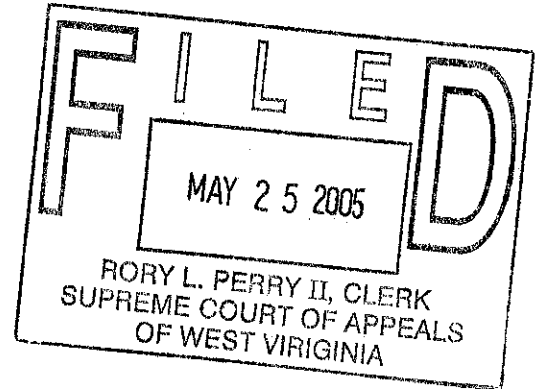


**IN THE
SUPREME COURT OF APPEALS**

**OF
WEST VIRGINIA
AT
CHARLESTON**



CRIMINAL ACTION NO.: 01-F-130-S

**IN RE: BRIEF IN SUPPORT OF PETITION FOR APPEAL OF
CRIMINAL CONVICTION OF
JAMES BLAINE WALDRON**

BRIEF IN SUPPORT OF PETITION FOR APPEAL

**FROM THE CIRCUIT COURT OF
MCDOWELL COUNTY, WEST VIRGINIA
(JUDGMENT ENTERED JULY 23, 2004)**

I. TYPE OF PROCEEDING AND NATURE OF RULING IN LOWER COURT

This is a Brief in support of a Petition for Appeal of a criminal conviction filed by the Appellant, James Blaine Waldron, based upon a jury verdict finding the Appellant, James Blaine Waldron, guilty of voluntary manslaughter, a violation of **West Virginia Code § 61-2-4, as amended**, in the Circuit Court of McDowell County, West Virginia.

The Appellant, James Blaine Waldron, was indicted in the May, 2001, term of the Grand Jury of McDowell County, West Virginia on the criminal charge of first degree murder a violation of **West Virginia §61-2-1, as amended**. Mose Douglas Mullins, Jr. was a co-defendant in this indictment. Mose Douglas Mullins, Jr. was indicted and charged with three (3) criminal counts: (a) Murder of the first degree in violation of **West Virginia Code §61-2-1**; (b) Malicious Assault in violation of **West Virginia Code §61-2-9**; and (c) Malicious Assault in violation of **West Virginia Code §61-2-9**. During the criminal investigation phase and subsequent prosecution of the State of West Virginia's case against Mose Douglas Mullins, Jr., the Appellant, James Blaine Waldron, by and through his counsel, was contacted by Mr. Sid Bell, Prosecuting Attorney of McDowell County, and plea negotiations ensued between the parties. These negotiations eventually resulted in the Appellant, James Blaine Waldron, agreeing to provide assistance to the investigating law enforcement officers in the recovery of evidence and the requirement that the Appellant's, James Blaine Waldron, testimony regarding the events leading up to the incident both before and at any trial or hearing in the prosecution of the co-defendant, Mose Douglas Mullins Jr. The Appellant, James Blaine Waldron, fully complied with each and every request that the State of West Virginia required of him and that as a result of Mr. Waldron's cooperation with the Prosecuting Attorney of McDowell County,

West Virginia, and the West Virginia State Police, Mose Douglas Mullins, Jr. voluntarily pled guilty to two (2) counts of malicious assault, a violation of West Virginia Code §61-2-9 and one (1) count of murder in the second degree, a violation of West Virginia Code §61-2-1, as amended. The Circuit Court of McDowell County, West Virginia sentenced the co-defendant, Mose Douglas Mullins Jr., to a period of (40) Forty years incarceration on all charges.

That after the resolution of the charges against co-defendant Mose Douglas Mullins Jr., a Plea Agreement and Sentencing Order was first presented before the Honorable Rudolf J. Murensky Jr. The Honorable Rudolf Murensky Jr. then scheduled a plea hearing, only to refuse to accept the terms and conditions of the Plea Bargain Agreement and Sentencing Order. Subsequently, the Trial Court, Judge Murensky, then offered to transfer the case to the Honorable Judge Booker T. Stevens, as Judge Stevens had been the presiding Judge who had handled the plea of the co-defendant, Mose Douglas Mullins Jr., and the Judge who had signed many of the Orders in the Waldron case, more specifically, Judge Stevens had signed the Order releasing the Appellant, James Blaine Waldron, into the hands of law enforcement to provide his assistance with the State of West Virginia's case against Mose Douglas Mullins Jr.

The terms and conditions of the Plea Bargain Agreement and Sentencing Order offered by the McDowell County Prosecuting Attorney as well as the Appellant, James Blaine Waldron, to Judge Stevens essentially were as follows:

- a. That the State of West Virginia agreed to dismiss with prejudice felony indictment 01-F-130 against the Appellant, James Blaine Waldron;

- b. The Appellant, James Blaine Waldron, agreed to enter a voluntary plea of guilty to the misdemeanor charge of "Accessory after the Fact, a violation of West Virginia of West Virginia Code §61-11-6, as amended." The State of West Virginia agreed to recommend to the Court that the Appellant, James Blaine Waldron, be given a period of one (1) year confinement in the Regional Jail, and that he be fined the sum of \$250.00, and that he be required to pay all costs associated with this action;
- c. The State of West Virginia further agreed to not oppose any Petition or Motion for Probation and/or home confinement and further the State of West Virginia agreed to not oppose that the Appellant, James Blaine Waldron, be credited for any time served relating to said charges; and
- d. All parties agreed that the plea agreement was entered into pursuant to Rule 11 of the West Virginia Rules of Criminal Procedure.

That on the 3rd day of March, 2003, the State of West Virginia by and through the McDowell County Prosecuting Attorney Sid Bell, and the Appellant, James Blaine Waldron, appeared for a status conference before the Honorable Booker T. Stephens, Circuit Court Judge for McDowell County, West Virginia. The Court then and thereby refused to accept the plea agreement and entered an Order scheduling the Appellant, James Blaine Waldron, for trial on

the First Degree Murder charge. That during the hearing the Trial Court stated that the only plea the Court would accept would be a "felony plea of some type."¹

The Court then "suggested unlawful assault". The Order entered by the Trial Court from the hearing stated that the Court, upon reviewing the totality of the circumstances, did not believe the plea agreement would be an appropriate or just disposition of this case. The Court then gave the Appellant, James Blaine Waldron, and his attorney an opportunity to discuss their options in light of the Court's ruling. The Appellant, James Blaine Waldron, opted for trial given the Circuit Court's failure to accept the plea agreement.²

A jury was selected and sworn and a trial commenced on 5th day of May, 2004, in the Circuit Court of McDowell County, West Virginia. The jury returned a verdict on 7th day of May, 2004, finding the Appellant, James Blaine Waldron, guilty of the lesser included offense of "Voluntary Manslaughter", a violation of **West Virginia Code § 61-2-4, as amended.**

That subsequent to the jury's verdict; post trial motions were filed with the Trial Court seeking a new trial based upon the existence of newly discovered evidence; juror misconduct; false testimony of witness offered by the State of West Virginia; that the verdict was against the weight of evidence; denial of fair trial; and that the use and presentment of prejudicial inflammatory remarks and evidence by the Special Prosecuting Attorney, during the Trial. The Trial Court denied all post trial motions over the objections of the Appellant.

That on the 14th day of July, 2004, the Appellant, James Blaine Waldron, was sentenced by the Honorable Booker T. Sephens, Circuit Court Judge of McDowell County, West Virginia

¹ James Blaine Waldron had a prior felony conviction of "malicious wounding" in the Circuit Court of McDowell County, West Virginia on October 24, 1997. Criminal Action No. 97-F-105K.

² A Writ of Prohibition was filed on the 29th April, 2004 before the West Virginia Supreme Court of Appeals attempting to stop the Trial which began on May 5, 2004.

to a definite term of confinement of "Seven (7) years in the custody of the {West Virginia} Division of Corrections."

That on the 30th day of September, 2004, the Appellant, James Blaine Waldron, appeared before the Honorable Booker T. Sephens, Circuit Court Judge of McDowell County, West Virginia pursuant to the "Recidivist Information" filed by the Special Prosecutor and the Court sentenced the Appellant, James Blaine Waldron, to an additional term of confinement of Five (5) years increasing the actual definite term of confinement to Twelve (12) years in the custody of the {West Virginia} Division of Corrections.

This criminal Appeal is taken upon various legal rulings and actions made by the Trial Court relating to the conduct of the Trial itself, and other issues relating to juror misconduct, admissability of prejudicial evidence, and the refusal of the Trial Court to accept the terms of the "plea bargain" agreement between the State of West Virginia and the Appellant.

