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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LEWIS COUNTY, WV
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
RESPONDENT,

v.

ARNOLD WAYNE MCCARTNEY,
PETITIONER

Lewis County Circuit Court
Case No.: 09-F-8

FROM THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

PETITION FOR APPEAL

Dennis J. Willett, Esq.
Nanners & Willett, L.C.
45 West Main Street
Buckhannon, WV 26201
(304) 472-2048
WV Bar No. 7095

Steven B. Nanners, Esq.
Nanners & Willett, L.C.
45 West Main Street
Buckhannon, WV 26201
(304) 472-2048
WV Bar No. 6358

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STATE OF WEST VIRGINIA,
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Case No.: 09-F-8

ARNOLD WAYNE MCCARTNEY,
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FROM THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

PETITION FOR APPEAL

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

KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

The Petitioner, Defendant below, Arnold Wayne McCartney, seeks an appeal of the following:

- I. The Petitioner's conviction on one count of Murder in the First Degree.
- II. The Petitioner's sentence to life imprisonment without mercy.
- III. Those matters set forth herein.

STATEMENT OF FACTS/PROCEDURAL HISTORY

The Petitioner, Arnold Wayne McCartney was arrested on December 20, 2008 and charged with murder in the first degree. The Petitioner was arrested at his home in Lewis County, West Virginia by the West Virginia State Police based upon the assertion that he had shot his girlfriend in the head with a firearm. The Petitioner had been drinking heavily during the course of the day. He was placed in the cruiser and the State Trooper then secured the scene and proceeded to obtain a digitally recorded statement from the Petitioner. The officer gave the Petitioner his Miranda warnings prior to taking his statement. It is important to note that the Petitioner is unable to read and write. During the time the Petitioner gave his statement he was in a very emotional state, crying, despondent, and remorseful. Following the statement being taken by the officer, the officer summarized what he believed to be the important parts of the oral statement which lasted approximately forty-five (45) minutes into a one (1) sheet hand written summary. The Trooper had the Petitioner to sign the bottom of the sheet and then had a additional Trooper transport the Petitioner to the Central Regional Jail. During the transport to the Central Regional Jail, the Petitioner continued to be in an extremely emotional state and made comments to the transporting Trooper that he believed his girlfriend was cheating on him.

The next morning the State Trooper called the Lewis County Magistrate Court to see if the Petitioner had been arraigned on murder charge upon being informed by the Magistrate there had not been an arraignment, the Trooper then drove to the Central Regional Jail in order to take another digitally recorded statement. The same process was utilized as the night before. The Petitioner was still in an extremely emotional state and gave the officer a lengthy digital recording which was condensed down to a hand written summary. Following the statement being given the Petitioner was arraigned on a warrant asserting charge of murder in the first

degree. The warrant did not allege the name or identity of the victim of the offense. The warrant was obtained by the arresting officer on December 20, 2008 and the Petitioner's arraignment occurred the next day on December 21, 2008, following the Trooper taking the second statement from the Petitioner. Following arraignment, Counsel was appointed for the Petitioner. On January 26, 2009 a hearing was held before the Circuit Court of Lewis County, West Virginia which the Circuit Court appointed co-counsel for the Petitioner in this matter. On January, 2009 counsel for the Petitioner and the Prosecuting Attorney, Gary W. Morris, III met at the State Police Barracks in Lewis County, West Virginia and obtained statements that the arresting officer had taken at the scene which included two (2) hand written summary statements of the Petitioner, hand written summary statement of Jason Dehainant, a hand written summary statement of Barney Joseph, and a hand written summary statement by fire personnel at the scene of the offense. The State Police also provided to Prosecuting Attorney and counsel copies of photographs that had been taken at the scene which included thirty (30) of eighty-four (84) pictures that were in the possession of the State Police. It is important to note that no additional discovery was provided to the Petitioner in this matter until two (2) weeks prior to trial. On January 29, 2009 a preliminary hearing was held in which the Magistrate Court of Lewis County found probable cause and bound the matter over for the Grand Jury. On March 2, 2009 the Grand Jury for Lewis County, West Virginia returned a single count indictment alleging the Petitioner had committed murder in the first degree and asserted the victim of the offense was Vicki Paige. On March 10, 2009 counsel for the Petitioner filed a written Motion Requesting Discovery from the State of West Virginia. On September 2, 2009 the State of West Virginia conducted a Suppression Hearing regarding the three (3) statements given by the Petitioner ((1) statement at the scene of the alleged offense on December 20, 2008, (2) the oral statement made

by the Petitioner while being transported to the Central Regional Jail, (3) the statement taken by the arresting Trooper at the Central Regional Jail on December 21, 2008.) At the Suppression Hearing the arresting officer stated that the Petitioner did not appear to be intoxicated and gave a knowing voluntary intentional waiver of his Miranda warnings and consented to his statement. The Circuit Court found that the statements were admissible and the Court proceeded on with the trial schedule for October 2009. Immediately prior to the pre-trial hearing on October 9, 2009 the State of West Virginia tendered to the Petitioner a packet of discovery materials. Upon a cursory review of the same counsel for the Petitioner noticed that the items that were tendered in the packet had been in the possession of the State Police for a period of several months the latest coming into the possession of the State Police in May and June of 2009. Counsel for the Petitioner objected to this at the pre-trial hearing due to the State's late disclosure and the Circuit Court scheduled the matter for a hearing upon the objections for October 22, 2009. The Court proceeded on with the jury selection that had previously been scheduled for October 20, 2009. A jury was paneled and the Petitioner was satisfied with the jury that was selected on December 20, 2009. On October 22, 2009 counsel for the Petitioner argued their Motion to Exclude the Evidence that was Tendered to the Petitioner on October 9, 2009 and preclude any additional evidence being offered due to the States' failure to timely comply with discovery in this matter. The State of West Virginia did not offer good cause as to why the discovery in the matter was provided at such a late date. Counsel for the Petitioner asked the Court for sanctions pursuant to West Virginia Rules of Criminal Procedure and the Circuit Court denied Counsel's request for sanctions and sua sponte continued the matter until the next term of Court. Counsel for the Petitioner objected and asserted their right for trial at term of Court as the jury had already been empaneled and the Petitioner was entitled to a trial during the current term of Court. The Circuit

Court continued the matter over Counsel's objection and set the trial for February 2010. The Circuit Court set a new date for the State to provide all the discovery in this matter and anything that was not produced prior to November 23, 2009 would not be admissible at trial. The State of West Virginia still failed to meet this discovery deadline and failed to produce additional evidence in their possession to the Petitioner including autopsy photos, documents from the West Virginia State Police crime lab regarding and evidence records for the firearm involved in this matter. On February 16, 2010 the Circuit Court proceeded to empanel a new jury and immediately proceeded into the trial of this case.

The trial continued through February 17, 2010 at which time both parties rested. The jury began its deliberation at 5:07 p.m. on February 17, 2010 and was unable to complete their deliberations on February 17, 2010, so the Court continued the matter until the morning of February 18, 2010. During its deliberations the jury requested the Court to re-instruct them as to the elements of the various murder offenses and manslaughter offenses. The Circuit Court submitted the jury instructions to the jury regarding the same and let them proceed with their deliberations. On February 18, 2010 the jury was in deliberations at 9:00 a.m. and returned a verdict at 11:23 a.m. The jury returned a verdict of guilty to the charge of murder in the first degree at which time the Court then proceeded with the bifurcated mercy phase of the trial. The Petitioner took the stand with respect to the mercy stage and offered evidence to support the jury finding that the Petitioner was entitled to mercy and at 12:01 p.m. the Circuit Court returned the jury to its room to deliberate without providing counsel the opportunity to present argument with respect to mercy. Further, the Court did not elicit a waiver of the Petitioner's ability to argue the mercy stage. At 12:13 p.m. on February 18, 2010 the jury returned a finding of no mercy and the Court set the matter for Post Trial Motions on April 7, 2010. On April 7, 2010 the Petitioner's

Counsel argued the- Post Trial Motions including the assertion that the Petitioner had been denied the ability to argue the mercy stage of the case following his testimony. The Circuit Court denied all of the Petitioner's Post Trial Motions and scheduled the matter for sentencing on May 4, 2010 and the Petitioner was sentenced to life in the penitentiary without mercy. The Circuit Court entered an Order reflecting the sentence on May 10, 2010. The Circuit Court of Lewis County, West Virginia, entered an Order extending the time frame for the filing of a Petitioner for Appeal to November 1, 2010.

