2) any act or speech that indicated an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested. *State v. Byers*, 159 W.V. 596, 224 S.E.2d 726 (1976). At no point did the Fire Marshals do anything, or say anything that would have led any reasonable person to believe that one could leave. Furthermore, by attempting to flee and being detained, Mr. Damron submitted to the Fire Marshal's authority. If the Fire Marshal was not placing Mr. Damron under arrest, the Fire Marshall had a duty to explain that he was not being arrested.

The West Virginia Supreme Court has consistently held that law enforcement can make a custodial situation non-custodial by informing the suspect he is free to leave at his choosing or like clarifying statements. *See State v. Stanley*, 168 W.V. 294, 284 S.E.2d 367 (1982). However, in this case there were no actions by the State that would have led Mr. Damron to believe he was free to leave. Moreover, the fact that Mr. Damron was laying face down on the ground with what he believed was a gun to his head (*See Habeas Hearing Tr. P. 27-28*), is evident that Mr. Damron had more than a mere "guilty conscious" as the Trial Court found in its reasoning. Under all circumstances, Mr. Damron acted as if he was being subject to an arrest due to the fact that Deputy Fire Marshal Steve Ellis acted as if he was attempting to arrest or in the least, subdue Mr. Damron until he could be formally arrested.

During the Habeas Hearing, the Trial Court also committed erroneous findings when it found "any error in the order reflecting that Mr. Ellis did not carry a gun was harmless. As it was not used against the Petitioner, the outcome of the Suppression Hearing would have been the same." Final Order P. 7. The truth of the matter is that the outcome of the Suppression Hearing would not have been the same. Mainly, it would have correctly found that Deputy Fire Marshal Steve Ellis was required to have a gun and did in fact have a gun. Moreover, the Court would have been more inclined to believe Mr. Damron was a part of a custodial interrogation and a reasonable person would have believed himself to be in custody. Thus, do to all of the above named erroneous reasoning by the Trial Court at Mr. Damron's Trial and at his Habeas Hearing, Mr. Damron's denial of Habeas Corpus relief should be set aside under the theory of *State v. Guthrie*.

2. The Court at Mr. Damron's Habeas Hearing erroneously concluded the statement included in Officer Sexton's report and given to Officer Compton was not testimonial in nature and therefore not subject to the strictures of *Crawford* due to the statements being taken by in the course of interrogation and not in an on-going emergency.

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), the United States Supreme Court examined the common law and history surrounding the Confrontation Clause. The Supreme Court summarized the law concerning the Confrontation Clause by holding "out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and Defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by Court". *Id.*

The Court at Mr. Damron's Habeas Hearing erroneously concluded the statement included in Officer Sexton's report and given to Officer Compton was not testimonial in nature and therefore not subject to the strictures of *Crawford*. See Final Order P. 9. Specifically, the Lower Court concluded the statement was admissible under the business record exception. *Id.* The Trial Court at Mr. Damron's Habeas Hearing declared, "even if this was the wrong basis under which to admit this evidence, the Court has firmly established that regardless of any fallacy in the admission of evidence, if there exists any legal grounds for said admission, it is not error." *Id.*

Additionally, the Court at Mr. Damron's Habeas Hearing incorrectly interpreted the facts of Mr. Damron's case according to the reasoning of *Davis v. Washington*, 547 U.S. 125, 126 S.Ct. 2266 (2006), (consolidated with *Hammon v. Indiana*, (June 19, 2006)). The Court in *Davis* clarified the definition of "testimonial statements vs. non-testimonial statements" for Confrontation Clauses purposes. Accordingly, the Court in *Davis* said "Statements taken by police officers in the course of an interrogation are "non-testimonial," and not subject to the

Confrontation Clause, when they are made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” *Id.* Additionally, the *Davis* Court further clarified that “Statements taken by police officers in the course of interrogation are “testimonial”, and subject to the Confrontation Clause, when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.*

Upon recognizing the appropriate rule of law the Court at Mr. Damron’s Habeas Hearing initially stated, “That it was obvious from the facts of this case that the statement taken from a Mr. Smith was taken by Officer Sexton during his initial arrival at the fire scene and in his attempts to determine what had happened.” *See* Final Order P. 9. This reasoning by the Court was correct. However, the very next paragraph, the Lower Court contradicted itself by stating, “It was an extremely dangerous situation as the entire building was engulfed in flames and the officer was certainly faced with an on-going emergency.” *Id.* Thus, the Court erroneously concluded that due to the “on-going emergency” the statement included in Officer Sexton’s report and given to Officer Compton was not testimonial in nature and therefore not subject to the structures of *Crawford*. *See* Final Order P. 10.