II. STATEMENT OF FACTS

That four years before the date of the shootings on the 13th day of May, 2001, Mose Douglas Mullins Jr., the co-defendant; was selling drugs, mainly Oxycotin, for Gabe Hicks, a well known, dangerous, and violent drug supplier in McDowell County, West Virginia. (*See Trial Transcript Pg. 255*) Mose Douglas Mullins Jr., became deeply indebted to Gabe Hicks for an amount somewhere in excess of five thousand dollars (\$5,000.00), due to the fact that after Gabe Hicks would supply the Oxycotins to Mose Douglas Mullins Jr., and Mr. Mullins would keep the drugs and use or take the potent prescription pills for himself instead of selling them for Mr. Hicks. (*See Trial Transcript Pg. 262*) Sometime in March of 2001, Gabe Hicks,

approached Mose Douglas Mullins Jr., and made a deal to free Mr. Mullins of his outstanding debt to Mr. Hicks. *(See Trial Transcript Pg. 264)* The “deal” was for Mose Douglas Mullins Jr., was to kill four (4) people that had possibly broken into Gabe Hicks home at a previous date and stole some of Mr. Hicks’ valuable possessions. *(See Trial Transcript Pg. 264)* Mose Douglas Mullins Jr., readily agreed to murder; Chantel Webb, Jeffery Mullins, Melissa Osborne, and Stevie Coleman, the four individuals who had broken into Gabe Hicks’ home, for the price of five thousand dollars each (\$5,000.00). *(See Trial Transcript Pg. 263)* Mose Douglas Mullins Jr., accepted this offer because Mr. Mullins would not only clear his debt to Mr. Hicks, but also Mr. Mullins stood to make a handsome profit off of these killings. Gabe Hicks then supplied Mose Douglas Mullins Jr. with a nine-millimeter pistol to be used in the commission of the killings. *(See Trial Transcript Pg. 264)*

Two (2) months after the meeting and the agreement had taken place, on the morning of May 13th, 2001, at approximately 11:00 a.m., Mose Douglas Mullins Jr. drove to the Appellant’s, James Blaine Waldron’s, home and asked the Appellant if he would want to “take a ride with him”. *(See Trial Transcript Pg. 268)* The Appellant, James Blaine Waldron, and Mose Douglas Mullins Jr. had been childhood friends knowing each other their whole lives and were next-door neighbors living in the Brit Day Trailer Camp in McDowell County, West Virginia. *(See Trial Transcript Pg. 292)* Suspecting nothing unusual, the Appellant, James Blaine Waldron, agreed and proceeded to “ride around” with Mose Douglas Mullins Jr., most of the morning, covering much of the roadway in Three Forks area in McDowell County, West Virginia. *(See Trial Transcript Pg. 269)*

At some time during the morning, Mose Douglas Mullins Jr., asked the Appellant, James Blaine Waldron, to show him where Lulabell Webb, Chantel Webb's Grandmother, lived. (See Trial Transcript Pg. 269) The Appellant, James Blaine Waldron accompanied Mose Douglas Mullins Jr., to the residence of Lulabell Webb, apparently looking for Chantel Webb. (See Trial Transcript Pg. 270) After noticing that Lullabel Webb's red Pontiac Sunfire was not at the residence, the two men turned around and continued looking for the red Sunfire figuring that Chantel Webb and Jeffery Mullins were simply out "running around" for the day. (See Trial Transcript Pg. 270) The Appellant, James Blaine Waldron, and Mose Douglas Mullins Jr., then proceeded to visit Mose Douglas Mullins's sister who lived up on Bradshaw Mountain. (See Trial Transcript Pg. 270) While on their way, James Blaine Waldron, and Mose Douglas Mullins Jr., stopped off to speak with Danny Ratliff for a few minutes. (See Trial Transcript Pg. 270) After leaving Mr. Ratliff's residence the two men decided to go back down the mountain. (See Trial Transcript Pg. 271) James Blaine Waldron and Mose Douglas Mullins Jr. pulled into a convenience store, the S & M Market, located at the bottom of Bradshaw Mountain where they encountered Chantel Webb, Jeffery Mullins and Don Ball for the first time in the red Pontiac Sunfire. (See Trial Transcript Pg. 271)

At that time, Mose Douglas Mullins Jr., enticed the three individuals, Chantel Webb, Don Ball, and Jeffery Mullins, to travel to a secluded location, by offering the three (3) individuals "drugs" so that Mose Douglas Mullins Jr., would be able to carry out the "hit" arranged between himself and Gabe Hicks. (See Trial Transcript Pg. 272) Mose Douglas Mullins Jr., was able to lure Chantel Webb, Jeffery Mullins and Don Ball up on Bradshaw Mountain to a location known as Payne Fork Hollow by offering to "snort some pills" with

them and "get high". (See Trial Transcript Pg. 272) Following the conversation, the three unsuspecting individuals, Chantel Webb, Don Ball, and Jeffrey Mullins, along with Mose Douglas Mullins Jr., and the Appellant, James Blaine Waldron , *who according to testimony offered by the State of West Virginia up to this point had no idea whatsoever what was about to take place*, left the S & M Market and proceeded directly up the mountain to Payne Fork Hollow. (See Trial Transcript Pg. 275) Testimony, from all parties, is that the car of Mose Douglas Mullins Jr. and James Blaine Waldron arrived at the location first, and when the red Pontiac Sunfire arrived carrying the other three (3) individuals, Chantel Webb, Don Ball and Jeffrey Mullins, that Mose Douglas Mullin's Jr.'s car was pointing back down the hollow. (See Trial Transcript Pg. 275) After arriving, the car of Chantel Webb was parked facing nose to nose with the car of Mose Douglas Mullins Jr. (Trial Transcript Pg. 276) Testimony further reflects that Mose Douglas Mullins Jr. calmly opened his door, went to the rear of his vehicle, opened the trunk of his yellow Chevrolet Nova and retrieved the nine (9) millimeter pistol, all the while acting like he was getting some pills from the trunk of his car. (See Trial Transcript Pg's. 277-278) Chantel Webb got out of her car and went over to speak with the Appellant, James Blaine Waldron, and Jeffery Mullins also exited the red Sunfire and was located between the two (2) vehicles when Mose Douglas Mullins Jr. began firing the pistol that was given to him be Gabe Hicks. (See Trial Transcript Pg. 278) This is when it became clear to the Appellant, James Blaine Waldron, of the criminal actions of Mose Douglas Mullins Jr. However, the testimony of Mose Douglas Mullins Jr. was that immediately after pulling off of the lot at the S& M Market, the car of Mose Douglas Mullins Jr. proceeded across the street to a location known as "Dewey's Video" *which is for the first time based upon the testimony of*

Mose Douglas Mullins Jr., that the Appellant was told of the plans to kill the three (3) individuals and that the assistance of the Appellant was enlisted to aid in the commission of the crime. (See Trial Transcript Pgs. 273)

After retrieving the nine milimeter out of the trunk, Mose Douglas Mullins Jr. walked over to Jeffrey Mullins who was standing between the two (2) cars and proceeded to shoot him multiple times, once in the head. *(See Trial Transcript Pg. 279)* Then, Mose Douglas Mullins Jr., walked over to the car in which Don Ball was seated in the drivers seat in and proceeded to shoot Mr. Ball multiple times. *(See Trial Transcript Pg. 279)* Finally, Mose Douglas Mullins Jr. walked over to Chantel Webb, shoots her in the hip knocking her to the ground and then walked over and grabs her and shoots her in the head "execution style." *(See Trial Transcript Pgs. 279-280)*

The Appellant, who based upon his testimony was seated in the front passenger seat of the Mose Douglas Mullins Jr., car was "busy" rolling a marijuana joint when the shooting began. *(See audio tape recording of voluntary statement given to Trooper Cooper at Princeton Detachment of West Virginia State Police by Appellant)* The testimony of Mose Douglas Mullins Jr., is that the Appellant never exited the car, however, the Appellant and Don Ball testified that the Appellant briefly stepped out of the vehicle "to see what had just occurred." *(See audio tape recording of voluntary statement given to Trooper Cooper at Princeton Detachment of West Virginia State Police by Appellant)* The Appellant, in fear for his own life, and not knowing how to react or what to expect of Mose Douglas Mullins Jr., gets back into the car and watches as Mose Douglas Mullins Jr. dags the bodies of Chantel Webb and Jeffrey Mullins to the edge of the dirt road and then throws them over the hill. *(See Trial*

Transcript Pg. 281) The Appellant, thinking that his brother, Gary Waldron, could help him get out of his present situation in some way, tells Mose Douglas Mullins Jr., to travel up to Frank Keen Ridge to the home of his brother Gary Waldron. (*See Trial Transcript Pg. 284*) However, when they arrived at Gary Waldron's home, the Appellant, James Blaine Waldron finds that his brother is not at home, but that behind his brother's home are his friends Barbara and Johnny Viars. (*See Trial Transcript Pg. 286*) Hoping to get help from the Vier's, the Appellant, James Blaine Waldron, walks to the house. Believing that his presence, and not knowing of the intentions of Mose Douglas Mullins Jr., was putting the lives of the Vier's family in danger, (located at the home were the two (2) Viers children, one who came down to the car near Mose Douglas Mullins Jr.,) and the Appellant believing that Mose Douglas Mullins Jr., still had the nine millimeter handgun in his possession and possible other weapons, the Appellant, James Blaine Waldron , decided to leave. (*See Trial Transcript Pg. 287*) The Appellant, and Mose Douglas Mullins Jr., got back in the car and took a right hand turn at the end of a dirt road near where Gary Waldron lived on Compton Mountain. (*See Trial Transcript Pg. 287*) Mose Douglas Mullins Jr., wanting to get rid of the murder weapon, stopped the car, got out, and threw the nine millimeter pistol off into the wooded area over the hill. (*See Trial Transcript Pg. 287*) At that time, Mose Douglas Mullins Jr., realized that he had blood on his shirt, pants and tennis shoes. (*See Trial Transcript Pg. 287*) Mose Douglas Mullins Jr., grabbed a pocket knife and cut his pant legs off. (*See Trial Transcript Pg. 287*) Mr. Mullins then threw his shirt, shoes, pants legs and socks over the hill near where the pistol had landed. (*See Trial Transcript Pg. 287*) Mose Douglas Mullins Jr., now was wearing a pair of cut-off shorts, and the Appellant, James Blaine Waldron, then got back into the car and then proceeded

down the mountain to a car wash located in Whitewood, Virginia. (*See Trial Transcript Pg. 289*)

