

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA, ex-rel.
SER. DAVID ROSENBERGER,**

Appellant/Petitioner Below,

v.

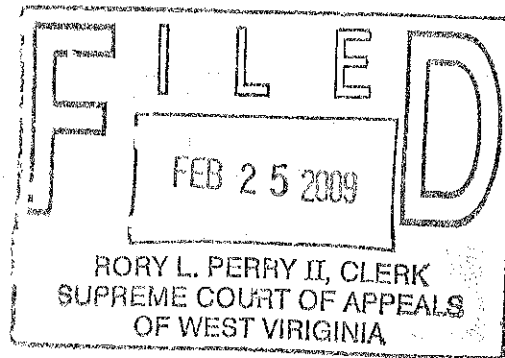
Appellate No. 34700

STATE OF WEST VIRGINIA,

Appellee/Respondent Below.

**FROM THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA
APPELLATE NO. 34700
HABEAS CORPUS PROCEEDING**

**APPELLANT, DAVID ROSEBERGER'S
BRIEF IN SUPPORT OF APPEAL**



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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA, ex-rel,
SER. DAVID ROSENBERGER,**

Appellant/Petitioner Below,

v.

Appellate No. 34700

**HOWARD PAINTER, WARDEN,
Mt. Olive Correctional Complex,**

Appellee/Respondent Below.

APPELLANT'S BRIEF IN SUPPORT OF APPEAL

**To the Honorable Justices of the
West Virginia Supreme Court of Appeals:**

The Appellant, David Rosenberger, by counsel, Timothy J. LaFon and Ciccarello, Del Giudice & LaFon, present this brief pursuant to Rule 10 of the Appellate Procedure of the West Virginia Supreme Court of Appeals. The Appellant seeks an appeal and reversal of an Order entered by the Circuit Court of Putnam County, West Virginia, entered on July 6, 2007.

I. Kind of Proceeding and Nature of Ruling in the Lower Tribunal

Appellant/Petitioner, David Rosenberger brought on a Petition for Habeas Corpus relief in the Circuit Court of Putnam County, West Virginia. The Appellant, the Petitioner in the habeas corpus proceeding was seeking reversal of a conviction on first degree murder without mercy which was rendered on November 2, 1995 in the Putnam County, West Virginia Circuit Court with the

Honorable Clarence L. Watt presiding. A full evidentiary hearing was held on the habeas corpus proceeding and the Appellant, David Rosenberger presented expert testimony in the areas of criminal defense and in the area of forensics as to the Appellant's ineffective assistance of counsel claim. This testimony of the these two experts went unrebutted by the Putnam County prosecutor who was responding to said Petition. Despite enormous evidence that the Appellant, David Rosenberger received dramatic ineffective assistance of counsel in his representation of the 1995 trial and the work up for the same, the Circuit Court of Putnam County denied said habeas corpus relief and this Petition for Appeal flows therefrom. This Petition for Appeal will primarily focus on the dramatic miscarriage of justice applicable to Petitioner, David Rosenberger in that Petitioner, David Rosenberger received ineffective assistance of counsel rising to the level of unconstitutionality. Further, David Rosenberger had substantial errors that occurred at his trial. The Appellant, David Rosenberger believes that the cumulative effect of all of these errors gives rise to a proper claim for a new trial. The Appellant petitioned for appeal on April 18, 2008 and by order of the Court on January 22, 2009 this appeal was granted. This brief flows therefrom.

II. Assignment of Errors Relied Upon In the Manner In Which They Were Decided Upon In the Lower Tribunal

1. The Appellant Rosenberger received ineffective assistance of counsel at his trial and the Putnam County Circuit Court erred when it denied a new trial and habeas corpus relief based thereupon.
2. Whether the cumulative effect of many errors at the trial level was so great to warrant the granting of a new trial and habeas relief. These cumulative errors are as follow:

- a. The trial court committed reversible error by refusing to grant a motion for mistrial on the basis that the prosecuting attorney had repeatedly and impermissibly vouched for and bolstered the testimony of the State's witnesses during his closing arguments.
- b. The trial court committed reversible error in failing to instruct the jury to disregard the improper, partial and prejudicial testimony of Dr. Irwin Sopher, resulting in the denial of Appellant's right to a fair trial.
- c. The trial court committed reversible error when it failed to grant the Appellant a new trial on the basis that the State had not proved that the alleged offense occurred in Putnam County, West Virginia.
- d. The trial court committed reversible error when it refused to direct a verdict of acquittal on the charge of first degree murder due to insufficient evidence of record that the Appellant committed acts that would constitute murder in the first degree.
- e. The trial court committed reversible error when it failed to undertake any analysis regarding missing, potentially exculpatory handwritten Department of Public Safety investigation notes pursuant to considerations set forth in Osakalumi.
- f. The Defendant was advised by the State that a witness would not be used at trial and therefore the defense counsel was not prepared for the testimony when said witness was presented.
- g. The trial court committed reversible and prejudicial error when it refused to give the jury instruction from Hatfield requested by defense counsel and in giving the new Guthrie instruction that the West Virginia Supreme Court of Appeals held should not be applied retroactively.

