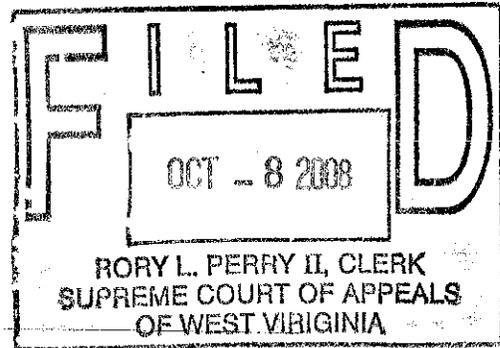


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34153

IN THE  
SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

Charleston



State of West Virginia, Plaintiff Below,  
Appellee

v.

Gary Wayne Kent, Defendant Below,  
Appellant.

Appeal Granted on June 11, 2008, from Judgment of June 4, 2007  
From the Circuit Court of Marion County

Appellant's Brief

by: Counsel for Appellant  
Joshua P. Sturm, Esq.  
Heidi M. Sturm, Esq.  
James B. Zimarowski, Esq.

## PROCEEDINGS AND RULINGS BELOW

In October 1998, Gary Kent was indicted by the Grand Jury of Marion County for First Degree Murder. On October 1, 1999, the Appellant was found guilty of First Degree Murder, deliberate and premeditated. An appeal was taken from that conviction; this Court reversed the conviction and remanded the case for a new trial due to this Court's finding that the Appellant was incompetent to stand trial. State v. Kent, 213 W. Va. 535, 584 S.E.2d 169 (2003).

A second trial was held and the jury returned a verdict of guilty of First Degree Murder, felony murder on March 19, 2007. On March 21, 2007, the Designation of Record for Appeal, Notice of Intent to Appeal, Motion for Judgment of Acquittal and Motion for New Trial were filed. The Trial Order was entered on April 3, 2007, and an Order Denying Defendant's Motion for Judgment of Acquittal and Defendant's Motion for a New Trial was entered on June 13, 2007. An Order Enlarging Time Frame in which to File Petition for Appeal was entered September 28, 2007, extending the time frame until December 12, 2007. A petition for appeal was filed with this Court and accepted as to the first Assignment of Error: The Trial Court erred in its ruling allowing the State to pursue felony murder charges against the Appellant because in the Appellant's first trial, the jury implicitly acquitted the Appellant of felony murder and double jeopardy principles prohibit the State from retrying the Appellant on the acquitted conduct of felony murder. It is upon this Assignment of Error Appellant now requests relief.

## STATEMENT OF FACTS

Gary Kent was arrested for the murder of Thomas Allen, a bookie in Fairmont. TT#1090.<sup>1</sup> Allen's death occurred on Sunday, July 26, 1998. Allen had been at his establishment earlier that day. TT #1124. His body was discovered in the early evening hours. TT #356. A woman named Nancy Pobega was seen at Tommy Allen's establishment around 2:15 p.m. TT #1127. When leaving his store, Allen saw the Appellant and gave him a ride. TT #1337. Allen gave Appellant a ride to at least the corner of Ogden and Baltimore Streets. TT #1156. From this point the State's version of the facts differs from the Appellant's.

The State's version is that Allen and Appellant proceeded up Ogden Avenue to an alley before the entrance to Windmill Park, where a softball tournament was going on. Allen's body was discovered in his van, in the alley, where he had been shot twice. The State accuses Appellant of having murdered his friend, Allen, for money.

There was also testimony that Allen returned to his store after having given Appellant a ride. Attorney Pat Stanton represented Allen in some business matters and after leaving his office that afternoon, he saw Allen around 3:15 p.m. TT #1129. Attorney Stanton spoke briefly with Allen and testified that there was a white man whose identity is unknown and Nancy Pobega in the store with Allen. TT #1127. Attorney Stanton is certain that the time was after 3 p.m. because he makes his living on billable hours. TT #1125.

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<sup>1</sup> Pages in the trial transcript are denoted as TT # \_\_\_\_.