The Appellant, James Blaine Waldron, who was in a state of shock from what he had just been exposed too and what had occurred and further realizing that he knew that Mose Douglas Mullins Jr. to always carry a small .38 caliber pistol with him, could only stand there and watch as Mose Douglas Mullins Jr., sprayed the blood off of his yellow Chevrolet Nova. (*See Trial Transcript Pg. 289*) The two men then got into the vehicle and continued back towards the Brit Day Trailer Camp in McDowell County, West Virginia. (*See Trial Transcript Pg. 289*) Mose Douglas Mullins Jr. decided to stop and get gas, so the two men stopped off at a small convenience store called the Double R. Store, or "R.C. Cole's", and purchased gas. (*See Trial Transcript Pg. 290*) The Appellant, James Blaine Waldron went inside to pay for the gas and while walking inside, met a man by the name of Gary O'Quinn. (*See Trial Transcript Pg. 290*) Mr. O'Quinn told the Appellant that he had heard over the police scanner that Don Ball had gotten shot and that the suspects were driving a yellow Chevrolet Nova. (*See Trial Transcript Pg. 290*) After the Appellant's conversation with Gary O'Quinn, the two men got back into the yellow Nova and began to drive around. (*See Trial Transcript Pg. 290*) At that point in time, the Appellant, James Blaine Waldron, began to tell Mose Douglas Jr. that he needed to turn himself in to the authorities for what he had done. Mose Douglas Mullins Jr. drove his yellow Chevrolet Nova back to his home at the Brit Day Trailer Camp where the police were located and the parties were arrested. (*See Trial Transcript Pg. 290*) Upon arriving at the trailer camp, Mose Douglas Mullins Jr. and the Appellant, James Blaine Waldron, were arrested at approximately 6:00 p.m. (*See Trial Transcript Pg. 291*) The West Virginia State

Police performed "gun shot residue tests" on both men, with the Appellant's test receiving a negative result and Mose Douglas Mullins Jr.'s test receiving a positive result. (*See West Virginia State Police Ballistic Report Pg. 16*) The West Virginia State Police found no money on either individual. (*See West Virginia State Police Ballistic Report*)

The Appellant, James Blaine Waldron, was incarcerated from the time of his arrest on May, 13th, 2001. As a result of discussions with the West Virginia State Police and the McDowell County Prosecutor, Sidney H. Bell, the Appellant, after agreeing that he would provide assistance to the State of West Virginia in prosecuting its criminal charges against Mose Douglas Mullins Jr., was released from jail on July 27, 2001. The Appellant, was released into the custody of the West Virginia State Police and gave a voluntary taped confession, **without counsel present**, and also traveled with the police to the scene and aided the police in the collection of evidence. That as a result of the Appellant's cooperation, Mose Douglas Mullins Jr. pled guilty. The Appellant, James Blaine Waldron, and the McDowell County Prosecuting Attorney who had entered into a Plea Agreement and Sentencing Order appeared before the Circuit Court of McDowell County who subsequently rejected the Plea Agreement and scheduled a jury trial, which resulted in the criminal conviction to which the Appellant is offering this Appeal from.

III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED UPON IN THE LOWER COURT

It is alleged that the Circuit Court erred as follows:

1. The Circuit Court of McDowell County should have honored the plea bargain agreement entered into between the State of West Virginia and the Appellant, James Blaine Waldron .
2. The Trial Court allowed into evidence and allowed the State of West Virginia to use “gruesome” photographs which were highly inflammatory and prejudicial to the Appellant, James “Rusty” Waldron thus denying a fair trial and resulting in a verdict based upon sympathy for the victims and/or prejudice against the Appellant.
3. The presence of Quinton Dawson in the court room discovered taking notes prior to the testimony of his daughter April Denise Dawson, and the failure of the Trial Court to preserve said notes violated the Appellant, James Blaine Waldron’s rights under both the West Virginia and the United States Constitution to preserve and examine evidence.
4. That statements by the Trial Court to the jury panel and the statements made to the subsequent “jury” throughout the Trial that the Court is “duty bound” to resolve the case within a certain time frame; together with comments by the Trial Court to the “jury” during the Trial itself; and the actions of the Trial Court in giving the “jury” a “Allen or dynamite” instruction during the juries deliberations resulted in the Appellant, James Blaine Waldron, not receiving a fair trial as the circumstances surrounding the Trial pressured the jury in reaching their decision.

**IV. POINTS AND AUTHORITIES RELIED UPON, A DISCUSSION OF LAW
AND THE RELIEF PRAYER FOR**

A. The Circuit Court of McDowell County should have honored the plea bargain agreement entered into between the State of West Virginia and the Appellant, James Blaine Waldron.

The Appellant, James Blaine Waldron, was indicted in the May, 2001 term of the Grand Jury of McDowell County, West Virginia on the charge of First Degree Murder a violation of West Virginia § 61-2-1, as amended. Waldron was not indicted as his co-defendant, Mose Douglas Mullins Jr, was of the additional two (2) counts of 'malicious assault' because based upon the testimony of Sid Bell, McDowell County Prosecuting Attorney the State did this because of the plea bargain agreement between the Appellant, James Blaine Waldron and the State of West Virginia through the McDowell County Prosecuting Attorney's Office. (*See Trial Testimony of Sid Bell at Pg. 561*) During the investigation and subsequent prosecution of the State of West Virginia's case against Mose Douglas Mullins, Jr., there were negotiations conducted between the McDowell County Prosecuting Attorney's Office and the Appellant, James Blaine Waldron.

In fact, on July 26, 2001, McDowell County Prosecutor, Sidney H. Bell drafted and faxed a letter to Counsel for the Appellant, James Blaine Waldron. (*See Defendant/Appellant's Motion for Reconsideration of Plea Agreement, Exhibit A*). In that letter, Mr. Bell wrote:

"[a]ccording to Sgt. Pauley and James Waldron's relatives, Mr. Waldron has decided to accept our plea offer and cooperate with the State Police. Sgt. Pauley advised me this

week that he communicated to you our willingness to consider more leniency for your client if his cooperation is given in good faith and produces good results."

The State of West Virginia acted on this agreement immediately. On the same date as he [Prosecutor Sid Bell] faxed the above-referenced letter, July 26, 2001, Mr. Bell drafted a "Motion Requesting Temporary Release of Defendant and Bail Bond to be Set." (See *Defendant/Appellant's Motion for Reconsideration of Plea Agreement, Exhibit B*)

It is very important to note that the State's Motion represented to the Trial Judge; Booker T. Stephens; the following:

The Appellant, James Blaine Waldron, and State Police investigators have been involved in negotiations with the [Appellant] defendant and his counsel, Charles B. Mullins, II, *which have resulted in the defendant's [Appellant's] offer to assist the police in recovering material physical evidence and to submit to interviews concerning the motive for and commission of the crimes charged in this matter.* The offer by the defendant [Appellant] is based upon the State's written offer of a plea agreement that the parties will later present to the Court.

The Motion also stated that "*exigent circumstances exist that make it imperative for the Defendant [Appellant] and the police to act immediately to search for physical evidence.*" (emphasis added)

The Honorable, Booker T. Stephens, signed an Order that Granted the State's Motion based upon those grounds. The Appellant, James Blaine Waldron, without counsel present, was released from jail into the custody of the West Virginia State Police and was transported to

the Princeton Detachment of the West Virginia State Police where the Appellant gave a voluntary audiotaped statement of his involvement. The Appellant in the accompany of the West Virginia State Police, again without counsel present, went to Compton Mountain and aided the police in the recovery of evidence, including; the weapon used in the shootings, a tennis shoe and white sock of Mose Douglas Mullins Jr. Additionally, on August 10, 2001, the State of West Virginia moved the Court to compel Mr. Waldron to provide a blood sample. A hearing was set on that specific Motion on August 29, 2001. During that hearing, Mr. Waldron voluntarily agreed to provide a blood sample to the State of West Virginia. The Trial Court entered an Order on said date for the recovery of the voluntary blood sample.

The Appellant, James Blaine Waldron, complied with each and every request that the West Virginia State Police and the McDowell County Prosecuting Attorney's office asked of him. As a result of Mr. Waldron's cooperation with the McDowell County Prosecuting Attorney's Office and the West Virginia State Police, Mose Douglas Mullins Jr., without going to Trial, entered a voluntary plea of "guilty" to two (2) counts of "malicious assault" and one (1) count of "murder in the second degree." Most importantly, as a direct result of Mr. Waldron's cooperation and the subsequent conviction of Mose Douglas Mullins Jr., the State of West Virginia and the Appellant, James Blaine Waldron, entered into an agreed Plea Agreement and Sentencing Order, relating to the charges filed against the Appellant.

The Plea Agreement and Sentencing Order essentially covered the following:

- a. The State of West Virginia agreed to dismiss with prejudice felony indictment 01-F-130 against James Blaine Waldron .

- b. The Appellant agreed to enter a voluntary plea of guilty to the misdemeanor charge of "Accessory after the Fact", a violation of West Virginia Code § 61-11-6, as amended. The State of West Virginia agreed to recommend to the Trial Court that the Appellant be given a period of one (1) year confinement in the Regional Jail, be fined \$250.00, and be required to pay all costs associated with the Court action.
- c. The State of West Virginia agreed to not oppose any Petition or Motion for probation and/or home confinement and further the State of West Virginia agreed to not oppose that the Appellant be given credit for any time served relating to said charges.
- d. All parties agreed that this plea agreement is entered into pursuant to Rule 11 of the West Virginia Rules of Criminal Procedure.