**ASSIGNMENT OF ERROR RELIED UPON ON APPEAL AND
MANNER IN WHICH DECIDED AT THE LOWER TRIBUNAL**

- I. WHETHER THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA, ERRED IN DENYING THE PETITIONER'S MOTION TO DISMISS FOR FAILING TO AFFORD THE PETITIONER A SPEEDY TRIAL DUE SOLELY TO THE STATE'S FAILURE TO PROVIDE TIMELY DISCOVERY.

The Circuit Court, without Motion of either the State or the Petitioner continued the Petitioner's trial from the pending (July) term of Court to the next regular term of Court (November) upon it's denial of the Petitioner's Motion to Exclude certain items of the State's evidence for failure to provide timely discovery of the same.

- II. WHETHER THE CIRCUIT COURT ERRED IN RULING THAT THE PETITIONER'S STATEMENT ADDUCED BY THE INVESTIGATING OFFICER AT THE CENTRAL REGIONAL JAIL ON DECEMBER 21, 2008, WAS ADMISSIBLE.

The Circuit Court found that the statement taken by the investigating officer while the Petitioner was incarcerated on the underlying charge was voluntarily given and was admissible at the Petitioner's trial.

- III. WHETHER THE CIRCUIT COURT IMPROPERLY ADMITTED THE ALLEGED MURDER WEAPON INTO EVIDENCE WITHOUT THE STATE HAVING PROPERLY ESTABLISHED A CHAIN OF CUSTODY THERETO.

The Circuit Court ruled that the State of West Virginia had established a sufficient chain of custody as to the alleged murder weapon to permit its admission into evidence.

IV. WHETHER THE CIRCUIT COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONIAL EVIDENCE RELATING TO THE VICTIM'S CAUSE OF DEATH.

The Circuit Court ruled that the County Coroner could testify as to the cause of death.

V. WHETHER THE PETITIONER WAS DENIED FUNDAMENTAL DUE PROCESS OF LAW WITH RESPECT TO THE CONDUCT OF THE PROCEEDINGS HELD DURING THE "MERCY" PHASE OF THE TRIAL FOLLOWING THE PETITIONER'S CONVICTION FOR MURDER IN THE FIRST DEGREE.

The Petitioner was denied the opportunity to provide closing argument during the mercy phase of his trial.

VI. WHETHER THE PETITIONER HERETO WAS DENIED HIS RIGHT TO A FAIR TRIAL BASED UPON THE CIRCUIT COURT'S DENIAL OF COUNSEL'S OBJECTION TO THE STATE'S PROPOSED INSTRUCTIONS.

The Circuit Court denied Counsel's objection to the State's proposed instruction which proved to confuse the jury and provide improper instruction as to the elements of the offense.

VII. WHETHER CIRCUIT COURT ERRED IN FAILING TO ADDRESS IMPROPER AND PREJUDICIAL STATEMENTS MADE BY THE PROSECUTING ATTORNEY TO THE JURY DURING CLOSING ARGUMENT.

The Circuit Court declined to instruct the jury to disregard improper and prejudicial statements made by the Prosecuting Attorney during final summation.

VIII. THE INDICTMENT RETURNED AGAINST THE PETITIONER WAS FATALLY DEFECTIVE INsofar AS THE SAME FAILED TO PROPERLY IDENTIFY THE ALLEGED VICTIM OF THE OFFENSE.

The Circuit Court denied Petitioner's Motions for Directed Verdict of Acquittal and Motion to Dismiss for failing to identify the victim of the offense.

IX. WHETHER THE CUMULATIVE ERROR OCCURING DURING THE PETITIONER'S TRIAL PROCEEDINGS REQUIRES A REVERSAL OF HIS CONVICTION UPON THE CHARGE OF MURDER, IN THE FIRST DEGREE, AND HIS SENTENCE OF LIFE IMPRISONMENT WITHOUT MERCY.

The numerous errors occurring during the Petitioner's trial proceedings and ruled on by the Trial Court in favor of the State.

X. WHETHER THE EVIDENCE ADDUCED AT THE PETITIONER'S TRIAL WAS SUFFICIENT TO SUPPORT HIS CONVICTION SHOULD REQUIRE A REVERSAL OF THE PETITIONER'S CONVICTION UPON THE CHARGE OF MURDER, IN THE FIRST DEGREE, AND HIS SENTENCE TO LIFE IMPRISONMENT WITHOUT MERCY.

The Circuit Court denied the Petitioner's Motion for judgment of acquittal and Motion for New Trial.

POINTS AND AUTHORITIES RELIED UPON

<u>AUTHORITIES CITED</u>	<u>PAGE</u>
<u>CASE LAW</u>	
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<u>Good v. Handlan</u> , 176, W.Va. 145 (1986)	15
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<u>State v. Persinger</u> , 169 W.Va. 121, 286 S.E.2d 261 (1982)	26
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<u>State v. Vance</u> , 162 W.Va. 467, 250 S.E.2d 146 (1978)	24
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<u>State v. White</u> , 66 W.Va. 46, 66 S.E. 20 (1909)	42
<u>State v. Young</u> , 173 W.Va. 1, 311 S.E.2d 118 (1983)	29
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DISCUSSION OF LAW

I. WHETHER THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA, ERRED IN DENYING THE PETITIONER'S MOTION TO DISMISS FOR FAILING TO AFFORD THE PETITIONER A SPEEDY TRIAL DUE SOLELY TO THE STATE'S FAILURE TO PROVIDE TIMELY DISCOVERY.

The West Virginia Constitution, in Article III, Section 14, commands that criminal trials must be commenced without unreasonable delay. W.Va. Const. Art. III, §14. The West Virginia legislature has added to the constitutional protections by enacting W.Va. Code, §62-3-1, which contains the so called "one term" rule which This Court has held that W.Va. Code, §62-3-1 provides a Defendant a statutory right to trial in the term of his or her indictment. Syl. Pt. 1, State ex rel. Shorter v. Hey, 170 W.Va. 249 (1982). This Court has also held that the "one-term" rule is not a constitutional right but is a personal right of a Defendant to request that a trial be convened even more quickly than mandated by constitutional constraints. State ex. rel., Workman v. Fury, 168 W.Va. 218 (1981). A continuance may not be granted "pro forma". Good v. Handlan, 176, W.Va. 145 (1986). The continuance of a trial past the one term requirement of W.Va. Code, §62-3-1 requires a showing of "good cause" which determination lies within the discretion of the Trial Court. See Good v. Handlan, 176 W.Va. 145 (1986), See also, Syl. Pt. 4, State ex. rel. Shorter v. Hey, 171 W.Va. 249, (1981).

In the instant case, the only cause for delaying the Petitioner's trial beyond the July term of Court arose from the Court's continuance of the trial, upon its own motion based upon the failure of the State to provide timely discovery. (See Transcript, p. 17, October 22, 2009). As the Petitioner's Motion to Exclude clearly demonstrates, the State acted egregiously and with

total disregard to the Petitioner's right's to receive a fair trial as contemplated under law. The jury had been selected on October 20, 2009, and the Petitioner was ready to proceed to trial without delay. The Petitioner was in the custody of the State and as such, it was incumbent upon the State to conduct itself in a manner that would not prejudice the rights of the Petitioner. As the Petitioner was being held without bond, he had a right to a speedy trial at the July term of the Lewis County Circuit Court, which Petitioner demanded. (See Transcript, p. 12-13, October 22, 2009). Rather, in the Petitioner's case, the Trial Court undertook to deny the Petitioner his right to receive a speedy trial by continuing the trial to the next term upon its own motion without affording the Petitioner the ability to be released from custody on bond or without imposing any sanction whatsoever upon the State for its egregious conduct in failing to provide timely discovery.

