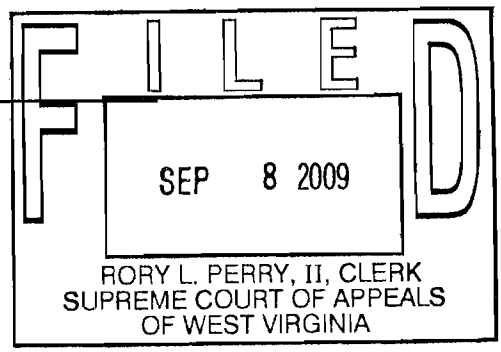
35014

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

Charleston

APPELANT'S BRIEF



State of West Virginia, Below, Appellee

v.

Raymond Elswick, Defendant Below, Appellant

Appeal Granted on June 17, 2009 from Judgment of January 8, 2009
From the Circuit Court of Roane County

Justices:

Hon. Brent D. Benjamin, Chief Justice
Hon. Robin Jean Davis
Hon. Margaret L. Workman
Hon. Menis E. Ketchum
Hon. Thomas E. McHugh

Rory L. Perry, Clerk

Filed by Counsel, Lee F. Benford II, and Morgan B. Hayes
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APPELLANT'S BRIEF

TO THE HONORABLE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA:

Comes Appellant, Raymond Elswick, by Lee F. Benford II and Morgan B. Hayes, his counsel, and hereby tender to the Court the Appellant's brief complaining of violations of his Constitutional rights and errors of law.

I. PROCEEDINGS AND RULINGS BELOW

On September 27, 2005, an indictment was returned by the grand jury attending the September 2005 term of the Circuit Court of Roane County, charging the Appellant, Raymond Elswick, with one count of first degree murder, one count of felony murder, one count of kidnapping and three counts of conspiracy to commit a felony. *Indictment, Supreme Court Record (hereinafter SCR) Volume I, Page 1-3.* On July 11, 2008, a Roane County Circuit Court jury returned a verdict of **GUILTY** of Voluntary Manslaughter, a lesser included offense as charged in Count 1 and **GUILTY** of Conspiracy to Commit a Felony as charged in Count 6 of the indictment. *Verdict of the Jury, SCR Volume II, Pages 1161-64.*

On December 10, 2008, a recidivist trial was held where the Jury did **FIND** that Raymond Elswick convicted in 05-F-59 was the same Raymond Elswick that had been convicted of two prior felonies (85-F-44 and 93-F-16). *Jury Verdict, SCR Volume II, Pages 1378-79.*

Following the recidivist trial, on December 10, 2008, the court imposed sentence committing Raymond Elswick to the custody of the Commissioner of West Virginia Department of Corrections for placement at the West Virginia Penitentiary in accordance with W.VA. Code §61-11-18, for a term of his natural life by Order entered

January 8, 2009. *Commitment Order, SCR Volume II, Pages 1383-86.* It is from this adverse judgment your Appellant seeks relief in this appeal.

On October 15, 2007, the lower court entered an ORDER GRANTING DEFENDANT'S MOTION FOR JUDICIAL NOTICE AND DENYING MOTION TO DISMISS BASED ON PROSECUTORIAL MISCONDUCT. *SCR, Prosecutorial Misconduct Order, Volume I, Pages 591-613.* This order was the ruling of the trial court on a defense motion seeking dismissal based on prosecutorial misconduct for chronic failure to provide prompt discovery to the defense. The lower court's order made numerous findings of fact that will be extensively cited in this brief because these are findings of fact that have already been established by a ruling made in the lower court.

II. FACTUAL AND PROCEDURAL HISTORY

A. PRE-INDICTMENT

On May 28, 2005, the Appellant was arrested and incarcerated in relation to the death of Daniel Lee Burns. At about the same time, Joey and Crystal Hicks were also arrested and charged in the death of Burns. The reports filed in this case indicate that the circumstances giving rise to these charges started in a home on Market Street in Spencer, West Virginia, being the home of Joey and Crystal Hicks and their two daughters ages 9 and 7. According to the reports, Crystal Hicks entered a room of the home to find Daniel Lee Burns, a 51 year old man with his hands down her 9 year old daughter's pants molesting her. According to the medical examiner Burns died as a result of multiple assaultive blunt force injuries of the head, trunk and extremities, which may have been caused by kicking, hitting or stomping. At the time, the Appellant was reported to be at the Hicks' home helping with some repairs. Charges were filed

against the parents of the child, Joey and Crystal Hicks, and against the appellant alleging that all three participated in an assault upon Burns causing his death.

B. FIRST TERM OF COURT (Sept. 27, 2005 – Jan. 23, 2006)

On September 27, 2005, the aforementioned indictment was returned by the grand jury attending the September 2005 term of the Circuit Court of Roane County.

On October 21, 2005, the State of West Virginia filed a Motion to Continue Trial because of the unavailability of DNA Testing Results, representing in said motion that certain DNA analysis, which was critical and material to the state's case would not be available until December 1, 2005. *State's Motion to Continue #1, SCR, Vol. I, Page 10-12.*

"On October 21, 2005, Appellant served a written pretrial motion upon the State of West Virginia, which motion included a motion for discovery and inspection pursuant to Rule 16 of the Rules of Criminal Procedure and a motion for production of statements of witnesses pursuant to Rule 26.2 of the Rules of Criminal Procedure, prior to trial. . ." *Defendant's Pretrial Motions, SCR, Vol. I, pp 14-15. See also Prosecutorial Misconduct Order, Vol. I, p. 593.*

On October 24, 2005, the Appellant appeared with counsel for pretrial motions hearing and the court granted a motion for a competency evaluation of the Appellant and without objection from the State. The Court ORDERED that this case be continued for good cause shown to the next regular term of Court for trial on Defendant's motion for competency evaluation because trial of the defendant awaiting evaluation cannot occur in this term of Court. *Order for 10/24/05, SCR Vol. 1, p 46. West Virginia Trial Court Rule 2.05* sets "the terms of court for the county of Roane, on the fourth Tuesday in January, May, and September." *Id.*

C. SECOND TERM OF COURT (Jan. 24, 2006 – May 22, 2006)

The Appellant was found competent to stand trial after the lower court reviewed a competency evaluation report submitted by Ralph S. Smith, M.D. *Competency Order, SCR, Volume I, page 68. See also Competency Report SCR Volume I, pp 55-67.* The case was "set for trial on April 11, 2006, during the January, 2006, Term of this Court." *Prosecutorial Misconduct Order, SCR Vol. I, p. 593.*

On March 24, 2006, the State filed a Motion to Continue Trial for Receipt of Scientific Evidence. *States Motion to Continue #2, SCR Vol. I, p. 69.* By order entered on April 4, 2006, the Court ordered ". . . this case be continued for good cause shown, to the next regular term of Court for trial on the State's motion to continue trial for receipt of scientific evidence." *Order 4/4/06, SCR, Vol. I, pp 71-72.* "The Court **ORDERED** that the trial of this case is set for the 6th day of June at the hour of 9:00a.m. [sic]" *Id.*

D. THIRD TERM OF COURT (May 23, 2006 – Sept. 25, 2006)

The case was set for trial on June 6, 2006. "Based on the **late disclosure** of DNA evidence, and the fact that the State Police DNA report **failed to address numerous items of physical evidence** that had been submitted, and because the state had **still not disclosed results of foot print analysis**, the Defendant on May 24, 2006, filed a Motion to Continue, a Motion for Additional Discovery and a Motion for independent testing." *Prosecutorial Misconduct Order, SCR, Vol. I, p. 594, paragraph 11* (emphasis added); *See also Motion to Continue caused by the State #1, SCR, Vol. I, pp. 80-82; Motion for Additional Discovery, SCR, Vol. I, pp. 73-76; and Motion for Independent Testing, SCR, Vol. I, pp 77-79.*

"On May 26, 2006, the defendant appeared with counsel for pretrial hearing at which time the Defendant's Motion to Continue was granted and the June 6, 2006, trial was continued to the 14th day of November, 2006. The Court further ordered that the state file a written disclosure of how the selection of items to be DNA tested was made. The State failed to comply with this order. Further, the Court ordered that a status hearing be held on the 17th day of July, 2006." *Prosecutorial Misconduct Order, SCR, Vol. I, p. 595, paragraph 12* (emphasis added).

E. FOURTH TERM OF COURT (Sept. 26, 2006 – Jan. 22, 2007)

"On September 26, 2006, the State of West Virginia filed the Fourteenth Supplemental Statement of Disclosure in this case, which for the **first time** disclosed the following documents to the defense:

a. A July 7, 2005, West Virginia State Police Forensic Laboratory blood identification report with case submission form [**over a year late**];

b. An October 8, 2005, West Virginia State Police Forensic Laboratory DNA identification report with case submission form [**11 months late**];

c. An October 26, 2005, West Virginia State Police Forensic Laboratory blood identification report with case submission form [**11 months late**];

d. A November 8, 2005, West Virginia State Police Forensic Laboratory footwear comparison report with case submission form [**10 months late**];

e. A July 7, 2005, West Virginia State Police Forensic Laboratory blood identification report with case submission form; [**over a year late**]

f. Four Property Disposition Report forms; and

g. A Vehicle Processing Receipt."

Prosecutorial Misconduct Order, SCR, Vol. I, pp. 596-7, Paragraph 17 (emphasis added); See also SCR, 14th Disclosure, Vol. III, pp. 1729-1760B.

