
NO. 34806

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

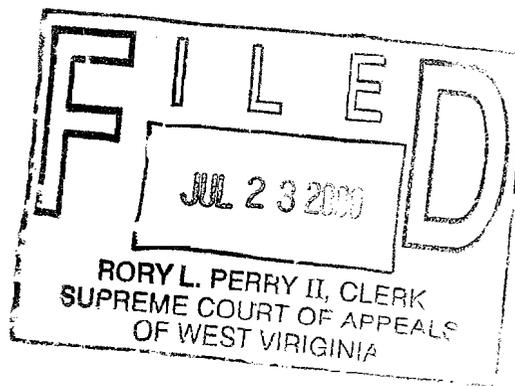
STATE OF WEST VIRGINIA,

Appellee,

v.

PHILLIP BARNETT and
NATHANIEL BARNETT,

Appellants.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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TABLE OF CONTENTS

	Page
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1
II. STATEMENT OF FACTS	1
III. RESPONSE TO ASSIGNMENTS OF ERROR	4
IV. ARGUMENT	6
A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND COMMIT REVERSIBLE ERROR IN DENYING APPELLANTS BEING ABLE TO PLAY THE TAPED STATEMENTS OF BRIAN DeMENT TO INVESTIGATORS TO THE JURY. MR. DeMENT HAD REPEATEDLY ADMITTED HE HAD LIED IN THESE STATEMENTS WHEN IMPEACHED BY APPELLANTS' RESPECTIVE COUNSEL, AND PLAYING THESE TAPES FOR THE JURY WOULD HAVE BEEN CUMULATIVE	6
1. The Standard of Review	6
2. Due to Brian DeMent's Admission That He Lied in Giving the Statements in Question As Well As His Being Extensively Cross-Examined and Having His Credibility Impeached on the Same, the Circuit Court Did Not Abuse Its Discretion in Denying the Motion to Have These Audiotapes Played Before the Jury	7
B. ALTHOUGH NO INSTRUCTION WAS GIVEN BY THE CIRCUIT COURT REGARDING BRIAN DeMENT'S PLEA AGREEMENT THAT IT WAS NOT FOR THE PURPOSE OF PROVING APPELLANTS' GUILT, NO DISCUSSION OR REQUEST FOR THIS OCCURRED DURING THE PERIOD OF INSTRUCTIONS BEING WORKED OUT WITH THE PARTIES, AND APPELLANTS WAIVED THIS RIGHT	10
1. The Standard of Review	10
2. Although There Was No Instruction Given Stating That Brian DeMent's Plea Agreement Testimony Should Not Be Used to Prove Appellants' Guilt, the Latter Waived Any Right to Have This Determined on Appeal	11

C.	WHEN THE ENTIRE VOIR DIRE QUESTIONING OF JUROR STATEN IS EXAMINED, SHE SHOWED NO SIGN OF BIAS AND COULD MAKE DECISIONS ACCORDINGLY. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO STRIKE HER FOR CAUSE	15
1.	The Standard of Review	15
2.	Despite Appellants' Assertions, Juror Staten Showed No Signs of Bias and Unequivocally Testified That She Could Make Decisions in the Case Impartially	16
D.	THE CIRCUIT COURT PROPERLY APPLIED WEST VIRGINIA CODE § 62-3-8 IN ASSIGNING PEREMPTORY CHALLENGES WHERE APPELLANTS WERE JOINTLY TRIED FOR THE MURDER OF THE VICTIM	21
1.	The Standard of Review	22
2.	The Circuit Court Properly Followed West Virginia Code § 62-3-8 Regarding Peremptory Strikes Where There Is a Joint Trial for Co-Defendants and No Reversible Error Occurred	22
E.	THERE WAS NO SPEEDY TRIAL VIOLATION REGARDING APPELLANTS' CASE. THE CIRCUIT COURT FOUND GOOD CAUSE FOR A CONTINUANCE MOTION TO BE GRANTED, THE ONE-TERM RULE WAS NOT VIOLATED AND NO PREJUDICE OCCURRED	25
1.	The Standard of Review	25
2.	The Decision of the Circuit Court to Continue Appellants' Trial Was No Abuse of Discretion, and Was Within Its Sound Discretion. There Was No Deliberate and Oppressive Attempt to Delay the Trial by the Prosecutor nor Any Substantial Prejudice Against Appellants That Would Warrant a Dismissal of the Indictment	26
V.	CONCLUSION	29

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Addams v. Texas</i> , 180 S.W.3d 386 (Tex. App. 2005)	24
<i>Pitsenbarger v. Nuzun</i> , 172 W. Va. 27, 303 S.E.2d 255 (1993)	25, 27, 28
<i>State v. Caudill</i> , 170 W. Va. 74, 289 S.E.2d 749 (1982)	11, 13, 14, 15
<i>State v. Ferrell</i> , 184 W. Va. 123, 399 S.E.2d 834 (1990)	14
<i>State v. Foster</i> , 171 W. Va. 479, 300 S.E.2d 291 (1983)	9
<i>State v. Griffin</i> , 211 W. Va. 508, 566 S.E.2d 645 (2002)	16, 17
<i>State v. Guthrie</i> , 205 W. Va. 326, 518 S.E.2d 83 (1999)	7, 8
<i>State v. Johnston</i> , 211 W. Va. 293, 565 S.E.2d 415 (2002)	15
<i>State v. King</i> , 183 W. Va. 440, 396 S.E.2d 402 (1990)	8, 9
<i>State v. Lambert</i> , 175 W. Va. 141, 331 S.E.2d 873 (1985)	28
<i>State v. Louk</i> , 171 W. Va. 639, 301 S.E.2d 596 (1983)	7
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995)	<i>passim</i>
<i>State v. Nett</i> , 207 W. Va. 410, 533 S.E.2d 43 (2000)	20, 21
<i>State v. Peyatt</i> , 173 W. Va. 317, 315 S.E.2d 574 (1983)	7
<i>State v. Wade</i> , 200 W. Va. 637, 499 S.E.2d 724 (1997)	15
<i>State v. Wilkinson</i> , 181 W. Va. 126, 381 S.E.2d 241 (1989)	25
STATUTES:	
W. Va. Code § 61-2-1	1
W. Va. Code § 62-3-1	5, 25, 26