However, a closer inspection of the facts indicate that the situation where Officer Sexton received the statements, which were included in his report, clearly indicate there was no “on-going emergency”. Particularly, the statements should have properly been interpreted to be testimonial in nature due to the “primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution”. *Davis v. Washington*, 547 U.S 125, 126 S.Ct. 2266 (2006), (consolidated with *Hammon v. Indiana*, (June 19, 2006)).

This is evident due to Officer Sexton's actual testimony regarding his responsibilities at the scene. Particularly, when asked by the State "What else did you do at the fire scene, Officer?" (Trial Tr. P. 85, L. 6-7), Officer Sexton testified the following response:

"My basic responsibility at the time after I informed the dispatcher of the incident and the fire department was responding talking to witnesses and I started my report and also gathered information to the victims as far as the people—business owners and the person that lived in the property also and gathered their information for the report."

Trial Tr. P. 85, L. 8-14.

Clearly, Officer Sexton's primary purpose at the scene was to gather information for his criminal investigation. Officer Sexton testified that he began talking to witnesses and began trying to find evidence that could possibly be used to identify a suspect. Specifically, Officer Sexton testified that while he could not recall if he took notes or not; he did get witnesses' information such as their names, personal information, and addresses. *See* Trial Tr. P. 81, L. 8-11. Additionally, some of the information received by Officer Sexton was used against Mr. Damron in Trial. Officer Sexton testified over objections by the Defense that one of the witnesses, (Mr. Smith), gave statements regarding seeing a person enter the building by "forcibly kicking the door open". Trial Tr. at P. 81-82. Officer Sexton also testified that the Witness gave him a physical description as to what type of clothing the suspected person was wearing. In particular, Officer Sexton testified over repeated objections by the Defense, that the Witness claimed he saw a person with an abrasion on his forehead who was wearing a "dark hooded jacket" enter the premises. *See* Trial Tr. at P. 82. L. 11. (Objections were sustained under hearsay/identification).

Clearly, there was never an "on-going emergency". Officer Sexton was on scene solely to investigate the crime scene and merely take statements to fill out an incident report. At no

time did he testify to being a part of any type of dangerous activity as the Habeas Hearing Court implied. To believe the Habeas Hearing Court, one would have to believe that Officer Sexton put any and all witnesses in peril by taking their names, personal information, addresses and statements while simultaneously doing "battle against the blaze." *See* Final Order, P. 9. This is preposterous because no police officer would put a citizen's life in danger just to get his or her address and a few statements. Clearly, there was never an "on-going emergency" and thus any statements included in Officer Sexton's incident report must be testimonial in nature for purposes of the Confrontation Clause.

Furthermore, the statements included in Officer Sexton's report by Mr. Smith can only be interpreted to be testimonial in nature. Officer Sexton was clearly an official person and the statement was given by a witness after the fact to help further a criminal investigation. In addition, the statements were used to establish or prove past events, which proved to be very relevant to a later criminal prosecution. Moreover, the Prosecution used this testimonial identification extensively in closing argument during Mr. Damron's Trial.

Despite never being allowed the opportunity to confront Mr. Smith, the State used Mr. Smith's statements during their closing arguments. The State basically told the Jury that Mr. Smith saw Mr. Damron kick in the door and start the fire. *See* Trial Tr. P. 312, 313. Specifically, the Prosecutor in his closing argument stated, "Now, nobody saw him set the first fire. Well, again, that witness pretty much saw him do it. Saw him kick the door in. Saw a fire starting just a few minutes later." Trial Tr. P. 313, L. 2-5. Obviously, these statements were very damaging against Mr. Damron. However, they should have never been allowed to be used due to the fact that Mr. Damron never had the opportunity to confront Mr. Smith and challenge his accuser as a direct violation of the Confrontation Clause.