Later in the afternoon, Appellant went to Cathy's Talk of the Town. TT #1125. Appellant later returned home and spoke with his sister on the telephone. TT #1146. His sister told him that Tommy was dead. TT #1146. He also spoke with Kenny Arnett who told him that Allen had been shot. TT # 1146.

Appellant was picked up for questioning at Sissy Jones' house and taken to the police station. TT #1071. A gunshot residue test was performed on the Appellant. TT #1082. Following that interview, the police returned with Appellant to his residence where he was allowed to change clothes and the police did a search of his residence. TT # 1086. Appellant was asked to return with the police to the station to give a second interview. TT #1086. Appellant was arrested late on the 27<sup>th</sup>. TT #1089. A second search was performed of Appellant's residence on July 28, 1998. TT #1012. A third search was performed of Appellant's residence on July 30, 1998; it was during this third search that a shell casing was found on the porch. TT #1018.

### ASSIGNMENT OF ERROR

The Trial Court erred in its ruling allowing the State to pursue felony murder charges against the Appellant because in the Appellant's first trial, the jury implicitly acquitted the Appellant of felony murder and double jeopardy principles prohibit the State from retrying the Appellant on the acquitted conduct of felony murder.

## ARGUMENT

The Bill of Rights of the United States Constitution specifically states, "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ..." which expressly prohibits the State in the case at hand to put the defendant on trial for Felony murder when the Jury in the first trial acquitted him thereof by not finding him guilty of that charge. The Appellant was convicted in the first trial of First degree murder, deliberate and premeditated. In the second trial, the one from which this appeal is taken, the Appellant was convicted of first degree murder, felony murder. [See Appendix 2: Verdict Form, trial 2.]

The issue at hand is clear: when the jury was discharged having found the defendant guilty of murder of the first degree, deliberate and premeditated, by signing the jury verdict form as such, it implicitly acquitted the defendant of the alternative, felony murder. Therefore, the State and Court should not have permitted the jury in the second trial the opportunity to view evidence, hear a jury charge or a complete a jury verdict form that included the option of felony murder. As accorded by the United States Supreme Court in Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L.Ed.2d 199 (1957), "Once a person has been acquitted of an offense he cannot be prosecuted again on the same charge. The United States Supreme Court has uniformly adhered to that basic premise."

The United States Supreme Court, as well as this Court, has addressed similar claims of double jeopardy violations. In Green, the defendant was originally convicted

of second degree murder under an indictment charging murder in the first degree. Id. The conviction was overturned on appeal, the defendant was retried on the same indictment, and was found guilty of first degree murder. On appeal, the United States Supreme Court addressed the double jeopardy claim and held that the defendant could not again be tried for first degree murder because the first trial jury, by finding him guilty of second degree murder, implicitly acquitted him of first degree murder.

The Court in Green, supra, addressed the issue of when jeopardy attaches and found that it attaches at the beginning of the trial. The Court commented that "Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. In brief, we believe this case can be treated

no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree." (citations omitted.) Green, supra.

The only difference between Green, supra, and the case as bar is that Green was convicted twice of two different degrees of murder whereas Appellant was convicted twice of the same degree of murder in two different manners. Appellant argues that it is a classic distinction without a difference. The United States Supreme Court clarifies the issue of determining whether an single statutory offense can be construed as two separate and distinct violations in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180; 76 L. Ed. 306; 1932 U.S. LEXIS 875 (1932) by stating, "Each of the offenses created requires proof of a different element. The applicable rule is that 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 a fact which the other does not. Gavieres v. United States, 220 U.S. 338, 342, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in Morey v. Commonwealth, 108 Mass. 433: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Compare Albrecht v. United States, 273 U.S. 1, 11-12, and cases there cited. Applying the test, we must conclude that here,

although both sections were violated by the one sale, two offenses were committed.”

Blockburger, Id.

In the case at bar, the defendant was charged with murder of the first degree. The State presented evidence that the defendant either committed a deliberate and premeditated murder or he committed a felony murder.