The State of West Virginia offered no justification for its failure to provide discovery. When questioned by the Court as to its failure to provide discovery, the following exchange occurred:

BY THE COURT: And then you've done your best to try to do it, but there seems to be an awful lot of scientific reports, an awful lot of things, even the autopsy report that's been available since May, was not turned over to the defense until the 9th of October, just two or three weeks before trial.

MR. MORRIS: That's correct.

BY THE COURT: Why?

MR. MORRIS: That is correct, Your Honor. On the morning of October 9th, there was a pretrial. I had made repeated inquiries of the State Police that we needed this information. It was provided to my office on the morning of October 9th, the criminal investigation report.

BY THE COURT: Well, why? I mean, this is a murder case. This is as serious a case as we can have and it sound like nobody's paying much attention to it.

MR. MORRIS: That's the way it seems to me too, Judge. In addition, that was a week ago Friday, what came with the

criminal investigation report, or what's mentioned in it, it actually belongs in this packet here. What's in – what is in that notebook there are the digital – the CDs, the photographs, we did not have those to give to the defense on October 9th, we had the report itself.

BY THE COURT: How long have they been in the State's possession?

MR. MORRIS: The State – as set forth by the defense.

BY THE COURT: What was that, in December?

MR. MORRIS: No, most of it appears to have come in at the various times basically set forth in the motion. The Medical Examiner's Office yesterday informed me that there is photographs that come with the autopsy. I didn't see those in the report. They're supposedly overnighting that to us today. We did not – the Medical Examiner's Office did not send the Prosecutor's Office a copy of the autopsy.

BY THE COURT: When did this – this allegedly occurred in December, the 20th, 2008.

MR. MORRIS: That's correct, Your Honor.

BY THE COURT: And we're just now getting this stuff together before trial?

MR. MORRIS: Yes, Your Honor.

BY THE COURT: A man's life is at stake here, the time that he's going to be – I mean, he's facing life in prison for the rest of his life and we're coming up here with this information at this time, who's dropping the ball here, Mr. Morris? Is it the investigating officers not furnishing it to you, it's you not getting after them or what? Somebody's dropping it.

MR. MORRIS: Well, Your Honor, perhaps I should have instituted some Court proceedings or something. However, I made repeated requests –

BY THE COURT: Well, you're the chief investigating – chief law enforcement officer in this county, you have the right to go to the State Police and say, "I want this information."

MR. MORRIS: Well, I did that, Your Honor, and –

BY THE COURT: And they got to give it to you and so that you can use it in discovery and since March, when he was – and I ordered discovery in March –

MR. MORRIS: Yes, sir. The ball was dropped.

BY THE COURT: And you just – and they didn't give you the autopsy report until the 9th.

MR. MORRIS: I still don't have the autopsy report. It was supposed to be being overnighted to me. There's a copy of it in the criminal investigation report, but it's not complete without the pictures and that's supposed to be available today. I would, before the Court rules, like to address my response to their Motion to

Exclude.

BY THE COURT: Don't we take seriously these kind of cases anymore? It doesn't seem like somebody's taking it serious.

MR. MORRIS: Well, my office does but apparently we didn't do enough or the communication lines don't seem to be effective, Judge.

The investigating officer is here if the Court wants to hear testimony.

BY THE COURT: Well, he's the investigating officer, why didn't he turn these things over to you?

MR. MORRIS: I don't know, Your Honor.

BY THE COURT: What's he doing? Is he doing his job? Do the State Police not take serious murder cases anymore or what?

MR. MORRIS: All I know, Your Honor, is what was stated in the record and what I received, when I received it, and –

BY THE COURT: Well, it's not your job to just sit there and wait on them to do something for you. If – when I order discover, you are supposed to furnish the discovery and furnish it as soon as possible, not two weeks before trial.

MR. MORRIS: I understand that, Judge.

BY THE COURT: Well, I see no alternative but to continue this case. We can't go to trial now, because I'd have to throw out of this evidence and if I throw out all of that evidence, you don't have a case.

MR. MORRIS: My Motion to Exclude, Your Honor, or my response to their Motion to Exclude does address the matters that were supplied promptly, as mentioned by Mr. Willett and as set forth in the Motion to Exclude, right after the preliminary hearing back in January, the – both defense counsel and I went out to the State Police barracks and met with the investigating officer, and at that time, the defense was provided with what I'll refer to as the guts of the State's case, which were the statements of Arnold McCartney and those have already been the subject of the suppression hearing where they were ruled admissible, the statement of Brian – two statements of Brian Joseph, Jason Dehainant, Charles McCartney and Steven Mealey. I believe those would fall within – although not formally attached to the – well, they were made prior to – the discovery motion was filed in March and they were provided back in January, so they were provided to the defense prior to the discovery motion being filed. The testimony of Trooper Morgan and Trooper Brewer, as the statements made by Defendant have been addressed and ruled admissible by the Court and then Trooper Morgan supplied his narrative of what happened and 30 pictures on a CD that was

supplied to the defense. I never received a copy of it. I was to have received a subsequent copy of what they did, the CD of 30 pictures and those depict 30 of the 84 pictures so any of the – those 30 pictures have been in the possession of the defense since then. At the preliminary hearing, there was testimony about the coroner, the county coroner and Patrick Tomey, as to the cause of death, I believe, Your Honor.

So I would ask that if the Court grant the Motion to Exclude, that it not encompass those matters and the matter – the cause of death is shown by the photographs given to the defense at that time, clearly show a gaping hole in the skull of the victim and I don't think there's any controversy –

BY THE COURT: Well, the point is, Mr. Morris –

MR. MORRIS: Yes, sir.

BY THE COURT: That the defense has a right to those scientific reports –

MR. MORRIS: Yes, sir.

BY THE COURT: - and some of this other evidence that Mr. Willett has noted –

MR. MORRIS: Yes, sir.

BY THE COURT: - in spite of this, because they have the right to examine that, and they may, based upon their examination of those reports, want to get witnesses –

MR. MORRIS: Yes, sir.

BY THE COURT: And obtain witnesses, and they can't do that until they get those reports, and even if the reports are turned over to them right now, today, the autopsy report, does he have time, do they have time to get another pathologist to go over that report with them, to see if he can't come in here and testify –

MR. MORRIS: No, sir, they don't.

BY THE COURT: They don't, that's right. They don't have time to do that. And all of the other things that they have mentioned. This case is not ready for trial and we have selected a jury. Fortunately, we haven't sworn the jury in, so they – the Defendant's not under jeopardy at this point in time. Do you agree with that, counsel?

See Transcript, pp. 7-12, October 22, 2009.

Discovery in criminal cases is governed by Rule 32 of the West Virginia Trial Court Rules and Rule 16 of the West Virginia Rules of Criminal Procedure. Rule 16 dictates that the State will permit a Defendant to inspect and copy any results of physical or mental examinations

that have been conducted, are material to the case or intended to be used in the State's case in chief, and which are in the possession of the State or could become known through the exercise of due diligence. Rule 16(D), W.V.R.C.R.P. Rule 16 further dictates that the State shall, upon request disclose to the Defendant a written summary of the testimony of the testimony of its expert witnesses and a list of names and addresses of all witnesses it intends to call in its case in chief together with any record of prior convictions. Rule 16(E), Rule 16(F), W.V.R.C.R.P.

The Petitioner had filed a Motion for Discovery on the 10th day of March, 2009. The State failed to comply with discovery, with the exception of the witnesses and report mentioned herein.

With respect to a criminal defendant's right to review evidence offered by the State, this court has held, [a]n accused's right to a fair trial and to fair cross-examination of witnesses against him "require[s] that the State be prepared to provide a defendant with a reasonable opportunity to examine adverse evidence presented by the State's experts." State v. Thomas, 187 W.Va. 686, 691-92, 421 S.E.2d 227, 233-34 (1992). In addressing the issue of non-disclosure of witnesses, this Court has held, "[t]he nondisclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." Syl. Pt. 1, State v. Johnson, 179 W.Va. 619 (1988).