Based on the dates of the above reports, the State withheld this information from the defense anywhere from **ten (10) to over fourteen (14) months** before it was **finally disclosed.**

"On October 2, 2006, the State of West Virginia filed the Fifteenth Supplemental Statement of Disclosure in this case, which for the **first time** disclosed materials from the West Virginia State Police Laboratory including **189 pages of processing reports concerning physical evidence and color reprints of photographs of the physical evidence processed by the State Police Laboratory**." *Prosecutorial Misconduct Order, SCR, Vol. I, p. 597, paragraph 18 (emphasis added); See also, 15th Disclosure, Vol. III, pp. 1761-1819.*

"Based on the **late disclosure** of the 189 page forensic laboratory report, photographic evidence disclosed being of poor quality and criminal histories of all witnesses not being disclosed, the Defendant, on November 8, 2006, filed a Motion to Continue the November 14, 2006 trial." *Prosecutorial Misconduct Order, Paragraph 19 (emphasis added); See also Motion to Continue caused by the State #2, SCR, Vol. I, pp 135-137.*

"On November 8, 2006, the Defendant appeared with his counsel for hearing upon the aforesaid Motion to Continue. The Court ruled that the Defendant was entitled to better quality photographs, and continued the trial of this case to February 20, 2007. *Prosecutorial Misconduct Order, Paragraph 20; See also Motion to Continue caused by the State #2 Order, SCR, Vol. I, p. 138.*

F. FIFTH TERM OF COURT (Jan. 23, 2007 – May 21, 2007)

"On January 29, 2007, the Defendant filed a Motion to Suppress for Failure to Present Evidence for Independent Evaluation. This motion was grounded on the failure of the State of West Virginia to produce all of the physical evidence for inspection by the Defendant's expert as had been **previously ordered** by the Court." *Prosecutorial Misconduct Order, SCR, Vol. I, p. 598, paragraph 21 (emphasis added); See also Motion to Suppress for Failure to Present Evidence for Independent Evaluation, SCR, Vol. I, pp 150-155.*

"On February 20, 2007, the Defendant appeared with counsel for trial. On the morning set for trial, before jury selection commenced, the State of West Virginia disclosed for the **first time** to the Defendant the West Virginia State Police Crime Scene Report dated **June 7, 2005** (**19 months late**), pertaining to this case, together with approximately fifty (50) photographs taken by the crime scene team. Based on the **untimely** disclosure of the report and photographs, the Defendant moved *ore tenus* to continue the trial. The motion to continue was granted and the case was continued to April 24, 2007." *Prosecutorial Misconduct Order, SCR, Vol. I, p. 598, paragraph 22 (emphasis added); Order, SCR, Vol. I, p. 343.*

"On April 24, 2007, the trial began as scheduled and after 4 days of jury trial, on April 27, 2007, the Defendant's motion for mistrial was granted over objection. The mistrial was ordered by the Court based on an improper argument by the Prosecuting Attorney during closing arguments. The Court found that the argument amounted to an indirect but unintentional reference to the fact that the Defendant did not testify before the jury." *Prosecutorial Misconduct Order, SCR, Vol. I, p. 599, paragraph 23.*

The prosecuting attorney, while addressing the jury during closing arguments, raised his left hand motioning toward defense table and looked toward defense table where the Appellant sat with his counsel and made the following statement to the jury: "I can't call Mr. Elswick as a witness, he has a right to remain silent..." *State's Closing, SCR, Vol. IV, p. 2645.* The appellant does not concede that this was an "indirect" or an "unintentional" reference to the fact that the Appellant did not testify. This mistrial, **caused by the State**, resulted in the trial of the case being continued to the next regular term of court, with a trial date of July 24, 2007.

G. SIXTH TERM OF COURT (May 22, 2007 – Sept. 24, 2007)

The Appellant interposed a Motion to Dismiss contending that the above mistrial, inasmuch as the prosecuting attorney caused it, constitutionally barred further prosecution on principles of double jeopardy. This motion was denied by the trial court on July 20, 2007. It does not appear that the trial court has entered an order denying this motion but the ruling is spread upon the record of the case in the July 20 2007, hearing transcript. *7/20/07 Hearing, SCR, Vol. IV, pp. 3083-3115.*

"On July 24, 2007, the Defendant appeared with counsel for trial and filed a written Motion to Continue based on the discovery of a possible witness that may have exculpatory evidence that the defense only learned of on the afternoon of July 23, 2007. The Court conducted a hearing, out of the presence of the jury panel, on this Motion to Continue and initially denied the motion and directed that the case would reconvene for jury selection." *Prosecutorial Misconduct Order, SCR, Vol. I, pp. 599-600 paragraph 25.*

"Before commencing jury selection, defense counsel informed the Court that he had just received a telephone call and received information that led him to believe that

the State of West Virginia by and through the Calhoun County Prosecuting Attorney had taken a statement from John Richards, the possible witness that may have exculpatory evidence, concerning the Daniel Burns murder case, and that this statement had not been disclosed to the defense by the Prosecuting Attorney. Based on this proffer, the Court recessed the trial and directed counsel to call the Calhoun County Prosecuting Attorney and make further inquiry on this matter and report back to the Court as to their findings. The Court reconvened, out of the presence of the jury panel to receive the report of counsel. Counsel advised the Court that they did speak to Matthew Minney, Calhoun County Prosecuting Attorney, on the telephone, that Mr. Minney confirmed that a statement had been received from John Richards concerning the Daniel Burns murder case, and that a copy of the statement had been faxed to the Roane County Prosecuting Attorney in **November 2005**." *Prosecutorial Misconduct Order, SCR, Vol. I, 599-600, paragraph 25 (emphasis added); 7/ 24/07 Hearing, SCR, Vol. IV, p.p. 3209-3223.*

"Thereupon, the Court reconsidered and granted the Defendant's Motion to Continue, the fourth continuance caused by the state, which motion had not been opposed by the State. The Defendant then moved *ore tenus* that the case be dismissed with prejudice for the non-disclosure of exculpatory evidence possessed by the State of West Virginia since November 1, 2005; 7/24/07 *Hearing, SCR, Vol. IV, p. 3214.* The Court denied the motion and the case was continued for trial unto November 27, 2007, and the motion to dismiss was set for hearing on July 27, 2007." *Prosecutorial Misconduct Order, SCR, Vol. I, pp. 599-600, paragraph 25.*

"The defendant filed two written motions which came on for hearing on July 27, 2007, a Motion to Dismiss Based on Prosecutorial Misconduct and a Motion for

Supplemental Discovery and Inspection and Forensic Testing of Certain Tangible Objects." *Prosecutorial Misconduct Order, SCR, Vol. I, p. 600, paragraph 26.*

Evidence was adduced in the July 27, 2007, hearing and based thereon the Court made certain findings, including the following:

"The court finds that on July 27, 2005, (sic) the Roane County Prosecuting Attorney's office received from the Calhoun County Prosecuting Attorney, via facsimile, the following:

A. Fax cover sheet (Exhibit 13) addressed to "Mark" indicating that the fax consisted of 5 pages, including cover sheet, and with reference of "John Richards statement."

B. Fax cover sheet (Exhibit 12) addressed to "Mark – PA Roane Co." indicating that the fax consisted of 3 pages, including cover sheet, and with reference of "John Richards." This facsimile included John Richards' two-page typed statement summarizing the area or issues about which he had information relative to this murder case. *Prosecutorial Misconduct Order, SCR, Vol. I, p. 602, paragraph 27.*

The uncontradicted evidence adduced at the July 27, 2007, hearing revealed that in November 2005 the State of West Virginia entered into a written plea agreement with John Manis Richards, reducing felony charges to a misdemeanor and in exchange Richards agreed to testify in the cases relating to the death of Daniel Burns. Nevertheless, the trial court denied the Motion to Dismiss Based on Prosecutorial Misconduct, but in doing so wrote:

> It completely escapes this Judge as to how a prosecutor in one county can decide to enter into a plea bargain with a Appellant, obtaining, as a concession to the state, the agreement of the Appellant to truthfully testify in a different jurisdiction, without discussing the matter with the prosecutor in the other jurisdiction. How else would one determine the necessity for

> such testimony, assess whether such testimony appears to be credible in light of the circumstances of the case known to the authorities in the other jurisdiction, and otherwise assess the value to the State of such testimony. *Prosecutorial Misconduct Order, SCR, Vol. I, p. 605 footnote 1 to paragraph 29.*

Thus, the Court concluded that the Roane County Prosecutor for West Virginia received discoverable evidence and did not disclose it to the defense as required but failed to sanction such behavior by its ruling.

The other motion heard on July 27, 2007, was the Defendant's Motion for Supplemental Discovery and Inspection and Forensic Testing of Certain Tangible Objects. This motion addressed a certain knife and lighter believed to be items of tangible evidence that the state had failed to disclose to the defense. The defense learned from statements of John Richards that co-defendant Joey Hicks had a knife and lighter in his possession when he was arrested in May 2005, that these items were used in the subject offense, and that the items were being held in co-defendant Hick's personal property at the Central Regional Jail. *Motion for Forensic Testing of Certain Tangible Objects, SCR, Vol. I, pp. 475-78.*

On July 25, 2007, the State of West Virginia filed and served on the Appellant a Twenty-Fourth Supplemental Statement of Disclosure in this action, wherein, for the **first time (over two years after the fact)**, the State of West Virginia disclosed to the defense that, among other items, the co-defendant Joey Hicks had in his possession and on his person the following two (2) items of tangible personal property when he was admitted to the Central Regional Jail on May 28, 2005, to wit:

a. "Edged Weapon Yellow Handled Knife"; and,

b. "Miscellaneous Gold in Color Lighter".

These items should have been seized and in the possession, custody and control of the state by the arresting officers at the time of the arrest of Joey Hicks in May 2005 and before he was transported to the Central Regional Jail.

The State of West Virginia, in its case in chief, contends that a finger of the alleged victim was excised with a knife and that the accused used a cigarette lighter to try to cauterize the wound to said finger so as to stop the finger from bleeding.