By choosing to convict the defendant of deliberate and premeditated murder in the first trial, the jury implicitly acquitted the defendant of the felony murder option. The defendant was put on trial two times for murder of the first degree; however, there is a very clear distinction between the two theories. The most obvious distinction is that felony murder is one in which a killing occurs “in the commission of, or attempt to commit arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance...” as defined by West Virginia Code § 61-2-1. Each of the aforementioned felonies consists of various elements which make it distinct and different from murder of the first degree, deliberate and premeditated. Because of this profound difference, the alternative means of murder are separate and distinct offenses. And, because of this distinction, the defendant cannot be charged with both, acquitted of one alternative and then retried and found guilty of other alternative without violating the Double Jeopardy principles of the Sixth Amendment of the United States Constitution.

The profound distinction of murder of the first degree, deliberate and

premeditated and murder of the first degree, felony murder is clear on its face: to be convicted of felony murder, the death must occur during the commission of a felony - in this case, an alleged robbery. When all evidence was presented at the first trial, the jury found and implicitly acquitted the defendant of that charge by finding him guilty of deliberate and premeditated murder - not felony murder. In Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 1, 1978 LEXIS 3 (1978), the Supreme Court held "The Double Jeopardy Clause 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." However, in the defendant's second trial, the State focused all of its efforts, modified and perfected its argument by using evidence, including testimony of unavailable former witnesses which should have been excluded, and expressly went about attempting to convict the defendant of an offense which he had been previously acquitted. As the Appellant was found to be incompetent during his first trial due to mental illness, he did not have the opportunity for cross-examination of these witnesses although the State in the second trial was permitted to introduce testimony of these persons.

The United States Supreme Court in Burks makes it very clear that, "The [Double Jeopardy] Clause does not allow the state to make repeated attempts to convict an individual for an alleged offense, since the constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." Burks, Id. at

headnote 6.

It was the State's responsibility to be sure it had the best evidence available, and in light of the considerable financial as well as staff resources it had at its disposal and did not, in terms of the alleged felony murder, effectively do so. However, in the second trial, the State had nine (9) additional years to modify its argument, prepare its evidence and use the advances in science and the zealotry of a different prosecutor who would soon be up for re-election to perfect an argument that the Appellant was involved in an alleged robbery when the victim was killed. It accomplished this goal by focusing on the robbery to establish a "motive".

Not unlike Green, supra, Appellant was in direct peril of being convicted and punished for felony murder at his first trial. He was forced to run the gauntlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either felony murder or deliberate and premeditated murder, it chose the latter.

To further illustrate the similarities in Green, supra, and the case at bar, it is helpful to examine the choices that the jury had. In Green, supra, the jury had the choices of first degree murder, second degree murder, and presumably, other lesser included offenses. In the first trial of the Appellant, the jury had the same choices, with the exception that there were two choices with regard to first degree murder, namely felony murder and deliberate and premeditated murder.

This Court, in applying the principles of Green, supra, in a similar case, stated,

"[b]ecause the jury at the appellant's initial trial had the option of returning a verdict for first degree murder, under Green, the conviction for the lesser included offense of second degree murder is to be viewed as an implicit acquittal on the charge of first degree murder, thus precluding a second prosecution on this charge." State v. Young, 173 W. Va. 1, 311 S.E.2d 118, 1983 W. Va. LEXIS 661 (1983).

When argued to the trial court, the State took the position that there could be no double jeopardy violation because felony murder is not a lesser included offense of first degree murder but rather just an alternate way of committing the crime under West Virginia law. The Supreme Court in Green rejected that position. "It is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense. If anything, the fact that it cannot be classified as "a lesser included offense" under the charge of felony murder buttresses our conclusion that Green was unconstitutionally twice placed in jeopardy. American courts have held with uniformity that where a Appellant is charged with two offenses, neither of which is a lesser offense included within the other, and has been found guilty on one but not on the second he cannot be tried again on the second even though he secures reversal of the conviction and even though the two offenses are related offenses charged in the same indictment." Fn. 14, Green, *supra*.