The Habeas Hearing Court determined it would follow the Trial Court's affirmation which allowed the incident report of Officer Compton into evidence under the business record exception thus disregarding the reasoning of *State v. Mechling*, 219 W.Va. 366, 633 S.E 2d 311 (2006). The Court in *Mechling* encountered a similar fact pattern. In *Mechling*, after discussing *Crawford* and *Davis*, our Supreme Court found from the circumstances of the case that the deputies' interrogation of a Ms. Thorn, the victim, was part of an investigation into possibly criminal past conduct. *Id.* The Court reasoned that:

There was no emergency in progress when the deputies arrived, and the Defendant had clearly departed the scene when the interrogation occurred. When the deputies questioned Ms. Thorn, they were seeking to determine "what happened", rather than "what is happening". Objectively viewed, the purpose of the deputies' interrogation was to investigate possible crime, which is, of course, precisely what the deputies should have done. However, the statement taken by the deputies could not become a substitute for Ms. Thorn's live testimony, because those statements "do precisely what a witness does on direct examination; they are inherently testimonial."
Id. quoting in part *Davis*, 547 U.S. 125 (2006).

For purposes here, the statements given by Mr. Smith to Officer Sexton were clearly testimonial in nature and thus should have been barred unless Mr. Smith gave live testimony. The statements were clearly given to help determine "what happened" rather than "what is happening". Moreover, the statements were specifically asked to help an ongoing criminal investigation. This is apparent because the statements were included in Officer Sexton's report and were used at Trial against Mr. Damron. In addition, the statements included in Officer Sexton's report were used by Officer Compton to help identify the accused Mr. Damron. Specifically, Officer Compton testified that he went to the scene to arrest Mr. Damron based on the Fire Marshal's radio call; and further only after he learned of this did he radio Officer Sexton to inquire as to the description as offered by Mr. Smith. *See* Trial Tr., P. 214 L. 18-24. Mr. Smith allegedly told Officer Sexton that a man with a scar on his forehead kicked in the door.

See Trial Tr., P. 97-98. This was clearly identification testimony given to an official person investigating a crime.

Furthermore, other than the asserted custodial statements allegedly made by Mr. Damron, there were not any other pieces of evidence connecting Mr. Damron to any of the fires except the statement given to Officer Sexton stating that a man with a scar on his forehead kicked the door of the building before the fire. This statement was crucial to the State's case in charging Mr. Damron with both first Degree Arson and second Degree Arson. The first fire was used against Mr. Damron for 1st Degree Arson, and the second fire was 2nd Degree Arson due to the fact that the building could no longer be considered a dwelling because it was uninhabitable due to the first fire. Additionally, due to the fact that the second fire consisted of someone attempting to set fire to a few rolled up newspapers, which were easily put out, the correct charge, should have been fourth Degree Arson. W. Va. Code §61-3-4. (2007); (Attempt to commit Arson; fourth Degree Arson).

Consequently, Mr. Damron's Constitutional Right under the Sixth Amendment to face Mr. Smith was clearly abridged by the admission of this evidence without any opportunity to cross-examine Mr. Smith. In addition, the admission of the hearsay statement of Mr. Smith violated the West Virginia Rules of Evidence. The Trial Courts ruling that the statement was admissible to establish state of mind to exercise probable cause for Officer Compton to arrest Mr. Damron was clearly very minimally probative and very prejudicial; therefore, the Circuit Court erred in admitting the statements over the Defendant's objection. See *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981); *State v. Golden*, 175 W.Va. 551, 336 S.E.2d 198 (1985).

The State clearly tried over Defense objections to get Mr. Smith's hearsay testimony into evidence throughout the Trial, and dwelled on this identification extensively in closing argument

without mentioning Officer Compton's subjective intent. Like in *Golden*, Mr. Smith's testimony went to the ultimate issue: Did Mr. Damron break and enter the building and commit Arson therein. However, Officer Compton testified that he went to the scene to arrest Mr. Damron based on the Fire Marshal's radio call; and further only after he learned of this did he radio Officer Sexton to inquire as to the description as offered by Mr. Smith. See Trial Tr., P. 214 L. 18-24. This evidence only reestablished in Officer Compton's mind what he already believed. Clearly, this minimally probative, very prejudicial evidence violates the principles laid out in *Golden*.

In addressing this Court's concern of *Crawford* retroactivity; Mr. Damron's case was heard by the Circuit Court of Cabell County nearly 1 year after *Crawford* was pronounced by the United States Supreme Court thus requiring no retroactivity analysis.

The statements in Officer's Sexton's report were testimonial in nature and Mr. Damron should have been afforded the chance to confront the witness, Mr. Smith. Therefore, Mr. Damron is entitled to reversal of his Habeas Corpus Petition.