This late and untimely supplemental disclosure was **prodded** out of the state only by the fact that the defense on July 23, 2007, discovered, through its own independent investigation, of significant Rule 16 and "*Brady*" material violations that should have been disclosed to the defense **at least as early as November 2005.**

It is important to note that at the time the Defendant's Motion for Supplemental Discovery and Inspection and Forensic Testing of Certain Tangible Objects in relation to said knife and lighter was heard on July 27, 2007, the case had just been continued for trial from July 24, 2007, unto November 27, 2007, due to the failure of the State to disclose that John Richards had entered into a plea agreement with the State in November 2005 to testify in the cases relating to the death of Daniel Burns. *Richards Plea Agreement, SCR, Vol. 1, p 481, ex. A.* The defense requested that the trial court order that the knife and lighter be forthwith transferred to the custody and control of the defense for forensic testing and analysis before any such testing and analysis is conducted by the state. In the July 27, 2007, hearing of said motion the state objected to allowing the defense to test the knife and lighter before the West Virginia State Police Lab first processed these items. T**he defense argued that the case had already been delayed excessively as a result of waiting on the state police lab to process evidence and produce reports and that if permitted to have the first opportunity to**

test these items the testing could be accomplished in a timely manner so as to avoid further delays of the trial of this action.

Although, the court wrote "[c]ontrary to the argument of the defense, every indication is that the state crime laboratory, not the prosecutor, was the source of the delay relating to forensic testing and reporting." *Prosecutorial Misconduct Order, SCR. Vol. 1, p. 609, footnote 2.* Nonetheless, the Court denied the defense request to have the items first for testing but did order that if the West Virginia State Police Lab identified any biological material that would have to be fully consumed in the testing that the defense be given notice and an opportunity to have their expert present for the testing.

At the close of the July 27, 2007 hearing, the case stood continued to the next term of court for trial on November 27, 2007. This allowed four months for the State to complete its processing and testing of the knife and lighter and make disclosure of same to the defense. It was reasonable to believe at that point in time that if the State made a diligent effort to process these items the same could be completed and disclosed to the defense in time for the defense to prepare for trial without further delay, even if the defense desired to conduct independent testing.

H. SEVENTH TERM OF COURT (Sept. 25, 2007 – Jan. 21, 2008)

In a hearing in this case on November 5, 2007, the prosecuting attorney announced that he had called the lab and left a message but had not received a response as to the status of the forensic testing of the knife and lighter. The trial court recessed the hearing to allow the prosecuting attorney to make a further effort to contact the lab by telephone to ascertain the status in relation to the knife and lighter, and thereafter the Court resumed the hearing and the Prosecuting attorney announced that he had spoken to Lt. Myers at the lab and was informed that the knife and lighter

were at the blood identification section of the lab and not at the DNA section of the lab yet; the prosecuting attorney indicated that he did not believe the testing could be completed and disclosed before the November 27, 2007, trial date and that he had a duty to disclose this information to the defense and moved to continue the trial of the case. This motion was granted and the trial of the case was continued unto December 18, 2007; *11/5/07 Hearing, SCR, Vol. IV, p.p. 3383-3392.* The parties again appeared before the Court on November 30, 2007, for status and pretrial motions hearing wherein the prosecuting attorney announced that Lt. Myers of the state police lab had called last week stating that they would try to have the knife and lighter evidence done by December 18, 2007, whereupon the Court again recessed the hearing to allow the prosecuting attorney to telephone the lab concerning the status of the testing on the knife and lighter, and thereafter resumed the hearing and the prosecuting attorney announced that he had spoken to Mr. Frances at the lab and that they had found blood on the lighter, that no blood was found on the knife, that DNA testing had not been done, that they would have to consume the entire sample to do the DNA testing, that they could do some further testing on the knife to detect blood but wanted to first test the knife for latent prints, that the case was doubtful ready for trial on December 18, 2007, and the case was then continued unto December 10, 2007, for further pretrial motions hearing and status report on the testing of the knife and lighter; *11/30/07 Hearing, SCR, Vol. IV, p.p. 3400-3405.*

Thereafter, the prosecuting attorney telephoned the defense and advised that the West Virginia State Police crime lab did not want to allow the defense expert to be present for the testing and that they would prefer to cease further testing and forward the items to the defense expert for testing in their lab. Based on these representations,

on or about December 7, 2007, the Appellant filed and served a renewed Motion for Independent Forensic Testing of Certain Tangible Objects and Motion for Supplemental Discovery and Inspection. *Renewed Motions Vol. I p.p. 679-697.*

The aforesaid motion came on for hearing on December 10, 2007, and the State indicated that there was no objection to said motion and thereafter, by order approved by the Prosecuting Attorney and entered on December 14, 2007, the aforesaid motion was granted and the Court ordered in pertinent part as follows:

> That the West Virginia State Police Laboratory forward, via overnight courier with tracking, addressed to Jami K. Harman, Scientific Director, Genetic Technologies, Inc., 434 Henrys Trace, Pacific, MO 63069, the following items: the knife and lighter currently in the possession of the West Virginia State Police Laboratory, which was submitted thereto for testing in relation to the above criminal case and the death of Daniel Burns, together with any biological materials and substances removed from said knife and lighter; the DNA sample of the victim, Daniel Burns; all West Virginia State Police Laboratory bench notes, processing notes, photographs, and a complete report detailing everything that has been done with the subject knife and lighter while it has been in their possession, including documentation of any deviations from standard protocol that occurred during testing; a copy of all communication records authorizing or requesting specific tests of said items; all communication records reflecting authorization to consume evidence during testing; procedures for storage of said items; a copy of accreditation certificate; names of all analysts involved in the testing, including technical reviewers together with copies of CVs, qualifications and job descriptions of all persons involved in handling and/or analysis of the knife and lighter; worksheets, notes, bench notes for all analyses and their subsequent results or lack thereof to include visual examination/testing results, photographs, diagrams and drawings, details of any contamination or sample errors that occurred during testing of evidence at any stage and documentation of corrective actions taken with regard thereto; proficiency test results summary for all analysts involved in the analysis.
>
> That in transferring the knife, lighter, biological materials and substances and the DNA sample of Daniel Burns, the West Virginia State Police Laboratory shall in all respects follow protocol so as to preserve and maintain the chain of custody and preserve the integrity of these items for further forensic testing. *Order 12/14/07, SCR, Vol. II, pp. 725-27.*

In a hearing in this action on the 14th day of December, 2007, the defense requested that the Court require all of the above ordered items to be produced by a date certain, to which request the State of West Virginia, by and through the Prosecuting Attorney, represented that such production could be accomplished within two weeks and thereupon by order entered the State was given unto December 28, 2007, to complete production of the above items. *Order, SCR, Vol. II, p. 737.* Furthermore, the case was continued for trial until March 25, 2008, the eighth term of court, to allow time for the forensic testing of the knife and lighter.

On or about January 9, 2008, Appellant filed a Motion to Compel Production and for Sanctions for Failure of the State to Comply with a Discovery Request pursuant to Rule 16(d)(2) of the West Virginia Rules of Crirninal Procedure. *Motion to Compel, SCR, Vol. II, pp740-45.* This motion was filed due to the failure of the State to deliver the items to the defense lab for the independent forensic testing of the knife and lighter. Numerous items had not been forwarded to the defense lab, most importantly the DNA sample of Daniel Burns. Moreover, the actual knife and lighter and swabs of these items were forwarded by the Roane County Prosecuting Attorney's office, contrary to the explicit terms of the court's order that all items be forwarded by the West Virginia State Police Lab. The subject motion submitted that the office of the Prosecuting Attorney by taking possession of certain swabs containing biological evidence was in violation of the trial court's order requiring that "in all respects follow protocol so as to preserve and maintain the chain of custody and preserve the integrity of these items for further forensic testing." *Id.*

On January 10, 2008, the trial court conducted a hearing on the defense motion to compel and for sanctions and thereupon issued a rule to show cause returnable to

January 28, 2008, directing that the director of the West Virginia State Police Lab appear and show cause as to why she should not be held in contempt for failing to comply with the court's previous orders. *Hearing 1/10/08, SCR, Vol. IV, p. p. 3528-45.* On January 28, 2008, a hearing was conducted on the rule to show cause during which counsel appeared on behalf of the West Virginia State Police Lab and represented that they had substantially complied with the Court's order. *Hearing 1/28/08, SCR, Vol. IV, p. p 3546-83.* Thereupon the court dismissed the rule to show cause over the objection of the defense. One of the reasons for the defense objection was that to date the DNA sample of Daniel Burns had still not been produced, without which no testing could commence. The court recessed the hearing and directed that the prosecuting attorney ascertain the location of the DNA sample and make report thereon upon resumption of the hearing. Upon reconvening, the prosecuting attorney appeared with Trooper Kitzmiller and represented that the DNA sample had been found at the local State Police Detachment and that it would be forwarded to the defense lab. *Hearing 1/28/08, SCR, Vol. IV, p.p. 3572-3577.* At this point in time the case was less than two months from the March 25, 2008, trial date and the
defense lab had been unable to commence forensic testing due to the failure of the State to comply with the previous orders of the Court to produce the items needed for forensic testing, most importantly the DNA sample of Daniel Burns.

The defense filed two other motions that came on for hearing on December 10, 2007, as follows: 1) Motion to Dismiss for Numerous and Ongoing Discovery Violations; and, 2) Motion for Dismissal Due to Failure to Provide Speedy Trial in Violation of the United States and West Virginia Constitutions and for Violation of the Statutory Three Term Rule Provisions of West Virginia Code §62-3-21. *Motion to Dismiss for Discovery*

Violations, SCR, Vol. I, pp. 698-718; Speedy Trial, SCR, Vol. I, pp. 651-78. The request for dismissal based on discovery violations was filed when the defense learned that the State Police had taken possession of property believed to belong to the Appellant, Raymond Elswick, which should have been disclosed pursuant to Rule 16, and that the property was discarded and not preserved. The trial court conducted an evidentiary hearing on this motion in which Trooper Kitzmiller testified and admitted taking possession of items "believed to be property of Raymond Elswick" on August 30, 2007, while executing a search warrant seeking possession of the knife and lighter that is the subject of the forensic testing in the within case. He further admitted that he had discarded these items. *Hearing, 12/14/07, SCR, Vol. IV, p. 3474.* The Court denied this motion reasoning that the defense had failed to make a showing that the items would be useful to the defense.