In this case, it is true that felony murder is not a lesser included offense of deliberate and premeditated murder. However, it is also true that by not finding

Appellant guilty of felony murder at the first trial when given the chance to do so, the jury implicitly acquitted Appellant of felony murder because it is a different offense with different elements and therefore to try him again on that charge places him twice in jeopardy for the same offense.

As quoted in The People of the State of New York v. Nathan Jackson, 20 N.Y.2d 440, 231 N.E.2d 722, 285 N.Y.S. 2d 8; 1967 N.Y. LEXIS 1152 (1967), "The point to be understood, however, is that if a jury is given an opportunity to return a verdict and it fails to do so, a Appellant cannot be retried for those offenses on which it was silent because he has been once placed in jeopardy" citing People v. Ressler, 17 N.Y.2d 174, 216 N.E.2d 582, 269 N.Y.S.2d 414, 1966 N.Y. LEXIS 1453 (1966); People v. Dowling, 84 N.Y. 478, 1881 N.Y. LEXIS 421 (1881); United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844, 1965 U.S. App. LEXIS 4912 (1965); Green v. United States.  
Id. In the case at hand, the jury had every opportunity at the first trial to find the Appellant guilty of either Murder of the First Degree, Felony Murder which was listed as the first option and next, Murder of the First Degree, Deliberate and Premeditated. [See Appendix 1: Verdict Form, trial 1.] The jury very clearly did not choose the first option: "Not Guilty" nor did it choose the second option: "Murder of the First Degree, Felony Murder". It instead decided that the Appellant was guilty of "Murder of the First Degree, Deliberate and Premeditated" and indicated as such on the Verdict Form.

The Jury Charge clearly distinguished the differences between murder of the first degree, deliberate and premeditated and murder of the first degree, felony murder.

Appellate Record #2373-2375.<sup>2</sup> The jury verdict form in first trial gave the jury the option of deliberate and premeditated murder and felony murder; the jury foreperson signed the option to convict the Appellant for deliberate and premeditated murder. The lack of signature for the felony murder option is an implicit acquittal. A thorough demarcation of deliberate and premeditated murder from felony murder was made in the court's instructions to the jury at the first trial, including a concise definition of robbery (the alleged underlying felony in this matter). The Jury made its decision in clear manner; the Appellant was found guilty of Murder of the first degree, deliberate and premeditated. The fact that the jury did not find the Appellant guilty of murder of the first degree, felony murder and in fact remained silent on it is an implied acquittal thereof. Because the jury had the opportunity to be present for the putting on of all available evidence including that of the alleged robbery and still did not find the Appellant guilty of felony murder should have prevented the Jury in the second trial of the Appellant from being permitted to entertain the idea that the Appellant alleged killed the victim while attempting to commit a robbery.

During the pre-trial phase of the Appellant's second trial, the trial judge addressed the issue of double jeopardy. Specifically the trial judge asks, "Did the jury verdict make a differentiation between felony murder and . . ." to which Mr. Zimarowski responds, "Yes, they did." (TT #188). Defense counsel makes it clear that the jury in the first trial had a decision to make: either the jury could choose to convict the Appellant of one of

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<sup>2</sup>Pages in the Appellate Record are denoted as Appellate Record #\_\_.

two murder of the first degree options: deliberate and premeditated or felony murder. Defense counsel cites West Virginia Code § 62-2-1 to clarify "technically they [the State] should have had a separate not guilty, guilty verdict on each felony murder or murder, but they [the State] chose not too...the only issue to be tried before this Court and the jury on the retrial is in effect a first degree murder case, not a felony murder case." (TT #189). The Court then specifically asks what the jury verdict form read in the first trial. Defense counsel demonstrates through State ex rel Stuckey v. Trent, 202 W. Va. 498, 505 S.E.2d 417, 1998 W. Va. LEXIS 80 (1998), that a distinction must be made between felony murder and deliberate and premeditated murder. "They are separate and distinct offenses. There are alternative ways of finding one guilty." TT #192). The Trial Judge responds in the affirmative this statement, "There are, I agree." (TT #192).