In Thomas, this Court held, "the precondition for accepting the scientific test as relevant evidence is the ability of a defendant to examine fully the results." State v. Thomas, 421 S.E.2d 227, 187 W.Va. 686 (1992). The State, even after being ordered to provide discovery during the hearing on Petitioner's Motion to Exclude failed to provide all evidence relating to the autopsy and chain of custody of the decedent's body and the alleged murder weapon.

During the hearing on Petitioner's Motion to Exclude on October 22, 2009, the

Prosecuting Attorney did not seek a continuance of the trial, but rather sought to have the Court rule that only certain items should be excluded for failure to disclose. In fact, from his argument, it was readily apparent that the State believed it could proceed to trial based upon evidence that was disclosed that the Prosecutor identified as constituting the “guts” of the State’s case. The Prosecutor stated to the Court,

My Motion to Exclude, Your Honor, or my response to their Motion to Exclude does address the matters that were supplied promptly, as mentioned by Mr. Willett and as set forth in the Motion to Exclude, right after the preliminary hearing back in January, the both defense counsel and I went out to the State Police barracks and met with the investigating officer, and at that time, the defense was provided with what I’ll refer to as the guts of the State’s case, which were the statements of Arnold McCartney and those have already been the subject of the suppression hearing where they were ruled admissible, the statement of Brian – two statements of Brian Joseph, Jason Dehainant, Charles McCartney and Steven Mealey. I believe those would fall within – although not formally attached to the – well, they were made prior to – the discovery motion was filed in March and they were provided back in January, so they were provided to the defense prior to the discovery motion being filed. The testimony of Trooper Morgan and Trooper Brewer, as the statements made by Defendant have been addressed and ruled admissible by the Court and then Trooper Morgan supplied his narrative of what happened and 30 pictures on a CD that was supplied to the defense. I never received a copy of it. I was to have received a subsequent copy of what they did, the CD of 30 pictures and those depict 30 of the 84 pictures so any of the – those 30 pictures have been in the possession of the defense since then. At the preliminary hearing, there was testimony about the coroner, the county coroner and Patrick Tomey, as to the cause of death, I believe, Your Honor.

So I would ask that if the Court grant the Motion to Exclude, that it not encompass those matters and the matter – the cause of death is shown by the photographs given to the defense at that time, clearly show a gaping hole in the skull of the victim and I don’t think there’s any controversy –

See Transcript, p. 10-11, October 22, 2009.

In the instant case, the failure of the State to disclose all relevant evidence as requested

was highly prejudicial to the Petitioner. The Petitioner was prepared to proceed to trial during the July term of Court; had empaneled what he believed was a fair jury; and had been held since his arrest without bond. His trial strategy was entirely based upon his determination that the State did not possess or did not intend to introduce sufficient evidence which would warrant a finding of guilt. The continuance of the trial subjected the Petitioner to further incarceration without bond, the loss of a jury panel which he deemed fairly selected; and drastically effected the overall defense strategy.

II. WHETHER THE CIRCUIT COURT ERRED IN RULING THAT THE PETITIONER'S STATEMENT ADDUCED BY THE INVESTIGATING OFFICER AT THE CENTRAL REGIONAL JAIL ON DECEMBER 21, 2008, WAS ADMISSIBLE.

The State, in its responses to discovery, disclosed the existence of a written "confession" allegedly made by the Petitioner to the investigating officer, Trooper Morgan, at the Central Regional Jail on December 21, 2008. With respect to the "confession" to Trooper Morgan, the Court, on September 2, 2009, conducted a hearing as to the admissibility of the same. The "confession" in question was taken the day after the Petitioner had been arrested and jailed upon the charge of Murder, in the First Degree. During this hearing, Trooper Morgan testified that he went to the Central Regional Jail because he wanted to get another statement from the Defendant. (See Transcript p. 26, September 2, 2009). Trp. Morgan testified that he sought to obtain a second statement before the Petitioner was able to obtain legal counsel. Trp. Morgan went so far as to state,

Q Okay, so you called in to the Magistrate Court to make sure that he hadn't been arraigned, so you could get down there before he got the lawyer, right?

A No, just to see if he asked for a lawyer. If he hadn't asked for a lawyer, I would have still went down and tried to speak to

him. I've done that on many occasions, even after they asked for a lawyer.

See Transcript, pp. 31-33, September 2, 2009.

It should be noted that Trooper Morgan had already taken a statement from the Petitioner at the scene of the offense on December 20, 2009 at approximately 7:00, p.m.. (See Transcript p. 33, September 2, 2009).

Upon conclusion of the suppression hearing, the presiding Judge, made certain findings and conclusions and ruled that the December 21st statement was admissible. (See Transcript pp. 33-34, September 2, 2009).

In addressing the question of admissibility of "confessions", this court has held, "[w]here the question on appeal is whether a confession admitted at trial was voluntary and in compliance with Miranda with respect to issues of underlying or historic facts, a trial court's findings, if supported in the record, are entitled to this Court's deference. However, there is an independent appellate determination of the ultimate question as to whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of Miranda and the United States and West Virginia Constitutions. State v. Potter, 478 S.E.2d 742, 197 W.Va. 734 (1996). It has also been held that, "[a] trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence. Syl. Pt. 3, State v. Vance, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Under Rule 5(a) of the West Virginia Rules of Criminal Procedure, and §62-1-5 of the West Virginia Code, a person who has been arrested has the right to be presented without unreasonable or unnecessary delay before a magistrate. The Petitioner herein contends that he

was placed under arrest in Lewis County, West Virginia, at approximately 7:00, p.m. on December 20, 2008, upon the charge of Murder, in the First Degree, a felony, and upon said arrest, was entitled to presentment before a Magistrate. The Petitioner was transported to the Central Regional Jail and incarcerated therein upon said charge. The investigating officer, took a statement from the Petitioner at the scene of the offense. The prompt presentment rule is set forth under West Virginia Code, 62-1-5, which states,

§ 62-1-5. Same--Delivery of prisoner before magistrate; complaint for person arrested without warrant; return.

(a)(1) An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence or as otherwise authorized by law, shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made.

(2) If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith in accordance with the requirements of rules of the supreme court of appeals.

(3) An officer executing a warrant shall make return thereof to the magistrate before whom the defendant is brought.

(b)(1) Notwithstanding any other provision of this code to the contrary, if a person arrested without a warrant is brought before a magistrate prior to the filing of a complaint, a complaint shall be filed forthwith in accordance with the requirements of rules of the supreme court of appeals, and the issuance of a warrant or a summons to appear is not required.

(2) When a person appears initially before a magistrate either in response to a summons or pursuant to an arrest with or without a warrant, the magistrate shall proceed in accordance with the requirements of the applicable provisions of the rules of the supreme court of appeals.

West Virginia Code, §62-1-5.

The prompt presentment rule is also contained in Rule 5(a) of the West Virginia Rules of Criminal Procedure. That rule states,

RULE 5. INITIAL APPEARANCE BEFORE THE MAGISTRATE; BAIL

(a) In General. An officer making an arrest under a warrant

issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivision of this rule.

Rule 5(a) West Virginia Rules of Criminal Procedure

The prompt presentment rule was recognized in Syl. Pt. 1, State v. Mason, 162 W.Va. 297, 249 S.E.2d 793 (1978). The underlying rationale of the prompt presentment rule is to seek to guarantee the trustworthiness of information elicited from a criminal defendant in such an instance where an unjustifiable delay in presentation before a judicial officer may render such information inherently unreliable or suspect as the fruit of an involuntary confession. In State v. Guthrie, this court held, “[t]he rationale that justifies refusing to admit a confession under circumstances where a defendant was questioned by police officers at the police station rather than taken to a neutral magistrate for an explanation of his rights, the charges against him, and mechanisms for acquiring bail, is that the confession elicited under those circumstances is inherently unreliable or suspect. State v. Guthrie, 173 W.Va. 290, 315 S.E.2d 397, 401 (1984). Also, this court later held, “[t]he delay in taking the defendant to a magistrate may be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant.” Syl. Pt. 6, State v. Persinger, 169 W.Va. 121, 286 S.E.2d 261 (1982). In State v. Humphrey, this court stated, “Our prompt presentment rule contained in W.Va. Code 62-1-5 [1965], and Rule 5(a) of the West Virginia Rules of Criminal Procedure, is triggered when an accused is placed under arrest. Furthermore, once a defendant is in police custody with sufficient probable cause to warrant an arrest, the prompt presentment rule is also triggered.”