W. Va. Code § 62-3-3 22

W. Va. Code § 62-3-8 *passim*

W. Va. Code § 62-3-21 5, 25, 28, 29

OTHER:

W. Va. R. Crim. P. 24(b)(2)(B) 21, 23

W. Va. R. Evid. 613(b) 9-10

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

This is an appeal by Phillip and Nathaniel Barnett (hereinafter “Appellants”) from the October 6, 2008, orders of the Circuit Court of Cabell County (Cummings, J.), which sentenced Phillip to a term of 40 years in the State penitentiary, and sentenced Nathaniel to a term of 36 years in the State penitentiary upon their respective convictions by a jury of one count of second degree murder in violation of West Virginia Code § 61-2-1. On appeal, Appellants claim that the circuit court committed various errors denying them a fair trial.

II.

STATEMENT OF FACTS

On August 8, 2002, West Virginia State Police in Huntington responded to a report and found a decomposed female body clothed in nothing but a rolled-up knit tube top in the Hickory Ridge

Road area. (Tr., 94, Aug. 25, 2008.) Sergeant Tony Cummings was one of the members of the State Police that went to the scene. (*Id.*) He testified that the deceased female was lying near a lean-to type shed. (*Id.* at 96.) The sergeant stated that there was no way to visually identify the body, but on August 10, 2002, the State Police were able to identify her through fingerprints as being Ms. Deanna Crawford. (*Id.* at 94-95, 97.)

The case went cold for a few years. However, in January of 2007 Sergeant Cummings and the West Virginia State Police in Cabell County received information from the county sheriff's office that a man by the name of Brian DeMent was involved in the murder, along with Appellants and Justin Black. (*Id.* at 99-100.) Through an intensive investigation of Mr. DeMent, Appellants became suspects in the case. (*Id.* at 100.)

Brian DeMent testified that on the night in question in August of 2002, he, Appellants, Ms. Crawford, and Justin Black left a party at Mr. Black's residence in a car and drove about two miles to the crime scene. (Tr., 373, 376-79, Aug. 27, 2008.) He stated that Justin Black drove, Deanna was in the front passenger side, and everyone else was in the backseat of the vehicle with Phillip sitting directly behind the victim. (*Id.* at 378.) Mr. DeMent said that during the car ride, the five of them were laughing, having a conversation and smoking a blunt. (*Id.* at 379.) He identified the property where they stopped as a backside of Hickory Ridge where an abandoned farm was situated. (*Id.* at 381.) When Justin Black stopped the car, almost simultaneously, Phillip hit Deanna in the face. (*Id.* at 379.) At this point, Mr. DeMent testified that all four men started screaming "Let's get this b----. Let's get this b----." (*Id.* at 381.) Brian DeMent testified that he dragged the victim out of the car by her throat and hit her once. (*Id.* at 381-82.) Brian DeMent then dragged her into the woods. (*Id.* at 382.) Once she was dragged out of the car, all four men started hitting her, including

Appellants. Most of these blows were to the body, and then to the face when Brian DeMent put her down. (*Id.* at 383.) Eventually, Mr. DeMent stated that he quit engaging in the beating and went into the weeds. (*Id.* at 384.) When Brian DeMent left the area and hid, he said he heard Deanna Crawford begging for her life; screaming, “Please help me. Please help me. Please don’t kill me.” (*Id.*) Mr. DeMent stated that this went on for approximately five to ten minutes. (*Id.*) He testified that eventually everything went quiet, and the three men got back in the car and headed toward Mr. Black’s residence. (*Id.* at 441.) Mr. DeMent testified that he stayed in this area about five to ten minutes. While there, he continued to hear the victim screaming, “Don’t kill me, Don’t kill me. Please stop.” (*Id.* at 386.) He then heard little moans and groans from her. (*Id.*) Mr. DeMent testified that he then went back to the area where the beating occurred to locate Ms. Crawford. (*Id.* at 397.) He said that, after searching for a few minutes, he found her body further into the woods, where he checked for a pulse and discovered that she was dead. (*Id.* at 387-89.)

During the trial, Tara Gillespie testified to a statement she gave to Corporal Mike Parde that at one of the parties around this time period, Justin Black and three other males took her vehicle. (Tr., 195-200, Aug. 26, 2008.) Additionally, Kevin Nowlin testified that he attended a party around this time at Justin Black’s residence where he saw Justin give Appellants, another male, and a female a ride up the road. (*Id.* at 242.) He then testified that he remembered seeing Justin Black and Phillip Barnett come back from that trip, but did not see Brian DeMent at the end of the party. (*Id.*)

Dr. Hamada Mamoud, West Virginia Deputy Chief Medical Examiner, testified regarding the medical examination of the victim. From the report, he testified that there was soft tissue injuries or blunt force trauma to the victim’s lower extremities. (Tr., 144-45, Aug. 25, 2008.) He stated that the report indicated she suffered from contusions and abrasions on her shins and feet. (*Id.* at 141.)

According to Dr. Mamoud, the report documented that Ms. Crawford had a fracture of the hyoid bone and a laceration of the right thyroid cartilage. (*Id.* at 143.) Based on this, the chief medical examiner concluded that Deanna Crawford died as a result of strangulation applied to the neck area by the hands. (*Id.* at 145.) He testified that when she was discovered, Ms. Crawford indicated severe decomposition to the head, neck and torso areas. (*Id.* at 139.) Based upon the report, Dr. Mamoud estimated that Deanna Crawford had been dead for three to five days upon discovery of her body. (*Id.* at 148.)