3. The Court at Mr. Damron's Habeas Hearing erroneously ruled that Mr. Damron's conviction for First and Second Degree Arson, and sentences of 20 years and 10 years, consecutively, violate the Double Jeopardy Clause of the 5th Amendment to the United States Constitution and Article III, Section V of the West Virginia Constitution by subjecting Mr. Damron to multiple punishments for the same offense.

The Court at Mr. Damron's Habeas Hearing found no merit in Mr. Damron's Double Jeopardy allegation. The Court gave a very conclusory statement without adequately addressing its reasoning. Mainly, the Court acknowledged Mr. Damron's Habeas argument where Mr. Damron asserted that *State v. Mullins*, 181 W.Va. 415, 383 S. E.2d 47 (1989), stood for the proposition that the Supreme Court determined that Second Degree Arson is a lesser included offense of First Degree Arson. However, the Court at Mr. Damron's Habeas Hearing

distinguished *Mullins* verses the facts from Mr. Damron's case by addressing the fact that the Defendant in *Mullins* was only charged with First Degree Arson.

The only attempt at logical reasoning by the Court at Mr. Damron's Habeas Hearing was to give a very large block citation of the *Mullins* case. Particularly, the Court quoted the following:

The appellants in this case, however, were not entitled to a lesser-included offense instruction, and the Circuit Court had no duty to give such an instruction even though Defense Counsel failed to offer one. We have held that "[w]here there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, and then the Defendant is not entitled to a lesser included offense instruction." Syl. pt. 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982). See *State v. Thompson*, 176 W.Va. 300, 308, 342 S.E.2d 268, 276 (1986); *State v. Ruddle*, 170 W.Va. 669, 671, 295 S.E.2d 909, 911 (1982). See also syl. pt. 1, *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985). As stated in section III of this opinion, the evidence in this case established first Degree Arson. There is no insufficiency on the necessary elements of the greater offense, first Degree Arson in this case, which are different from those of the lesser included offense, second Degree Arson. There was no evidence presented at Trial that sought to prove that the burned building was not a dwelling. Moreover, as stated previously in this opinion, the evidence overwhelmingly supported the first Degree Arson conviction because of the apartment units located within the burned building. Thus, there is no evidentiary dispute on the elements of the greater or lesser-included offense. The appellants deny committing the offense at all and claim to have been somewhere else when the burning occurred.

State v. Mullins, 181 W.Va. 415, 421, 383 S.E.2d 47, 53 (1989).

The only implication that can be drawn from the above quote is the Habeas Court may have decided there was not any evidentiary dispute on the elements of the greater or lesser-included offense due to the Court's belief there was not any evidence presented at Trial that sought to prove that the burned building was not a dwelling. If this is the case then the Court made an erroneous decision.

It is a bad comparison because as the Court mentioned earlier, the Defendant in *Mullins* was only charged with First Degree Arson due to the fact that the Defendant did not attempt to

argue the building was not a dwelling and merely denied committing the offense at all. Mr. Damron on the other hand did deny committing the offense but Mr. Damron urged the Court that the Court was mistaken in charging him with First and Second Degree Arson. Whereas, the proper charge, if any, should have only been Fourth Degree Arson, which is essentially attempted Arson.

Mr. Damron reminds the Court that he was convicted of Second Degree Arson based on circumstantial evidence of someone lighting folded up newspapers on fire in an attempt to reignite the previously burned building. In addition, that Mr. Damron was convicted of First Degree Arson based on circumstantial evidence consisting of hearsay testimony of a witness that Mr. Damron was not given the opportunity to confront and statements connecting Mr. Damron to the first fire, which should have been barred, based on a violation of Mr. Damron's *Miranda Rights*.

Additionally, the Court in *Mullins* said, "To sustain a conviction of Arson based on circumstantial evidence, the evidence must show that the fire was of an incendiary origin and the Defendant must be connected with the actual commission of the crime." *Id.* As stated earlier, the only evidence connecting Mr. Damron with the actual commission of the crime was circumstantial evidence, which should have been properly inadmissible. Without the improper evidence, the most the State could have charged Mr. Damron with should have been Fourth Degree Arson in the attempted burning of the previously burned building. Alternatively, Mr. Damron could have been charged with Second Degree Arson if the State could prove with enough circumstantial evidence that the ignited newspapers actually caused the previously burning building to be reignited. Without the properly inadmissible hearsay testimony from the

witness that Mr. Damron did not get a chance to confront, the State would have a very difficult time convicting Mr. Damron.