Syllabus Point 2, State v. Humphrey, 177 W.Va. 264, 351 S.E.2d 613 (1986).

In the instant case, the statement taken at the Central Regional Jail on December 21, 2008, should be excluded as involuntarily given and taken in violation of the Petitioner's right to prompt presentment before the Lewis County Magistrate Court. The investigating officer took advantage of the situation to gather additional inculpatory evidence against the Petitioner before he could be advised of his rights by the Court. The Petitioner had been arrested at the scene of the offense, questioned at the scene, and thereafter incarcerated. The Petitioner was of limited intellect, unable to read, certainly unfamiliar with the law and criminal process and under tremendous stress. By ruling that the statement of December 21, 2008, was admissible, the Circuit Court erred insofar as the statement was not voluntarily given and was obtained in violation of the prompt presentment rule.

III. WHETHER THE CIRCUIT COURT IMPROPERLY ADMITTED THE ALLEGED MURDER WEAPON INTO EVIDENCE WITHOUT THE STATE HAVING PROPERLY ESTABLISHED A CHAIN OF CUSTODY THERETO.

The State of West Virginia, during the Petitioner's trial sought to introduce into evidence the alleged murder weapon. It is believed that the alleged murder weapon that had been collected at the scene of the offense was transported to the Weston Detachment of the West Virginia State and thereafter, it is believed that the weapon was transported to the State Police Forensic Laboratory for testing. Afterwards, it is believed that the weapon was returned to the Weston Detachment. Counsel for the Petitioner objected to the admission of the same because the State had failed to provide documentation relative to the location and the identity of those persons who had possession or involvement with the same. It is important to note that this documentation was requested as a part of the Petitioner's original discovery requests which were

not responded to by the State and which nondisclosure was the basis of the Petitioner's Motion to Exclude which was heard by the Court on October 22, 2009. Therein, the Court, on its own motion, continued the Petitioner's trial to the next term of Court and ordered the State to provide all discovery materials by November 23, 2009. During the October 22, 2009, hearing, the Court stated, "[t]he State will have 30 days from today, that is, by the 23rd day of November, 2009, to furnish all discovery to the Defendant. *Anything not disclosed at that time is inadmissible.* Now you folks get on the ball." (emphasis added). See Transcript, pp. 17-18, October 22, 2009. Despite this, the evidence relating to the chain of custody of the alleged murder weapon was not provided. Counsel offered objection to the introduction of this evidence which despite its prior order, the Court overruled.

BY THE COURT: What's your objection to the admission of the gun at this time?

MR. NANNERS: the chain of custody has not been established through his agency. We did not receive any of the documentation from the State to prove what this witness has testified to, who signed it out, when it was examined, when it was signed back in, we have no record – we have never received anything on that. In addition, there has not been the final chain of custody link to the State Police evidence locker here and Sergeant Menendez, who is the custodian of that locker.

See Transcript, p. 317, February 17, 2010.

Also,

Q Mr. Cochran, your forensic laboratory case submission form, at the end, did you sign that?

A It has my initials, showing that that is part of the documentation that I examined, but I did not sign that submission form.

Q You didn't sign that you received via evidence locker, laboratory case number 804-895, section ID number F-08-201?

A All of that information is filled out by our Evidence Receiving Technicians.

Q You didn't sign it?
A No, I did not sign it.
Q They didn't sign it? Nobody signed it?
A I don't have a signature on it and –

MR. WILLETT: Thank you. Your Honor, I move to exclude the testimony of this witness.

BY THE COURT: Overruled.

See Transcript, p. 321, February 17, 2010.

The rules governing chain of custody are designed to ensure that evidence introduced at trial is substantially similar in condition to the same evidence as discovered during the pretrial investigation. See Syl. Pt. 1, State v. Davis, 164 W.Va. 783, 266 S.E.2d 909 (1980). Whether a sufficient chain of custody has been shown to permit the admission of physical evidence is an issue for the trial court to resolve. Id. at 783-84, 266 S.E.2d at 910, Syl. Pt. 2. In Davis, the Court recognized that to allow the admission of physical evidence into a criminal trial, “it is only necessary that the trial judge, in his discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with.” Id. at 786-87, 266 S.E.2d at 912. A trial court's decision on chain of custody will not be disturbed on appeal absent an abuse of discretion. Id. at 783, 266 S.E.2d at 909, Syl. Pt. 2; see Syl. Pt. 8, State v. Young, 173 W.Va. 1, 311 S.E.2d 118 (1983).

In the Petitioner's case, the State failed to provide discovery of evidence relating to the chain of custody as to the alleged murder weapon. The Trial Court failed to enforce its prior ruling that any such evidence not disclosed by November 23, 2009, would be inadmissible. Further, the State, during trial failed to call relevant witnesses including the custodian of the State Police evidence locker and what evidence was offered to establish a proper chain of custody was incomplete, unsigned, and unreliable.

IV. WHETHER THE CIRCUIT COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONIAL EVIDENCE RELATING TO THE VICTIM'S CAUSE OF DEATH.

Your Petitioner contends that the Trial Court erred in allowing the admission of testimonial evidence of Patrick Tomey as to the cause of death of the decedent. Article 12 of Chapter 61 of the West Virginia Code establishes the office of the State's Chief Medical Examiner. West Virginia Code, §61-12-3, sets forth that the Chief Medical Examiner shall be responsible for

- (1) The performance of death investigations conducted pursuant to section eight of this article;
- (2) The establishment of cause and manner of death; and
- (3) The formulation of conclusions, opinions or testimony in judicial proceedings.

West Virginia Code, §61-12-3(d).

West Virginia Code, §61-12-8(a), sets forth,

When any person dies in this state from violence, or by apparent suicide, or suddenly when in apparent good health, or when unattended by a physician, or when an inmate of a public institution, or from some disease which might constitute a threat to public health, or in any suspicious, unusual or unnatural manner, the chief medical examiner, or his or her designee or the county medical examiner, or the coroner of the county in which death occurs shall be immediately notified by the physician in attendance, or if no physician is in attendance, by any law-enforcement officer having knowledge of the death, or by the funeral director, or by any other person present or having knowledge. Any physician or law-enforcement officer, funeral director or embalmer who willfully fails to comply with this notification requirement is guilty of a misdemeanor and, upon conviction, shall be fined not less than one hundred dollars nor more than five hundred dollars. Upon notice of a death under this section, the chief medical examiner, or his or her designee or the county medical examiner, shall take charge of the body and any objects or articles which, in his or her opinion, may be useful in

establishing the cause or manner of death, and deliver them to the law-enforcement agency having jurisdiction in the case.

Further, West Virginia Code, §61-12-8(b), states,

A county medical examiner, or his or her assistant, *shall make inquiries regarding the cause and manner of death*, reduce his or her findings to writing, and promptly make a full report thereof to the chief medical examiner on forms prescribed by the chief medical examiner, retaining one copy of the report for his or her own office records and providing one copy to the prosecuting attorney of the county in which the death occurred.

West Virginia Code, §61-12-8(b). (emphasis added).

This Court has previously held, “[a]ny physician qualified as an expert may give an opinion about the physical and medical cause of injury or death, which opinion may be based in part on an autopsy report; such testimony does not violate the confrontation clause, as the autopsy report fits within the firmly rooted hearsay exception for public records.” State v. Kennedy, 517 S.E.2d 457, 205 W.Va. 224 (1999). See also, State v. Jackson, 298 S.E.2d 866, 171 W.Va. 329 (1982).