On August 27, 2008, the jury found Appellants guilty of second degree murder. (Tr., 565-66, Aug. 27, 2008.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

Appellants' assignments of error are quoted below, followed by the State's responses:

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

State's Response:

The circuit court did not abuse its discretion in denying Appellants' motion to have the audiotaped statements of Brian DeMent played to the jury. Mr. DeMent was extensively cross-examined and had his credibility impeached on the stand; so the witness was confronted with prior inconsistent statements, and there was no reversible error.

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

State's Response:

Appellants waived any right to have this instruction given. At most, this was harmless error.

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

State's Response:

Juror Staten established that she could make decisions in the case impartially and without bias, and the circuit court did not commit reversible error by denying Appellants' motion to strike for cause.

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

State's Response:

The circuit court correctly applied West Virginia Code § 62-3-8 with respect to peremptory strikes in a joint trial of co-defendants, and there is no statutory basis for Appellants' scheme to allow them six peremptory strikes each.

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

State's Response:

When West Virginia Code §§ 62-3-1 and -3-21 are examined, Appellants' right to a speedy trial was not violated by the granting of the State's motion to continue.

IV.

ARGUMENT

- A. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND COMMIT REVERSIBLE ERROR IN DENYING APPELLANTS BEING ABLE TO PLAY THE TAPED STATEMENTS OF BRIAN DeMENT TO INVESTIGATORS TO THE JURY. MR. DeMENT HAD REPEATEDLY ADMITTED HE HAD LIED IN THESE STATEMENTS WHEN IMPEACHED BY APPELLANTS' RESPECTIVE COUNSEL, AND PLAYING THESE TAPES FOR THE JURY WOULD HAVE BEEN CUMULATIVE.**

There was no reversible error committed by the circuit court in the denial of Appellants' motion to have the jury hear the taped interviews Brian DeMent gave to investigators. Brian DeMent was extensively cross-examined and had his testimony impeached regarding these prior inconsistent statements. Mr. DeMent repeatedly testified that his statements to the investigators were lies. Brian DeMent's testimony was thoroughly impeached, and the jury found his testimony at trial to be truthful. Appellants cite various case law that really is not on-point here. Additionally, Appellants mischaracterize West Virginia Rule of Evidence 613(b) in attempting to further their argument that the circuit court committed error. In light of Mr. DeMent's admitting that he lied in previous statements, playing these audio recordings of the statements to the jury would have been nothing but cumulative evidence.

1. **The Standard of Review.**

“Concerning our standard of review of the circuit court’s exclusion of the evidence at issue, we note that “[r]ulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.””

State v. Guthrie, 205 W. Va. 326, 332, 518 S.E.2d 83, 89 (1999), quoting *State v. Louk*, 171 W. Va. 639, 643, 301 S.E.2d 596, 599 (1983), citing Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

2. **Due to Brian DeMent's Admission That He Lied in Giving the Statements in Question As Well As His Being Extensively Cross-Examined and Having His Credibility Impeached on the Same, the Circuit Court Did Not Abuse Its Discretion in Denying the Motion to Have These Audiotapes Played Before the Jury.**

Appellants wrongly contend that the circuit court committed reversible error by denying the motion to allow the jury to hear taped statements from Brian DeMent that he gave to investigators. Mr. DeMent's credibility was extensively impeached during cross-examination by both Appellants' respective counsel. On numerous occasions throughout cross-examination details of these statements were brought out to impeach his trial testimony that he, Justin Black, and Appellants were involved in the murder of Deanna Crawford. (Tr., 416, 421, 433, 456-57 and 469, Aug. 27, 2008.) During cross-examination, Mr. DeMent's trial testimony was also thoroughly impeached by Appellants' respective counsel's questioning him regarding inconsistent statements that he initially gave to the West Virginia State Police. (*Id.* at 406, 420, 421-22, 424, 430-31, 440-42, 443 and 476.) Mr. DeMent admitted during cross-examination that he misinformed the State Police in his statements. (*Id.* at 476.) Mr. DeMent testified that he told the investigators lies. (*Id.* at 432-33.) He also testified that although he told partial lies and truths in the past, he was testifying truthfully at trial. (*Id.* at 449.)

In ruling against Appellants, the trial judge stated the following:

And I did rule that once Mr. DeMent admitted that he lied in those things [taped statements to investigators], and he definitely admitted that he lied.

The Impeachment evidence you had of playing was improper to be played, because it was not an issue that he lied. So your matter is on the record.

(*Id.* at 484.)

It was not fully articulated by the circuit court, but in light of the ample opportunity to impeach and the admission of prior dishonesty the ruling to deny the taped statements being played for the jury could have been on the basis of West Virginia Rule of Evidence 403. According to Rule 403,

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of *undue delay, waste of time, or needless presentation of cumulative evidence.*

(Emphasis added.)

Due to the fact that Mr. DeMent admitted being untruthful in the past when this was thoroughly brought out during cross-examination and that his credibility was definitely impeached by Appellants' respective counsel on this issue, playing these audio statements for the jury may indeed amount to undue delay, waste of time or needless presentation of cumulative evidence. By applying the standard established in *Guthrie, supra*, there is no question that this ruling was within the circuit court's sound discretion and was not reversible error.

Appellants cite *State v. King*, 183 W. Va. 440, 396 S.E.2d 402 (1990), in arguing that the circuit court erred. Yet in that case, this Court upheld a conviction where the defendant challenged the admittance of video testimony to police where a minor sexual abuse victim testified in court that she lied to the police and was coerced. *Id.*, 183 W. Va. at 447-48, 396 S.E.2d at 406-07. This case involved the Court ruling that an admission was lawful when the same was challenged by a defendant.

The holding in *King* with respect to the admission of taped statements is as follows:

A videotaped interview containing a prior inconsistent statement of a witness who claims to have been under duress when making such statement or coerced into making such statement is admissible into evidence if: (1) the contents thereon will assist the jury in deciding the witness' credibility with respect to whether the witness was under duress when making such statement or coerced into making such statement; (2) the trial court instructs the jury that the videotaped interview is to be considered only for purposes of deciding the witness' credibility on the issue of duress or coercion and not as substantive evidence; and (3) the probative value of the videotaped interview is not outweighed by the danger of unfair prejudice.