The motion seeking dismissal based on speedy trial violations was also addressed by the trial court in the December 14, 2007, hearing and the court requested that the parties file legal memorandum with 30 days. Thereafter, the Appellant served and filed a memorandum in support of the speedy trial motion on or about January 15, 2008. The State did not file a timely memorandum and in a hearing on January 28, 2008, the court allowed until Thursday, January 31, 2008, at 4:00 p.m. for the state to file a memorandum. On January 30, 2008, the State filed its memorandum opposing the speedy trial dismissal. *SCR, Vol. II, p.p. 800-802.* On February 7, 2008, the Appellant filed a response to the state's memorandum. *SCR, Vol. II, p.p. 817-829.* The speedy trial motion was subsequently denied on March 7, 2008. *Denial of Speedy Trial Violation Order, SCR, Vol. II, pp 844-54.*

I. EIGHTH TERM OF COURT (Jan. 22, 2008 – May 26, 2008)

On January 28, 2008, the DNA sample of Daniel Burns was finally mailed by the State to Genetic Technologies so that forensic testing could commence. Once forensic testing commenced Genetic Technologies Incorporated found biological material on the knife and lighter but would have deconstruct and disassemble the knife and lighter to complete the testing. On February 29, 2008 an agreed order was entered to allow Genetic Technologies Incorporated to deconstruct and disassemble the knife and lighter. *Order 2/29/08, SCR, Vol. II, p. 830.*

The Appellant's trial was scheduled for March 25, 2008. On the 14th day of March, 2008 the defense moved for a continuance of the trial within the same term of court to the trial week of May 12, 2008, for the needed time to complete the independent forensic testing, receive a report thereon, disclose the same to the prosecution, and secure the presence of the Appellant's expert for trial. *Motion to Continue within term, SCR, Vol. II, pp. 872-82.*

On the 17th day of March, 2008, a hearing was held on the motion to continue which was granted and trial was set on the 8th day of July, 2008, being the ninth term of court.

J. NINTH TERM OF COURT (May 27, 2008 – September 22, 2008)

Finally, after numerous delays, most of which were caused by the state, the trial of this case commenced on July 8, 2008. On July 11, 2008, the jury returned a verdict of guilty of voluntary manslaughter and conspiracy to commit a felony. Thereafter, Appellant's post-trial motions were denied. Prior to sentencing upon the jury verdict, the state filed a recidivist information alleging that the Appellant had two prior felony convictions and was thereby subject to the enhanced sentence of life in prison.

The Appellant moved to dismiss the recidivist information for reason that the State did not comply with the mandatory statutory duty to "immediately" inform the court of the Appellant's alleged prior felony convictions. *Recidivist Motion, SCR, Vol. II, pp. 1337-41.* This motion was denied and the recidivist information was tried to a jury. The recidivist jury found that the Appellant was the same person previously convicted of two felony offenses and thereupon the trial court did sentence the Appellant to a term of life in the penitentiary.

III. ASSIGNMENTS OF ERROR

I. The Trial Court Erred on July 20, 2007, in Denying Elswick's Motion to Dismiss based upon Double Jeopardy when the Prosecuting Attorney caused a mistrial by commenting on the fact that Elswick did not testify violating Elswick's Constitutional privilege against self-incrimination.

II. The Trial Court Erred on July 8, 2008, in Denying Elswick's Renewed Motion to Dismiss based upon Double Jeopardy when the Prosecuting Attorney caused a mistrial by commenting on the fact that Elswick did not testify violating Elswick's Constitutional privilege against self-incrimination.

III. The Trial Court Erred in Denying Elswick's request for Motion to Dismiss based upon Prosecutorial Misconduct when the Prosecutor did not disclose a plea agreement entered into by the State of West Virginia and John Richards to secure his testimony in violation of Rule 16 of the Rules of Criminal Procedure and *Brady*.

IV. The Trial Court Erred on December 10, 2007 in denying Elswick's request for Motion to Dismiss for Numerous and Ongoing Discovery violations.

V. The Trial Court erred in denying Elswick's Motion to Dismiss for failure to provide a Speedy trial in violation of the United States and West Virginia Constitutions and for violation of the statutory (3-Term Rule) contained in West Virginia Code §62-3-21.

VI. The Trial Court erred in denying Elswick's Motion to Dismiss for Destruction of Evidence wherein the state admittedly disposed

of Rule 16 materials without disclosing such materials to the defense thereby violating his constitutional right to due process of law.

VII. The Trial Court erred in refusing to give Elswick's theory of defense instruction as offered thereby violating his constitutional right to due process of law.

VIII. The Trial Court erred in refusing to give Elswick's jury instruction on battery as a lesser included offense thereby violating his constitutional right to due process of law.

IX. The Trial Court erred in granting the state's motion to continue over objection of the Appellant on July 9, 2009, thereby violating his constitutional right to due process of law.

X. The Trial Court erred in refusing to employ the use of juror questionnaires as requested by Elswick thereby violating his constitutional right to due process of law.

XI. The Trial Court erred in refusing to grant Appellant's motion to dismiss the recidivist information.

IV. DISCUSSION OF APPLICABLE LAW

A. DOUBLE JEOPARDY

The Appellant asserts that trial court erred by proceeding to trial in violation of the Double Jeopardy Clause of both the United States and West Virginia Constitutions. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." *United States Constitution, Article 5.* "No person shall be . . . in any criminal case, be compelled to be a witness against himself, or be twice put in jeopardy of life or liberty for the same offence." *West Virginia Constitution, Article 3, §5.* In the case at bar the Appellant moved for a mistrial after a four-day trial when the prosecutor made reference to the Appellant's right to remain silent that was granted. *Mistrial Transcripts, SCR, Vol IV, pp 2606-25.* When a defendant in a criminal prosecution requests a mistrial the general rule of law is that he has consented to the mistrial thereby removing any double jeopardy bar to re-prosecution for the same offense. *Oregon v. Kennedy,*

456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed. 2d 416 (1982); United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed. 2d 267 (1976); Bass v. Abbot, 180 W.Va. 119, 375 S.E.2d 590 (W.Va. 1988); State v. Pennington, 179 W.Va. 139, 365 S.E2d 803 (W.Va. 1987).

However, retrial is barred where the error that prompted the mistrial is intended to provoke a mistrial or is "motivated by bad faith or undertaken to harass or prejudice" the Appellant. *United States v. Dinitz,* 424 U.S. 600, 611 (1976). The United States Supreme Court in the *Kennedy* decision states that the test for when double jeopardy bars retrial where the defendant has moved for mistrial is that prosecutorial or judicial conduct intended to provoke the defendant into moving for a mistrial. The *Kennedy* Court rejected a more general test of "overreaching" as "it offers virtually no standards for its application and because such a rule may not aid defendants as a class." *Id.*

Justice Rehnquist, writing for the plurality, in the *Kennedy* decision indicates that the showing required to prove intent to provoke a mistrial would be "objective." Justice Rehnquist states: "...a standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure,* II-162 (2d Ed., 1993).

Notwithstanding the *Kennedy* holding, the West Virginia Supreme Court of Appeals in the case of *State v. Clements,* 175 W.Va. 463, 334 S.E.2d 600 (W.Va. 1985), Syllabus point one holds: "Unless the defendant can show that the prosecutor or the court was guilty of overreaching, a defendant's request for a mistrial removes any barrier to reprosecution." Syllabus point 6 of the more recent West Virginia *Pennington*

case holds: "Where, in a criminal case, the Defendant moves for a mistrial on the basis of reversible error not arising from evidentiary insufficiency or prosecutorial or judicial overreach and the mistrial is granted, jeopardy does not ordinarily bar a retrial, because the mistrial motion is functionally equivalent to an appeal based on the same trial error." Both *Clements* and *Pennington* were decided after *Kennedy* and would seem to suggest that the West Virginia Supreme Court is willing to apply the more general "overreaching" standard. However, in the more recent West Virginia *Abbot* case (1988), citing the *Kennedy* case, syllabus point one holds: "When a mistrial is granted on motion of the defendant, unless the defendant was provoked into moving for the mistrial because of prosecutorial or judicial conduct, a retrial may not be barred on the basis of jeopardy principles." *Id.* The *Abbot* court further states: "We specifically adopted this standard in *State v. Pennington,* ... where we held that when a mistrial is granted on motion of the defendant, unless the defendant was provoked into moving for the mistrial because of prosecutorial or judicial conduct, a retrial may not be barred on the basis of jeopardy principles." *Id.* The *Abbot* court makes no reference to the *Pennington* syllabus point stating that "prosecutorial or judicial overreach" is the standard. Analysis of these West Virginia decisions seems to indicate that the test our Supreme Court will likely apply to the double jeopardy analysis is the *Kennedy "intent"* test. Syllabus point two in the *Abbot* case holds as follows: "The determination of "intention" in the test for the application of double jeopardy when a defendant successfully moves for a mistrial is a question of fact, and the trial court's finding on this factual issue will not be set aside unless it is clearly wrong." *Id.*

Thus, it is clear that even where the defendant successfully moves for a mistrial, there is a narrow exception to the rule that the Double Jeopardy Clause is not a bar to

retrial. Counsel has not found any West Virginia cases where this exception has been applied barring retrial. However, the case of *Anderson v. State,* 645 S.E.2d 647 (Ga. 2007) decided by the Court of Appeals of Georgia is instructive and similar to the case at bar. The Georgia court held that the record showed that the state intended to goad the defendant into moving for a mistrial, and thus retrial was barred by double jeopardy where the state elicited testimony from a police officer that defendant refused to sign a waiver of his rights after his arrest. In so holding the Georgia court made the following finding:

> [w]e find it impossible to believe that an error which is so blatant and so contrary to the most basic rules of prosecutorial procedure and conduct could have been simply a negligent act. To allow this prosecutor's action to be categorized as a mistake would require this Court to assume that this prosecutor was totally lacking the foundational knowledge for prosecutorial conduct in a courtroom.... p. 646

Prosecuting Attorney Sergent was called as a witness by the defense on the Motion to Dismiss upon the Double Jeopardy violation. Prosecutor Sergent's own sworn testimony established in the record of this case that at the time of the subject trial he had been admitted to practice law in West Virginia since 1985; that he started handling criminal cases in May 1985 and at that time had been actively engaged in either the defense or prosecuting of criminal cases in the State of West Virginia; that during that time he had tried "multiple" criminal cases to a jury, including multiple murder cases; that he was aware that the appellant had chosen to remain silent in the subject case; that he was aware that they jury had been instructed that they were not to consider or draw any inference from the fact that the appellant had not testified; that during his closing statement to the jury he stated "I can't call Mr. Elswick as a witness,

he has a right to remain silent."; and, that he agreed that the prohibition of commenting to a jury or the defendant's right to remain silent is a basic, elementary, fundamental aspect of criminal procedure.