The lower court denied the Petition for Habeas Corpus relief based thereupon.

III. Statement of the Case

Appellant was indicted in July, 1995 before the Circuit Court of Putnam County, West Virginia for first degree murder. The Appellant was indicted for allegedly murdering John W. Fallecker in October 1987. James W. Casey was appointed as counsel and Charles Damron as co-counsel for David Rosenberger. The trial was held on this matter before the Honorable Clarence L. Watt in Putnam County, West Virginia. The Appellant was convicted of first degree murder without a recommendation of mercy on November 2, 1995. The essential allegations at trial against Mr. Rosenberger were that he and two of his friends (Kevin Warner and Ernest Templin) found the victim drunk, placed him in a vehicle and drove him to a remote area. The testimony is relatively undisputed that at that point that Kevin Warner and Ernest Templin assaulted the victim and that Warner hit the victim in the head with a tire iron. The victim then jumped or was thrown over a bridge and fell to the creek bed and drown. It was how this drowning took place that was the subject of Rosenberger and Templin's separate trials. It is interesting to note that Mr. Templin was acquitted in his trial and amazingly so, Mr. Warner was given immunity to testify although it was undisputed that he was the individual who struck the victim in the head with a tire iron.

Counsel for Appellant, James Casey, filed a Motion for New Trial. The motion was considered and refused on May 30, 1996 and the Appellant was sentenced to life in prison. Mr. Casey and Mr. Damron were appointed to represent the Appellant on this appeal which was due in September, 1996. Amazingly so, the Petition for Appeal was not filed until August, 2000, some four (4) years following the original deadline. Mr. Casey was the subject of a Supreme Court ethics opinion (see In Re: James M. Casey, Supreme Court No. 28854 Findings of Fact, Conclusions of

Law Recommendations of Hearing Panel Subcommittee July 2, 2001) in which Mr. Casey was admonished because of his failure to appropriately follow through on this appeal and to represent Mr. Rosenberger.

This appeal was denied consideration on January 9, 2001 by this Court. In the omnibus hearing for Habeas Corpus Relief conducted before the Putnam County Circuit Court on May 12, 2004 testimony established that a plea of second degree murder was offered to the defense counsel prior to Appellant's trial. The testimony by Mr. Casey himself in the habeas corpus proceeding confirmed the same and further confirmed that Mr. Casey advised against accepting the plea offer of second degree murder. On a second offer of the same plea, Mr. Casey represented in the habeas corpus proceeding that he did not advise Mr. Rosenberger to take the deal. He based this upon his belief that he had a good defense going into the trial. At the habeas corpus proceeding there were four (4) witnesses who testified. James Casey, defense counsel for the Appellant, David Rosenberger testified and the two prosecutors testified from the Putnam County Prosecutor's Office who tried the case and handled the matter against the Appellant in the 1995 trial, being Phillip Morrison and Bill Rardin. Also testifying as an expert hired on behalf of the Petitioner, David Rosenberger, was William C. Forbes, former Prosecuting Attorney of Kanawha County, West Virginia with much experience in the area of criminal matters. Although the Appellant did not have another of his experts testify at said omnibus hearing, he was given permission by order of the Court subsequent to this hearing to retain an expert in the forensic field and this expert retained was Dr. Cyril Wecht, J.D. M.D. who is both an attorney and coroner, has both his medical degree and law degree, has served as coroner for Allegheny County, Pennsylvania and has testified in hundreds of forensic matters. His report was tendered to the Court prior to the Court rendering it's decision

denying habeas corpus relief. (See attached).