Id., Syl. Pt. 2. Apart from this case dealing with videotaped statements, this holding is clearly inapplicable to the case at bar.

Appellants also cite *State v. Foster*, 171 W. Va. 479, 300 S.E.2d 291 (1983), in arguing that the circuit court committed reversible error in denying the motion to allow the jury to hear the audio-recorded statements of Brian DeMent. However, that case overturned a conviction where the admission of an exculpatory letter from a co-defendant was denied when he was a rebuttal witness where the circuit court ruled that it was outside of the scope since the letter impeached the direct testimony. This Court held that by denying this impeachment evidence altogether rather than at least giving a cautionary instruction or limiting it to this impeachment evidence, it denied the defendant a fair trial. *Id.*, 171 W. Va. at 483, 300 S.E.2d at 295. In the present case, impeachment evidence was allowed albeit not to the extent Appellants desired via audiotape statements played to the jury. In *Foster, supra*, it was a complete denial of impeachment evidence. Therefore, this case is inapplicable as well.

Appellants further assert their argument by alleging that the circuit court violated West Virginia Rule of Evidence 613(b). According to that rule,

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Yet this rule places conditions and requirements on when extrinsic evidence of prior inconsistent statements are to be admitted. It gives no mandate for such admission.

In light of all of this, Appellants' argument fails on this ground.

B. ALTHOUGH NO INSTRUCTION WAS GIVEN BY THE CIRCUIT COURT REGARDING BRIAN DeMENT'S PLEA AGREEMENT THAT IT WAS NOT FOR THE PURPOSE OF PROVING APPELLANTS' GUILT, NO DISCUSSION OR REQUEST FOR THIS OCCURRED DURING THE PERIOD OF INSTRUCTIONS BEING WORKED OUT WITH THE PARTIES, AND APPELLANTS WAIVED THIS RIGHT.

The fact is that Appellants never requested the instruction throughout the entire case that they now claim its absence to be reversible error. Despite the fact that this Court has held that it is reversible error where no instruction is given regarding a co-defendant's testimony of a plea agreement not to be used to prove guilt of a defendant in a case, there was absolutely no discussion or request for such an instruction and no objection raised due to its absence. In light of this, Appellants waived any right to have their convictions reversed on this ground. This did not arise to the standard of being plain error. If nothing else, this was harmless error.

1. The Standard of Review.

To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings

Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. *A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or*

abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right -- the failure to make timely assertion of the right -- does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious."

Assuming that an error is "plain," the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. Pts. 7, 8, and 9, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (emphasis added).

2. **Although There Was No Instruction Given Stating That Brian DeMent's Plea Agreement Testimony Should Not Be Used to Prove Appellants' Guilt, the Latter Waived Any Right to Have This Determined on Appeal.**

Appellants waived any right for this Court to determine this issue. This is because during the discussion of the instructions between the trial judge and all of the parties, there was absolutely no request or mention of one stating that the jury could not use testimony regarding Brian DeMent's taking a plea to prove that Appellants were guilty of the crime. Additionally, there was no objection to the fact that one was not given when the instructions were read to the jury. This was a knowing and intentional relinquishment or abandonment of a known right in accordance with *Miller, supra*.

Appellants correctly cite *State v. Caudill*, 170 W. Va. 74, 289 S.E.2d 749 (1982), regarding this matter. According to *Caudill*,

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-accomplice's credibility. The failure by a trial judge to give a jury instruction so limiting such testimony is, however, reversible error.

Id., Syl. Pt. 3.

Yet there was absolutely no mention of this ruling or the instruction by Appellants' respective defense counsel. Appellants cite an exchange during the time instructions to the jury were being discussed, yet there was no request for this instruction or any mention of it whatsoever cited by Appellants. When the instructions to the jury were being determined, the following exchange cited by Appellants took place:

Prosecutor: I don't think the first full paragraph needs to be in there. And I'm not sure that— if that's what they're arguing. I think it's fine for them to say it. I don't think it's appropriate for you to say that in the charge, Judge.

Court: To what? To where it says an accomplice—

Prosecutor: No sir, above that. The defendants are defending on the basis that.

Court: Matter of fact, 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.

Prosecutor: I think the first three lines. And then, Judge, the first one, two lines, four lines. And then judge, the first one, two, three, four lines— five lines—I'm not sure that that's—

Mr. Conway: Which page?

Prosecutor: The same one. Just going on down defining what an accomplice is. I don't know why we couldn't just start with, "The testimony of an accomplice is admissible in evidence".

Court: I think that— I hate to admit it. You may be right on that. Any— well—

Prosecutor: Because I am not sure if Brian DeMent admitted to being an accomplice. He admitted to being guilty.

Court: The first three lines— An accomplice is a person who knowingly and with criminal intent, participates directly with another— or I would change it to with other persons in the commission of a crime, I think

should stay in definitely. Next line, “The witness Brian DeMent claimed,” is a comment on the evidence.

Mr. Laishey: I’m sorry. I don’t understand that.

Prosecutor: So take out the fourth and fifth line there?

Court: Yeah Jack, look at this here. And I’m going to strike out— this will read with other persons in the commission of the crime.

Mr. Laishey: That’s fine, your honor. We know that— Mr. Chiles is correct what Brian DeMent—

Court: You can comment on it. I can’t.

(Tr., 494-95, Aug. 27, 2008.) This exchange had nothing whatsoever to do with the instruction required in *Caudill, supra*, but rather a discussion of the language and terminology of an accomplice.