The case at bar is very similar to the *Anderson* case. The prosecuting attorney knew that the Appellant had elected to exercise his right to remain silent. Both sides had rested, the jury had been instructed and closing argument had commenced. The trial court had given the jury the following instruction:

> [t]he Constitution of the United States and the Constitution of the State of West Virginia give to all persons the right to remain silent during the trial of a criminal case, and to require the State to prove guilt beyond a reasonable doubt. The Appellant, RAYMOND ELSWICK, has **no duty to take the stand as a witness in his own behalf, and if does not do so, This is not evidence,** and you should draw no inference therefrom as to his guilt or innocence. You should entirely disregard this fact and not discuss it. *Judge's Charge to Jury 1.50,SCR, Vol. II, p. 1208, ex. A (emphasis added).*

Nevertheless, following the jury instructions the prosecuting attorney, during closing arguments, raised his left hand motioning it toward defense table and looked toward defense table where the Appellant sat with his counsel and made the following statement to the jury: "I can't call Mr. Elswick as a witness, he has a right to remain silent..." thereby effectively asking the jury to draw an inference from his election not to testify. *SCR, Vol. IV, p. 2645.* The prohibition of commenting on the defendant's right to remain silent is so basic and fundamental to criminal procedure that one can only conclude that a seasoned and veteran attorney did such act blatantly and contrary to the most basic requirements of prosecutorial conduct. The trial court erred by concluding that the comment by the prosecuting attorney was inadvertent and unintentional.

The application of the objective test called for by the *Kennedy* and *Abbot* cases militates in favor of finding on the facts of this case that the narrow exception must be applied and the retrial of this case barred by double jeopardy. The objective finding called for by the facts of this case is that the prosecuting attorney intended to provoke the Appellant into moving for a mistrial. It cannot be said by any objective rule that the conduct of the prosecuting attorney was unintentional or inadvertent. Otherwise, one must conclude that this Court is to assume that this prosecutor was totally lacking the foundational knowledge for prosecutorial conduct in the courtroom.

Therefore, the Appellant asserts that the subsequent trial was barred by the Double Jeopardy clauses of the United States and West Virginia constitutions because the prosecutor's actions were intended to goad the Appellant into moving for a mistrial.

B. SPEEDY TRIAL

The right to a speedy trial is constitutionally guaranteed by the West Virginia Constitution Article III, Section 14, and by the Sixth Amendment of the United States Constitution and statutorily by W. Va. Code §62-3-21.

The Appellant asserts that his constitutional right to a speedy trial as guaranteed by the West Virginia Constitution Article III, Section 14, and by the Sixth Amendment of the United States Constitution has been violated. The West Virginia Supreme Court of Appeals has recognized that W. Va. Code § 62-3-21 (hereinafter the three-term rule) is this State's legislative declaration of what **ordinarily** constitutes a speedy trial within the meaning of the federal and state constitutions but the Appellant bases his speedy trial violation claim not only upon a statutory violation but a violation of both the United States Constitution and the West Virginia Constitution. A great number of West Virginia cases address speedy trial claims using the three-term rule. The Appellant maintains

that the legislature is free to adopt any speedy trial statute as long as it does not usurp the United States and/or West Virginia Constitutions. Therefore, Appellant's speedy trial claim involves addressing both the statutory violation(s) and constitutional violation(s).

1. STATUTORY ANALYSIS

It is the three-term rule, W.Va. Code, § 62-3-21, which constitutes the legislative pronouncement of our speedy trial standard under Article III, Section 14 of the West Virginia Constitution. Syl. Pt. 1, *Good v. Handlan,* 176 W.Va. 145, 342 S.E.2d 111 (W. Va., 1986).

> "Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; or **by a continuance granted on the motion of the accused**; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict; and every person charged with a misdemeanor before a justice of the peace, city police judge, or any other inferior tribunal, and who has therein been found guilty and has appealed his conviction of guilt and sentence to a court of record, shall be forever discharged from further prosecution for the offense set forth in the warrant against him, if after his having appealed such conviction and sentence, there be three regular terms of such court without a trial, unless the failure to try him was for one of the causes hereinabove set forth relating to proceedings on indictment. *W. Va. Code* §62-3-21 [1959]. (emphasis added)

The record clearly shows that the Appellant did ask for some of the continuances; but, only after being goaded to do so by late disclosures made by the state; and one such late disclosure was even on the day of trial. A remedy could have been to have the late discovery inadmissible at trial, but the Appellant would be making such a decision in the dark, not knowing if the untimely discovery materials contained exculpatory evidence. For defense counsel to request exclusion of such evidence

without first thoroughly examining the evidence would amount to ineffective assistance of counsel. So in fact, such remedy would have required the Appellant to give up one constitutional right, the right to effective assistance of counsel, to enforce another constitutional right, the right to a speedy trial. "**Coexistent with the right of a criminal defendant to a speedy trial is the right to have effective assistance of counsel at that trial.**" *State ex rel. Rogers v. Casey,* 166 W.Va. 179, 182; 273 S.E.2d 356, 359 (W.Va., 1980) (emphasis added); see also, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). Citizens are guaranteed all the constitutional rights and do not have to sacrifice one right to enforce another right which the trial court suggested as a remedy "[n]o motion was ever made to limit or to exclude witnesses lately disclosed, or to exclude witnesses whose criminal histories were not provided or . . . or to exclude documentary or tangible evidence lately disclosed . . ." *Denial of Speedy Trial Violation Order, SCR, Vol. II, pp 847.* A defendant is entitled to full and complete timely disclosure of discoverable material along side his right to a speedy trial; these rights coexist. The right to a speedy trial cannot be reduced to a Hobson's choice between other constitutional rights.

A strict interpretation of the three-term rule violation would result in the Appellant not havind a *per se* three-term rule violation because the continuances were granted "at the motion of the accused" even though forced by the State. Thus, it is imperative to perform a Constitutional analysis for due process as guaranteed by the *United States Constitution* sixth and fourteenth amendments and a state Constitutional analysis for a speedy trial as guaranteed in *West Virginia Constitution, Article 3, §5.*

2. Federal Constitutional Analysis of Speedy Trial

Four factors underpin a federal constitutional claim of denial of speedy trial: 1) the length of delay; 2) the reason for the delay; 3) the defendant's assertion of his or her right to a speedy trial; and 4) the prejudice to the defendant. *Barker v.Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972). The balancing of the conduct of the defendant against the conduct of the government should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding that the Appellant has been denied a speedy trial. *Id.*

a. The Length of Delay

The United States Supreme Court found that a two part inquiry is necessary for the length of delay factor in *Doggett v. U.S.* 505 U.S. 647, 112 S.Ct. 2686. First, it is necessarily long to be sufficient to even trigger an analysis of the *Wingo* factors. "Depending on the nature of the charges, the lower courts have generally found post-accusation delay 'presumptively prejudicial' at least **as it approaches one year.** " (emphasis added) *Doggett*, at 652, n.1. Mr. Elswick was indicted on September 27, 2005 and the arraignment was held October 11, 2005. Mr. Elswick has made a showing sufficient to trigger the analysis. As a factor among several, the court considers the extent to which the delay stretches beyond the bare minimum needed to trigger the judicial examination of the claim. The instant case went far beyond the bare minimum for United States Constitutional analysis and the lower court found "Defendant Elswick has made a showing sufficient to trigger the analysis." *Denial of Speedy Trial Violation Order, SCR, Vol. II, p. 850.* It is the government's duty to proceed with reasonable diligence in its investigation and preparation for arrest, indictment and trial; if it fails to do so after discovering sufficient facts to justify indictment and trial, it violates the Appellant's due process rights. *U.S.C.A. Const. Amends. 5, 14.*

b. The Reason For The Delay

In the instant case the lower court has already determined the reasons for the delays in its ORDER GRANTING DEFENDANT'S MOTION FOR JUDICIAL NOTICE AND DENYING MOTION TO DISMISS BASED ON PROSECUTORIAL MISCONDUCT.

> Numerous delays have occurred in this case. On at least two occasions, trial was continued because of delays in forensic testing by the crime laboratory; on one occasion, trial was continued to allow for a competency evaluation of the defendant [during the 1st and uncounted term for the 3 term rule]; **the remaining occasion[s] have been due to late disclosure of discoverable information by the State, prompting motions to continue by the Defendant. On one occasion, a mistrial was declared after 4 days of jury trial**. *Prosecutorial Misconduct Order, SCR, Vol. I, p. 608.*

The trial court erred in its ORDER DENYING SPEEDY TRIAL when it asserts that "[i]n addition, the 'reasons' or 'fault' for delay cannot be attributed solely to the State, particularly where as here the continuances come at the instance of the Defendant and the Defendant benefited by the delays making further forensic investigations, obtaining favorable expert witness testimony and further searching for exculpatory information . . ." *Denial of Speedy Trial Violation Order, SCR, Vol. II, pp 850-1*

First, the Court agreed "that many of the motion to continue filed by the Defendant were precipitated by late production of discoverable material. Trial was twice continued because of delays in forensic testing by the state crime laboratory. Trial was continued one time (in 2007) for approximately 2 months and within the same term of court, because the W. Va. State police did not deliver the prosecutor their Crime Scene Report and several photographs until the day trial was scheduled to commence." *Denial of Speedy Trial Violation*

Order, SCR, Vol. II, pp 845. Despite the trial court laying a considerable amount of blame on the W. Va. State Police it is the State of West Virginia that has the burden of producing timely discovery. Moreover, it is the duty of the prosecutor to make inquiry of discoverable material pursuant to *Kyles v. Whitley.*

Second, the Court found again that the motions for continuance came due to late disclosure of discoverable information by the State in it's Conclusions of Law point 10: "[u]doubtedly, there have been many discovery violation in this case, either a failure of discovery or late discovery affording the defense an insufficient opportunity to be prepared for a scheduled trial date." *Prosecutorial Misconduct Order, SCR. Vol. I, p. 611.* Moreover, the defendant would have made further forensic investigations, obtaining favorable expert witness testimony and further searching for exculpatory information within the framework of a speedy trial with timely disclosure of discoverable information by the State.

c. Appellant's Assertion of His or Her Right to A Speedy Trial

"Most States have recognized what is loosely referred to as the 'demand rule,' although eight States reject it." *Barker at* 2189. Footnote 21 of *Barker* points out that West Virginia has rejected the demand rule by citing *Ex parte, Chalfant,* 81 W. Va. 93, 93 S.E. 1032 (W. Va., 1917). In West Virginia one does not have the duty to bring him or herself to trial but it is incumbent upon the state to provide a speedy trial. "It is the government's duty to proceed with reasonable diligence in its investigation and preparation for arrest, indictment and trial. If it fails to do so after discovering sufficient facts to justify indictment and trial, it violates this due process right." *State ex rel. Leonard v. Hey,* 269 S.E.2d 394, 398 (W.Va., 1980); Syl. Pt. 1 *State v. Carrico*; 189 W.Va. 40, 427 S.E.2d 474 (W.Va.,1993).

d. The Prejudice To The Appellant

"Presumptive **prejudice** is part of the mix of relevant *Barker* factors and increases in importance with the length of the delay. . .[T]he Government's egregious persistence in failing to prosecute Doggett is sufficient to warrant granting relief. The negligence caused delay six times as long as that generally deemed sufficient to trigger judicial review, and the presumption of **prejudice** is neither extenuated, as by Doggett's acquiescence, nor persuasively rebutted." *Doggett at* 2688. "We have observed in prior cases that unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including 'oppressive pretrial incarceration,' 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired; by dimming memories and loss of exculpatory evidence." *Doggett at* 2692; see also *Barker,* 407 U.S., at 532, 92 S.Ct., at 2193; see also *Smith v. Hooey,* 393 U.S. 374, 377-379, 89 S.Ct. 575, 576-578, 21 L.Ed.2d 607 (1969); *United States v. Ewell,* 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966).

The trial court erred by not finding prejudice to the Appellant as a result of delays caused by the State. The trial court states "[t]he defense relies heavily on the ***Doggett*** case for the assertion that prejudice to the defendant Raymond Elswick from the delay in resolving the Indictment must be **presumed**." ." *Denial of Speedy Trial Violation Order, SCR, Vol. II, pp 852.* The trial court further errs stating "the facts of the ***Doggett*** case are much more egregious than those presented here. In ***Doggett***, ***supra***, 505 U.S. 647 (1992), the delay between the finding of the Indictment and the **arrest of the accused was 8-1/2 years.** ." *Denial of Speedy Trial Violation Order, SCR, Vol. II, pp 853.* (emphasis added). The instant case is easily distinguishable from *Doggett* as there was no delay between the finding of Indictment and the arrest of the accused; he

had been incarcerated almost three (3) years awaiting trial. The Defendant relied upon *Doggett* to demonstrate that even pre-trial delay is prejudiced.

The trial court also used *Smith v. Hooey, supra,* in it's rationale saying "the delay between the Indictment and the motion to dismiss for violation of the right to speedy trial was in excess of 6 years." *Denial of Speedy Trial Violation Order, SCR, Vol. II, pp 853.* Again, that case is easily distinguishable because the defendant in the *Hooey* case was already incarcerated in Fort Leavenworth serving another imposed Federal sentence. Raymond Elswick was not being incarcerated for anything other than the instant offense.

The trial court erred by placing significant weight on the prejudice to the defendant. The trial court wants to rebut presumptive prejudice by saying the state induced continuances benefitted the appellant. Again, the continuances were un-needed if the State provided timely disclosure of discoverable material. If the State would continually force motions to continue for discovery violations until all the State's witnesses died the continuances would have benefited by the defendant and there would be no prejudice by the trial courts rationale. Except, for the blatant fact the defendant would have been incarcerated the whole time without his due process right to a speedy trial.

e. All four factors

In the case at bar, the State of West Virginia has failed to afford the Appellant a speedy trial as guaranteed by the United States Constitution. The controlling law on this issue is found in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In *Barker* the United States Supreme Court adopted a balancing approach for speedy trial claims in which the conduct of the government and the Appellant are

weighed against one another on a case-by-case basis. "The Court made it palpably clear in *Barker* that it regarded **none of the factors alone as either necessary or a sufficient condition to support a finding that there has been a deprivation of the right** to a speedy trial." *State v. Cox*, 162 W.Va. 915 at 919, 253 S.E.2d 517 at 521 (W.Va., 1979). (emphasis added).

Considering the totality of factors presented by the case at bar and the applicable law, it is overwhelmingly apparent that the Appellant has been deprived of his right to a speedy trial on all four prongs of *Barker*: 1) length of delay; 2) cause of delay; 3) assertion of right; and 4) prejudice to Appellant. All four factors militate in favor of the Appellant's claim of a speedy trial violation.

Length of Delay – The case clearly exceeds the 3-term rule but for the fact that the defense was goaded into asking for continuances; the federal and state constitutional standards for speedy trial were exceeded.

Reason for Delay – The Court has already made findings in this case that the **numerous delays of this case have been caused by the State.**

Assertion of Right – West Virginia has rejected the 'demand rule', as recognized by the United States Supreme Court in *Barker* at footnote 21. Thus, in West Virginia there is **no duty to demand speedy trial.**

Prejudice to the Appellant - The negligence and dilatory conduct of the State has caused excessive delay well beyond that minimal threshold to trigger constitutional speedy trial analysis and is **presumptively prejudicial.**

3. WEST VIRGINIA CONSTITUTIONAL ANALYSIS

West Virginia adopted the *Barker* four-factor test in *State v. Cox. Id,* 162 W.Va. 915, 253 S.E.2d 517 (1979); see also *State v. Foddrell,* 171 W.Va. 54, 297 S.E.2d 829

(1982) Syllabus point 2. The State has been using the three-term rule statute as the test in performing its constitutional analysis under the West Virginia Constitution. In *State v. Carrico* the court stated:

> West Virginia is free to adopt protections of its own, so long as West Virginia does not diminish federal rights. *Oregon v. Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); *State ex rel. McLendon v. Morton,* 162 W.Va. 431, 249 S.E.2d 919 (1978). *W.Va. Constitution,* Art. III, § 14 and the sections of the *W.Va.Code,* namely § 62-3-21 [1959] and § 62-3-1 [1981] **meet or exceed the *Barker* standards on every prong: . . .**427 S.E.2d 475, 478 (W. Va. 1993) (emphasis added).

In most cases using the three-term rule statute as the tool by which to do a West Virginia Constitutional speedy trial analysis will arrive at the correct result, except in cases where the determination hinges upon the second prong of *Barker*, the cause for the delay. *W. Va. Code* §62-3-21 does not meet or exceed the *Barker* standards of every prong. This is because a strict application of W. Va. Code § 62-3-21, without considering the constitutional requirements, will improperly attribute delay caused by the state to the defendant if the defendant is forced to request a continuance based upon State failure to provide discoverable materials timely (eg. providing discoverable material late or on the day of trial). Other jurisdictions have recognized this very problem and have addressed it in its constitutional analysis. "In attributing each period of delay, when analyzing a speedy trial claim under the . . .[State] Constitution, **a court must bear in mind that delay requested by a particular party may be attributable to the other party**." *State v. Ariegwe*, 167 P.3d 815 (Montana, 2007) (emphasis added). And, this is precisely what occured in the instant case. Again, the Appellant is claiming a violation to a speedy trial under the U.S. and West Virginia Constitutions and is only using W. Va. Code § 62-3-21 because the court has adopted it in doing its speedy trial analysis.

Thus, if one is to use W. Va. Code § 62-3-21 to perform a speedy trial analysis to meet or exceed the *Barker* standards on every prong it should be stated as follows: 1) have more than three terms after the term of indictment passed; 2) attribute the cause of the delay(s) to either the state, to the defendant, or to neither (*e.g.* a juror created a mistrial would be neither); 3) did the defendant expressly waive his right to speedy trial because waiver can't be assumed from a silent record "because the three-term rule operates no matter whether the defendant asks for a trial." 2 Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure (2d Ed. 1993); and 4) prejudice is shown by exceeding three terms of court that are attributable to the state.

In *State ex rel. Rogers v. Casey* the court *sua sponte* continued the case to allow defense counsel proper time to prepare thus when the relator raised the three term rule, however, the state attempted to argue that is a *de facto* motion by the defense. 166 W.Va. 179, 273 S.E.2d 356 (W.Va., 1980). "[T]he State in this case had an ample opportunity and an obligation to schedule trial in such a manner as to ensure the relator's counsel time to prepare. That the State failed to do. The delay compelled the court to order a continuance to protect the relator's right to effective assistance of counsel and to a fair trial. Under these circumstances we cannot find that the continuance was granted on a *de facto* motion of the relator's counsel, or that the State was excused from providing trial within three terms by any of the factors set out in W.Va.Code, 62-3-21 (1959). The January 1980 Term, therefore, must also be counted against the State." *State ex rel. Rogers v. Casey,* 166 W.Va. 179, 273 S.E.2d 356 (W.Va., 1980). The case at bar is similar to *Rogers* in that the state caused the delay. It is only that, in the instant case, the court did not *sua sponte* continue the case thus defense counsel was forced to move for the continuance to provide the defendant with

his due process right to effective representation.

a. The Length of Delay

The United States Supreme Court found that a two part inquiry is necessary for the length of delay factor in *Doggett v. U.S.* 505 U.S. 647, 112 S.Ct. 2686. First, it is necessarily long to be sufficient to even trigger an analysis of the *Barker* factors. "Depending on the nature of the charges, the lower courts have generally found post-accusation delay 'presumptively prejudicial' at least **as it approaches one year.** " (emphasis added) *Doggett*, at 652, n.1. Mr. Elswick was indicted on September 27, 2005 and the arraignment was held October 11, 2005. Mr. Elswick has made a showing sufficient to trigger the analysis. As a factor among several, the court considers the extent to which the delay stretches beyond the bare minimum needed to trigger the judicial examination of the claim. The instant case went well beyond twice the bare minimum for United States Constitutional analysis. "*W.Va.Code*, 62-3-21, [1959] establishes the **outermost limit** of what constitutes a speedy trial under the State Constitution." *State ex rel. Workman v. Fury*, 168 W.Va. 218, 220; 283 S.E.2d 851, 853 (emphasis added).

It is the government's duty to proceed with reasonable diligence in its investigation and preparation for arrest, indictment and trial; if it fails to do so after discovering sufficient facts to justify indictment and trial, it violates the Appellant's due process rights. *U.S.C.A. Const. Amends. 5, 14.*

b. The Reason For The Delay

West Virginia has recognized the requirement to attribute the cause of delay in a speedy trial analysis in syllabus point four of *Adkins v Leverette* "[a] defendant cannot successfully assert violation of his constitutional right to a speedy trial when any delay,

such as a continuance on his motion, **is attributable to him**." *Id.* 264 S.E.2d 154 (W. Va. 1980) (emphasis added). The *Leverette* court stated, "the defendant's counsel, by deposition, related that he, with his client's knowledge and consent, requested various continuances. He indicated that by reason of the difficulty in defending this case, any delay would inure to the benefit of the defendant." "We cannot say that the defendant was deprived of a speedy trial, when most, if not all, of the delay was attributable to his own actions." *Id.* at 157. However, in the instant case delay was caused by the State's own actions or lack of action and therefore must be assessed against the State.

In the instant case the court has already determined the reasons for the delays in its PROSECUTORIAL MISCONDUCT ORDER.

> Numerous delays have occurred in this case. On at least two occasions, trial was continued because of delays in forensic testing by the crime laboratory; on one occasion, trial was continued to allow for a competency evaluation of the Appellant [during the 1st and uncounted term for the 3 term rule]; **the remaining occasion[s] have been due to late disclosure of discoverable information by the State, prompting motions to continue by the Appellant**. On one occasion, a mistrial was declared after 4 days of jury trial. *Prosecutorial Misconduct Order, SCR, Vol. I, p. 608.*

c. Appellant's Assertion of His or Her Right To A Speedy Trial

West Virginia has rejected the demand rule in *Ex parte, Chalfant*, 81 W. Va. 93; 93 S.E. 1032 (W. Va., 1917). In West Virginia one does not have the duty to bring him or herself to trial but it is incumbent upon the state to provide a speedy trial. "It is the government's duty to proceed with reasonable diligence in its investigation and preparation for arrest, indictment and trial. If it fails to do so after discovering sufficient facts to justify indictment and trial, it violates this due process right." *State ex rel. Leonard v. Hey,* 269 S.E.2d 394, 398 (1980); Syl. Pt. 1 *State v. Carrico*; 189 W.Va. 40, 427 S.E.2d 474 (W.Va.,1993). In West Virginia only one asserting a right to a speedy

trial under W. Va. Code §63-2-1, the one term rule, does one need to actively assert his or her right to a speedy trial. See *State ex rel. Workman v. Fury* ,168 W.Va. at 221, 283 S.E.2d at 853. *See also Pitsenbarger v. Nuzum,* 172 W.Va. 27, 303 S.E.2d 255 (1983).

"[I]t is the duty of the state to provide a trial without unreasonable delay and an accused is not required to demand a prompt trial." *State v Lacy*, 232 S.E.2d 519; 160 W. Va. 96 (W. Va. 1977). The three-term rule effectively asserts the Appellant's right to a speedy trial "rule operates no matter whether the defendant asks for a trial (as opposed to the *Barker* standard where such a request is an important consideration)." *Carrico at* 478.

Silence or inaction by defendant or his counsel does not waive defendant's speedy trial rights. *State ex rel. Holstein v. Casey,* 265 S.E.2d 530; 164 W.Va. 460 (W. Va., 1980).

The trial court errs by erroneously concluding that "there is no Three-Term Rule statutory violation in this case, and there is no, accordingly, no violation of the W. Va. Constitution". DENYING SPEEDY TRIAL ORDER, p. 8. Moreover, the trial court errs by citing *United States v. Thomas* "a [d]efendant's failure to assert his rights in a timely fashion weighs heavily against his Sixth Amendment claim." 167 F.3rd 299, 305 (6th Cir. 1999). West Virginia is a non-demand state.

d. The Prejudice To The Appellant

A violation of the three-term rule is prejudice in and of itself. "*W.Va.Code*, 62-3-21, [1959] establishes the **outermost limit** of what constitutes a speedy trial under the State Constitution." *State ex rel. Workman v. Fury*, 168 W.Va. 218, 220; 283 S.E.2d 851, 853 (emphasis added). Moreover, in the case at bar the Appellant had been deprived of his liberty for almost three years, being incarcerated without bail awaiting

trial. If one attributes the cause for delays then clearly three terms of court are attributable to the State. Clearly, the Appellant's right to a speedy trial was compromised by state action or more specifically inaction.

e. All Four Factors

In the case at bar, the State of West Virginia has failed to afford the Appellant a speedy trial as guaranteed by the West Virginia Constitution. The controlling law on this issue is found in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In *Barker* the United States Supreme Court adopted a balancing approach for speedy trial claims in which the conduct of the government and the Appellant are weighed against one another on a case-by-case basis. "The Court made it palpably clear in *Barker* that it regarded none of the factors alone as either necessary or a sufficient condition to support a finding that there has been a deprivation of the right to a speedy trial." *State v. Cox*, 162 W.Va. 915 at 919, 253 S.E.2d 517 at 521 (W.Va., 1979). The defense contends that any one factor is sufficient to show a violation of the speedy trial right if shown in considerable weight.

Considering the totality of factors presented by the case at bar and the applicable law, it is overwhelmingly apparent that the Appellant has been deprived of his right to a speedy trial on all four prongs of *Barker*: 1) length of delay; 2) cause of delay; 3) assertion of right; and 4) prejudice to Appellant. All four factors militate in favor of the Appellant's claim of a speedy trial violation.

Length of Delay – The Appellant awaited trial almost three years due to state action or inaction.

Reason for Delay – The Court has already made findings in this case that the **numerous delays of this case have been caused by the State.**

Assertion of Right – West Virginia has rejected the 'demand rule', as recognized by the United States Supreme Court in *Barker* at footnote 21. Thus, in West Virginia there is **no duty to demand speedy trial.**

Prejudice to the Appellant - The negligence and dilatory conduct of the State has caused excessive delay well beyond that minimal threshold to trigger constitutional speedy trial analysis and is **presumptively prejudicial.** Moreover, the Appellant in this case

C. PROSECUTORIAL MISCONDUCT

Rule 16(d)(2) of the West Virginia Rules of Criminal Procedure sets forth the sanctions available for the government's failure to provide discoverable material. Under Rule 16(d)(2), the trial court may: 1) order immediate production of the undisclosed evidence; 2) grant a continuance; 3) prohibit the introduction into evidence of the undisclosed material; and 4) enter any other order it deems just. An order for dismissal is the most extreme sanction but nonetheless is appropriate given the nature of egregious nature of this discovery violation. In *United States v. Jackson*, the Seventh Circuit upheld the district court's dismissal of the indictment because of the government's failure to provide the defendant with a list of witnesses pursuant to the trial court's order. Id, 508 F.2d 1001 (7th Cir., 1975).

In the case at bar the prosecuting attorney failed to disclose the November 2005 plea agreement and statements of John Richards to the defense wherein Mr. Richards agreed to testify in the instant case. *Richards Plea Agreement, SCR, Vol. I, pp 513-517.* The defense inadvertently learned of these materials only in July 2007 on the eve of a trial date. It was this discovery that ultimately led to the exculpatory evidence that

co-defendant Joey Richards had in his possession when he was taken to jail a knife that had the blood and DNA of the victim Daniel Burns.

It cannot be legitimately argued by the government that the above mentioned evidence is anything but discoverable and that the prosecutor knew or should have known of its existence. The government was under an inescapable duty to relay the above information to Appellant's counsel as soon as it came in to its possession. For reasons known only to the government, it chose at its peril to disregard the obligations mandated upon it by decades of case law, the West Virginia Rules of Criminal Procedure, the rules of Professional Conduct, common sense and simple fairness.

The government chose to ignore the most fundamental of rules of criminal law which attempts to assure that trials are neither one-sided, nor heavy handed. The government cannot now escape the results of its misconduct by contending that it had no knowledge of the existence of discoverable material despite incontrovertible evidence to the contrary. *Examination of Prosecutor, SCR, Vol. IV, pp 3347-71.*

D. NUMEROUS AND ONGOING DISCOVERY VIOLATIONS

"The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case. *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 135, 454 S.E.2d 427, 429 (1994) (Syllabus Pt. 2).

"A circuit court may choose dismissal for egregious and repeated violations where lesser sanctions such as a continuance would be disruptive to the administration of justice or where the lesser sanctions cannot provide the same degree of assurance that the prejudice to the Appellant will be dissipated." *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 135, 454 S.E.2d 427, 429 (1994) (Syllabus Pt. 3).

"In exercising discretion pursuant to Rule 16(d)(2) of the West Virginia Rules of Criminal Procedure, a circuit court is not required to find actual prejudice to be justified in sanctioning a party for pretrial discovery violations. Prejudice may be presumed from repeated discovery violations necessitating numerous continuances and delays." *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 135, 454 S.E.2d 427, 429 (1994) (Syllabus Pt. 4).

"While discovery has not been elevated to a constitutional dimension, it is clear that constitutional rights of a criminal defendant are implicated when a discovery system has been put in place and the prosecution fails to comply with court ordered discovery. We believe that it is necessary in most criminal cases for the State to share its information with the defendant if a fair trial is to result. Furthermore, we find that complete and reasonable discovery is normally in the best interest of the public." *State v. Gray*, 217 W. Va. 591, 602, 619 S.E.2d 104, 115 (2005) (citing *Rusen*).

E. DESTRUCTION OF EVIDENCE

"When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the Defendant's request for it, would have been subject to disclosure

under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction." *State v. Osakalumi*, 194 W. Va. 758, 759, 461 S.E.2d 504, 505 (1995) (Syllabus Pt. 2).

F. THEORY OF DEFENSE INSTRUCTION

"A defendant is entitled to have the judge instruct the jury on his theory of the defense, provided that it is supported by law and has some foundation in the evidence." *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir.1990). Where there is competent evidence tending to support a theory it is error for the trial court to refuse to give a proper instruction presenting such theory when requested to do so. *State v. Hayes*, 136 W.Va. 199, 67 S.E.2d 9; *State v. Smith*, W.Va., 193 S.E.2d 550. *State v. Green*, 157 W. Va. 1031, 1034, 206 S.E.2d 923, 926 (1974). The trial court refused the theory of defense instruction offered by the defense and instead gave a modified version of the defendant's offered instruction over objection of the defense. *Defendant's Theory of Defense, SCR, Vol. II, p. 1160; See also Memo on Theory of Defense, SCR, Vol. II, pp. 1156-59.*

G. BATTERY LESSER INCLUDED INSTRUCTION

"The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense." Syllabus Point 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981). See also *State v. Dellinger*, 178 W. Va. 265, 265, 358 S.E.2d 826, 826 (1987). The defense requested that the trial court instruct the jury on battery as a lesser included offense to the charge of murder as contained in the indictment. Appellant submits that on the facts of this case, it is impossible to commit the greater offense of murder without first having committed the lesser offense of battery. The only direct eyewitness testimony offered, other than the testimony of co-defendants, was that Elswick did no more that kick Burns as he said, "Come on man, get out of the yard."

H. STATE'S MOTION TO CONTINUE DURING JURY TRIAL OVER OBJECTION

The trial court abused its discretion when the State's Motion to Continue the presentation of evidence to the next day was granted over the objection of the defense. The defense objected and requested that the state be required to rest its case if no further witnesses or evidence was available. The trial court overruled the defense objection, continued the case and provisionally held the prosecuting attorney in contempt of court. *Transcripts of , SCR, Vol. IV, pp. 3779-3783.*

I. REFUSAL OF JUROR QUESTIONNAIRES

In criminal case, inquiry made of jury on its voir dire is within sound discretion of trial court and not subject to review, except when discretion is clearly abused. West Virginia Code 56-6-12; Rules of Criminal Procedure, Rule 24(a); *State v. Linkous*, 460

S.E.2d 288, 194 W.Va. 287 (1995). The requested juror questionnaires would have served to assure that a fair and impartial jury was seated to hear the trial of the case. The refusal of Elswick's requested use of juror questionnaires is a clear abuse of discretion. *Motion, SCR, Vol. I. pp.* 269-87

J. RECIDIVIST INFORMATION

West Virginia Code §61-11-19 sets forth the procedure that must be followed in order to impose greater punishment for prior felony convictions and in pertinent part states as follows:

> It shall be the duty of the prosecuting attorney when he has knowledge of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court **immediately** upon conviction and before sentence. Said court shall, before expiration of the term at which such person was convicted, cause such person or prisoner to be brought before it, and upon an information filed by the prosecuting attorney setting forth the records of conviction and sentence, or convictions and sentences, as the case may be, and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he is the same person or not. (Emphasis supplied)

The State failed in this case to comply with the mandatory statutory duty to "immediately" inform the court of the Appellant's alleged prior felony convictions. The State should have provided this information to the Court on July 11, 2008, when the jury returned the guilty verdict in this case.

After the above verdicts were returned the case came back before the court on August 18, 2008, for a hearing on post trial motions. During this hearing, the State, for the first time after the above verdicts, provided the following limited information to the court concerning any possible prior felonies:

MR. SERGENT: Your Honor, the State intends to file a habitual criminal information in this case. I've made the decision based on the review --

THE COURT: It is not filed, though, is it?

MR. SERGENT: No, it doesn't -- the problem is, your Honor, once we went back through the underlying felonies, one of which is a Roane County case involving a breaking and entering of a building other than a dwelling --

8/18/08 Hearing, SCR, Vol. IV, p. 3603, ln 2-11.

The limited information provided to the court as set forth above during the August 18, 2008, hearing is insufficient to comply with the mandatory reporting requirements of West Virginia Code §61-11-19.

Thereafter, and without giving the court any further information so as to comply with the mandatory reporting requirements of West Virginia Code §61-11-19, on the 18th day of September, 2008, the State filed an Information of Prior Felony Convictions pursuant to West Virginia Code §61-11-18, as amended, seeking to enhance the punishment that may be imposed on the Appellant in this case.

The first sentence contained in West Virginia Code §61-11-19 establishes upon the State only a duty to give information to the court, and the prosecutor would fully comply with his duty by simply stating the facts to the court. Having done so, he is then free to file an information or to choose not to file one. *Griffen v. Warden, W. Va. State Penitentiary,* 517 F.2d 756 (4th Cir. 19 75), cert denied, 423 U.S. 990, 96 S. Ct. 402, 46 L. Ed. 2d 308 (1975). The language of this section is clear and the procedural requirements contained therein are mandatory. *State ex rel. Robb v. Boles,* 148 W. Va. 641, 136 S.E.2d 891 (1964). The provisions of this section are mandatory and must be complied with fully before an enhanced sentence for recidivism may be imposed under §61-11-18. *State v. Deal,* 178 W. Va. 142, 358 S.E.2d 226 (1987).

Being in derogation of the common law, the habitual criminal statutes are generally held to require a strict construction in favor of the prisoner. *Moore v. Coiner,* 303 F. Supp. 185 (N.D. W. Va. 1969); *Justice v. Hedrick,* 177 W. Va. 53, 350 S.E.2d 565 (1986); *State v. Jones,* 187 W. Va. 600, 420 S.E.2d 736 (1992).

The only mandatory duty imposed upon the State by West Virginia Code §61-11-19 to immediately upon conviction provide information to the court of prior felonies has not been complied with in the case at bar. Construing this statute strictly requires that the Information of Prior Felony Convictions filed in this case be dismissed for the failure of the State to comply with the mandatory and prerequisite duty to first give information thereof to the court immediately upon conviction.

V. CONCLUSION

Appellant's April 2007 jury trial ended with a mistrial because the prosecutor's intended actions goaded the defendant into moving for a mistrial. Therefore, a subsequent trial was barred by the Double Jeopardy clauses of the United States and West Virginia Constitutions. Moreover, the state must offer defendants speedy trials and failure to do so will result in a loss of its right to prosecute. *State ex rel. Holstein v. Casey,* 164 W.Va. 460, 265 S.E.2d 530 (1980). Moreover, the egregious discovery violations in this case along with the other errors cited deprived Elswick of his constitutional right to due process of law and a fair trial. There is only one remedy for a double jeopardy violation or for deprivation of the Appellant's constitutional rights to speedy trial and due process– **REMAND WITH INSTRUCTION TO DISMISS WITH PREJUDICE**. Anything less than a dismissal with prejudice is an erosion of the right to a speedy trial, the double jeopardy protections and due process rights as guaranteed by

the United States and West Virginia Constitutions. The right to a speedy trial predates the United States Constitution and can even be found in the *Magna Carta* and is so fundamental to American jurisprudence that it must be vigilantly protected and preserved. The remedy for the violation of the right to a speedy trial is – **REMAND WITH INSTRUCTION TO DISMISS WITH PREJUDICE.**

VI. RELIEF REQUESTED

Raymond Elswick respectfully requests that his conviction and sentence be reversed and his case remanded to the circuit court with direction that an order be entered therein dismissing the indictment with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Morgan B. Hayes and Lee F. Benford II, Counsel for the Appellant, do hereby certify that we have served the foregoing Appellant's Brief upon the West Virginia Attorney General by hand delivering a true copy thereof to Dawn E. Warfield, Deputy Attorney General at 1900 Kanawha Blvd. East, State Capitol, Building 1, Room 26E, Charleston, West Virginia, 25305, on this 8th day of September, 2009.

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