In addition, the *Mullins* case stated, "Circumstantial evidence will not support a guilty verdict, unless the fact of guilt is proved to the exclusion of every reasonable hypothesis of innocence; and circumstances which create only a suspicion of guilt but do not prove the actual commission of the crime charged, are not sufficient to sustain a conviction." *Id.* at 421. As stated in Mr. Damron's previous arguments, without the benefit of the improper evidence the State could not prove the actual commission of the crime charged due to the fact that Mr. Damron's actions created a mere suspicion of guilt.

Additionally, the Court in Mr. Damron's Habeas Hearing did not even address the West Virginia Legislative history concerning Arson. Instead, the Lower Court decided the fate of Mr. Damron's Habeas Petition's issue on Double Jeopardy concerning Arson by looking at case law dealing with drug possession with intent to deliver. *See* Final Order P. 12. Specifically, the Court in their Final Order distinguished *State v. Zaccagnini*, 172 W. Va. 491, 308 S. E. 2d 131 (1983), and *State v. Barnett*, 168 W. Va. 361, 284 S.E 2d 622 (1981). Neither of those cases dealt with Arson. Rather, those two cases dealt with possession with intent to deliver a controlled substance.

Particularly, the *Barnett* Court determined simultaneous delivery of two controlled substances to the same person is one offense for purposes of the Double Jeopardy Clause. *See Barnett*, 168 W. Va. 361, 284 S.E 2d 622 (1981). Whereas *Zaccagnini* presented the Court with a situation, in which the Defendant had violated two statutory provisions requiring different evidence to sustain a conviction. *Zaccagnini*, 172 W. Va. at 500, 308 S.E. 2d at 140. The *Zaccagnini* Court distinguished *Barnett* by explaining the *Barnett* scenario involved

“simultaneous delivery of two controlled substances that violated the same statutory provision and carried the same penalty”. *State v. Zaccagnini*, 172 W. Va. at 499, 308 S. E. 2d at 139.

The Lower Court in its Final Order for Mr. Damron’s Habeas Hearing then cited the language of *Zaccagnini* where the Court summarized the two statutory drug related violations by stating “Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” *See* Syl. Pt. eight of *State v. Zaccagnini*, 172 W. Va. 491, 308 S. E. 2d 131 (1983). The Lower Court in its Final Order for Mr. Damron’s Habeas Hearing in what is presumptively an attempt to interpret the West Virginia State Legislative intent regarding Arson by stating, “If there is an element of proof that is different, then the presumption is that the Legislative intended to create separate offenses. Final Order P. 12.

The Court at Mr. Damron’s Habeas Hearing then erroneously found that the West Virginia State Legislature “overwhelmingly” intended that each violation of First Degree Arson and Second Degree Arson be a separate offense. *See* Final Order P. 12. However, this interpretation is completely incorrect due to the fact that the West Virginia Supreme Court has already found that Second Degree Arson is a lesser-included offense of First Degree Arson. *See State v. Mullins*, 181 W.Va. 415, at 422 (1989).

The Court at Mr. Damron’s Habeas Hearing improperly determined that the *Mullins* case did not apply due to the fact the Defendant in *Mullins* was only charged with First Degree Arson. However, the *Mullins* case is directly on point due to the issue concerning whether the Defendant was entitled to the lesser included offense of Second Degree Arson to be included in his charges to the Jury along side of First Degree Arson. *See State v. Mullins*, 181 W.Va. 415, at 422 (1989).

The Court in *Mullins* looked at the West Virginia Code dealing with Arson. Specifically, First Degree Arson requires the building burned to be a dwelling. West Virginia Code § 61-3-1. The West Virginia Legislature defines a dwelling as any building or structure intended for habitation or lodging, in whole or in part. W. Va. Code § 61-3-1(b) (1). Additionally, The West Virginia Supreme Court has held that a building which contains an apartment is a “dwelling house”, for purposes of W. Va. Code § 61-3-1. *Mullins*, at Syl. Pt. 3. The West Virginia Supreme Court goes further and finds that if a portion of a building is used or intended for use as human habitation, the entire structure becomes that which is defined in West Virginia’s First Degree Arson Statute. *Id.*, at 421. It is this analysis upon which this Court has found Second Degree Arson to be a lesser-included offense of First Degree Arson.