If this is a discussion regarding an instruction that testimony regarding a plea agreement is not to be used to prove another defendant(s) guilty, which the State does not concede is the case, one of the defense attorneys actually gave an affirmative agreement to this language. If this is what Appellants are asserting is a discussion regarding the required instruction of *Caudill*, Defense Counsel Laishey gave his affirmative agreement, and Defense Counsel Conway made no comment. (Tr., 495-96, Aug. 27, 2008.) However, this had nothing to do with the instruction required by *Caudill*. Regardless, Appellants waived this right by their respective counsel’s silence on the issue throughout discussion of the instructions and subsequent reading to the jury of the same. It would be unreasonable to require a circuit judge, *sua sponte*, to produce the instructions to the jury, a task given to the attorneys in a trial.

Appellants reference an instruction request that was given in the above-outlined exchange that Mr. DeMent’s testimony is “false and given to obtain a lesser punishment.” (*See* Appellants’

Brief at 26.) However, such request that Appellants allege the trial judge denied cannot be determined from the exchange. Additionally, there is nothing in the record that shows that such an instruction was requested. However, even if this was requested and denied, it is vastly different than an instruction stating that the jury cannot use a plea agreement to prove the guilt of a defendant or defendants who are currently on trial. What Appellants allege was denied in their Brief was not the instruction required in *Caudill, supra*.

Additionally, this does not fall under the plain error doctrine. There was extensive, detailed testimony given by co-defendant Brian DeMent with respect to Appellants' culpability in the murder. When one takes the relatively small segment of his testimony where his plea agreement is mentioned, the absence of the instruction stating that the agreement cannot be used to prove Appellants' guilt does not rise to the level of plain error.

If nothing else, this omission should be deemed harmless error. According to this Court,

“Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.” Syllabus point 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979).

Syl. Pt., *State v. Ferrell*, 184 W. Va. 123, 399 S.E.2d 834 (1990).

Again, in examining the detailed, extensive testimony of Brain DeMent, it was indeed sufficient evidence to convict Appellants of this offense when the testimony regarding the plea agreement absent the instruction to the jury is taken out. There is no way that this relatively small portion of Mr. DeMent's testimony with respect to his plea agreement had any prejudicial effect on

the jury. This is especially true when comparing it to the vast testimony he gave concerning he and Appellants' involvement in Deanna Crawford's murder. If anything, the testimony he provided regarding his agreement with the State where a *Caudill* instruction was not given should have gone against Mr. DeMent's credibility in light of a deal that was struck for a prosecutorial recommendation of a lighter sentence.

For all of the reasons outlined above, Appellants' argument fails on this ground.

C. WHEN THE ENTIRE VOIR DIRE QUESTIONING OF JUROR STATEN IS EXAMINED, SHE SHOWED NO SIGN OF BIAS AND COULD MAKE DECISIONS ACCORDINGLY. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO STRIKE HER FOR CAUSE.

While it is true that Juror Staten had read about the case in newspaper articles in the past, had worked with West Virginia State Trooper Losh's wife, and dreaded sitting on the jury panel for this case, she indicated no bias and unequivocally stated that she could be impartial in her decision-making. Appellants pick and choose various statements from this prospective juror that may put her ability to be impartial into question, but when answers are examined in detail and applied to the law, there was no bias on her part. Thus, the circuit court did not abuse its discretion.

1. The Standard of Review.

"We review the trial court's decision on [striking a juror] under an abuse of discretion standard."

State v. Johnston, 211 W. Va. 293, 294, 565 S.E.2d 415, 416 (2002), quoting *State v. Wade*, 200 W. Va. 637, 654, 499 S.E.2d 724, 741 (1997).

"Once a prospective juror has made a clear statement during voir dire reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by

subsequent questioning, later retractions, or promises to be fair.” Syl. Pt 5, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002).

Syl. Pt. 2, *State v. Griffin*, 211 W. Va. 508, 566 S.E.2d 645 (2002).

The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.

Syl. Pt. 4, *State v. Miller*, *supra*; Syl. Pt. 1, *State v. Griffin*, *supra*.

2. **Despite Appellants' Assertions, Juror Staten Showed No Signs of Bias and Unequivocally Testified That She Could Make Decisions in the Case Impartially.**

Appellants picked and chose various responses given by Juror Staten during voir dire to assert that she had a fixed opinion of the case and could not judge impartially, thus failing the test established in *Griffin*, *supra*. However, when her responses are fully examined, it is apparent that she indeed could make decisions in this case free of any bias and that she could be impartial, in accordance with *Miller*, *supra*.

The first argument Appellants assert that Juror Staten had a fixed opinion of the case and was biased is that she had read about it. While she had read some about this case, her reading was very cursory and sparse, and there was absolutely no sign of it resulting in any bias. During voir dire, the following exchange took place:

Defense Counsel Laishey: Well, you had indicated that you had followed this case in the news.

Juror Staten: Yes. But not in great detail. But I followed it because my sister lives in Lincoln County, and her body [the victim's] was found close to Salt Rock. *But I could*

not give you all of the details on it. (Emphasis added.)

Defense Counsel Laishey: You have followed it then since the discovery of the body six years ago.

Juror Staten: I just read as articles came in the papers sporadically. And then I saw the article in the paper Saturday morning.

Defense Counsel Laishey: And that article reflected that the trial was going to forward [*sic*]?

Juror Staten: Yes.

Defense Counsel Laishey: Tell us what you remember.

Juror Staten: It reflected that a jury would be selected this morning. And I remember that the first two were found guilty [Brian DeMent and Justin Black], the first two that were accused of the murder, and this was a separate hearing. I did not hear anything that was conclusive either way, but that—that was written in the paper.

Court: Mr. Conway [Defense Counsel] do you have any questions in this light?

Defense Counsel Conway: Yes, sir. Do you remember any other details from the newspaper articles that you haven't already mentioned?

Juror Staten: No. The main part I remember is trying to identify the body and, you know, that was the thing that stood mostly in my mind. *No, not really details on it.*

(Tr., 39-41, Aug. 25, 2008; emphasis added.) These exchanges show that, despite some cursory reading about the case, her knowledge of it was sketchy at best. Regardless, she showed absolutely no indication that she had a fixed opinion of the case, and there was no indication that she could not be impartial, as is required under *Griffin, supra*, and *Miller, supra*, to strike a juror for cause.