Although the Stuckey decision does not require the State to elect either one theory of murder of the first degree or another in a trial for murder; however, it does not specifically address the issue at hand. In the case at bar, the State in the first trial presented the jury with both variations on murder of the first degree: deliberate and premeditated and felony murder. However, the Appellant was convicted by the jury of committing a deliberate and premeditated act of murder when the State presented the jury its evidence; it implicitly acquitted him of felony murder.

In the second trial, the State again presented the jury with both alternatives to murder of the first degree although the Appellant had been previously acquitted of the felony murder alternative. Specifically, the trial court judge stated "I think West

Virginia law was wrong." (IT #222). Therefore, the State presented the jury with information and a theory in which the Appellant killed the victim while attempting to rob him. The jury accepted this theory and the Appellant was then convicted of felony murder. The Court should not have charged the jury with the felony murder alternative to the murder of the first degree: deliberate and premeditated when the Appellant had been previously acquitted by the jury in the first trial. Charging the jury with both deliberate and premeditated murder and felony murder is in direct contradiction to the standards set forth by the United States Constitution, Bill of Rights, Amendment VI. Mr. Kent was tried and acquitted by a jury of his peers for the crime of felony murder.

"Due process requires that criminal prosecutions comport with prevailing notions of fundamental fairness and that criminal Appellants be afforded a meaningful opportunity to present a complete defense." Clark v. Brown, 450 F.3d 898, 2006 U.S. App. LEXIS 13320 (2006). In the case at hand, the State, with the help of the trial judge who felt the prevailing West Virginia law to be wrong, did not "comport with prevailing notions of fundamental fairness ..." by permitting the State to present evidence, charge the jury and present a jury verdict form that allowed for a felony murder option.

The Court's opinion in Green was very clear: "It is not essential that a verdict of guilt or innocence be returned for a Appellant to have once been placed in jeopardy so as to bar a second trial on the same charge. A Appellant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be

tried again." Green, Id. at headnote 4. In the case at bar, the State was provided each and every opportunity to present evidence and witnesses that could have led the first jury to convict the Appellant of felony murder. It did not and ultimately, the State cannot have the opportunity to retry the Appellant for an offense for which he has been acquitted.

PRAYER FOR RELIEF

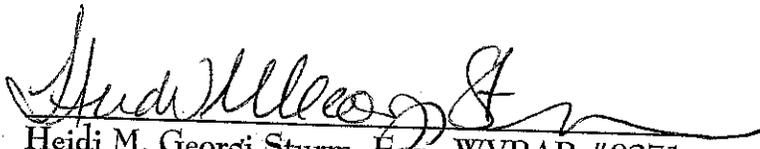
WHEREFORE, for this and other errors which are apparent upon a fair reading of the transcript and the record, your Appellant, Gary Wayne Kent, respectfully prays that this Court reverse his conviction for first degree murder, felony murder and cure the error as requested.

Respectfully Submitted,  
Gary Wayne Kent,  
Appellant,  
By Counsel,



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Joshua P. Sturm, Esq., WVBAR #9110  
P.O. Box 49  
Fairmont, West Virginia 26555-0049  
304.366.5556



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Heidi M. Georgi Sturm, Esq., WVBAR #9371  
P.O. Box 2203  
Fairmont, WV 26555-2203  
304.534.8003

James B. Zimarowski, Esq., WVBAR #4196  
265 High Street, Suite 200  
Morgantown, West Virginia 26505  
304.292.7492

CERTIFICATE OF SERVICE

I, Joshua P. Sturm, Esq., counsel for the Appellant herein, do hereby certify that I served the foregoing APPELLANT'S BRIEF upon the Parties by depositing the same in the United States Mail, First Class Postage Prepaid, on this 6<sup>th</sup> day of October 2008, addressed as follows:

Mr. Patrick N. Wilson  
Marion County Prosecuting Attorney  
213 Jackson Street  
Fairmont, WV 26555

Darrell McGraw  
West Virginia Attorney General  
State Capitol Complex  
Building 1, Room E-26  
Charleston, WV 25305



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Joshua P. Sturm, Esq. (WVBAR #9110)  
P.O. Box 49  
Fairmont, WV 26555-0049  
304.366.5556

## Appendix 1

131

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA  
(DIVISION I)

STATE OF WEST VIRGINIA,  
Plaintiff,

Vs.