In the Petitioner’s case, the only evidence introduced by the State as to the cause of death was the testimony of Patrick Tomey, who testified as the County Coroner for Lewis County, West Virginia, and the actions he took at the scene of the offense. The decedent’s body was prepared for transport by Mr. Tomey for transport to the Medical Examiner’s office for the purpose of an autopsy. The Chief Medical Examiner’s office conducted an autopsy of the decedent, however, the State failed to introduce any evidence relating to the autopsy and the results thereof.

During the Petitioner’s trial, the Prosecuting Attorney offered only the testimony of Mr. Tomey as to the cause of death to which opinion Counsel objected.

Q Okay. Now, as a coroner, when you're filling out those forms, is there a place where you fill out, if you know, the cause of death?

A On – when I fill out my form, when they go out to Charleston, they're the ones that fill out to what the cause of death, when they go for an autopsy.

Q But sometimes don't you fill out the cause of death?

A Sometimes I do, yes.

Q In this case, did you fill out the cause of death?

A Can I look through my notes?

BY THE COURT: You may.

WITNESS: Yes, I did write down cause of death in my notes.

MR. MORRIS:

Q What was it?

A Gun –

MR. WILLETT: Objection.

BY THE COURT: Well, he can testify to what he wrote down. Proceed.

WITNESS: Cause of death, what I wrote down in my notes, "Gunshot to the head."

MR. MORRIS: I have no further questions, Your Honor.

See Transcript, p. 306, February 17, 2010.

It is clear that Mr. Tomey was not qualified to render an opinion as to the cause of death. Article 12, of Chapter 61 of the West Virginia Code, clearly delineates that it is the province of the Chief Medical Examiner to conduct autopsies, determine cause of death, and provide necessary testimony thereto. West Virginia Code, §61-12-3; West Virginia Code, §61-12-8.

Mr. Tomey was not qualified as an expert witness nor was he shown to be a physician or any other person empowered to render such opinion. Thus, his opinion should have been excluded as to the cause of death.

V. WHETHER THE PETITIONER WAS DENIED FUNDAMENTAL DUE PROCESS OF LAW WITH RESPECT TO THE CONDUCT OF THE PROCEEDINGS HELD DURING THE "MERCY" PHASE OF THE TRIAL FOLLOWING THE PETITIONER'S CONVICTION FOR

MURDER IN THE FIRST DEGREE.

Following the return of the verdict convicting the Petitioner of Murder, in the First Degree, the Trial Court proceeded to the “mercy phase” of the trial. The Petitioner offered his own testimony regarding the events that led to his conviction, and rested. The State did not offer any evidence. The Trial Court immediately sent the jury to deliberate upon the issue of mercy without affording the Petitioner the opportunity to present argument with respect to the issue of mercy.

During post-trial motions held on April 7, 2010, Counsel for the Petitioner sought to new trial based upon this issue. The Court addressed the motion thusly,

MR. NANNERS: The final issue that we would raise, Your Honor, is the fact that during the mercy stage of the case, the jury heard the testimony of Mr. McCartney, New evidence was offered, but the Defendant was not granted the ability to make closing argument, or any argument at all, with respect to the mercy issue. I’ve got some case law from State of West Virginia.

THE COURT: Wait a minute. You-all were offered a chance to argue that, weren’t you?

MR. NANNERS: There was no offering argument. As soon as the witness came off the stand, the Court sent the jury back to deliberate on the issue of mercy; and were not permitted the chance to argue that.

THE COURT: There’s noting in the transcript about final arguments. After that, the State didn’t put on any witnesses. He only put on Mr. McCartney. I see no objections in here. I see where you requested, did not request, a final argument.

MR. NANNERS: Your Honor, that is a reversible error to not permit the Defendant to make an argument at the close of any evidence. We have case law from the State of West Virginia, State versus Webster case. I have a copy that I could tender to the Court for review and a copy for counsel. This case deals with denying a defendant an oral argument after a bench trial. But, the fundamental premise is throughout the case. When we cite the Herring versus New York, U. S. Supreme Court opinion: “There’s a Constitutional right of defendant to be heard through counsel necessarily; and that necessarily includes his right to have counsel make a proper argument on the evidence in the applicable law in

his favor, however, simple, clear, and unimpeached, and conclusive the evidence may seem. Unless he has waived the right to such argument, or the argument is not within the issues of the case, the trial court has no discretion to deny the accused such right.”

Mr. McCartney did not waive the right.

THE COURT: I don't think it was denied him, either. I just don't think you-all asked for it and didn't get it. You're the only one that had a witness. I don't think it was prejudicial to him.

MR. NANNERS: Well, it was certainly prejudicial. He was denied mercy.

THE COURT: Just because you argue it doesn't mean he would get mercy.

MR. NANNERS: I understand, but you can't surmise that.

THE COURT: Your motion is denied and overruled. I'm sure you'll go to the Supreme Court, and they'll tell me if I'm wrong about that.

MR. NANNERS: I understand, Your Honor. That's all we have with respect to our post-trial motions.

See Transcript, pp. 15-17, April 7, 2010.

In State v. McLaughlin, ___ W.Va. ___, (2010), this Court discussed the procedure which should govern the bifurcated penalty portion of a murder trial. The Court held,

Given that under the foregoing statute, the punishment of life imprisonment upon conviction for first degree murder is fixed unless the jury, in its discretion, recommends mercy, it logically follows that the defendant should generally go first in offering argument and evidence to the jury in his or her quest to show the jury why it should recommend **mercy**. *See id.*; W.Va. Code, §62-3-15. Thereafter, the State would be allowed to offer any impeachment or rebuttal evidence as warranted by evidence offered by the defendant, including, but not limited to, evidence surrounding the nature of crime committed, as well as evidence of other bad acts. The defendant then would have the last opportunity to offer any evidence to refute that offered by the State, and have the last argument to the jury before it would make the mercy determination.

State v. McLaughlin, ___ W.Va. ___, (2010).

In State v Webster, this Court discussed the fundamental right to present argument to the jury

prior to deliberation. The Court held, “. . . a defendant in a criminal case has a right to present a closing argument at trial and the failure of a court to allow the defendant the opportunity to present an oral closing argument at trial constitutes reversible error that cannot be cured upon appeal by remand of the case for the purpose of permitting an oral closing argument post-trial.” State v. Webster, 218 W.Va. 173, 624 S.E.2d 520 (2005).

Based upon the foregoing, it is apparent that the Trial Court erred in failing to provide the opportunity for closing argument during the mercy phase of the Petitioner’s trial. The Trial Court improperly treated the issue as one which had to be requested rather than a right which had to be affirmatively waived. The Petitioner at no point in this matter waived his right to argument and should have been provided opportunity for the same. Thus, it should be concluded that the Petitioner was unjustifiably deprived his right to receive a fair trial.

VI. WHETHER THE PETITIONER HERETO WAS DENIED HIS RIGHT TO A FAIR TRIAL BASED UPON THE CIRCUIT COURT’S DENIAL OF COUNSEL’S OBJECTION TO THE STATE’S PROPOSED INSTRUCTIONS

At the close of evidence at the Petitioner’s trial, the Court reviewed proposed jury instructions. Counsel for the Petitioner objected to the States proposed instruction no. 6 which stated,

The jury is instructed that murder in the first degree consists of an intentional, deliberate and premeditated killing which means the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ, and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder.

State v. Guthrie, 194 W.Va. 657 (1995).

Counsel objected to this instruction in that it conflicted with an instruction already admitted. Counsel objected that the giving of this above stated instruction would confuse the jurors and that the proposed instruction did not contain all relevant elements of the offense. See Transcript, p. 366, February 17, 2010. This concern as born out as during deliberation, the jury announced that it had a question as to the definitions of the offenses.

FOREPERSON: Yes, we would like to have definition, written definition of the offenses as charged, Murder First, Murder Two, Voluntary Manslaughter, broken down so that we can compare and contrast, perhaps, to make sure that we cover all bases.

BY THE COURT: I understand. You want me to read those to you again?

FOREPERSON: If you could, may I take notes?

BY THE COURT: Well –

FOREPERSON: We would prefer a copy.

BY THE COURT: I can let you take the instructions back to the jury room with you. You got a paper clip, another paper clip? I will let you take the instructions back with you. The question you are asking is in Instruction Number One, State's Instruction Number One.