Next, Appellants argue that Juror Staten's "friendship" with Trooper Losh's wife was grounds for her to be struck for cause. However, when examined closely, this relationship was more of an acquaintanceship, to which she later testified. With respect to this, the following exchange occurred:

Defense Counsel Laishey: And you are friends or you work with [West Virginia State Trooper] Losh's wife?

Juror Staten: Yes, Leiga Losh. I did at one time. But I am friends with her. We're *acquaintances*. I see her occasionally out in public

Defense Counsel Laishey: Have you had an occasion to discuss with her your jury duty?

Juror Staten: No. Haven't seen her in probably for maybe a year, maybe longer.

Defense Counsel Laishey: Did you know that her husband had worked on this case?

Juror Staten: No, not at all.

(Tr., 40, Aug. 25, 2008; emphasis added.) As noted above, this "friendship" was really an acquaintanceship where the two people rarely saw each other. There was no indication that this amounted to facts to the contrary that she could be free of bias as is required under *Miller, supra*.

Finally, Appellants contend that the circuit court erred in not striking Juror Staten for cause because she said that she "dreaded" sitting on the case. (Tr., 42-43, Aug. 25, 2008.) But this statement was made because of the seriousness of the case. (*Id.*) This is a feeling that many potential jurors have when a murder is involved. This in no way indicates any bias or inability to be impartial. The State extensively questioned Juror Staten on this issue and her ability to be free of any bias. In this exchange, the following testimony occurred:

Prosecutor: Your word dread bothered me a little bit. If the State met its burden of proving guilt beyond a reasonable doubt, would you have any problems being able to vote guilty?

Juror Staten: No, I wouldn't.

Prosecutor: And if we didn't prove it beyond a reasonable doubt, would you have any problems voting not guilty?

Juror Staten: No, I wouldn't.

Prosecutor: You realize each case is different? And even between these two defendants?

Juror Staten: Right.

Prosecutor: If you would think, one, that there was sufficient evidence to convict one but not the other, would you have any problem voting to convict one and voting to acquit one?

Juror Staten: No, I wouldn't.

Prosecutor: If the evidence was insufficient to show you that either was guilty, would you have any problem voting not guilty?

Juror Staten: No.

(*Id.* at 45-44.) This is a clear indication that Juror Staten had no problem specifically related to “dreading the case” and that she had no fixed opinion that would cause her to have an inability to be impartial.

On this specific issue, the trial judge stated the following in ruling against Appellants:

The fact that she may dread being here, any person in their right mind would probably prefer not to sit on the jury. I'm sure both defendants would prefer not to be here today. I would prefer to be fishing myself. But we are here. That does not express any prejudgment. Matter of fact, she appears to be very clear and open in her responses, and I'm going to deny your motion to excuse her for cause.

(*Id.* at 45.)

As the circuit court pointed out, Juror Staten was very clear in her ability to have no fixed opinion and make decisions free of any bias or partiality. A good example of where a juror was equivocal regarding bias and prejudice where this Court reversed a lower-court decision when he was not struck for cause is *State v. Nett*, 207 W. Va. 410, 412, 533 S.E.2d 43, 45 (2000). In *Nett*, this Court reversed a decision where the trial judge utilized rehabilitative questions on a juror and denied striking him for cause in a DUI case where the latter had two friends killed by drunk drivers and had knowledge of the defendant's prior DUI offenses. In that case, the trial judge's line of questioning went as follows:

TRIAL COURT: That's the question that we're going to get to in a moment so we might as well touch on it now. The question is here you have a person who is charged with Driving Under the Influence of Alcohol, Third Offense. And the fact that you had these experiences with either friends, neighbors involved in the operation of motor vehicles, both with drinking involved, would that experience in any way influence you so that you couldn't sit as a juror after taking that oath and verdict? Keeping in mind, as I will tell you time and again-everybody will-Mr. Nett, at this point as he sits here, is innocent. The Constitution of our country presumes him innocent. That's our system. And he's entitled, as anybody else would be, to have a trial. And that's what we're here to make sure, Can you do that, sir?

JUROR: Hard to say at this point. I can't unequivocally say no.

* * *

TRIAL COURT: The question is, and it's a good question, but would you tend to believe that Mr. Nett is guilty of the current charge because of prior convictions for DUI? That's the key?

JUROR: It's hard to say, looking at it from this side, without seeing all the evidence.

TRIAL COURT: That's a good point. And it's only because we start this case with a clean slate and not to put too fine a point on it, is that you have an empty vessel here and it's only filled with evidence that's admitted during the trial. And the law then that's given to you at the end, and you mesh the two and you apply the facts as you find them to be to the law that I give you and then you deliberate and reach a verdict. That's the system. And the question is-and only you can answer this-as to whether or not, knowing that's the system, could you return a fair, impartial, unbiased verdict?

JUROR: It would be difficult.

TRIAL COURT: Is that "yes" or "no"? Don't be ashamed. I really need to know.

JUROR: At this point, it's really hard for me to say. I don't know that I'd be able to separate myself. I can't say for sure.

Nett, 207 W. Va. at 413-14, 533 S.E.2d at 46-47. This is clearly distinguishable from the case at bar and shows that Juror Staten truly had no fixed opinion and could be free of any bias. The circuit court did not abuse its discretion in denying this motion.

In light of all of this, Appellants' argument fails on this ground.

D. THE CIRCUIT COURT PROPERLY APPLIED WEST VIRGINIA CODE § 62-3-8 IN ASSIGNING PEREMPTORY CHALLENGES WHERE APPELLANTS WERE JOINTLY TRIED FOR THE MURDER OF THE VICTIM.

There is absolutely no statutory basis for Appellants' scheme where they contend that they should have had a pool of 26 potential jurors with the right to strike peremptorily six jurors each. Appellants mischaracterize West Virginia Rule of Criminal Procedure 24(b)(2)(B) in their attempt to further their argument. The circuit court correctly applied West Virginia Code § 62-3-8 with respect to peremptory strikes in a joint trial of co-defendants.

1. **The Standard of Review.**

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 shall be stricken therefrom; and if they cannot agree upon the names to be so stricken off, the prosecuting attorney shall strike therefrom a sufficient number of names to reduce the panel to twelve. If persons jointly indicted elect to be, or are, tried separately, the panel in the case of each shall be made up as provided in the third section of this article.

W. Va. Code § 62-3-8.

2. **The Circuit Court Properly Followed West Virginia Code § 62-3-8 Regarding Peremptory Strikes Where There Is a Joint Trial for Co-Defendants and No Reversible Error Occurred.**

Appellants wrongfully contend that the circuit court committed reversible error in limiting them to three peremptory challenges of jurors each. Initially, it is worth noting that there is nothing in the record or the trial transcript that indicates that the circuit court made this limitation on Appellants, nor do they cite any proof of this. According to Appellants, the State used two peremptory challenges, and they each independently struck three peremptorily. (*See Appellants' Brief at 30.*)

Appellants correctly cite West Virginia Code § 62-3-3, which states the following:

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, from which panel the accused may strike off six jurors and the prosecuting attorney may strike off two jurors. The prosecuting attorney shall first strike off two jurors, and then the accused six. If the accused failed to strike from such panel the number of jurors this section allows him to strike, the number not stricken off by him shall be stricken off by the prosecuting attorney, so as to reduce the panel to twelve, who shall compose the jury for the trial of the case.

A panel of 20 were drawn in accordance with this statute. However, as West Virginia Code § 62-3-8 states, where there are co-defendants being tried jointly, there may be up to six jurors peremptorily struck, and all choices must be agreed upon by the co-defendants. As mentioned above, Appellants admit that six jurors were peremptorily stricken, and there is absolutely no proof of any disagreement between them on these decisions. There is nothing cited in Appellants' brief regarding any dispute over the various decisions of peremptory strikes. In light of this, the circuit court did not violate West Virginia Code § 62-3-8, and any argument that it committed reversible error on this ground is dubious, at best.

Appellants attempt to further this argument by citing West Virginia Rule of Criminal Procedure 24(b)(2)(B). According to Rule 24(b)(2)(B),

Multiple Defendants. If there is more than one defendant the court *may* allow the parties additional challenges and permit them to be exercised separately or jointly.

(Emphasis added.)

This is a permissible rule that allows the court to expand the number of peremptory challenges, as well as having these decisions made separately by multiple defendants in a joint case. However, this is no mandatory rule requiring additional peremptory strikes where co-defendants are tried in a joint case as in the instant one. This is up to the circuit court's discretion, and by not expanding the number of peremptory strikes each defendant could utilize, it properly employed its discretion. This is no ground to reverse the trial court's decision.

Appellants correctly assert that there are no criminal cases directly on-point regarding this issue. (See Appellants' Brief at 30.) They state that courts have gone both ways on this matter, yet cite no persuasive authority to support their argument. One case that may be persuasive authority

for the State is *Addams v. Texas*, 180 S.W.3d 386 (Tex. App. 2005). In this case, the Texas Court of Appeals in Corpus Christi held that questions involving the issue of peremptory strikes are to be reviewed under an abuse of discretion standard. *Id.* at 404 (citing *Lopez v. Foremost Paving, Inc.*, 705 S.W.2d 643-44 (Tex. 1986)). In this case the court upheld the lower court ruling denying a motion to sever a joint trial on the basis that defendants were given six peremptory strikes each and the State permitted six for each defendant since it was consistent with the statutory language. *Id.* at 403-04. The State asks this Court to adopt an abuse of discretion standard in the case at bar, and uphold this decision in light of the circuit court acting consistently with West Virginia Code § 62-3-8.

If there was any error that occurred regarding this issue--which the State does not concede whatsoever--there was waiver on the part of Appellants in accordance with *Miller, supra*. As with the above issue regarding the omitted instruction to the jury, Appellants knowingly and intentionally relinquished or abandoned a known right, and this Court need not examine this issue. After voir dire and various rulings regarding motions to strike for cause, a discussion took place with all parties off the record and then peremptory strikes were made. (Tr., 67-68, Aug. 25, 2008.) The trial judge asked all parties if they were finished striking the jury, and both Appellants' respective defense counsel affirmatively responded, "Yes, sir." (*Id.* at 69.) This was definitely a waiver, and even if this did amount to error, the number of peremptory challenges does not amount to plain error. Not awarding Appellants additional peremptory challenges due to a joint case does not affect substantial rights.

In light of all of this, Appellants' argument fails on this ground.

E. THERE WAS NO SPEEDY TRIAL VIOLATION REGARDING APPELLANTS' CASE. THE CIRCUIT COURT FOUND GOOD CAUSE FOR A CONTINUANCE MOTION TO BE GRANTED, THE ONE-TERM RULE WAS NOT VIOLATED AND NO PREJUDICE OCCURRED.

The circuit court was acting lawfully in accordance with West Virginia Code §§ 62-3-1 and -3-21 regarding Appellants being tried. Although they were not tried during the same term as the indictment was handed down, Appellants were tried within three terms and the circuit court found good cause for granting a continuance that caused the delay. Appellants cite no reason as to how or why this caused substantial prejudice to them. In fact, the case of *Pitsenbarger v. Nuzum*, 172 W. Va. 27, 303 S.E.2d 255 (1993), which is cited by Appellants, does not really even hold what their brief states that it does.

1. The Standard of Review.

“A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion.” Syl. Pt. 2, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

Syl. Pt., *State v. Wilkinson*, 181 W. Va. 126, 381 S.E.2d 241 (1989).