That on February 6, 2003 the Appellant, James Blaine Waldron, with counsel, and Sid Bell, Prosecuting Attorney for McDowell County, West Virginia, appeared before the Honorable, Rudolph J. Murensky II and presented the plea offer to which the Court refused to accept. However, Judge Murensky offered to transfer the case to the Honorable, Booker T. Stephens, because of the fact that Judge Stephens had signed most of the Orders in Mr. Waldron's case and Judge Stephens had took the plea of Mose Douglas Mullins Jr. (*See Transcript of Hearing held before Honorable, Rudolph J. Murensky II, on February 6, 2003*)

On March 3, 2003, the State of West Virginia by Prosecuting Attorney, Sid Bell, and the Appellant, James Blaine Waldron, appeared at a status conference before the Honorable, Booker T. Stephens. The Court refused to accept the plea, and entered an Order on that date scheduling Trial. Within that Order, the Court stated that the only plea the Court would accept

would be a felony plea.³ The victim of the prior “malicious wounding” charge was Quentin Louie Dawson, Jr., who is the son of Quinton Dawson and the brother of April Dawson, who both testified in this Trial of James Blaine Waldron. Quinton Dawson is the individual who was “caught” and admonished by the Trial Court during the Trial itself, for taking notes. April Dawson is a witness who was called by the Appellant in an effort to repute the fact that the conversation between Mose Douglas Mullins Jr., and James Blaine Waldron at “Dewey’s Video” ever occurred; as April Dawson gave an original statement to police officers that she saw the vehicle of Mose Douglas Mullins Jr., directly leave the parking lot at S & M Market and proceed up the hill not over to the video store where the conversation occurred where Mose Douglas Mullins Jr., enlisted the assistance of James Blaine Waldron .

The Court then “suggested to the Appellant, a plea to the charge of “unlawful assault”. The Order entered by the Court from that hearing states that the Court, in reviewing the totality of the circumstances, does not believe the plea agreement would be an appropriate or just disposition of this case. The Court then gave the Appellant and his attorney an opportunity to discuss their options in light of the Court’s ruling. The Appellant, opted for trial given the Circuit Court’s failure to accept the plea agreement.⁴

That a jury was selected and sworn and that a Trial commenced on May 5, 2004 in the Circuit Court of McDowell County, West Virginia. That the Jury returned a verdict on May 7,

³ Because Mr. Waldron had a prior felony conviction for “malicious wounding” in the Circuit Court of McDowell County, West Virginia, the Appellant and counsel, were concerned that pursuant to the provisions of **West Virginia Code § 61-11-18** the Appellant would be subjected to an extended sentence if he elected to accept the proposed sentencing agreement.

⁴ Upon the decision by the Appellant, James Blaine Waldron to go to Trial the McDowell County Prosecuting Attorney’s Office moved that the Court to be requisied and the Court granted said request and Special prosecutir, Fred Giggensch, was appointed in the place and stead of the McDowell County Prosecuting Attorney.

2004 finding the Appellant, James "Rusty" Waldron, guilty of the lesser included offense of "Voluntary Manslaughter", a violation of West Virginia Code § 61-2-4, as amended.

That on July 14, 2004 the Appellant, James Blaine Waldron, was sentenced by the Honorable Booker T. Sephens, Circuit Court Judge of McDowell County, West Virginia to a definite term of confinement of "Seven (7) years in the custody of the {West Virginia} Division of Corrections."

That on September 30, 2004 the Appellant, James Blaine Waldron, appeared before the Honorable Booker T. Sephens, Circuit Court Judge of McDowell County, West Virginia pursuant to the "Recidivist Information" filed by the Special Prosecutor and the Court sentenced the Appellant, James Blaine Waldron, to an additional term of confinement of Five (5) years increasing the actual definite term of confinement for the Appellant to Twelve (12) years in the custody of the {West Virginia} Division of Corrections.

The West Virginia Supreme Court of Appeals has held that, [a]s a matter of criminal jurisprudence, a plea agreement is subject to principles of contract law insofar as its application insures that a defendant receives that which he is reasonably entitled to receive. State ex rel. Brewer v. Starcher, 195 W. Va. 185, 192, 465 S.E.2d 185, 192 (1995). The West Virginia Supreme Court of Appeals has stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration [for the plea], such promise must be fulfilled. Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427, 433 (1971); State v. Myers, 204 W. Va. 449, 513 S.E.2d 676 (1998); State ex rel. Brewer v. Starcher, 195 W. Va. 185, 192, 465 S.E.2d 185, 192 (1995).

Because a plea agreement requires a defendant to waive certain fundamental rights, the West Virginia Supreme Court found that the court was compelled to hold both prosecutors and courts to the most meticulous standards of both promise and performance. State ex rel. Brewer v. Starcher, 195 W. Va. 185, 192, 465 S.E.2d 185, 192 (1995).

Although addressing prosecutors, it is important to note that our highest Court has stated that “a prosecuting attorney or his successor is bound to the terms of a plea agreement once the defendant enters a plea of guilty or otherwise acts to his substantial detriment in reliance thereon.” Syllabus, State ex rel. Gray v. McClure, 161 W. Va. 488, 242 S.E.2d 704 (1978).

In this case, the Appellant, James Blaine Waldron, upon advise and consent of his legal counsel, entered into negotiations with the McDowell County Prosecuting Attorney, Sid Bell. That as a result of these discussions and negotiations, the Appellant, James Blaine Waldron agreed to; and in fact did provide assistance to the State of West Virginia in the investigation and prosecution of the State of West Virginia’s criminal charges against Mose Douglas Mullins Jr. In doing so, it was conveyed from the McDowell County Prosecutor, Sidney Bell, directly to defense counsel that the State of West Virginia was willing to “consider more leniency for your client if his cooperation is given in good faith and produces good results.”

Subsequent to that communication, James Blaine Waldron voluntarily gave a blood sample for DNA and other scientific analyses, to confirm the statements he was making to investigators. Mr. Waldron gave a confession to officers as well as he also traveled with the investigating officers to the scene of the crime and gave invaluable and integral help that assisted the State in prosecuting their case against, Mose Douglas Mullins Jr., all without counsel present, based upon the plea agreement. Of course, the Appellant, only did this after

the Trial Court entered and signed an Order granting the Appellant's release from custody in order to assist the State of West Virginia pursuant to the terms and conditions of the plea agreement. The Appellant, based upon the Trial Court's entry of the Order believed that the Judge was fully aware of the terms and conditions relating to his release and at no time did the Trial Court indicate otherwise.

The Trial Court's acquiescence in releasing Mr. Waldron to help in the State's case against Mr. Mullins pursuant to plea negotiations with the State of West Virginia, led Mr. Waldron to take actions that were contrary to his interests, and substantially impacted the resulting Trial in his case. Mr. Waldron made himself available to fulfill all terms and conditions of the plea agreement. The Appellant whole-heartedly cooperated in the case against Mose Douglas Mullins Jr. The Appellant waived his right to a jury trial (although he eventually was "forced" to trial). Mr. Waldron has performed all of his obligations under the terms and conditions of the plea agreement obviously to his detriment.

This Trial Court had direct knowledge that there were plea negotiations going on in this case. The Court was aware that Mr. Waldron was assisting the State of West Virginia in their prosecution of Mose Douglas Mullins, Jr. Furthermore, the Court was aware that it was these plea negotiations that led Mr. Waldron to cooperate. The Court then acquiesced in certain promises being made to the Appellant in order to obtain Mr. Waldron's help in the prosecution of Mr. Mullins. The Court did this by releasing Mr. Waldron from custody in exchange for his help. Finally, after obtaining all of his help, this Court then denied Mr. Waldron the very deal that was brokered for in exchange for his help. As noted above, the West Virginia Supreme Court has found that they were compelled to hold both prosecutors and courts to the most

meticulous standards of both promise and performance. State ex rel. Brewer v. Starcher, 195 W. Va. 185, 192, 465 S.E.2d 185, 192 (1995).

Mr. Waldron upheld his end of performance. Accordingly, the Trial Court should have honored the plea that was entered into between the State of West Virginia and Mr. Waldron. For the trial Court to do otherwise violated the very common contract principles of promise and performance, as well as the equitable principles of "justness" and "fairness."

Mr. Waldron's Original Plea Agreement With the State Is Consistent with and Promotes the Interests of Justice.

Rule 11 of the West Virginia Rules of Criminal Procedure gives a trial court discretion to refuse a plea bargain. Syllabus Point 5, State v. Guthrie, 173 W. Va. 290; 315 S.E. 2d 397 (1984).

In fact, a court's ultimate discretion in accepting or rejecting a plea agreement is whether that plea agreement is consistent with the public interest or, stated in a slightly different form, whether it promotes the ends and interests of justice. Myers v. Frazier, 173 W, Va. 658 at 665; 319 S.E.2d 782 at 789 (1984).

The West Virginia Supreme Court of Appeals has opined as to what is meant by a plea bargain being in the public interest in the fair administration of justice. Specifically, our highest Court has stated that there is an initial consideration that the plea bargain must be found to have been voluntarily and intelligently entered into by the defendant and that there is a factual basis for the guilty plea. Additionally, consideration must be given not only to the

general perception that crimes should be prosecuted, but to the interests of the victim as well.

Id.

Additionally, one primary test is “in the light of the entire criminal event and given the defendant’s prior criminal record, whether the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charge and the character and background of the defendant.” Id at 666.

It should also be noted that there are other important considerations. One of these is that a plea agreement may be both “*reasonable and necessary when it is designed to secure a legitimate and important prosecutorial interest.*” Id at 667. (emphasis added). The West Virginia Supreme Court of Appeals, by example, stated that this could occur when a prosecutor enters into a favorable plea bargain with the defendant in order to obtain critical testimony needed to convict an accomplice. Id at 667. Accordingly, it is the duty of the prosecutor to inform the trial court of his specific reasons for entering into a plea agreement with the defendant. Id at 667.

In this case, the Court was faced with a plea agreement that reduced Mr. Waldron’s conviction from one of a felony first-degree murder charge to a misdemeanor “accessory after the fact charge”. In deciding whether to accept or reject this plea, this Court has to decide whether the plea agreement is consistent with the public interest.

The plea agreement that was originally reached in this case is consistent with the public interest. Firstly, Mr. Waldron freely and voluntarily entered into the plea agreement. Additionally, there is a factual basis for the Appellant entering into the plea. Further, the underlying crimes, the murder of Jamie Shantel Webb, and the shooting of Don Ball and

Jeffrey Mullins were prosecuted. Mose Douglas Mullins Jr., pled guilty to second degree murder and "malicious wounding". Mr. Waldron's participation in the State of West Virginia's investigation was critical in the plea that was entered by Mose Douglas Mullins Jr.

In this case a very important "prosecutorial interest" was served. Specifically, Mr. Waldron diligently and in good faith participated and cooperated with the State's case against Mr. Mullins. In doing so, the McDowell County Prosecuting Attorney agreed to allow Mr. Waldron to plea to "accessory after the fact." This leniency was predicated on the fact that a "*legitimate and important prosecutorial interest*" was secured. Thus, the original plea agreement between the State of West Virginia and Mr. Waldron was reasonable and necessary. The Trial Court should have allowed Mr. Waldron to obtain the benefit from which he was promised. This is especially true given the fact that the Trial Court knew that Mr. Waldron was cooperating, and in fact authorized his release to cooperate, pursuant to the plea agreement.

Rule 11 (e) of the West Virginia Rules of Criminal Procedure Forbids A Judge From Participating in Plea Negotiations.

Rule 11 (e) of the West Virginia Rules of Criminal Procedure provides that the trial judge shall not participate in plea discussions. "Rule 11(e)(1) prohibits absolutely a trial court from all forms of judicial participation in or interference with the plea negotiation process." **State v. Sugg, 193 W. Va. 388, 406, 456 S.E.2d 469, 487 (1995).**

In **State v. Sanders, 209 W.Va. 367 (2001)**, the West Virginia Supreme Court of Appeals stated that "there are good reasons for the rule admitting of no exceptions. First and

foremost, it serves to diminish the possibility of judicial coercion of a guilty plea, regardless of whether the coercion would cause an involuntary, unconstitutional plea. Second, such involvement is likely to impair the trial court's impartiality. A judge who suggests or encourages a particular plea bargain may feel a personal stake in the agreement and, therefore, may resent a defendant who rejects his advice. Third, judicial participation in plea discussions creates a misleading impression of the judge's role in the proceedings. As a result of his participation, the judge is no longer a judicial officer or a neutral arbiter. Rather, he becomes or seems to become an advocate for the resolution he suggests to the defendant. For these reasons, Rule 11(e)(1) draws a bright-line prohibiting judicial participation in plea negotiations."

In this case, Mr. Waldron had agreed with the State of West Virginia what his plea agreement was to be. On March 3, 2003, the State of West Virginia and the Appellant, James Blaine Waldron, appeared for a status conference. The Trial Court entered an Order on that date scheduling trial. Within that Order, the Trial Court stated that the only plea the Court would accept would be a plea to some type of felony.

The Appellant, was then given time to decide whether to plead to a felony charge or go to trial. To this point, the Appellant elected to go to trial. However, on this point the Trial Court directly participated in the plea negotiation process and procedure by stating the Trial Court would only accept a plea to some type of "felony." This involvement by the Trial Court effectively destroyed the very premise that the plea agreement was built upon. Mr. Waldron was integral in the conviction of Mose Douglas Mullins, Jr. Additionally, the State of West Virginia, the decedent's family, and the citizens of McDowell County received a direct benefit from Mr. Waldron's cooperation. Finally, the Trial Court's knowledge of the fact that the

Appellant was actively participating and cooperating with the State of West Virginia in order to obtain a plea agreement, clearly provides at the minimum an implied approval by the Trial Court. Mr. Waldron was required to choose between choosing a "felony plea" which would make the Appellant, a twice convicted felon or going to Trial for first degree murder. This unfair and unequitable decision only comes after Mr. Waldron was promised a misdemeanor "accessory after the fact" charge in exchange for his help. Lastly, and most importantly, this unfair decision comes only after the Trial Court affirmatively allowed Mr. Waldron to act to his detriment, and to the State's benefit, knowing that Mr. Waldron was acting pursuant to a plea agreement. Mr. Waldron should receive the benefit of his bargain.

B. That the Circuit Court allowed into evidence "gruesome" photograph which were highly inflammatory and prejudicial to the Appellant, James Blaine Waldron, thus denying him a fair trial.

Once the Trial Court had refused to accept the plea agreement between the State of West Virginia and the Appellant at a pre-trial hearing held before the Trial Court on March 22, 2004, over the objections by Appellant's counsel, the Trial Court allowed "gruesome, inflammatory and prejudicial" photographs to be admitted into evidence and the Trial Court further allowed the State of West Virginia to utilize the photographs in front of the jury in such a manner as to substantially prejudice the "jury" and that such actions denied the Appellant a fair trial based upon the evidence and the verdict was based upon prejudice and severe emotional distress. The

admission of these photographs into evidence and their allowed use during Trial by the Special Prosecuting Attorney violated Rule 403 of the West Virginia Rules of Evidence.

The West Virginia Supreme Court of Appeals has stated that real or demonstrative evidence may not and should not be offered solely to appeal to the emotions or passions of the jurors or merely to distract their attention, and, depending upon the impact such evidence would reasonably have on a jury, its admission might constitute prejudicial error. In State v. Ashcraft, 172 W. Va. 640, 309 S.E. 2d 600 (1983), the Court discussed the use of inflammatory demonstrative evidence by stating:

[W]e caution the lower court that it should cautiously examine the use during closing arguments of exhibits which have not been admitted into evidence. Demonstrative evidence cannot be offered solely to appeal to the emotions or passions of the jury, and depending upon the impact such exhibits may reasonably have on a jury, their use may rise to the level of prejudicial error.

The test should be whether the probative value of the evidence is greater or less than its inflammatory effect. See, State v. Thomas, 157 W. Va. 640, 203 S. E. 2d 445 (1974). While some authorities have questioned whether the “substantially outweigh” test of Rule 403 is applicable to demonstrative evidence, it is well established in West Virginia and federal courts that if the probative value of the evidence outweighs its inflammatory nature, it is admissible; however, if its sole effect is to inflame the jurors, it should not be admitted. To be probative, the evidence must (a) constitute proof of a real issue, (b) tend to refute a claim of the defense, or (c) provide assistance in explaining or illustrating testimony. When photographs first began

finding their way into trials they were viewed with suspicion and received with caution. It was not uncommon to place upon the offering party the burden of producing the negative as well as the photograph itself, and of proving that neither retouching nor other manual or chemical intervention was reflected in the proffered print. The burden has now shifted, and the proponent of a proffered photograph has established a *prima facie* case for its admissibility when s/he has shown it to be an accurate representation of the scene in question. When such a *prima facie* case is established, the opposing party should then be afforded an opportunity to *voir dire*, to cross-examine, and to offer evidence to show that the picture is not in fact an accurate representation. See, State v. Johnson, 111 W. Va. 653, 164 S.E. 31 (1931).

The admission of photographs is within the discretion of the court. See, State v. Kerns, 187 W. Va. 620, 420 S. E. 2d 891 (1992). The West Virginia Supreme Court of Appeals has consistently held that the admission of photographs is within the broad discretion of a trial judge, leaving for appellate review only the question of whether that discretion was abused. See State v. Mullins, 171 W. Va. 542, 301 S.E. 2d 173 (1983). In the absence of a clear showing of abuse of discretion, the trial judge's decision to admit or not admit photographs into evidence will not be disturbed. See United States v. Whitfield, 715 F.2d 145 (4th Cir. 1983). To be clear, the discretion of the trial court runs not only to the admission of the photograph, but also to the scope and dimensions of the photograph sought to be introduced. A court has the discretion under Rule 611(a) to reduce the size of any exhibit, including photographs. Michael v. Sabado, 192 W. Va. 585, 453 S.E.2d 419 (1994).

A trial judge may properly, within its broad discretion, exclude the admission of photographs that are obscure and not sufficiently clear to aid the jury in its fact finding process.

See Elswick v. Charleston Transit Co., 128 W. Va. 241, 36 S.E.2d 419 (1945). However, the failure to admit a relevant photograph that has been sufficiently authenticated is error.

State v. Dunn, 162 W. Va. 63, 246 S.E.2d 245 (1978). In State v. Sette, 161 W. Va. 384, 242 S.E.2d 464 (1978), the Court affirmed the lower court's admission of inflammatory pictures on the ground that the pictures aided in depicting the seriousness of the crime and were at least probative to that extent. On the other hand, it is not error to refuse to admit a photograph where the evidence is merely cumulative to other evidence. West Va. Dep't of Hwys. v. Delta Concrete Co., 165 W. Va. 398, 268 S.E.2d 124 (1980); Tri State Asphalt Prods., Inc. v. McDonough Co., 182 W. Va. 757, 391 S.E.2d 907, 910 (1990) (where other testimony on same subject not error to exclude photograph). Photographs that are not relevant, unnecessary, and cumulative should be excluded. Gebhardt v. Smith, 187 Va. 515, 420 S.E.2d 275, 278 (1992). Unless the exhibit is found to be *gruesome*, to be admissible the trial judge must find the photograph relevant and that its probative value outweighed its prejudicial effects. State v. Haddox, 166 W. Va. 630, 276 S.E.2d 788 (1981); State v. Reed, 166 W. Va. 558, 276 S.E.2d 313 (1981); State v. Clawson, 165 W. Va. 588, 270 S.E.2d 659 (1980); United States v. Johnson, 623 F.2d 339 (4th Cir. 1980). Therefore, for most issues regarding the inflammatory or prejudicial nature of photographs, courts employ the normal Rule 403 balancing test. As developed below, however, until Derr, see, State v. Derr, 192 W. Va. 165, 451 S.E.2d 731 (1994), in West Virginia a gruesome photograph had to meet a higher standard of Rowe. See, State v. Rowe, 163 W. Va. 593, 259 S.E.2d 26 (1979) (gruesome pictures, while *not per se* inadmissible, must have more than substantial probative value). With the court's decision in Derr, this all changed and Rule 403 became the sole test for determining the

admissibility of gruesome photographs. In applying the balancing test of Rule 403, the final determination of admissibility is within the trial judge's discretion. See, State v. Reed, 166 W. Va. 558, 276 S.E. 2d 313 (1981); State v. Clawson, 165 W. Va. 588, 270 S.E. 2d 659 (1980).

On the other hand, where that discretion is abused, the admission of photographs will be deemed error. Under prior West Virginia law, pictures with only a slight probative value were admissible. See, e.g., Harper v. Cook, 139 W. Va. 917, 82 S.E.2d 427 (1954). Of course, like Rowe, Harper v. Cook, 139 W. Va. 917, 82 S.E.2d 427, has now been superseded by the adoption of Rule 403. It should be clear that a photograph may be excluded for reasons other than gruesomeness if it is otherwise prejudicial. Photographs showing defendants in prison clothing have been held inadmissible in West Virginia. See, State v. Lawson, 125 W. Va. 1, 22 S.E.2d 643 (1942); State v. Reedy, 177 W. Va. 406, 352 S.E.2d 158 (1986). Both in Lawson and Reedy, the court declared error in the admission of the photographs because there were other available methods of identification. On the other hand, photographs are not rendered inadmissible simply because they are "very uncomplimentary" and offered "to foster sympathy for the prosecution. See, State v. Reedy, 177 W. Va. 406, 352 S.E.2d 158 (1986). In determining the admissibility there are two separate objections that are normally made. They are (a) lack of proper authentication and (b) the photograph is gruesome. Prior to the West Virginia Supreme Court of Appeals decision in Derr, in West Virginia gruesome pictures were presumed prejudicial and the burden was on the proponent to show that the picture has more than mere probative value -- the proponent must show that the picture is of *essential* evidentiary value to the case. In cases where an objection was made because of gruesome photographs, the objecting party has the initial burden of showing that the photographs are

gruesome before reversible error may be declared. In State v. Beck, 167 W. Va. 830, 286 S.E.2d 234 (1982), the court stated that “[i]n order for photographs to come within the gruesome photograph rule established in State v. Rowe, there must be an initial finding that they are gruesome. Where they are not so found, the **Rowe** rule is not triggered.” Where such a finding was not made the admission of photographs is reviewed only for an abuse of discretion under Rules 401-403. As suggested above, the “gruesome photograph” rule was overruled. The court in **Derr** stated whatever the wisdom and utility of **Rowe**, and its progeny, it is clear that the **Rowe** balancing test did not survive the adoption of the West Virginia Rules of Evidence. Therefore, **Rowe** was expressly overruled because it was considered manifestly incompatible with Rule 403 of the West Virginia Rules of Evidence. Accordingly, the admissibility of photographs over a gruesome objection must be determined on a case by case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence. The now rejected “gruesome photograph” rule discussed above did not apply in civil cases, and this is especially true where the photograph has some relevancy to the case at hand. Now in civil or criminal cases, Rule 403 supplies the controlling standard for deciding a gruesome photograph objection. See United States v. Porter, 821 F.2d 968, 974 (4th Cir. 1987) (the court found that because the photographs belonged to the conspirators, there was no reason to suspect that they were not what they were purported to be). Photographs showing gunshot wounds to the face of the victim were ruled admissible over a Rule 403 objection. In **Analla**, United States v. Analla, 975 F.2d 119 (4th Cir. 1983), the court stated that a trial judge’s admission of “gruesome” photographs cannot be disturbed absent a clear abuse of discretion. Continuing in **Analla**, the court found that the photograph, with the least amount of blood, was admitted to corroborate

the testimony of a witness and to show the position of the body. United States v. Analla, 975 F.2d 119 (4th Cir. 1983).

The West Virginia Supreme Court of Appeals recently revisited this issue in State v. Copen, 211 W. Va. 501, 566 S. E. 2d 638 (2002). The Court in admitting photographs claimed by the Defendant to be “gruesome” stated that during the trial, it was the position of the Appellant that he was not attempting to shoot the victim when he fired at her. Instead, he claimed that he was simply trying to shoot at the ground to scare her. The challenged photographs, along with the testimony of the medical examiner, demonstrated that eight or nine of the 11 bullets fired by the Appellant actually struck the victim's body. The Trial Court examined the photographs and concluded that they were not gruesome. The Court also examined the probative value of the photographs and concluded:

“[T]he photographs and each of the photographs are highly probative of the wounds, the nature of the wounds, and the location of the wounds suffered by the alleged victim in this case. They are also highly probative because they intend [sic] to either corroborate the testimony of other witnesses or evidence or potentially contradict the testimony or evidence of other witnesses.”

The court found that the prejudicial effect of the admission of the photographs did not outweigh their probative value. The Court stated that “this Court has reviewed the photographs and has found that in most cases, they cannot be considered unduly gruesome.” The photographs do portray the nude body of the victim. However, most of the photographs do not show particularly shocking wounds with detached or plainly revealed internal body parts, and most do not show badly torn flesh or even substantial

amounts of blood. Instead, most show small red circles or spots where bullets entered the body. One photograph does appear to be relatively gruesome in that it shows, in somewhat high resolution, a gap in the victim's head where a bullet entered the victim's eye and exited through the victim's temple.

Even if the photographs could be considered to be gruesome, as indicated in State v. Derr, Id., gruesomeness alone does not justify the exclusion of the photographs from a trial. The exclusion is justified only if the prejudicial effect of the gruesomeness outweighs the probative value of the photographs. State v. Derr, Id.

“In examining the evidence in the present case, this Court, like the trial court, believes that the appellant later during the trial did interject an issue in the case as to whether he was actually attempting to shoot at the victim or shoot around her and simply frighten her. In effect, there was some question as to intent and malice, and intent and malice were plainly issues in the case when the photographs were offered into evidence. The fact that multiple shots were fired at the victim, so many in fact that they could not have been fired in an instant alone, coupled with the fact that the majority of bullets fired actually struck the body of the victim when the bullets were fired from a weapon with a sophisticated and accurate scope, would, in this Court's opinion, tend to be circumstantially probative of the fact that the Appellant actually acted with intent and malice.”

In this case, during the selection of the jury panel the Special Prosecutor purposely displayed beside of him in an open chair at counsel table to prospective jurors a photograph of the victim Chantele Webb. When counsel for the Appellant, became aware of such issue and the fact was brought to the attention of the Trial Court the prosecutor was directed to remove the photograph and not allow it to be viewed until properly admitted into evidence. (*See Trial Transcript Pg. 67-68*) The Trial Court stated to the Prosecutor, “it shouldn't be open to where

they can see it now". (See *Trial Transcript Pg. 68*) The Special Prosecuting Attorney moved the Court for admission of the photograph to which the Appellant objected. The Prosecuting Attorney in his argument to the Court stated that the purpose in admitting the picture was to "show that Chantel Webb was alive." Further the Court states to the Prosecutor "And I take it in your opening you just wanted to show that was her---", to which the Prosecuting Attorney responded "Exactly." (See *Trial Transcript Pg. 70*) It is interesting to note that never did the Prosecuting Attorney mention to the Trial Court that the State intended during the direct examination of Jeffery Mullins to turn the picture over and ask the witness about the writing "I love Chantel" and the presence of the initials "JCW and JTM." (See *Trial Transcript Pg. 132-133*) It would see that this testimony was designed exactly to elicit emotion and sympathy for the victim and designed to evoke prejudice against the Appellant. The Prosecutor during his opening statement stated to the jury, "What's this case about? You remember the guy that was sitting in the wheelchair when we were starting these proceedings, the guy I went to talk to. It's about him --- severely brain damaged, can't walk. He's a near quarriplegic because he got shot several times. That's what this case is about. The case is about Chantele Webb. This is here when she was alive. See Her? This is the only thing left for her two children to see of her. Her kids are seven and nine years old. She's dead. This is a case about malicious assault times two. The Appellant was not even indicted on the charges of malicious assault." (See *Trial Transcript Pg. 76-77*) Further, during the presentation of his opening statements the Prosecutor by the use of a projector is displaying to the jury the admitted gruesome photographs which the Appellant had objected too, at the pretrial hearing. (See *Trial Transcript Pg. 77,78,79,80,81*) The Special Prosecutor again during his opening statement displayed to

the jury the gruesome photographs and stated to the jury "You will see this is her laying on a morgue table. This is how she ended her Mother's Day. She was a mother of two children...." (See Trial Transcript Pg. 82) The Prosecutor refers to the case as a "bloody case" (See Trial Transcript pg. 82) The Prosecutor displays crime scene pictures and alludes to the "blood trails" and "they drove through the blood" and "so much blood was up there blood was on the car in splatters". (See Trial Transcript Pg. 83) Perhaps the most atrocious act of the Prosecutor was during the direct testimony of Jeffrey Troy Mullins. Jeffrey Mullins was shot in the head and once in his torso. As a result of the shooting Jeffrey Mullins is confined to a wheelchair and can only move his left arm and his head. (See Trial Transcript Pg. 128) The Special Prosecutor during his direct examination of Jeffrey Mullins presented the witness with a photograph of the decedent Chantele Webb and then requested that the witness turn the photograph over to which was written on the back the words "I love Chantel" and the initials "JCW and JTM" were written. The witness responded that he was the person who wrote that inscription "I love Chantele" and that the decedent wrote the initials. During this testimony the witness in the presence of the jury was obviously visually upset. However, this was not enough for the Prosecutor who announced before the jury "I got another picture---It's not going to be fun. Okay?" At which time the Prosecutor displayed to the witness the pictures of the decedent taken of her at the morgue showing the decedent wrapped in blood dressings, visuable covered with blood and showing her face. The Appellant objected to this pure theatrical act purposely designed to inflame and prejudice the jury panel. The witness upon seeing this photgraph became nearly distraught. (See Trial Transcript Pg. 132,133,134) The Trial Court

over objection of the Appellant's counsel released Jeffrey Mullins to sit in the courtroom in the presence of the jury during the remainder of the Trial.

C. The presence of Quinton Dawson Sr. in the court room discovered taking notes prior to the testimony of his daughter April Denise Dawson, and the failure of the Trial Court to preserve said notes violated the Appellants right under both the West Virginia and the United States Constitution.

After the Trial Court refused to accept the plea agreement between the State of West Virginia and the Appellant, James Blaine Waldron, and also allowed gruesome, inflammatory and prejudicial photographs to be admitted into evidence, it further erred by violating the Appellant's due process rights. The Trial Court failed to preserve notes taken during the trial by an adverse witness to the Appellant, Quinton Dawson Sr., whose daughter was to later testify in the trial. By denying the Appellant a chance to review and preserve these notes, the Trial Court nullified the Appellant's right for a motion for a new trial on the issue of newly discovered evidence or possibly misconduct.

The United States Constitution states that the restriction on the right to present relevant evidence "violates the due process clause where the restriction offends some principle of justice so rooted in traditions and conscience of our people as to be ranked as fundamental." **U.S.C.A. Const. Amend. 14.** The West Virginia Constitution provides a criminal defendant a level of due process protection at least equal to that provided in the United States Constitution, and may, in certain circumstances, require higher standards of protection. **Const. Art. 3, § 10;**

U.S.C.A. Const. Amends. 5, 14. Further, the West Virginia Supreme Court of Appeals has noted that "Certain constitutional rights are so inherently personal and so tied to fundamental concepts of justice that their surrender by anyone other than the accused acting voluntarily, knowingly, and intelligently would call into question the fairness of a criminal trial." State v. Neuman, 179 W.Va. 580, 371 S.E.2d 77 (1988).

In this case, the Appellant, James Blaine Waldron, was denied his right to review, examine, and preserve potential witness tampering evidence based on the fact that the notes almost surely were taken to instruct April Denise Dawson's testimony. The Trial Court and every concerned party was placed on notice of the potential evidence, however due to the Trial Courts actions in confiscating and destroying the evidence, the Appellant was denied his opportunity to be heard in regards to the evidence at trial and on appeal. In other words, by not preserving the notes that were taken by Quinton Dawson Sr., the Appellant was unable to have this Court review whether or not the notes tainted another witness's substantive testimony, thus denying the Appellant due process of law and a fair trial.

The prior felony conviction for the Appellant, James Blaine Waldron, was from McDowell County, West Virginia of the charge "unlawful wounding." This charge occurred on or about October 24, 1997. It is important to note that the victim of this criminal action was Quentin Louie Dawson Jr., the son of Quintin Dawson Sr., and brother of April Denise Dawson who **both** offered testimony against Rusty Waldron in this case. In fact, prior to the sentencing, Quentin Dawson Sr. wrote the sentencing Judge a rather lengthy letter detailing why the Appellant, James Blaine Waldron, should be given a severe sentence. This letter is contained within the Court file, however a copy was never provided to the Appellant's counsel

prior to sentencing. Most questionable is the fact that Quintin Dawson Sr. is the individual who was found by the Trial Judge to be taking notes while present in the Courtroom during the presentation of testimony and prior to the testimony of his daughter April Denise Dawson. (*See Trial Transcript Pg. 529*) The Trial Court then confiscated the personal notes transcribed by Quinton Dawson Sr. (*See Trail Transcript Pg. 530*) It was only during the post-trial hearings that the Appellant, James Blaine Waldron, actually learned that the notes had been destroyed with no mention of what was actually contained in the notes.

During the opening statement offered by the State of West Virginia, the State represented to the jury that prior to traveling up to the site of the shooting that Mose Douglas Mullins, Jr. and the Appellant, James Blaine Waldron, pulled across the street to Dewey's video and this is where for the first time supposedly Mose Douglas Mullins told the Appellant, James Blaine Waldron, that he was going to "need some help with this" and this is when Mose Douglas Mullins offered Rusty Waldron a Thousand Dollars to act as a "lookout" for him prior to the shootings. (*See Trial Transcript Pg. 86-87*) During the opening statement offered by the Appellant, the Appellant's counsel stated to the jury that "an important part of this case" is going to be April Dawson. (*See Trial Transcript Pg. 100*) Further, and also in the opening statement offered by the Appellant, the Appellant's counsel stated to the jury that Mose Mullins Jr.'s testimony is that later that day "[t]hey finally ran into these people at S&M Market." And that Mose Douglas Mullins recollection of the events were, "I then drove across the street just a few feet away, and for the first time, I pulled the gun out from under the seat, I showed it to Rusty and said "I'm going up there to kill these people." "I'll give you a thousand dollars (1,000.00) if you'll listen for me." And, Rusty, said yes." Further the Appellant in his opening,

represented to the jury that "The people that were at the market will testify that they saw him go up on the hill—directly up on the hill." (*See Trial Transcript Pg. 109*)

Quinton Dawson was called by the State of West Virginia as a witness on the first day of the Trial. Mr. Dawson was released by the trial Court and remained in the Courtroom throughout the remainder of the Trial. (*See Trial Transcript Pg. 159*) During the testimony of Don Ball, during his cross examination, Mr. Ball was sasked by the Appellant's counsel: "Did you see the vehicle that Mose Mullins was driving in leave the parking lot?" Mr. Ball responded "yes." Counsel then asked Mr. Ball, "And could you tell me the direction that it traveled?" Mr. Ball responded by saying, "It went up the mountain." Counsel then asked Mr. Ball, "Did you see it go across the street to dewey's Video?" Mr. Ball responded, "What? Go out into the the other road and go up to the other way? I Didn't see that." (*See Trial Transcript Pg. 243*) During the direct examination of Mose Mullins, Mr. Mullins stated "I went to Dewey's Video. I just sat there for a little bit like I was going somewhere, and I reached under the the car seat, and I pulled the gun out." (*See Trial Transcript Pg. 273*) During the cross examination of Mose Douglas Mullins counsel for the Appellant, asked Mr. Mullins if April Dawson was present went he drove his car across the street from the S & M Market over to Dewey's Video to which Mose Douglas Mullins responded "yes". Mose Douglas Mullins states during his cross examination that it was at Dewey's Video where his conversation occured with the Appellant, James Blaine Waldron, telling Mr. Waldron of his plans to kill someone and enlisting Mr. Waldron's help. (*See Trial Transcript Pg. 390*) During the cross examination of Trooper Jason Cooper counsel for the Appellant, Rusty Blaine Waldron, asked the Trooper during your testimony before the Grand Jury you mentioned that you had two

witnesses that saw the the accused and the victim leave the S & M Market to which State Trooper Cooper responded that the identity of the two witnesses were Stephanie Sparks and April Dawson. (*See Trial Transcript Pg. 496*) Immediately prior to the testimony of April Dawson, and while Quinton Dawson Sr., was present in the Courtroom, in response to an objection from the State of West Virginia counsel for the Appellant, stated to the Court” [T]he reason we called -- we think Ms. Dawson is important is she was present on the scene when all of the parties was down there. She’s going to testify to -- we think that she’s going to testify to the fact that when the parties left the market, rather than her saying Mose Mullins people go across the street the street to the video store, that she saw them proceed right up the hill.” (*See Trial Transcript Pg. 582-583*) In her statement given to Trooper Cooper on May 25, 2001 Ms. Dawson stated “Then Don, Jeffrey, and Shantel got into the car, Doug and Rusty pulled out behind them and began following them. They were headed toward Bradshaw Mountain.” (*See statement of April Dawson taken on May 25, 2001*) April Dawson was called by the Appellant, and during her testimony she changed her testimony to match Mose Douglas Mullins story her testimony before the jury was as follows” -- Don pulled out on the top of the parking lot. Rusty and Doug pulled out at the bottom of the parking lot, and now that I do recall, I sat there a few more minutes. I didn’t leave right away. I did see—I don’t know if it was two or three minutes later, I did -- Don and them had went up the mountain, and I don’t know if they went and turned around or what, but I did see them come back and go up the same direction that Chantel and Don had just went in two or three minutes later.” Ms. Dawson further stated “Well, when he pulled out, I didn’t pay any attention which way he went, but like I said, I sat on the parking lot a few minutes, and then, as we was pulling out, I did—I don’t know if he went straight up in

Three Forks towards Dewey's Video and turned around or what, but he did come back out of that way and go up the mountain two or three minutes behind them in the same direction that they had just pulled out and went to – and went in, Don and Rusty.” She further stated “I went up that way, but before I left there, they had already come back down the road and went up the mountain because I sat on the parking lot, like five minutes afterwards; so when they pulled out, you know. I don't know where they went, but I do know before I pulled out, they came back out of that hollow and went up Bradshaw Mountain in the same direction.” (See Pg. 587-589)

D. That statements by the Trial Court to the jury panel at the beginning of the Trial and subsequent statements by the Trial Court to the “jury” stating that the Court was “duty bound” to finish the Trial on a certain day and within a certain time frame; together with comments by the Trial Court to the “jury” during the Trial itself; and the actions of the Trial Court in giving the “jury” a “dynamite or Allen” instruction during the juries deliberations resulted in the Appellant, James Blaine Waldron not receiving a fair trial

After the Trial Court refused to accept a valid plea agreement, allowed inflammatory gruesome photographs to be admitted into evidence, and failed to preserve possible witness tampering evidence, it then made improper statements directly to the jury. These statements, which included a finite “duty bound” time frame to which the trial had to finished were coupled with a “dynamite or Allen” jury instruction which resulted in the Appellant's loss of a fair trial.