Now, here's what – you can sit back down, if you like. When these are presented to me by the parties, I look at them and see if they're correct and sometimes I have to make corrections to them, which I did in this one. A lot of corrections, which you'll notice and I hope you can read my writing. And if you have a problem with it, call back and let me know, because this State's Instruction Number One answers your question, but you're going to notice that I have made some corrections throughout and hopefully you all can read my writing.

So I'm going to let you all take these back with you and you all can have the instructions and I'm going to put the one that you're asking about on the top, okay? And you all can look it over when you get back there. Does that answer your question?

FOREPERSON: Yes, sir.

BY THE COURT: All right. You all may go back and continue your deliberation.

See Transcript, p. 412, February 17, 2010.

This Court has previously held that, “[i]nstructions in a criminal case which are confusing, misleading or incorrectly state the law should not be given.” Syllabus Point 3, State v. Bolling, 162 W.Va. 103, 246 S.E.2d 631 (1978).⁷ Syllabus Point 4, State v. Neary, 179 W.Va. 115, 365 S.E.2d 395 (1987).” Syl. pt. 9, State v. Murray, 180 W.Va. 41, 375 S.E.2d 405 (1988). Further, it has also been held, “It is reversible error to give an instruction which is misleading and misstates the law applicable to the facts.” Syl. pt. 4, State v. Travis, 139 W.Va. 363, 81 S.E.2d 678 (1954).

As set forth, the granting of State’s instruction no. 6, operated to provide the jurors with a confusing array and varying definitions of the offenses which could be considered. To permit the State to introduce an instruction which differed from its own prior instruction by omitting necessary elements of the offense denied the Petitioner his right to a fair trial.

VII. WHETHER CIRCUIT COURT ERRED IN FAILING TO ADDRESS IMPROPER AND PREJUDICIAL STATEMENTS MADE BY THE PROSECUTING ATTORNEY TO THE JURY DURING CLOSING ARGUMENT.

During the Petitioner’s trial, the Prosecuting Attorney made prejudicial and improper comments to the jury during his rebuttal summation. During his final argument, the Prosecuting Attorney stated to the jurors, “But letting a murderer go invites a repeat of the same crime.” Rather than interrupt the Prosecutor during his final argument, Counsel allowed the Prosecutor to conclude then moved the Court for an instruction to the jury to disregard that statement as improper. The Court failed to take any action with what it found to be an improper statement by the Prosecutor.

MR. WILLETT: Judge, I didn’t want to object during Mr. Morris’s rebuttal summation, but we did have an objection and want to ask this Court to instruct the jury to disregard Mr. Morris’s

statement regarding , “If we don’t put this murderer away it invites it to happen again.” I think that’s improper argument.

BY THE COURT: Well, I thought your – argument was improper but there was no objection to it, either. I think it would be worse to say something to them about it than just let it go.

MR. WILLETT: Yes, sir.

BY THE COURT: I’ll just let it go.

Transcript, pp. 408-409, February 17, 2010

In syllabus point six of State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995), this Court articulated the factors to be examined when analyzing an alleged prejudicial prosecutorial remark, as follows:

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syllabus point five of Sugg clarified that not every improper prosecutorial remark will result in reversal of a conviction: “A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice.” Syl. Pt. 5, State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995). In State v. Graham, 208 W.Va. 463, 541 S.E.2d 341 (2000), this Court also addressed the principles by which prosecutorial comments must be judged. This Court stated as follows:

In reviewing allegedly improper comments made by a prosecutor during closing argument, we are mindful that “[c]ounsel necessarily have great latitude in the argument of a case,” State v. Clifford, 58 W.Va. 681, 687, 52 S.E. 864, 866 (1906) (citation omitted), and that “[u]ndue restriction should not be placed on a prosecuting attorney in his argument to the jury.” State v. Davis,

139 W.Va. 645, 653, 81 S.E.2d 95, 101 (1954), *overruled, in part, on other grounds, State v. Bragg*, 140 W.Va. 585, 87 S.E.2d 689 (1955).

In State v. Boggs, this Court also held, “[t]he discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom.” Syl. Pt. 3, State v. Boggs, 103 W.Va. 641, 138 S.E. 321 (1927).

The prosecutor's argument was improper insofar as he was asking the jury to convict the Petitioner to insure that no other murder would occur rather than asking them to apply the facts to the law. Under the Fifth and Sixth Amendments to the United States Constitution, and Article III of the Constitution of this State, an accused is guaranteed the right to receive a fair trial and a decision from an impartial jury. Attempts by a prosecutor to improperly prejudice the Jury against the accused effectively deny an accused the right to receive a fair and impartial hearing. As this Court has held, “the prosecutor has an ethical responsibility to safeguard against these abuses,” and the prosecutor may “strike hard blows, but not foul ones”. United States v. Ash, 413 U.S. 300, at 320 (1973); citing, Berger v. United States, 295 U.S. 78, 88 (1935); Brady v. Maryland, 373 U.S. 83, (1963). As the Petitioner was been tried upon the most infamous of offenses, and is facing the harshest criminal penalty that can be imposed, it is incumbent upon the Court and the State of West Virginia to insure that he receives a fair trial and that such conviction and sentence will not be based upon improper consideration by the jury of matters that are not relevant nor based upon the evidence presented.

VIII. THE INDICTMENT RETURNED AGAINST THE PETITIONER WAS FATALLY DEFECTIVE INsofar AS THE SAME FAILED TO PROPERLY IDENTIFY THE

ALLEGED VICTIM OF THE OFFENSE.

Your Petitioner contends that the Circuit Court erred in failing to direct a verdict of acquittal or dismissal of the indictment insofar as the indictment returned by the Grand Jury failed to properly identify the alleged victim of the offense. The indictment returned by the Grand Jury named "Vicki Page" as the victim. In reality, the testimonial evidence adduced at trial shows that the decedent was "Vickie Page". See Transcript, p. 264, February 17, 2010. At no other time during the trial was evidence introduced to contradict the identity of the decedent as being that of the person named in the indictment. At no time during the trial process did the State of West Virginia ever seek to even move the Court to amend the indictment to reflect the proper identity of the decedent, much less seek a re-indictment of the Petitioner in this regard. Counsel for the Petitioner offered numerous objections and motions regarding the same, which the Trial Court failed to properly address. See Transcript, pp. 183, 185, February 16, 2010; See Transcript, pp. 345, 369-370, February 17, 2010.

In, State v. Myers, this Court held, "[i]n any case of homicide, there must be proof of the identity of the deceased and the causation of death." State v. Myers, 298 S.E.2d 813 (1982).

During the Petitioner's trial, the State offered no evidence consistent with the identity of the decedent as being "Vicki Page" as set forth in the indictment. Additionally, the State did not offer any evidence to establish the identity of the decedent by family or friend testimony, birth certificates or any other document that could establish identity.

IX. WHETHER THE CUMULATIVE ERROR OCCURING DURING THE PETITIONER'S TRIAL PROCEEDINGS REQUIRES A REVERSAL OF HIS CONVICTION UPON THE CHARGE OF MURDER, IN THE FIRST DEGREE, AND HIS SENTENCE OF LIFE IMPRISONMENT WITHOUT MERCY.

As set forth above, the State committed the following numerous errors that prevented the Petitioner from receiving a fair trial, including:

- a.) The State failed to prove the identity of the victim of the offense;
- b.) The indictment was fatally flawed naming the wrong victim which the State never sought to amend or correct;
- c.) The State provided the bulk of its discovery responses to the Petitioner two weeks prior to trial after the jury had been empanelled which led the Trial Court to continue the Petitioner's trial, sua sponte, from the pending term of Court, over the objection of the Petitioner;
- d.) The State offered no cause whatsoever as to its failure to provide timely discovery responses and no sanction was imposed upon the State for its egregious conduct;
- e.) Despite the Court's order to provide timely discovery, the State failed to produce all requested information including: autopsy photographs and related documents and chain of custody documents as to the decedent's autopsy and the alleged murder weapon;
- f.) The State failed to produce autopsy evidence to establish the cause of death;
- g.) The State failed to establish a proper chain of custody relating to the alleged murder weapon;
- h.) The State made improper and prejudicial closing argument;
- i.) The failure of the Trial Court to afford the Petitioner the opportunity to present argument to the jury with respect to the issue of mercy.
- j.) The giving of improper jury instructions.

This Court has previously addressed the effect of an accumulation of error that would

constitute a denial of the right to receive a fair trial. In State v. Smith, this Court held that cumulative error can be found “[w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.” Syl. Pt. 5, State v. Smith, 156 W.Va. 385, 193 S.E.2d 550 (1972).

None of the errors as set forth above can be classified as harmless. In fact, any one of these errors alone should justify a reversal of the Petitioner’s conviction and sentence. The State of West Virginia acted egregiously in its investigation and prosecution of the Petitioner. Given the fact that the Petitioner had been charged with the most infamous of offenses and was subject to the maximum penalty afforded by law, it was incumbent upon the State and the Trial Court to ensure that the Petitioner was afforded a fair trial and due process of law.

X. WHETHER THE EVIDENCE ADDUCED AT THE PETITIONER’S TRIAL WAS SUFFICIENT TO SUPPORT HIS CONVICTION SHOULD REQUIRE A REVERSAL OF THE PETITIONER’S CONVICTION UPON THE CHARGE OF MURDER, IN THE FIRST DEGREE, AND HIS SENTENCE TO LIFE IMPRISONMENT WITHOUT MERCY.

In West Virginia, the court does not invade the province of the jury by setting aside a verdict unsupported by the evidence. State v. White, 66 W.Va. 46, 66 S.E. 20 (1909). This Court has previously held, “[i]n a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the accused beyond a reasonable doubt, though the evidence adduced by the accused is in conflict therewith.” “To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate, and that consequent injustice has been done.” Syl. pt. 1, State v. Starkey, 161 W. Va.

517, 244 S.E.2d 219 (1978).

The Petitioner contends that even if the Court accepts as true the evidence presented by the State and reasonable inferences arising from that evidence that the State has not established a prima facie case to support the conviction obtained against the Petitioner.

It is well settled that a claim of insufficiency of evidence to support a verdict is a carries with it a heavy burden of proof upon the Petitioner. As this Court has held,

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. Syllabus Point 3, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court in Guthrie also identified the standard upon which an appellate court shall consider such a claim.

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. Syllabus Point 1, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

In the instant case, it becomes quite apparent that the verdict of guilt is inappropriate given the evidence presented. The evidence presented as outlined above can only leave in the

minds of any reasonable person a clear question as to the guilt of the Petitioner.

In the Court's charge to the jury, the trial court Judge properly instructed the jury that it could not base its verdict of guilt upon suspicion, conjecture or speculation. In this case, it becomes clear that the jury nonetheless engaged in such activities in order to reach its verdict. Throughout the entire presentation of the State's case, no evidence was presented to establish with any certainty the elements of the offense of Murder, in the First Degree.

The State offered witnesses that established the Petitioner's theory of diminished mental capacity. The State's witnesses corroborated the Defendant's claim of extreme intoxication and heat of passion. The State called Brian Joseph who testified that the Petitioner was drinking throughout the day of the incident; and that the Petitioner became engaged in an argument with the decedent. Further, the Petitioner was in such a state of anger that he attempted to physically assault Brian Joseph necessitating that he fled the premises by jumping from a doorway to the ground all while have a broken foot. Brian Joseph testified regarding the Petitioner's state of mind, stating:

"He come out there right in front of the back door and said yeah and then turned around and asked me if I wanted a beer, so he got a beer off the back porch and give me one, and when he opened the other one, I put my hand on his shoulder and I said, "Arnie, please don't." And that was all I said, and it was like a switch went off, he threwed his beer at me and I turned around and went back through the kitchen and he picked up a stack of dishes to throw at me. They hit the sink and I didn't stop, I just - I went right on around the playpen and jumped out the front door, which there ain't no steps there, so - and I didn't stop, I just went down to the neighbor's house."

See Transcript, pp. 112-113, February 16, 2010.

"Throwed his full beer at me and it exploded against the wall and then when he done that, I turned around and went back through the kitchen and he picked up a stack of dishes there by the back door and throwed at me and missed me, the broke in the sink and I

didn't stop, I just went right on out and jumped out the front door and went to the neighbor's."

See Transcript, pp. 114, February 16, 2010.

The second witness offered by the State, Jason Dehainant, who testified that the Petitioner came to his residence after the incident and that he was

Q So Arnie came in, or knocked on the door and then just came in, and he was upset –

A He wasn't hisself. He wasn't the Arnie that I knew.

Q He wasn't acting normal.

A No. No, he wasn't.

See Transcript, pp. 141-142, February 16, 2010.

The third witness offered by the State, Trp. J. R. Brewer, testified that while transporting the Petitioner to the Central Regional Jail following his arrest, he had an the following exchange with the Petitioner:

Mr. McCartney stated, "Never let your friends move in with you.", and I said, "Why?" And his statement was, "I think she was fucking him." He also advised this officer that he messed up and he didn't mean for the gun to go off.

See Transcript, pp. 146, February 16, 2010.

The investigating officer, Trp. Morgan, changed his testimony on a material issue. During the pretrial suppression hearing held on September 2, 2009, Trp. Morgan testified as follows:

Q During your – how many years were you a military policeman?

A Approximately three years.

Q Okay, so during your six years in law enforcement, have you had an occasion to deal with people in an intoxicated condition?

A Yes.

Q And did you determine that you believed Mr. McCartney was in his right mind when he gave you the statement?

A Yes.

Q He wasn't intoxicated to the state where he wouldn't be competent?

A: No.

See Transcript, pp. 12-13, September 2, 2009.

However, during an in camera hearing during the Petitioner's trial, Trp. Morgan changed his testimony to state as to this issue, state that he did believe the Petitioner was intoxicated. See Transcript, p. 160, February 16, 2010.

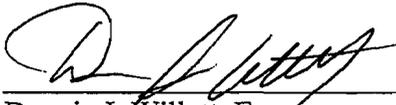
The State offered no additional witnesses to the incident or the events leading up to the incident, thus leaving the only evidence to support a conviction as to a lesser included offense based upon an accidental act committed under heat of passion and extreme intoxication.

Based upon the foregoing, it is clear that based upon the standards set forth in Guthrie and Starkey, there exists very serious questions as to whether the State had proven beyond a reasonable doubt each of the elements of the offenses charged. The inconclusiveness of the evidence demonstrates that the evidence could not establish beyond a reasonable doubt that the Petitioner was guilty Murder in the First Degree.

RELIEF REQUESTED

For the foregoing reasons, the Petitioner, Arnold Wayne McCartney, prays that he be granted an appeal, that his conviction upon the charge of Murder, in the First Degree, and his sentence to life imprisonment without mercy be reversed and set aside or in the alternative that he be granted a new trial and that he be afforded all such further relief as may be deemed appropriate under the circumstances.

ARNOLD WAYNE MCCARTNEY,
PETITIONER,
By Counsel,



Dennis J. Willett, Esq.
Nanners & Willett, L.C.
45 West Main Street
Buckhannon, WV 26201
(304) 472-2048
WV Bar No. 7095

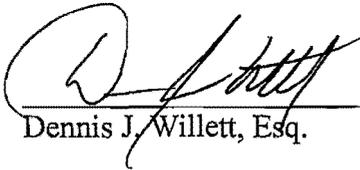


Steven B. Nanners, Esq.
Nanners & Willett, L.C.
45 West Main Street
Buckhannon, WV 26201
(304) 472-2048
WV Bar No. 6358

CERTIFICATE OF SERVICE

I, Dennis J. Willett, do hereby certify that on this the 1st day of November, 2010, I served the foregoing Petition for Appeal and West Virginia Supreme Court of Appeals Docketing Statement by hand delivering true copies thereof to:

Mr. Gary Morris, Esq.
Lewis County Prosecuting Attorney
Weston, WV 26452



Dennis J. Willett, Esq.



Steven B. Nanners, Esq.