“Where the trial court is of the opinion that the state has deliberately or oppressively sought to delay a trial beyond the term of indictment and such delay has resulted in substantial prejudice to the accused, the trial court may, pursuant to W.Va.Code, 62-3-1, finding that no good cause was shown to continue the trial, dismiss the indictment with prejudice, and in so doing the trial court should exercise extreme caution and should dismiss an indictment pursuant to W.Va.Code, 62-3-1, only in furtherance of the prompt administration of justice.” Syl. Pt. 4, *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 294 S.E.2d 51 (1981).

Syl. Pt. 1, *Pitsenbarger v. Nuzum*.

2. **The Decision of the Circuit Court to Continue Appellants' Trial Was No Abuse of Discretion, and Was Within Its Sound Discretion. There Was No Deliberate and Oppressive Attempt to Delay the Trial by the Prosecutor nor Any Substantial Prejudice Against Appellants That Would Warrant a Dismissal of the Indictment.**

When the statutory provisions and case law concerning speedy trial and continuance are examined, Appellants' assertion that the circuit court violated the one-term rule and denied them a speedy trial is without merit. West Virginia Code § 62-3-1, in pertinent part, states the following:

When an indictment is found in any county, against a person for a felony or misdemeanor, the accused, if in custody, or if he appear in discharge of his recognizance, or voluntarily, shall, *unless good cause be shown for a continuance*, be tried at the same term.

(Emphasis added.)

During an August 27, 2007, Motion Hearing, Brian DeMent, through his counsel, was granted a continuance. (Motion Hr'g, 10, Aug. 29, 2007.) Based on this, the State moved for a continuance of Appellants' case. The main reason was that the prosecutor believed that Brian DeMent was potentially going to enter a plea agreement, and this co-defendant needed some time to understand the issues and think all of this through. (*Id.* at 15-16.) The prosecutor stated that in the interest of justice and being able to present its case, the continuance was necessary based on the DeMent continuance motion that was granted. (*Id.* at 16.) The State went on to make the case for a continuance pointing out that there was a tradition in that jurisdiction and the State as a whole to select which co-defendant to try first when there are multiple defendants. (*Id.* at 11, 22.) The circuit court did grant the State's motion for continuance of Appellants' trial. (*Id.* at 23.)

Appellants correctly assert that during this Motion Hearing, the circuit judge said that the State did not show good cause when he granted the continuance. (*Id.* at 23-24.) However, in a

subsequent hearing, the circuit judge changed his mind and found good cause for the continuance motion, amending his previous ruling. (Motion Hr'g, 3-4, Apr.15, 2008.) The circuit court ruled that the State indeed had the right to select which co-defendant to try first when there were multiple defendants. (*Id.* at 4.)

There was no prejudice with the delay of Appellants' case being tried. As the State noted, it took about five years for indictments to be handed down, and it was taking a long time to get the cases prepared. (Motion Hr'g, 17, Aug. 29, 2007.) This was a hard case to solve, and there was no evidence that a delay of another year in order to have Mr. DeMent's case tried first would prejudice Appellants. Appellants give no real evidence that they were subject to substantial prejudice as is the standard established in *Pitsenbarger, supra*.

Additionally, this Court held in Syllabus Point 2 of *Pitsenbarger* the following:

Under W. Va. Code, 62-3-1 [1959], which provides a personal right to criminal defendants to be tried more expeditiously than the Constitution requires, the burden is on the party seeking this statutory protection to show that the trial was continued without good cause.

Appellants really do not meet this burden. Again, Appellants point out that the circuit judge originally found that the State lacked good cause for a continuance when he granted the motion, yet they fail to mention that he later changed his mind and amended the ruling. Appellants cite *Pitsenbarger* asserting that this Court held that a continuance cannot be granted for the prosecution's convenience and that motions for the same in order to pressure a defendant should be looked on with disfavor. Yet this is found nowhere in the text of this opinion. *Pitsenbarger* actually involved an administrative foul-up caused by a failure in communication by the petitioner, the prosecutor, and the judge; where the Court found no prejudice and denied an attempt to bar prosecution on the

charges. *Pittsenbarger*, 172 W. Va. at 29, 303 S.E.2d at 257. Regardless, the motion for a continuance was not requested to pressure Appellants nor was it for the State's convenience, but rather to give Brian DeMent more time to think about a plea agreement when he was given a continuance in that he had indicated he was considering it.

Additionally, Appellants would be entitled to have had their trial barred with respect to the indictment if the three-term rule was violated. According to Syl. Pt. 1, *State v. Lambert*, 175 W. Va. 141, 331 S.E.2d 873 (1985):

“Whereas W. Va. Code, 62-3-1, provides a defendant with a statutory right to a trial in the term of his indictment, it is W. Va. Code 62-3-21, rather than W. Va. Code 62-3-1, which is the legislative adoption or declaration of what ordinarily constitutes a speedy trial within the meaning of U.S. Const., amend. VI, and W. Va. Const., art. III, § 14. *State ex rel. Smith v. DeBerry*, 146 W. Va. 534, 538, 120 S.E.2d 504, 506 (1961).” Syl. Pt. 1, *State ex rel. Shorter v. Hey*, 170 W. Va. 249, 294 S.E.2d 51 (1981).

According to West Virginia Code § 62-3-21:

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.

Despite the delay due to the continuance, Appellants were tried within three terms, as is required under West Virginia Code § 62-3-21. This was brought out by the circuit court during the April 15, 2008, hearing. (Motion Hr'g, 5, Apr. 15, 2008.)

For all of these reasons, Appellants' argument fails on this ground.

V.

CONCLUSION

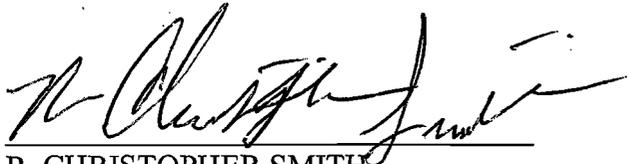
For the foregoing reasons, the judgment of the Circuit Court of Cabell County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellants by depositing it in the United States mail, first-class postage prepaid, on this th day of 23rd day of July, 2009, addressed as follows:

To: Daniel R. James, Esq.
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