The West Virginia Supreme Court of Appeals has held that “[t]he general rule that whether a trial court’s instructions constitute improper coercion of a verdict necessarily depends upon the facts and circumstances of the particular case.” State v. Hobbs, W.Va., 282 S.E.2d 258 (1981). The West Virginia Supreme Court of Appeals has also held that “[t]he trial court must carefully instruct the jurors not to give up their conscientious convictions merely for the sake of achieving a verdict, and must scrupulously avoid expressing any opinion as to how the case should be decided. The trial court decision to so instruct the jury must neither encourage disagreement nor coerce agreement.” State v. Taft, 144 W.Va. 704, 110 S.E.2d 727 (1959). In furtherance of this issue, *the West Virginia Supreme Court of Appeals has found that remarks by the trial court requiring the jury to reach a verdict within a time limit set by the court constituted an improper coercion of the jury by the court.* State v. Spence, 173 W. Va. 184, 313 S.E.2d 461 (1984).

In Spence, the trial court had made such remarks to the jury as: “we are going to take as much evidence as we can. If I hadn’t been so rash as to promise a bunch of you ladies and gentlemen, and I’ll stick to my promise, you will be out of here by noon, tomorrow”, and “I am not attempting to punish you. I don’t want to hold you unduly but I need your help”. After the jury had deliberated for less than an hour, the court called them back in court from their deliberations and inquired of their progress. When the foreman replied that no substantial progress had been made, the court stated:

“Now the Court is not ordering you, but you have to reach a verdict. I am merely telling you what is contemplated in the eyes of the law, if it is possible to do it. I am going to give you ladies and gentlemen a few more minutes to see if you can resolve your differences by discussing them and if you can arrive at a verdict.”

The West Virginia Supreme Court of Appeals reversed this conviction and remanded the case for a new trial finding that these statements, when considered with all the facts and circumstances considered in their entirety throughout the course of the trial, had the effect of improperly coercing the jury to reach a verdict.

In the present case, at the beginning of the Trial during the voir dire of the jury the Trial Court made the following statement to the jury “ “Let me do this since--- and I really should have done this ahead of time with the jurors. There’s a good possibility—and you need to listen up, also, those out there. Theree’s a good possibility that this evening we may go past 5:00 o’clock till about 6:30 or 7:00 o’clock, and tomorrow morning instead of coming in at 9:30, you will need to be here at 8:00 o’clock, and then we will go tomorrow evening until about 6:30 or 7:00 o’clock. The reason I’m telling you that is that I’m “duty bound” to finish this trial by Friday, May the 7th. So, we’re going to come in early and go late. So, if your schedule won’t allow that, I need to know that now so that we can get someone else who—we have other jurors—so we can get someone else who can take your place.” (See Trial Transcript Pg. 33) To which prospective Juror Number 6 stated that she would be unable to meet such a schedule as she had no one to care for here children. The Court then went on to state in the presence of the jury panel “So, everyone else is all right with what I said, Okay? Now, Friday, we’ll do the same thing, and we’ll be here till midnight or 1:00 in the morning on Friday night to finish, if it does that, but I want to finish it Friday. (See Trial Transcript Pg. 34)

Based upon the Trial Court’s statements three (3) potential jurors were replaced. The Court again upon the calling of the replacement juror Linda Bailey stated “Now you heard the time span I gave. Are you all right with that?” The Court again stated to potential Juror Sandra

Riffe; "Does the time period fit your schedule, ma'am?" The Clerk then called potential juror Steven Lee to which the Trial Court inquired "Do you have a problem with the times that I mentioned?" (*See Trial Transcript Pg. 35*)

In response to the statements made by the Trial Court during the voir dire of the potential jury panel counsel for the Appellant, asked the potential jury panel "if there is anyone on the panel here today that you have a family member, a child, some personal problems in your life that jury duty is going to be difficult for you for the next three days?" (*See Trial Transcript Pg. 64*) The Trial began and testimony was taken on day one of the Trial until the Jury was released at 6:27 p.m. The Jury appeared on day two of the Trial at 8:30 a.m. Out of the presence of the Jury during preliminary matters before Court began the Trial Court stated: "Well, my purpose in starting at 8:30 was to get an early start and not to take all day taking up preliminary matters, but if you want to stay here till about 9:00 o'clock tonight, I mean, I have no problem with that. So, we're going to move on, but I let Mr. Mullins bring up a preliminary matter, so now if you wish to Mr. Giggenbach, you can." (*See Trial Transcript Pg. 307*) Further, the Trial Court stated out of the presence of the Jury; "We're spinning our wheels here this morning. I want to get the Trial underway and get it over with and let the jury decide it in a reasonable period of time here." The Court went on to state "Do I dare ask if there are any other preliminary matters?" (*See Trial Transcript Pg. 308*) During the cross examination of the co defendant Mose Douglas Mullins Jr., the Trial Court asked " Mr. Mullins, I'm not trying to speed you up, but how much longer are you going to be?" (*See Trial Transcript Pg. 356*) Further, during examination of Trooper Doug Miller counsel for the Appellant, stated in the presence of the jury "Your Honor, I know we're rushing." (*See Trial Transcript Pg. 529*)

In response the Prosecutor stated ".....They should read it, but to sit here and read the whole thing to the jury, it's going to take us another two hours." (See Trial Transcript Pg. 529) On day two the jury was released at 6:45 p.m. and instructed to return at 8:30 a.m. At the beginning of the testimony on day three of the Trial the Trial Court in the presence of the Jury stated " We're going to finish up here today; so just keep bearing with me and be patient with me." (See Trial Transcript Pg. 583) The jury began deliberations at 11:30 a.m. and at 12:06 p.m. the Baliff was notified that the Jury had a question. The Jury wanted to know the possible criminal penalties for each possible verdict (See Trial Transcript Pg. 658) The Jury was returned to deliberate at 12:10 p.m. and was allowed to deliberate until at 2:08 at which time the jury was released for lunch. At 3:18 p.m. the jury returned and began deliberations until 5:52 p.m. at which time the Court sua sponte brought the jury into the Court room and inquired "I just thought I'd call you out and see how you're doing?" To which a juror replied "Not too good". (See Trial Transcript Pgs 658-659) Further the Court inquired "Do you feel that you are going to be able to reach a verdict, unanimous verdict?" The Juror replied "No, not the way it's looking. Not the way we're going." At this time the Court proceeded to give the jury the "Allen Charge " At 5:55 the jury was returned to the jury room and by 6:45 the Court was notified that a verdict had been reached. (See Trial Transcript Pg. 661) Two of the female jurors were visible crying as they entered the Court room and the verdict was read.

V. CONCLUSION

In the first instance, the Appellant submits that he should be awarded a new trial based

upon the egregious conduct of the Trial Court by failing to honor a valid bargained for plea agreement. Mr. Waldron upheld his end of performance, giving up constitutionally protected fundamental rights. Accordingly, the Trial Court should have honored the plea that was entered into between the State of West Virginia and Mr. Waldron. For the Trial Court to do otherwise violated the very common contract principles of promise and performance, as well as the equitable principles of "justness" and "fairness."

Secondly, the Appellant submits that by allowing such gruesome, inflammatory and prejudicial photographs to be admitted into evidence and further allowing the State of West Virginia to utilize the photographs in front of the jury in such a manner as to substantially prejudice the "jury" denied the Appellant's rights to a fair trial based upon the evidence. The admission of these photographs into evidence and their allowed use during Trial by the Special Prosecuting Attorney violated Rule 403 of the West Virginia Rules of Evidence.

In the third instance, the Appellant submits that the Trial Court failed to preserve evidence of potential witness tampering which denied his right to review, examine, and preserve notes that were almost surely taken to instruct and persuade April Denise Dawson's testimony. The Trial Court and every concerned party was placed on notice of the potential evidence, however due to the Trial Courts actions in confiscating and destroying the evidence, the Appellant was denied his opportunity to be heard in regards to the evidence at Trial and in regards to his ability to perfect an appeal, violating his due process rights.

Lastly, the Appellant submits that the Trial Court, by making improper statements to the jury panel and the selected jury regarding "duty bound" time constraints, violated his right to a fair trial. Based upon the facts and circumstances of this particular case, the Trial Court deprived

the Appellant of his right to a fair trial by not carefully instructing the jurors in not to give up their conscientious conviction merely for the sake of achieving a verdict and satisfying the Trial Court and also by coercing and encouraging a verdict in a specific time frame.

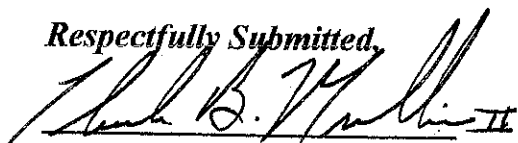
VI. RELIEF REQUESTED

WHEREFORE, the Appellant, James Blaine Waldron, would pray that the West Virginia Supreme Court of Appeals reverse the jury verdict rendered in the Circuit Court of McDowell County West Virginia and remand this matter back to the Circuit Court of McDowell County, West Virginia for retrial and further that the West Virginia Supreme Court of Appeals grant to the Appellant, James Blaine Waldron such other general and further relief as the Court deems just and proper upon a full hearing of this matter.

**JAMES BLAINE WALDRON,
APPELLANT,**

By Counsel

Respectfully Submitted,



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CERTIFICATE OF SERVICE

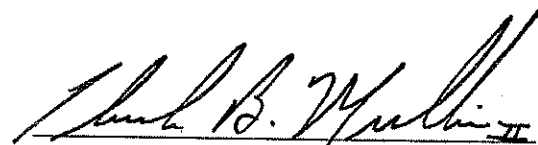
I, Charles B. Mullins II, hereby certify that I have this the 24th day of May 2005, by U.S. First Class Mail, postage prepaid, mailed a true and accurate copy of the foregoing **“BRIEF IN SUPPORT OF PETITION FOR APPEAL OF CRIMINAL CONVICTION OF JAMES BLAINE WALDRON”** to the following:

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Circuit Clerk of McDowell County
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Welch, West Virginia 24801

The Honorable Rory L. Perry, II
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