In Mr. Damron’s case, the building which burned contained apartments on the second floor and thus should have been interpreted to be a “dwelling house”, for purposes of W. Va. Code § 61-3-1. Mr. Damron was actually indicted on the following counts: Count 1 and 2, First Degree Arson; Count 3 and 4, Second Degree Arson. *See* No. 03-F-215. In this case, the Jury was allowed to consider both First and Second Degree Arson as punishment for “each” burning. Thus, Mr. Damron was subject to punishment for four charges, when at most he was subject to two. The Jury returned a verdict of guilty on Count 2 of First Degree Arson and on Count 4, Second Degree Arson.

The best explanation for this is due to the fact that the building was burned twice just a few hours apart where Mr. Damron was only connected to the first fire through circumstantial evidence given by a witness which Mr. Damron was never given the opportunity to confront (*See* argument above). Additionally, it is not discernable from the convictions whether Mr. Damron was convicted of First Degree Arson for the “first burning”, and Second Degree Arson for the

“second burning”, and because they were not the same “act.” Such an argument would be an argument in support of Trial Counsel’s assertion that the verdicts are inconsistent. Additionally, any attempt to charge Mr. Damron from the “second burning” should have been for Fourth Degree Arson (attempted Arson) due to the fact that the building had already been burned and extinguished and the only flames from the second fire came from rolled up newspaper, which was quickly extinguished.

Additionally, absent the clear prior holdings of this Court finding that Second Degree Arson is a lesser-included offense of First Degree Arson and thus violates the Double Jeopardy Clause, further analysis would still prove fatal to the results of the Trial Court and the convictions by the State. A claim that Double Jeopardy has been violated based upon multiple punishments for the same offense is first resolved by determining Legislative intent as to punishment. Syl. Pt. 4, *State v. Green*, 207 W.Va. 530 (2000) (quoting Syl. Pt. 7, *State v. Gill*, 187 W.Va. 136 (1992)). If no such clear Legislative intent can be discerned then the Court should use the *Blockburger* test *See (Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932)), when dealing with two separate criminal provisions. *See Green*, at 536.

As West Virginia does not have a Legislative history, we must look to the Statute to interpret intent. The only thing discernable from the Statutes is that First Degree Arson has a more severe penalty of two to twenty years, while Second Degree Arson carries a one to ten year penalty, both definite. *See W. Va. Code §§ 61-3-1, 2*. Additionally and more importantly, the elements are identical except that First Degree Arson requires that the building or structure be a dwelling. In essence, the lesser-included offense would require no proof beyond that which is required for conviction of the greater offense.

Furthermore, the *Blockburger* test provides the same results. In determining whether one offense is the "same offense" as another for Double Jeopardy purposes, the U.S. Supreme Court developed the *Blockburger* or same elements test, which concludes that an offense is not a lesser-included offense in another offense if it contains an element of proof that the greater offense does not. See *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932). This test was adopted by West Virginia as well. *State v. Zaccagnini*, 172 W.Va. 491 (1983). In *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221 (1977), the U.S. Supreme Court also observed, "It has long been understood that separate statutory crimes need not be identical in order to be the same." See *Brown*, at 168.

The elements can be broken down as such:

First Degree Arson - 1) any person 2) who willfully and maliciously 3) sets fire to 4) any building 5) intended for habitation in whole or in part whether occupied, unoccupied or vacant 6) whether the property of himself/herself or another.

Second Degree Arson - 1) any person 2) who willfully and maliciously 3) sets fire to 4) any building 5) whether the property of himself/herself or another 6) not included in the preceding section.

First Degree Arson requires at least part of the building to be intended for habitation, whether it actually is inhabited or not. Thus, Second Degree Arson contains no elements different from those elements in First Degree Arson. *Blockburger* calls this a violation of Double Jeopardy.

In Mr. Damron's case, the two charges of First Degree Arson and the two charges of Second Degree Arson are improper. From the language of the Arson Statutes, the second act of burning could not include a First Degree Arson charge due to the building no longer being

inhabitable. The building was no longer inhabitable due to the damage of the previous fire and the water damage from extinguishing that fire. Certainly, no person could have returned to their apartment after "the entire building was engulfed in flames." See Final Order P. 9. (Courts wording on whether there was an on-going emergency).