FELONY NO. 98-F-167

GARY DEWAYNE KENT,  
Defendant.

VERDICT FORM

(1) WE, THE JURY, FIND THE DEFENDANT, GARY DEWAYNE KENT, NOT GUILTY.

\_\_\_\_\_  
FOREPERSON

(2) WE, THE JURY, FIND THE DEFENDANT, GARY DEWAYNE KENT, GUILTY OF MURDER  
OF THE FIRST DEGREE (FELONY MURDER).

\_\_\_\_\_  
FOREPERSON

(3) WE, THE JURY, FIND THE DEFENDANT, GARY DEWAYNE KENT, GUILTY OF MURDER  
OF THE FIRST DEGREE (DELIBERATE AND PREMEDITATED).

*Angela Jackson*  
\_\_\_\_\_  
FOREPERSON

(4) WE, THE JURY, FIND THE DEFENDANT, GARY DEWAYNE KENT, GUILTY OF MURDER  
OF THE SECOND DEGREE, A LESSER INCLUDED OFFENSE OF DELIBERATE AND PREMEDITATED  
MURDER.

\_\_\_\_\_  
FOREPERSON

(5) WE, THE JURY, FIND THE DEFENDANT, GARY DEWAYNE KENT, GUILTY OF  
VOLUNTARY MANSLAUGHTER, A LESSER INCLUDED OFFENSE OF DELIBERATE AND PREMEDITATED  
MURDER.

\_\_\_\_\_  
FOREPERSON

VERDICT RECEIVED: *10/19/99*

*[Signature]*  
\_\_\_\_\_  
JUDGE

## Appendix 2

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA  
DIVISION I

STATE OF WEST VIRGINIA,

Plaintiff,

V

GARY DEWAYNE KENT,

Defendant.

Case No. 98-F-167

FILED

3/19/07

*Barbara P. Cole*

CIRCUIT CLERK

VERDICT FORM

(1) We the Jury find the Defendant, GARY DEWAYNE KENT, NOT GUILTY.

\_\_\_\_\_  
FOREPERSON

(2) We the Jury find the Defendant, GARY DEWAYNE KENT guilty of MURDER OF THE FIRST DEGREE (DELIBERATE AND PREMEDITATED).

\_\_\_\_\_  
FOREPERSON

(3) We the Jury find the Defendant, GARY DEWAYNE KENT guilty of MURDER OF THE FIRST DEGREE (DELIBERATE AND PREMEDITATED), and we recommend mercy.

\_\_\_\_\_  
FOREPERSON

3/19/07

*Barbara P. Cole*  
CIRCUIT CLERK

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(4) We the Jury find the Defendant, GARY DEWAYNE KENT guilty of MURDER OF THE FIRST DEGREE (FELONY MURDER).

\_\_\_\_\_  
FOREPERSON

(5) We the Jury find the Defendant, GARY DEWAYNE KENT guilty of MURDER OF THE FIRST DEGREE (FELONY MURDER), and we recommend mercy.

*Jack L. Mincea*  
\_\_\_\_\_  
FOREPERSON

(6) We the Jury find the Defendant, GARY DEWAYNE KENT, guilty of MURDER OF THE SECOND DEGREE.

\_\_\_\_\_  
FOREPERSON

(7) We the Jury find the Defendant, GARY DEWAYNE KENT, guilty of VOLUNTARY MANSLAUGHTER.

\_\_\_\_\_  
FOREPERSON

VERDICT RECEIVED: 19 MARCH 2007

*Rory L. Perry II*  
\_\_\_\_\_  
JUDGE

FILED  
OCT - 8 2008  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA