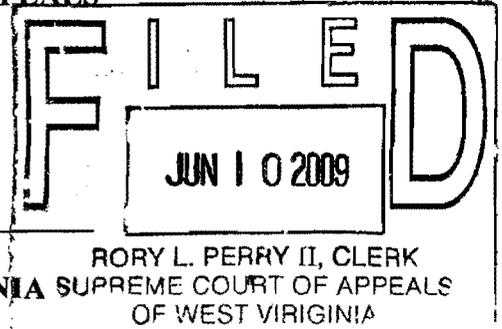


NO. 34806

IN THE SUPREME COURT OF APPEALS

OF
WEST VIRGINIA



CHARLESTON, WEST VIRGINIA

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA

Appellee

v.

Appeal from the Judgment of the Circuit Court of
Cabell County, West Virginia Case No. 07-F-141, 142

**PHILLIP BARNETT and
NATHANIEL BARNETT**

Appellants

APPELLANTS' BRIEF

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Pitsenbarger v. Nuzum, 172 W.Va. 27, 29, 303 S.E.2d 255 (1983).

Price v. Charleston Area Medical Center, 217 W.Va. 663, 619 S.E.2d 176 (2005).

State v. Adkins, 162 W.Va. 815, 253 S.E.2d 146 (1979)

State v. Bennett, 157 W.Va. 702, 203, S.E.2d 699 (1974)

State v. Justin Black (*Petition for Appeal* currently before this Honorable Court)

State v. Caudill, 170 W.Va. 74, 289 S.E.2d 748 (1982)

State v. Ellis, 161 W.Va. 40, 239 S.E.2d 670 (1977)

State v. Fellers, 165 W.Va. 253, 267 S.E.2d 738 (1980)

State v. Foster, 171 W.Va. 479, 300 S.E.2d 291 (1983)

State ex rel. Shorter v. Hey, 170 W.Va. 249, 294 S.E.2d 51(1981).

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State v. King, 181 W.Va. 440, 396 S.E.2d 402 (1990)

State v. Phillips, 194 W.Va. 569, 461 S.E.2d 75 (1995)

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State v. Spadafore, 159 W.Va. 236, 220 S.E.2d 655 (1975)

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California v. Green, 399 U.S. 149 (1970).

Chambers v. Mississippi, 410 U.S. 284 (1973)

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Evans v. Verdini, 466 F.3d 141 (2006)

Olympic Realty Co. v. Kamer, 141 S.W.2d 293 (1940).

Ross v. Oklahoma, 487 U.S. 81 (1988)

Snyder v. Coiner, 510 F.2d 224 (4th Cir. 1975)

United States v. Aronson, 319 F.2d 48 (2nd Cir.1963)

United States v. Dardi, 330 F.2d 316 (2nd Cir. 1964)

United States v. Freeman, 302 F.2d 347 (2nd Cir. 1962)

United States v. Jannsen, 339 F.2d 916 (7th Cir. 1964)

United States v. Mahler, 363 F.2d 673 (2nd Cir. 1966)

United States. v. Simpkins, 505 F.2d 562 (4th Cir. 1974)

WEST VIRGINIA RULES OF EVIDENCE

W.Va. R. Evid. 803(8)

W.Va. R. Evid. 201

W.Va. R. Evid. 404(b)

W.Va. R. Evid. 609(a)(1)

W.Va. R. Evid. 613(b)

WEST VIRGINIA RULES OF CRIMINAL PROCEDURE

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W.Va. Code § 62-3-21

TRANSCRIPTS

August 29, 2007 Motion Hearing Transcript

August 30, 2007 Pre-Trial of Co-Defendant Brian Dement Transcript

August 30, 2007 Pre-Trial Transcript of Co-Defendant Justin Black

October 23, 2007 Plea Hearing Transcript of Brian Dement

Cook Transcript

Lane Interview

Trial Transcript

APPELLANTS' BRIEF

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**I. KIND OF PROCEEDING AND THE NATURE OF THE RULINGS IN
THE LOWER TRIBUNAL**

On May 11, 2007, the appellants were indicted for the First Degree Murder of Deanna Crawford, who was found dead on August 8, 2002, in a rural area of Cabell County known as Hickory Ridge. Justin Black and Brian Dement were co-indicted for the death of Ms. Crawford in Count I of the indictment. Brian Dement was also charged with maliciously wounding another woman in January of 2007, in Count II of the indictment. Mr. Dement is an S.S.I. recipient, having been diagnosed with attention deficit disorder and manic depression.

A trial date of September 4, 2007 was set on June 25, 2007, and the Judge *sua sponte* severed all defendants for trial.

Appellants filed "speedy trial" requests during the term of the indictment and all subsequent terms. The Prosecuting Attorney requested a continuance on August 29, 2007, arguing principally that he needed to try co-defendant Dement first as he had no case against the appellants unless he extracted a plea and testimony from Dement. In the words of the prosecutor, "...it would be difficult, if not impossible, for the State to go forward on some or all of these cases, if that does not happen..." [August 29, 2007 Motion Hearing Transcript at 26, line 15-24]

Accordingly, the Court continued the case allowing the State to first proceed against Mr. Dement. Suppression hearings were conducted principally dealing with Dement's statements to several West Virginia State Police Officers over the course of

nine continuous hours. The Court ruled that Mr. Dement's three statements, which had glaring inconsistencies, were admissible in the State's case in chief. The Court continued Dement's case until October 23, 2007. On the first day of trial Mr. Dement accepted a plea bargain to Second Degree Murder for Count I of the indictment and Malicious Wounding for Count II of the indictment. As part of the bargain, Mr. Dement agreed to cooperate with the State by testifying against the appellants.

Ultimately, a joint trial of the appellants commenced on August 25, 2008. Without uttering one word in their defense, without offering any defense witnesses, and based solely on the testimony of a convicted felon and "roll-over" cooperating co-defendant who opted for a plea, Phillip Barnett and Nathan Barnett were convicted of Second Degree Murder in the Circuit Court of Cabell County, West Virginia on August 27, 2008. The Order of conviction was entered on September 9, 2008.

By Order entered on October 6, 2008, appellant Nathaniel Barnett was sentenced to be confined for a period of Thirty Six (36) years with credit for time served in jail and appellant Phillip Barnett was sentenced to be confined for a period of Forty (40) years with credit for time served in jail. A Notice of Intent to Appeal was timely filed by the appellants' counsel on October 24, 2008, and served upon the State on the same day. Subsequently, a Petition for Appeal was timely filed and granted by Order entered by this Court on April 8, 2009. The record was received by the Appellants on May 13, 2009. Phillip and Nathaniel Barnett are currently incarcerated in the Western Regional Jail where they have been since their conviction on August 27, 2008. The Appellants now seek an appeal by this Court of their case, a reversal of their conviction, a vacation of their sentence, a new trial, and whatever relief the Court would deem appropriate.

II. STATEMENT OF FACTS

On August 8, 2002, the body of Deanna Crawford was found in a rural section of Cabell County, West Virginia, known as Hickory Ridge. The State Medical Examiner's Office determined the cause of death was by manual strangulation and ruled the manner of death as a homicide. The evidence at trial revealed that Ms. Crawford was a known prostitute and crack cocaine addict in Huntington, West Virginia.

Upon discovery of the body in 2002, the West Virginia State Police dispatched their forensic crime scene unit which cordoned off and carefully processed and investigated the scene. Despite a thorough, exhaustive and painstaking investigation, the scene yielded nothing linking the appellants to that location.¹

Initially, four targets were identified in the investigation. John Vinton, known to often engage the services of various prostitutes, was larcened by a prostitute within days before Deanna's body was found. Leads were pursued and a witness by the name of Betty Cull came to light. Ms. Cull told the State Police that Vinton had asked her to look up Ms. Crawford's address information at the Cabell County Department of Health and Human Resources offices where Cull worked. After several days, Vinton went to the home of Ms. Cull on August 5, 2002. This occurred three days before Ms. Crawford's body was found on Hickory Ridge next to a boarded shack. Vinton asked Cull if she had looked up the address he requested. Cull said that she could not jeopardize her job by acquiring this information. Vinton then stated that her whereabouts was not necessary and that nobody would have to worry about that girl "robbing" anyone else again because

¹ The crime scene area was 150 square feet. Over nineteen items were recovered and submitted for trace evidence including fibers, hair, fingerprints, D.N.A. and tire cast impressions. The autopsy revealed that aside from the hyoid bone, a small bone in the front of the neck, there were no fractures, no broken nails, no chipped teeth, no broken jaw and no hemorrhage. In fact, there was no evidence that Ms. Crawford was beaten, kicked or punched. [Trial Transcript at 152]

her body was up on Hickory Ridge near an old shack. Three days later, on August 8, 2002, Ms. Crawford's body was found on Hickory Ridge next to an old shack.

In the companion case of *State v. Justin Keith Black*, which *Petition for Appeal* was granted by this Court on January 22, 2009, evidence was elicited from Rachel Fairchild, one of Ms. Crawford's close friends, who last saw Ms. Crawford about one week before her body was found. During Ms. Fairchild's last meeting with Ms. Crawford in the hours from Friday night into early Saturday morning, which was August 3, 2002, she observed Ms. Crawford take money from Mike Sinclair in his own home. Ms. Crawford had also been living with Mike Sinclair just prior to her death in 2002. Furthermore, Ms. Crawford was seen on a "Speedway" convenience store video with a man named Ira Crocket at around 3:00 a.m. on August 4, 2002.

In 2003, West Virginia State Trooper John Black executed a search warrant on John Vinton's home. Vinton's statements to Betty Cull were included in the search warrant affidavit. Vinton eventually died and the case remained dormant and unsolved for five years. No one implicated the appellants in any fashion for five years.

However, in January of 2007, the State Police received information that Brian Dement was talking about the death of Ms. Crawford. Dement was audio-recorded in his home, without his knowledge, by his uncle, a disreputable convicted felon, who was cooperating with law enforcement.² In later interviews of Dement, after he entered into a plea bargain deal, he was asked by private investigators, "How did you come up with

² A motion to suppress Mr. Dement's statement was successful in his case. The Court found the recording of his statement was in violation of the precepts set forth in *State v. Mullens*, 221 W.Va. 70, 650 S.E.2d 169 (2007).

these three guys [Justin Black, Phillip Barnett and Nathan Barnett] as opposed to somebody else that you might know?" Dement responded,

I particularly didn't. My Uncle Greg asked me who my friends was in the beginning. And I told him who they were in Salt Rock, okay. And then when I went down there - - - to the State barracks. . ." Dement continued, ". . . My Uncle Greg wore a wire in on me, okay - - - and tried to get me to confess to all of this stuff." "But the reason I know all of that stuff is, like I said, my Uncle Greg came in and told me the state police came and questioned them. Told him what happened . . ."
[Cook Transcript at 5,7]

Later in a second interview conducted by private investigator Danny Lane, Dement stated,

I was coerced to give statements that were false. State troopers gave me most of it and I just filled in a little detail here and there.

In January of 2007, Brian Dement was brought by West Virginia State Troopers to their Barracks in Huntington, West Virginia. Over the course of nine hours, Mr. Dement signed two statements handwritten by the State Police which detailed Ms. Crawford's murder. A third and last statement was tape-recorded by the police. Each written version contained asserted facts which were inconsistent with each other. Mr. Dement claimed that he, along with Justin Black, Philip Barnett, and Nathan Barnett, left a party at Justin Black's home on Hickory Ridge in Cabell County with Ms. Crawford in a dark colored car. He claimed that Justin Black drove the car with Ms. Crawford in the passenger seat. He also claimed that he and the Barnetts were in the back seat. For some inexplicable reason, Mr. Black stopped the car and Dement grabbed Ms. Crawford by the neck, jerking her out of the car and dragged her by the neck thirty to forty yards to a boarded shack where he violently struck her. While all three of his statements contained

major contradictions, he stated in one that he then left Ms. Crawford while Black and the appellants proceeded to hit and kick Ms. Crawford, although they were out of sight. He then went to the body, which he said was curled in a fetal position (unlike the recumbent supine pentagram configuration indicated by the police) and checked the carotid pulse on Ms. Crawford's neck and discovered that she was dead.

Dement was represented by attorney Kent Bryson who filed a motion to suppress his statements, claiming that they were involuntary as a matter of fact and law.

The Court ruled that Dement's statements to the police were admissible in the State's case in chief. At a pre-trial hearing held on August 30, 2007, the Prosecuting Attorney, knowing that Dement's statements would be used as substantive evidence against Dement, advised the Court, ". . . the Court having just ruled that these statements are admissible, he [Dement's attorney] is in the process of explaining Mr. Dement's options to him and making recommendations to him. He feels that Mr. Dement may very likely end up engaging in plea negotiations, pleading to something and agreeing to testify against the others . . ." [August 30, 2007 Hearing Transcript at 6]

As forecast, Dement pled guilty the very day his trial was scheduled to begin. The plea deal consisted of Dement promising to cooperate with the State by testifying in the trials of his codefendants [appellants and Mr. Black] in exchange for the State recommending a prison sentence between twenty and twenty four years for Second Degree Murder. Additionally, the prison sentence for a second and unrelated charge of malicious wounding his girlfriend with whom he resided in January of 2007, was recommended by the State to run concurrently with the Second Degree Murder Charge. At the plea hearing, when questioned by the Court as to the factual basis for the

strangulation of Ms. Crawford, Dement's response was, "Oh, I don't know, mon." [Plea Hearing Transcript at 26] The Prosecuting Attorney asked the Court to continue sentencing until after his testimony in appellants' trial. On April 25, 2008, the Court sentenced Mr. Dement to a thirty-year prison term. Defense Counsel filed a motion for reconsideration to reduce the sentence to twenty-four years as agreed by the State. Inexplicably, that motion has yet to be ruled upon. After the Court accepted Dement's plea, he was remanded to the Western Regional Jail in Barboursville, West Virginia. While in Western Regional Jail, Mr. Dement spoke with Nathan Barnett's private investigator, Greg Cook, with the permission of Dement's attorneys. In that conversation, which was recorded without Dement's knowledge, Dement denied that he killed Ms. Crawford. More importantly, he exonerated both Nathan and Phillip Barnett. That recording was played in its entirety for the jury in co-defendant Justin Black's trial, but was disallowed in the appellants' trial.³

In March of 2008, Dement again was interviewed, this time by Justin Black's private investigator, Danny Lane, and Black's defense counsel, Jay Love, at the Western Regional Jail. This interview was again conducted with permission from Dement's attorneys and was recorded with Mr. Dement's prior knowledge. Dement again exonerated both Phillip and Nathan Barnett. Dement explained that he was high on Xanax, marijuana and alcohol the day he was taken to the State Police barracks and after he was confronted for over nine hours, simply capitulated when he was told by the police that Black implicated him. Dement explained that once he realized he was facing life in prison because his false statements would be used against him, he felt he had no other

³ In the *Black* trial, a small portion of the statement which discussed Dement's willingness to submit to a polygraph examination was redacted from the audio recording and the transcript which the jurors were each given to aid them in listening to the recording.

choice but to take the plea offer from the State. Both of the investigators' recordings were played for the jury during Mr. Black's trial for impeachment of the State's star witness, Brian Dement. The trial court reversed its position and would not allow the jury to hear the tapes in the case *sub judice*.

Dement's attorney attacked the manner in which he was manipulated into giving a false statement to the troopers. He argued that he was given all the pieces of information about the crime from various troopers. The troopers told Dement the information that they claimed Black gave to them. When he would not give the statement the troopers wanted, a trained polygrapher, Trooper Parde, interviewed him. His doom was confirmed when his grandfather, who sought a second opinion from a Huntington lawyer, advised that the confession would be the most damning piece of evidence against him. Thus, Dement had to take the best deal possible.

In the Cook and Lane interviews, Dement clearly stated that his confession to the State Police was the product of his drunken drug stupor given over nine grueling hours of police interrogation.⁴ Critically, these statements served to reveal that the genesis for the inclusion of Phillip Barnett and Nathan Barnett as accomplices originated with the police. The trial court refused to allow the jury to hear these two critical taped interviews. This critical Constitutional infraction is discussed in Assignment A.

The State had no other evidence which directly or indirectly bore on the appellants' guilt. There was no motive and no corroborating forensic evidence. But for

⁴ Dement: "... my statement comes in and I've got to say what's in my statement, correct?

Dement: "And that's what I had to do."

Dement: "... that's why I'm stuck ... the Judge thinks I'm a liar ... he's going to sentence me to a long time in jail ... and I've got too much going on for me ... I'm just so confused." [Cook Transcript at 19]

Dement, there was no geographical link of the appellants to the place where the body was found.

The only other evidence offered by the State was a procession of witnesses who were at a party at the Justin Black residence on Hickory Ridge sometime in the summer of 2002.

The State theorized that Mrs. Crawford was at a party on Hickory Ridge at the residence of Justin Black and that she left in a car driven by Justin Black and accompanied by Nathan and Phillip Barnett and Brian Dement. Some of the party witnesses testified that the party in question occurred on the weekend of July 28, 2002, not August 5, 2002 as the prosecution claimed. One witness, who attended the 2002 parties at Justin Black's home, was Candace Day. She testified that Nathan Barnett never attended or left any parties without her. One witness saw Ms. Crawford on August 3, 2002 get into a black Cavalier in Huntington. [Trial Transcript at 320]

Todd Childers testified that he saw Ms. Crawford at Mr. Black's driveway on July 31, 2002. [Trial Transcript t 181] Tara Gillespie testified that she remembered a lot of parties at the Black residence in 2002. [Trial Transcript at 201] One was on July 31, 2002, two days after her birthday. [Trial Transcript at 207] Significantly, she testified that neither Dement nor Crawford were there and that she had never seen either one of them before. [Trial Transcript at 203] The only other salient testimony brought out through this witness was that Justin Black took her car and left with three other people for a short time. She never identified who the three others were. However, her car was pink as opposed to Dement's testimony that the car was dark. [Trial Transcript at 202]

Kevin Nowlin testified that Ms. Crawford was not at the party. [Trial Transcript at 247] He further testified that Justin Black, Phillip and Nathan Barnett, and Nathan's girlfriend, Candace Day, left the party for a short time in a silver Toyota Tacoma. [Trial Transcript at 244] He further testified that his prior statement to the State Police was not accurate. [Trial Transcript 236] Finally, he testified that Ms. Crawford was not at the party and he was not sure if Mr. Dement was there.

William Harbour remembered a party where he noticed a young lady wearing leopard pants. However, he described her as having dark hair. [Trial Transcript at 357] Ms. Crawford had light colored hair. A pair of leopard print slacks was found near the body. He also testified that Mr. Dement was not at the party [Trial Transcript at 360]

The leader of the State Police Crime Scene response unit testified at trial. Contrary to Mr. Dement's testimony that Ms. Crawford was lying in a curled position [Trial Transcript at 287], Sgt. McCord testified that she was found on her back in what would be best described as a pentagram. Furthermore, contrary to Mr. Dement's testimony that Ms. Crawford was fully clothed, the crime scene found her naked from the waist down and her top pulled up [Trial Transcript at 436]. The inconsistencies between Dement's testimony and the actual findings of the crime scene are replete and startling. At trial, Dement couldn't remember who was at the party. He could not remember who initiated the discussion about going for a ride.

The crime scene collected nineteen pieces of evidence, including beer cans, a Skoal (chewing tobacco) can, a glass, a pair of pants, a chain and a coat hanger. Tire impressions were photographed and cast. No forensic evidence ties either appellants to

the scene. The body was found uphill from the unpaved road, contrary to Mr. Dement's testimony that he dragged Ms. Crawford downhill.

The medical examiner determined the cause of death to be manual strangulation. Only Dement admitted that his hands were around Ms. Crawford's neck after he grabbed her from the car, dragged her forty yards, then later checked her carotid artery for a pulse. Except for some small bruises to the shins, there was no evidence consistent with having been repeatedly struck and/or kicked as Dement testified. There was no evidence of sexual assault, no bone fractures, no chipped teeth, and no hemorrhage.

Dement was the State's sole geographical link between the scene where Ms. Crawford's body was located and a party at the residence of Justin Black, which preceded the car ride. The above-stated facts and circumstances surrounding Ms. Crawford's death were the basis of the murder charge lodged against the Appellants. With the exception of Mr. Dement's testimony, all the probative evidence brought forward at the trial against the Appellants was circumstantial. The Appellants were tried together. Counsel representing Appellants did not call one witness. The Appellants did not testify. The trial, including jury selection, was over in two and one-half days.

III. DISCUSSION OF LAW AND ASSIGNMENTS OF ERROR

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY NOT ALLOWING THE STATE'S CHIEF WITNESS TO BE CONFRONTED WITH PRIOR INCONSISTENT STATEMENTS WHICH EXONERATED APPELLANTS

The State's case rested on the credibility of Brian Dement, a convicted felon who accepted a plea bargain in exchange for his cooperation and testimony against appellants.⁵

⁵ The trial court recognized that without Dement's testimony, the State had no case. "The Court recognizes without getting a rollover, the State cannot get a conviction against Mr. Barnett.

On October 25, 2007, Greg Cook, a private investigator working for the attorney representing appellant Nathan Barnett, visited Mr. Dement at the Western Regional Jail in Barboursville, West Virginia. The visit was two days after Dement accepted a plea bargain. This audiotape was transcribed by the trial judge's court reporter with proper certification. The transcription was thirty three pages in length and the interview lasted approximately thirty minutes.

In the companion case of *State v. Justin Keith Black*, each juror was given a copy of this transcript for ease of reference, and the audio recording, of excellent quality and audible sound, was played in its entirety, except for the redacted reference to a polygraph examination.

The Cook interview was conducted in an open-ended, non-suggestive manner. Mr. Dement initially and steadfastly stated that his statements to the police were the product of deceit and *in terrorem* interrogative techniques.

[Cook Transcript at 3]

Mr. Dement: I've been trying to go against my statement ever since I, but they wouldn't let me.

Mr. Cook: Okay, they being?

Mr. Dement: My lawyers, the judge.

Continuing further, Dement explained that he was confronted by the police in a typical good cop/bad cop fashion with blandishments and inducements.

Mr. Dement: - - the police took me when I was intoxicated and messed up -

[Hearing 8-30-07 p.5] The Prosecuting Attorney made the same observation at an August 29, 2007 hearing [p. 16]. "and it would be difficult, if not impossible for the State to go forward on some or all of these case."

[Cook Transcript at 4]

Dement recounted how he was confronted and interrogated by the police over an arduous nine hour interrogation session, and disingenuously told that Nathan and Phillip Barnett, who were being simultaneously interviewed, confessed and implicated him. This was untrue, as Phillip Barnett and Nathan Barnett have consistently maintained their innocence.

Mr. Dement: I said I didn't write a word, you know. And they said Phillip, Nathan and Justin's (Black) up there, they done confessed to it. And they want you to confess to it.

[Cook Transcript at 4]

To understand the proper syntax of Dement's statement, all four co-defendants were brought to the State Police barracks on January 28, 2007, and interrogated and polygraphed in separate rooms until the a.m. hours of January 29, 2007. At the time of his statement, the press had previously reported the location of Ms. Crawford's body and the cause and manner of her death. Therefore, some details were already disseminated. It bears pointing out that Mr. Dement, through his counsel, vociferously attacked the voluntariness of his statement in a four hour suppression hearing. However, when the Court ruled that his three separate, yet inconsistent, statements were admissible in the State's case in chief, he realized their legal significance. His only option was to take a deal. Dement told both Cook and the trial court that on the day that he was interrogated, he took eight Xanax pills, smoked marijuana, and consumed alcohol shortly before the police took him into physical custody. [Cook Transcript at 16, 17, 18] He also told Cook that the only audio-recorded statement given to the police was the last one, which commenced approximately 9 hours after he was apprehended.

Mr. Cook: - - -, you felt your only option you had was to go ahead and tell them whatever they wanted to hear so that you could get the benefit of the plea bargain, and get less time in prison.

Mr. Dement: God, you're smart. Thank you.

Mr. Cook: Is that correct?

Mr. Dement: That's so correct.

[Cook Transcript at 31]

Dement was interviewed a second time by Justin Black's attorney and his private investigator, Danny Lane. He gave them permission to audio-tape record this interview. Although only approximately eleven minutes in duration, Dement remained consistent with the Cook interview which was inconsistent with his trial testimony.

At trial, the prosecuting attorney revisited his three statements which commenced at 8:22 p.m. on January 28, 2007, and ended at 5:17 a.m. on January 29, 2007. The statements had glaring inconsistencies. To ameliorate the harsh effect these inconsistencies would ultimately have on the credibility on this mendacious star witness, the prosecuting attorney confronted the inconsistencies head on and questioned Dement extensively helping him to explain the inconsistencies under the pretext of misunderstandings, misstatements and contextual misconceptions.

The prosecuting attorney knew that defense counsel sought to confront Dement with the Cook and Lane interviews. Anticipating the attack, Dement made a sweeping generic statement that both interviews were lies predicated on self-preservation interests, i.e., he didn't want to be labeled a snitch in prison. The disingenuousness of this claim is apparent since he would ultimately testify against Mr. Black and the Appellants.

The court in one fell swoop refused to allow the jury to hear the audio tapes, departing 180 degrees from the companion trial of *State v. Justin Keith Black* where the jury not only heard the audio tapes, but were also given a transcript as an aid.

When Dement stated that he lied to both Cook and Lane, the trial court ruled that impeachment was accomplished and, therefore, their audio taped interviews and transcripts were inadmissible for impeachment purposes. The Judge's ruling was too simplistic, inconsistent with other minor state witnesses who were impeached with prior statements by the State on direct examination, and a mechanical misapplication of the impeachment rule. The gravamen of this denial of critical impeachment of the State's chief witness violated the Appellants Right to a Fair Trial.

This Honorable Court, in *State v. Foster*, 171 W.Va. 479, 300 S.E.2d 291 (1983) reversed a murder conviction where the trial court erred in refusing to admit a letter written by a chief prosecution witness that contradicted the witness's testimony and corroborated testimony of the defendant.

Foster asserted self defense. To accomplish this, he had to impeach the testimony of an accomplice who testified that the victim was unarmed when both he and defendant each fired one shot, killing the victim. The accomplice never testified on direct or redirect examination to whether the victim was armed. It was not until he was called as a rebuttal witness that he was asked to testify to this matter. The accomplice testified that the victim was unarmed when the defendant and he fired their guns killing him. Defense counsel then sought to impeach the accomplice with a prior inconsistent contradictory letter. The Court ruled that the letter impeached elements of the accomplice's direct

testimony, and it could not be admitted on rebuttal. This Honorable Court granted Mr.

Foster a new trial holding:

[a] criminal defendant has a broad right to impeach prosecution witnesses on cross-examination with prior inconsistent statements. *See State v. Fellers*, 165 W.Va. 253, 267 S.E. 2d 738 (1980); *State v. Wayne*, 162 W.Va. 41, 245 S.E.2d 838 (1978); *State v. Johnson*, 142 W.Va. 284, 95 S.E.2d 409 (1956). While the scope of cross-examination is generally within the discretion of the trial court and usually limited to matters brought out on direct, *United States v. Simpkins*, 505 F.2d 562 (4th Cir. 1974), *cert. denied*, 420 U.S. 946, 95 S. Ct. 1327, 43 L.Ed2d 424 (1975), the trial court may not control the scope of cross-examination so far as to prejudice the defendant. Furthermore, we are advised that “cross-examination to impeach is not, in general, limited to matters brought out on the direct examination.” *McCormick on Evidence; supra*, at 49. The right to an effective cross-examination is an integral part of the confrontation clause of the Sixth Amendment to the United States Constitution, *Snyder v. Coiner*, 510 F.2d 224 (4th Cir. 1975); and this right does not yield to a Rhadamanthine application of court rules governing order of proof. *State v. Foster*, 171 W.Va. 479, 482-84 (1983)

Moreover, this Honorable Court stated,

we might conceivably agree with the court below were the contradiction of one insignificant piece of rebuttal testimony to open the door to an avalanche of evidence impeaching earlier direct testimony. Even then, however, giving a cautionary instruction, or limiting the admitted evidence to that contradicting the rebuttal testimony, very likely would suffice to protect the State’s interests. In any event, the opposite is the case here: **the single piece of evidence most damaging to appellant’s claim of self-defense was the testimony of the sole eyewitness that the victim was unarmed when appellant shot her. To forbid the defense to enter into evidence a prior inconsistent statement of the prosecution’s star witness on this very matter was to deny the appellant a fair trial.** [EMPHASIS MINE] *Foster at 295.*

The rules of evidence in West Virginia, or any state, may not conflict with constitutional guarantees. A good example of the conflict that can arise between a state evidentiary rule and a federal constitutional right is found in *Chambers v. Mississippi*, 410 U.S. 284 (1973). In *Chambers*, another man, McDonald, had confessed to the murder for which Chambers was on trial. McDonald had later recanted that confession.

Chambers was not permitted to cross-examine McDonald as to his prior inconsistent statement after Chambers called him as a witness when the state failed to do so, because under Mississippi's common-law "voucher" rule, a party could not impeach his own witness. Secondly, Chambers could not introduce the testimony of the three persons to whom McDonald had confessed, because Mississippi's hearsay rule provided no exception for statement against penal interest, which is what these three statements were. The Supreme Court reversed Chambers' murder conviction, holding that both these state rules violated his Fifth Amendment guarantee of due process. *Id.*

This Honorable Court, in interpreting our *Rules of Evidence*, has never trumped constitutional concerns and, consequently, there are significant rule differences in criminal cases. Several rules of evidence explicitly apply differently in criminal cases, *to-wit*:

- *W. Va. R. Evid.* 803(8) states that certain public records and reports are not excluded by the hearsay rule. The rule specifically provides, however, that "in criminal cases, matters observed by police officers and other law enforcement personnel, "are not admissible under this hearsay exception."
- *W. Va. R. Evid.* 201 substitutes "may, but is not required to, "accept judicially noticed facts as conclusive in criminal cases as opposed to "shall" in civil cases.
- *W. Va. R. Evid.* 404(b) contains a notice provision that applies only in criminal cases.
- *W. Va. R. Evid.* 609(a)(1) provides extra protection for the criminal defendant.

The United States Supreme Court has ruled that prior inconsistent statements made by a witness who concedes making the statements are not barred by the confrontation clause, where the witness may be asked to defend or otherwise explain the inconsistency between his prior and his present version on the events in question, thus

opening himself to full cross-examination at the trial, as to both stories. *California v. Green*, 399, U.S. 149 (1970).

If the witness's testimony as a whole is useful on any fact of consequence, then the witness may be impeached on any other matter testified to by means of a prior inconsistent statement. *Evans v. Verdini*, 466 F.3d 141 (2006).

A witness may be examined for impeachment purposes about a prior statement inconsistent with his present testimony. This form of impeachment is universally recognized. The purpose is to show that the witness speaks out of both sides of his mouth. The prior statement is not used to prove any substantive fact at issue in the trial, but solely to demonstrate self-contradiction.

The Trial Court made the observation that since Mr. Dement admitted that he lied to the private investigators, impeachment was accomplished and there would be no need to allow the jury to hear the audiotapes where he exonerates both Phillip and Nathan Barnett in two separate recordings.

The Court's misapplication of the impeachment rule is readily apparent. The Court improperly focused on Rule 613(b), which deals exclusively with the procedural aspects of impeachment by extrinsic evidence, *i.e.*, another witness. Mr. Dement was confronted on cross-examination (intrinsically), and testified that both of the statements to investigators Cook and Lane were false, as he did not want to be labeled a snitch or roll-over defendant while in jail. Thus, the jury heard three inconsistent versions of his prior statements to the police over a span of nine hours, yet were not allowed to hear two audio-recorded statements to private investigators.

Testimony revealed that Dement has been treated for mental illness, including bipolar disorder and attention deficit disorder. Testimony also revealed Dement is a S.S.I. recipient. [Trial Transcript at 408] Dement testified on direct examination that his three statements to the police were only partially true and contained lies, but the Court allowed him to explain his inconsistencies. [Trial Transcript at 443] At one point on direct examination, he testified that he did not intentionally lie. Mr. Dement states, "I was just misinformed." [Trial Transcript at 457]

Defense counsel raised the issue with the trial court. More specifically, Defense counsel stated, "Judge, in response to your questions, there had been indications that we - - the defense wanted to continue to impeach Mr. Dement with the recorded statements taken by Mr. Greg Cook out at the jail. And in an off-the-record discussion, Your Honor had indicated that it would not be permitted due to the admissions already made by Mr. Dement, and I wanted to place that - - ." [Trial Transcript at 483]

The Court responded, "And I did rule that he lied in those things, and he definitely admitted he lied. The impeachment you had of playing the recording was improper to be played, because it was not an issue that he lied." [Trial Transcript at 484]

Rule 613(b) provides the requirements for extrinsic proof of a prior inconsistent statement. Apparently the Judge labored under the misconception that since Dement admitted generically to lying to two different private investigators in over forty minutes of audio-recordings and, therefore, was, as Rule 613(b) says *inter alia*, "afforded an opportunity to explain or deny the same," having denied the truth of these statements the impeachment was accomplished and the statements were disallowed.

Furthermore, in *State v. King*, 181 W.Va. 440, 396 S.E.2d 402 (1990), the witness admitted making the prior inconsistent statement. She added that her prior statement was given under coercion and intimidation. The Court, noting that the prior statement was videotaped, allowed it to be played to the jury.

Dement's trial testimony is replete with qualified answers, feigned inability to remember, and embellishments which were flat out lies. When questioned about his statement to the effect that the appellants told him that they heard the victim's neck snap, he replied, "I lied." [Trial Transcript at 430]

Furthermore, Dement's trial testimony is replete with evasive, inchoate and equivocal answers, *i.e.*, "I don't remember" [Trial Transcript at 373], "I couldn't tell you" [Trial Transcript at 375], "I have no idea." [Trial transcript at 379]

When asked if he had ever spoken to Ms. Crawford, he stated, "I don't recall. I don't think so." [Trial Transcript at 377] When questioned as to where he went after the murder, he gave three different responses ranging from going to a store to call a cab [Trial Transcript at 390], to stopping at the Black party, and finally to walking eighteen miles to Huntington in three hours – a truly amazing feat.

Critically, he testified that he was never approached by Nathan or Phillip Barnett to come up with a pat answer so that all would be consistent with one another.

Inconsistent does not mean diametrically opposed. A feigned lack of recollection or memory also invokes the precepts of attacking with prior inconsistent statements.

Further, he testified to significant details at trial that, because of their importance to the prosecutor's case, would not likely have been omitted, yet nonetheless, were not contained in his three police interviews. He also used phrases which were foreign to his

lexicon, *i.e.* “to minimize my role.” [Trial Transcript 393]. Thus, the audiotape statements at the Western Regional Jail to the investigators which were more conversational in nature, filled in these omissions. Given all of these inconsistencies, embellishments and lies, the jury needed to hear the audiotapes.

This case is a classic example of this Honorable Court’s concern of “the inherent questionable nature of prior statements, particularly those made to police officers under coercive circumstances.” *State. v. Spadafone*, 159 W.Va. 236 at 246, 220 S.E.2d 655 at 661 (1975). This is best exemplified by the following excerpt from the third statement to the police:

Q: (By the lead investigating State Police) You told us earlier that there was a girl there.

A: (Dement) Yes.

Q: Okay, and you know her name?

A: “ . . . I can’t remember the name you all told me.”

Q: Okay, do you remember her name or just because we told you that?

A: Because you told me that.

In this case, Mr. Dement’s three statements to the police were admitted as exhibits. The jury was never told what to do with the statements. Did the three police statements constitute evidence, or were they admitted solely for bolstering and/or impeachment? The Court never told the jury what to do with these statements. Thus, the jury heard Mr. Dement and received his statements to the police. The jury also received other prior inconsistent statements of some minor fact witnesses. Yet, the most critical witness could not be impeached and assailed by the critical investigator interviews. The appellants had a constitutional right under *Foster* taken away by the trial court. The recorded interviews needed to be played. The nuance of expression, the syntax of the

interview, the clearness of Dement's responses without pause and without hesitation, need to be played.

B. THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE EFFECT OF CODEFENDANT'S TESTIMONY RELATIVE TO HIS SECOND DEGREE MURDER CONVICTION PURSUANT TO A PLEA BARGAIN AGREEMENT

There is no question that Mr. Dement's testimony was the State's case. Indeed, the State had no other evidence which directly or indirectly bore on the appellants' guilt. There was no motive or corroborating forensic evidence. There was no one who positively placed the victim with the appellants on the evening when she was killed. The appellants were not geographically linked to the place where Ms. Crawford's body was found on Hickory Ridge. There was no conclusive evidence to establish the presence of the victim at Justin Black's party at his residence on August 5, 2002. The State could not establish the date of Justin Black's party. One witness out of twenty or thirty people said a woman was wearing leopard print slacks. A pair of leopard print slacks was found near the victim's body.

Dement was the only link between the murder of Deanna Crawford and the appellants. He took the stand and the State asked him about his conviction for Second Degree Murder, which he readily admitted. He was handcuffed when he testified [Trial Transcript at 380].

On January 29, 2007, over the course of nine hours, Dement gave three statements to the State Police. He testified that his first statement was to State Trooper Losh, whose wife is good friends with Juror Staten [See Assignment C]. He testified that his first statement was not true [Trial Transcript at 393], and his second statement was not true

[Trial Transcript at 394]. He further testified that most of his third statement was true [Trial Transcript at 398].

All of Dement's statements were marked as State's exhibits and he testified at length concerning the inconsistencies among them. The first statement commenced at 8:22 p.m., the second at 3:00 a.m. and the third ended at 5:22 a.m. He was asked to explain the inconsistencies. Finally, he was asked if he pled guilty to the Malicious Wounding of Brittany Wolf, his girlfriend, on an unrelated charge committed in 2007, and Second Degree Murder [Trial Transcript at 398]. He testified that he received a thirty year sentence [Trial Transcript at 399].

He then was confronted concerning his plea.

Q: And what did you agree to do in exchange for that [sic] agreement?

A: I gave my testimony.

Q. What kind of testimony?

A: The one I'm telling today.

Finally, Dement testified that he pled guilty to Second Degree Murder because he was guilty. The Trial Court did not give a cautionary instruction nor an instruction in the charge to the jury concerning the limited purpose of his convictions.

The appellants agree that the State is generally permitted to bring out the criminal record of its witnesses on direct examination. "The matter of informing court and jury about information of such clear relevance as the criminal record of a witness called by the prosecution is not something which is to be reserved for the pleasure and strategy of the defense." *United States v. Freeman*, 302 F.2d 347, 350 (2d Cir. 1962), *cert. denied*, 375 U.S. 958 (1963). The jury may also be apprised of the fact that a co-defendant has

pleaded guilty, either by instructions from the court, *United States v. Dardi*, 330 F.2d 316, 332-33 (2nd Cir.), *cert. denied*, 379 U.S. 845 (1964), or by the testimony of a Government witness, *United States v. Aronson*, 319 F.2d 48, 51 (2nd Cir.), *cert. denied*, 375 U.S. 920 (1963), *United States v. Jannsen*, 339 F.2d 916, 919 (7th Cir. 1964). “The claim that it was improper for the government to bring out on direct examination of its key witnesses that they had already pleaded guilty to the conspiracy is not convincing. The proponent of a witness need not allow such information damaging to his credibility to be first established on cross-examination” *United States v. Mahler*, 363 F.2d 673, 678 (2nd Cir. 1966).

In *State v. Caudill*, 170 W.Va. 74, 289 S.E.2d 745 (1982), this Honorable Court, in an opinion authored by Justice Thomas McHugh, ruled that in a case like this when testimony is adduced from a co-defendant like Dement, and if such testimony is admitted into evidence, **the trial judge is required to give an instruction limiting the testimony to the issue of the witness-accomplice's credibility.**

Justice McHugh’s opinion was a treatise on accomplice testimony where the accomplice testifies to his plea and conviction for which the defendant is on trial. In *State v. Price*, 114 W.Va. 736, 174 S.E. 518 (1934), the defendants were on trial for murder. One co-defendant entered a plea of guilty and was called as a witness for the State, and stated that he was guilty. This Court ruled this to be reversible error.

However, a guilty plea made by an accomplice cannot be used as an attempt to show guilt by association. Testimony having that intent and so limited as to achieve that intent is error. [Emphasis mine]

In *State v. Bennett*, 157 W.Va. 702, 203 S.E.2d 699 (1974), the defendant was on trial for attempted armed robbery. The Defendant's accomplice, testifying as a State's witness, volunteered from the stand that he had entered a plea of guilty to a charge arising out of the same transaction for which the defendant was on trial. This Court ruled that this was reversible error. The same ruling occurred in *State v. Ellis*, 161 W.Va. 40, 239 S.E.2d 670 (1977).

This Court then revisited these rulings in *State v. Adkins*, 162 W.Va. 815, 253 S.E.2d 146 (1979), but still held firm to the precept that an accomplice's confession and plea of guilty cannot be used under some theory of agency as an admission against interest binding upon all participants.

In its analysis, this Court stated as follows:

“From these cases a clear rule regarding the situation presented by this case may be formulated. In a criminal trial an accomplice may testify as a witness on behalf of the State to having entered a plea of guilty to the crime charged against a defendant where such testimony is not for the purpose of proving the guilt of the defendant and is relevant to the issue of the witness' credibility. The failure by a trial judge to give a jury instruction so limiting such testimony is, however, reversible error.”

An example of such an instruction is found in *United States v. Aronson*, 319 F.2d 48 (2nd Cir.1963):

I want to tell you again the fact that such pleas were entered does not mean that the remaining three defendants on trial ... are guilty with them.

The pleas are not evidence to the defendants remaining on trial that they are guilty, or the crime charged in the indictment was committed.

These pleas do not give rise to any inference as to the guilt of the remaining defendants here on trial. The guilt or innocence of the defendants still on trial must be determined solely by you, solely by the evidence introduced in the trial of this case.”

Such an instruction was not given in *State v. Caudill*, 170 W.Va. 74, 289 S.E.2d 748 (1982). This Honorable Court ruled that, **if such testimony is admitted into evidence, the trial judge is required to give an instruction limiting the testimony to the issue of the witness-accomplice’s credibility.**

There was no such instruction given in appellants’ trial when Mr. Dement testified or in the *Charge to the Jury*. Furthermore, during instruction arguments at the close of the evidence the Court struck from the general charge to the jury the following language requested by defense counsel:

“Defendants are defending upon the basis that they did not commit the crime, and that the testimony of Brian Dement is false and given to obtain a lesser punishment.”

“The witness Brian Dement claims to have been an accomplice of the Defendants in the murder of Deanna Crawford.”

In so ruling, the Court stated, “ - - - it is not proper for me to say that at this time. It would have been proper had there been testimony. And that must be stricken.” [Trial Transcript at 494]

The Prosecuting Attorney then stated, “. . . I’m not sure Brian Dement admitted to being an accomplice. He admitted to being guilty.” [Trial Transcript 495]

The jury was not given the required *Caudill* instruction nor were they given any guidance that Brian Dement is under the law, if he is believed, an accomplice.

The trial court prohibited this instruction laboring incorrectly under the precept that an “incredible accomplice testimony defense” must be affirmatively raised and established by defense witnesses. This ruling cuts against the universal precept of criminal jurisprudence that every defendant has a general defense to a crime simply by a plea of not guilty. In short, the defense was an assault on the State’s star witness. The trial court erred by holding that the requested instruction could only be given had the defense affirmatively introduced evidence, or as the Judge said, “It would have been proper had there been testimony.”

An attack on the credibility of the star witness, without appropriate instructions as to who that accomplice is and without a strong instruction as set forth in *Caudill*, constitutes reversible error.

C. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY NOT REMOVING JUROR STATEN ON APPELLANTS’MOTION TO STRIKE FOR CAUSE

Peremptory challenges are one of the most important rights secured to the accused. *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988).

W.Va. Code § 62-3-3, reads, in pertinent part:

In a case of felony, twenty jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel cannot be procured in this way, the court shall order others to be forthwith summoned and selected, until a panel of twenty jurors, free from exception, be completed ...

Pursuant to W.Va. Code § 62-3-3, a defendant is entitled to a panel of twenty jurors, free from exception, before he or she is called upon to exercise peremptory challenges. If proper objection is raised at the time of impaneling the jury, it is reversible error for the court to fail to discharge a juror who is obviously objectionable. *State v. West*, 157 W.Va. 209, 219 (1973). In *State v. Wilcox*, 169 W.Va. 142, 144 (1982), this

Court, citing W.Va. Code § 62-3-3, specifically noted that denying a valid challenge for cause of a jury panel member is reversible error even if the disqualified juror is later struck by a peremptory challenge. In *State v. Phillips*, 194 W.Va. 569 (1995), this Court reaffirmed the rule in *Wilcox* and found that the language in W.Va. Code § 62-3-3, grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. In an opinion written by Justice Cleckley, the Court held that “if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court’s error.” *Id.* at 588.

In the case *sub judice*, the total jury venire only consisted of twenty eight people, a critical error committed by the Court, especially in a murder case that was highly publicized for six years. The Court empanelled twenty three jurors. Juror Meadows was removed for cause as she was a home confinement officer and knew the mother of co-defendant, Justin Black. Juror Hoffman was removed for cause as she knew the victims stepmother and had spoken with her. Juror Hightower was equivocal and stated that he could not be certain he could set aside what he heard and read about the case. Juror Stotts was also removed for cause.

Another Juror, Juror Georgia Anne Staten, stated that she had followed the case in the news for over six years and had read about the case after she was notified of jury duty. Juror Staten stated that she remembered “that the first two were found guilty ...” In addition, Juror Staten stated she was friends with the wife of Trooper Losh, a West Virginia State Police officer involved in the underlying investigation. [Trial transcript at 40]. Juror Staten also stated that she “dreaded” the fact that she would possibly have to

be on the jury. [Trial transcript at 42]. Finally, when questioned whether the convictions of Mr. Dement, and Mr. Black would make it more likely to find these defendants guilty she replied "I don't feel it will." [Trial transcript at 41]. She was equivocal. Defense counsel made a motion to strike Juror Staten and argued that from the responses that Juror Staten had "at least subconsciously formed an opinion about the case." [Trial transcript at 44]. Defense counsel's motion to strike Juror Staten for cause was denied by the Court. Consequently, the appellants were required to waste one of their peremptory challenges to correct the trial court's error in not removing Juror Staten for cause.

In determining whether a defendant validly challenges a prospective juror for cause, any doubt regarding a juror's impartiality must be resolved in favor of the party challenging the prospective jury. *Davis v. Wang*, 184 W.Va. 222 (1990). Thus, under the precepts of *Davis*, *Phillips*, *Ross*, *Wilcox*, and *Davis* the court below committed reversible error. More specifically, since appellants validly challenged prospective Juror Staten for cause and there was a basis in fact to remove her and any doubt regarding her impartiality was not resolved in the appellants favor, reversible error resulted regardless of the fact that appellants subsequently used a peremptory challenge to remove Juror Staten from the jury.

D. THE COURT BELOW COMMITTED REVERSIBLE ERROR BY LIMITING EACH APPELLANT TO THREE PEREMPTORY CHALLENGES

Some amount of interpretation is always necessary when a case involves a statute or rule.

In the case *sub judice*, there are two statutes and one rule that are in direct conflict with each other. W.Va. Code § 62-3-3 is an old statute dating back to 1887 and states in pertinent part that in a felony case, a defendant may strike six jurors and the prosecuting

attorney may strike two jurors from a panel of twenty. W.Va. Code § 62-3-8, which dates to 1887, and has remained unchanged, states in pertinent part that persons indicted and tried jointly for a felony shall be allowed to strike from the panel of jurors not more than six thereof, and only such as they all agree upon. W.Va. R. Crim. P. 24(b)(2)(B) states in pertinent part that if there is more than one defendant the court may allow the parties additional challenges and permit them to be exercised separately or jointly.

Although the two statutes and rule when read are in conflict, they do have a commonality in that they speak to the issue of peremptory challenges afforded to a criminal defendant.

While this Honorable Court has addressed the issue of juror strikes in a multiple defendant civil arena, there are no cases that address this issue in a multiple defendant capital criminal case. *Price v. Charleston Area Medical Center*, 217 W.Va. 663, 619 S.E.2d 176 (2005). However, W.Va. Code § 62-3-8 deals specifically with peremptory strikes among codefendants in a felony case. While some authorities hold that each criminal codefendant is entitled to the number of peremptory challenges to which a single defendant would be entitled, others hold that such number must be shared and must be jointly exercised by, or apportioned among the codefendant, but that the court may grant additional challenges to the codefendants.

In the underlying case, the State exercised two peremptory challenges and each Defendant independently exercised only three peremptory challenges, thus reducing the panel to fifteen. The State and defense each then struck one alternate, allowing for one alternate. The alternate was not needed at the end of the trial. The procedure followed below should cause this Court great concern for several reasons. First, in *State v. Phillips*, Justice Cleckley stressed that if the court fails to remove just one juror for cause

and the defendant subsequently has to waste a peremptory challenge, reversible error results. *Phillips* at 588. In another case, the Court stated, “the right to challenge a given number of jurors without showing cause is one of the most important rights to a litigant...the right to reject jurors by peremptory challenge is material in its tendency to give the parties assurance of fairness of a trial in a valuable and effective way.” *Olympic Realty Co. v. Kamer*, 141 S.W.2d 293, 297 (1940). Clearly, peremptory challenges are one of the most important rights secured to the accused and have been given enough serious consideration by this Court to cause reversible error when they are unnecessarily wasted.

Second, W.Va. Code § 62-3-8, in pertinent part, plainly states joint codefendants shall strike six jurors that **they all agree upon**. As stated above, the trial court split the six peremptory strikes amongst the codefendants. Three strikes were independently used by one Defendant and other three strikes were independently used by the other Defendant. By only granting each Defendant three peremptory strikes the Court violated W.Va. Code § 62-3-8 as the Defendants did not “all agree upon” which jurors should be removed. By splitting six strikes, it is clear that the joint codefendants did not all agree upon the six peremptory strikes. Splitting peremptory strikes amongst codefendants is bad policy and fundamentally unfair to an accused. Under the lower courts position, had there been twelve codefendants each would only be afforded half of a peremptory strike.

There is a simple antidote to remedy the error committed below. Pursuant to W.Va. R. Crim. P. 24(b)(2)(B), the Court below should have empanelled twenty six qualified and unbiased jurors and granted each Defendant six peremptory challenges to be exercised independently. Had the Court below followed this simple course of action,

the codefendants would have been placed in the same position under W.Va. Code § 62-3-3 had they exercised their right to be tried separately.⁶ By limiting each Defendant to three peremptory strikes, the Court below trampled upon one of the most fundamental rights secured to an accused and committed reversible error.

E. THE LOWER COURT VIOLATED THE ONE TERM RULE, THUS DENYING THE APPELLANTS THEIR CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

The Appellants were indicted for First Degree Murder on May 11, 2007 and a trial date was set for September 4, 2007. Both appellants timely filed a request for a “speedy trial” with the court every term of court the case was active. On August 29, 2007, the prosecuting attorney moved the court for a continuance as he wished to try codefendant Brian Dement first and due to the fact that the State had no case against the appellants unless he extracted a plea from Mr. Dement. [August 29, 2007 Motion Hearing Transcript at 14-17] The prosecutor did not have good reason to request the continuance and the Court was not persuaded, by its own admission, yet still continued the matter. On October 23, 2007, codefendant Brian Dement entered into a plea agreement with the State in exchange for his testimony against the appellants. Finally, on August 25, 2008, the appellants’ case was heard by a jury.

The West Virginia Rules of Criminal Procedure and the West Virginia Code specifically protect a defendant’s rights regarding a “speedy trial.” This Court recognized the right to a speedy trial is triggered by the return of an indictment. *Good v. Handlan*, 176 W.Va. 145, 342 S.E.2d 111 (1986). W.Va. Code § 62-3-1 states that “when an indictment is found in any county, against a person for a felony..., the accused,

⁶ In a felony case, a defendant tried alone may strike six jurors.

if in custody, or he appear in discharge of his recognizance, or voluntarily, shall, unless good cause be shown for a continuance, be tried at the same term.

As stated before, appellants were indicted on May 11, 2007 and timely filed motions for a “speedy trial” during every term of court their case was pending. Regardless, appellants were not tried until August 25, 2008. As found in the statute, the only exception to the one term rule is if the court is of the opinion that for good cause shown upon the record upon its own motion or upon motion of the one or more parties, continue a criminal trial beyond the term of indictment. *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 294 S.E.2d 51(1981).

In case *sub judice*, the court in addressing the issue of good cause to the prosecutor’s motion to continue on August 29, 2007 stated, “I am not finding good cause for this continuance...” [August 29, 2007 Motion Hearing Transcript at 23] Despite this statement by the court, the case was continued and not tried by a jury during that term of court or the next term of court. The Court was well aware of the fact that the entire purpose of the delay by the State was merely to give it a decided tactical advantage in the case. [August 29, 2007 Motion Hearing at 14-17] More specifically, the tactical advantage was to enter into a plea agreement with Brian Dement in exchange for testimony in the case against the appellants. This Court held in *Pitsenbarger v. Nuzum*, that “although difficulties beyond the control of the court of litigants, along with the reasons listed in W.Va. Code § 62-3-21 can constitute good cause, the circuit court should not grant continuances for the prosecution’s convenience. In addition, continuances granted to accommodate tactical considerations are looked on with disfavor

especially ... when the delay is designed to pressure a defendant. *Pitsenbarger v. Nuzum*, 172 W.Va. 27, 29, 303 S.E.2d 255, 257 (1983).

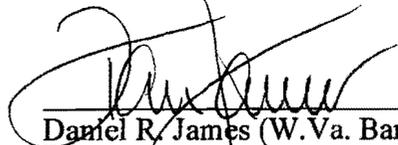
Clearly, by the Court's own admission, a violation of the one term rule occurred when the court continued the case. The trial court had a statutory duty to assure the appellants' request for a speedy trial was within the same term when the indictment was returned as good cause did not exist for a continuance. Having denied the appellants their right to a speedy trial, the court was required to fashion a flexible remedy for the deliberate and oppressive delay of the State. *Good v. Handlan*, 176 W.Va. 145, 342 S.E.2d 111 (1986) The trial court, having failed to find good cause to continue the case and having failed to take any remedial measures, denied appellants their statutory right to a "speedy trial" and prejudiced their ability to present a defense in a timely fashion, thus constituting reversible error.

PRAYER FOR RELIEF

WHEREFORE, the Appellants pray for the following relief from this Honorable Court:

1. A hearing.
2. That the Court reverse the appellants' conviction for the charges in this brief;
3. That the Court expunge the appellants' criminal record to show no conviction and no arrest for the charges in this Brief;
4. That the Court release the appellants from their confinement or, in the alternative, set a bond;
5. That the Court grant appellants a new trial;
6. That the Court grant any further relief that it deems necessary.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA

Appellee,

v.

Case No. 34806

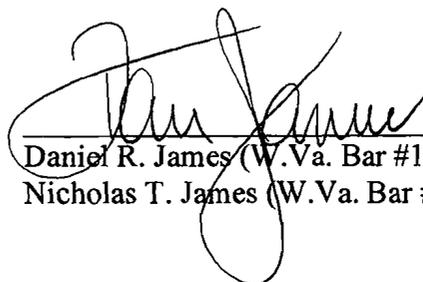
PHILLIP BARNETT and
NATHANIEL BARNETT

Appellants

CERTIFICATE OF SERVICE

I Daniel R. James, counsel for the Appellants, Phillip and Nathaniel Barnett, HEREBY CERTIFY that on the 9th day of June, 2009, I served a copy of the foregoing APPELLANTS' BRIEF on Dawn E. Warfield, Esq., by mailing a true and accurate copy U.S. Mail, postage prepaid to the following:

Dawn E. Warfield, Esq.
Attorney General's Office
State Capitol, Room E-26
Charleston, WV 25305


Daniel R. James (W.Va. Bar #1871)
Nicholas T. James (W.Va. Bar #10545)