While there is no case law on point differentiating habitable verses uninhabitable for Arson purposes, the West Virginia Supreme Court has nevertheless agreed "(I)t is fair to presume that no individual would voluntarily choose to live in a dwelling that had become unsafe for human habitation." *Teller v. McCoy*, 162 W.Va. 367, 395, 253 S.E.2d 114,130-131 (1978) (Holding waivers of the implied warranty of habitability are against public policy). Quoting *Bowles v. Mahoney*, 91 U.S.App.D.C. 155, 161, 202 F.2d 320, 326 (1952) (Bazelon, J. dissenting). See also *Board of Educ. of County of Wood v. Airhart*, 212 W.Va. 175, 182, 569 S.E.2d 422, 429 (2002). Clearly, a building that had just hours before had been engulfed in flames could not be considered safe for human habitation. Thus, the building during the second fire could not properly be defined as a dwelling for First Degree Arson purposes. Furthermore, the nature of the second act of allegedly attempting to burn an already burnt building should have at most been a charge of Fourth Degree Arson instead of two counts of Second Degree Arson. Therefore, Mr. Damron should not have been subjected to punishment for four charges when at most he should have been subject to two. As a result, Mr. Damron rights against Double Jeopardy were violated.

Because Mr. Damron's Double Jeopardy rights were violated, he is entitled to a remedy. The usual remedy for a Double Jeopardy error of this nature is reversal of the convictions and remand for a new Trial. When a Jury is allowed to consider conviction on both counts when at most a Defendant is subject to punishment for only one, this constitutes reversible, prejudicial

error, requiring a new Trial or in the alternative the lesser of the counts. *See State v. Rogers*, 209 W.Va. 348, 547 S.E.2d 910 (2001). For purposes of argument Number 3 only, and in the interest of judicial economy, Mr. Damron is seeking reversal of his denial of Habeas Corpus, with instructions that the 1st Degree Arson Count be reversed and the 2nd Degree Arson be affirmed. Mr. Damron has sufficiently demonstrated that he is entitled to relief. Therefore, Mr. Damron is entitled to reversal of his Habeas Corpus denial.

VII. CONCLUSION

In conclusion, Mr. Damron, the Petitioner, respectively asserts the he has sufficiently met his burden in demonstrating that he deserves reversal of the denial of his Habeas Corpus Petition Civil Action Number 06-C-093. Mr. Damron asserts he thoroughly demonstrated the Lower Court erroneously denied him Corpus relief due to improperly allowing his statements to Fire Marshal Steve Ellis into evidence, which violated the Defendant's Fifth Amendment Rights under the United States and West Virginia Constitution. Also, Mr. Damron asserts the Court at his Habeas Hearing erroneously concluded the statements did not violate the Confrontation Clause of the United States Constitution. The Court's ruling that Officer Sexton's report was not testimonial in nature and therefore not subject to the strictures of *Crawford* due to the statements being taken in the course of interrogation and not in an on-going emergency was clearly erroneous. Lastly, Mr. Damron asserts he properly proved the Court erroneously ruled in his Habeas Hearing Conviction for First and Second Degree Arson, and sentences of 20 years and 10 years, consecutively, violate the Double Jeopardy Clause of the 5th Amendment to the United States Constitution and Article III, Section V of the West Virginia Constitution by subjecting Mr. Damron to multiple punishments for the same offense.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel., Mark Damron
Plaintiff Below-Appellant,

v.
WILLIAM HAINES, WARDEN,
Defendant Below-Appellee.

No. 072291

CERTIFICATE OF SERVICE

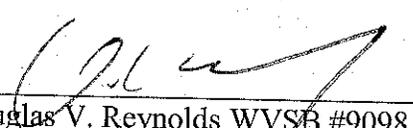
The undersigned attorney does hereby certify that the foregoing **APPELLANT'S BRIEF** has been served upon the following by depositing a true and exact copy in the US Mail Postage prepaid addressed as follows:

TO: West Virginia Attorney General's Office
Appellate Division
State Capitol Complex,
Bldg. 1, Room E-26
Charleston, WV 25305

And to the following by depositing a true and exact copy in their box located in the Circuit Clerk's Office of said County:

TO: Chris Chiles, Prosecutor
Cabell County Prosecutor's Office
Cabell County Courthouse
750 Fifth Avenue, Suite 350
Huntington, WV 25701

Dated this 2nd day of June, 2008.



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