The defense attorney for David Rosenberger, James Casey in his testimony recounted many errors both by him and by his defense team. These errors by Mr. Casey's own admission brought into question the effectiveness of the assistance of counsel in Mr. Rosenberger's 1995 trial. This testimony by Mr. Casey went relatively un rebutted and was as follows:

1. Failure to retain experts: The defense counsel James Casey, did not retain an expert to review of any of the scientific or autopsy evidence presented in this case. This was crucial in this case as the cause of death was the key issue in this trial. Dr. Irwin Sopher testified on behalf of the prosecution but simply testified as to the notes in the file of another coroner who performed the autopsy on the deceased. It was disputed whether, in fact, the victim died from the blow to the head by the tire iron or by the drowning in the creek below the bridge from which the victim fell. As it blatantly obvious from this, it was crucial that the defense have an expert as to the cause of death or, at least, to rebut Dr. Sopher (or at least to properly advise Mr. Rosenberger). In the original trial of this matter, the testimony by Dr. Sopher was that the victim suffered from an extreme blow to the head and was extremely intoxicated at the time the alleged crime took place and perhaps as a result suffered a death by drowning. Since the immunized witness, Kevin Warner was undisputedly the person who hit the victim in the head and this was not a felony/murder case the cause of death was crucial to the defense of David Rosenberger. Defense counsel did not retain such an expert to review any scientific evidence and/or the autopsy report and apparently did not even interview the coroner who actually performed the autopsy, as all the testimony at the trial went in through Dr. Sopher who was not even the individual who performed the autopsy.

2. Defense counsel did not retain an expert to present or investigate the defense of

diminished capacity: The defense counsel for Mr. Rosenberger clearly stated that he knew that the Defendant suffered from prior alcohol and drug abuse problems and that the Defendant claimed to be drunk on the night of this event. *State vs. Keaton*, 272 S.E.2d 817 (166 W. Va. 77, Sup. Ct. 1988) provides a defense to one charged with first degree murder if the Appellant was too drunk to be capable of deliberating or premeditating. Based upon the defense counsel James Casey's own statements, he did not even consider said defense nor retain an expert to review or analyze the Defendant for purposes of advancing such a defense forward. (See pages 57-58 omnibus hearing transcript).

3. Defense counsel failed to have his client psychologically analyzed: In a first degree murder case, psychological defense must be considered and analyzed. It appears from a review of the defense counsel's file that no such analysis was ever conducted nor was Appellant ever psychologically evaluated. In light of the Appellant's previous drug and alcohol problems it was imperative to do so in this case.

4. The Appellant's counsel did not subpoena a key witness in the case: Mr. Templin, who was one of the alleged assaulters of the victim was not subpoenaed to trial. According to the file in this matter, the defense counsel never interviewed Mr. Templin. Since the Appellant, Mr. Rosenberger claimed that one of his defenses was that Ernest Templin was in the creek bed at the time that the victim was drowned, it was imperative to have Mr. Templin at the trial. This was not even considered by the defense counsel.

5. The defense counsel did not properly investigate or prepare the case: During Mr. Casey's testimony before the Putnam County Circuit Court Judge on May 12, 2004, (habeas corpus omnibus hearing) which lead to the Circuit Court's decision to deny habeas corpus relief, Mr. Casey

testified that at or about the time preparation for this trial and the trial was taking place, the defense counsel James Casey was very busy at the Legislature, was running a solo practice and had a son who was grievously ill and had been to the Children's Hospital in Columbus on several occasions. In fact, on page 20 the transcript at said habeas corpus omnibus hearing, Mr. Casey was asked because of his schedule and all the other matters going on in his life whether in retrospect he should not have taken the case and his answer was "probably was not a wise decision." In fact, Mr. Casey testified on page 21 and thereafter that another attorney, Charlie Damron was appointed as his co-counsel. It was the testimony of Mr. Casey that Mr. Damron had no experience in such cases and that he had been appointed because Judge Watt was trying to help him get back on his feet after a difficult time in his life. Mr. Casey testified that he left the work up of the case to Mr. Damron and Mr. Casey was handed the file at trial time and simply went and tried the case based upon the file and the work up done by Mr. Damron. Mr. Casey himself testified on page 23 of the habeas corpus omnibus hearing transcript that it was questionable whether Mr. Damron had the experience to work up and try a case such as the one presented against the Appellant. In fact, Mr. Casey himself testified that Mr. Damron was simply not competent to handle such affairs and had no experience in such matters. (See pages 23-24 of Habeas Corpus Omnibus transcript). Mr. Casey further testified on page 26 of the transcript of the Omnibus hearing that Mr. Damron misrepresented the status of the file of the case and Mr. Casey assumed certain things had been done that were not done. As a result, Mr. Casey himself testified on page 26 of the transcript that there was an improper work up of the case. On page 28 of the transcript, Mr. Casey said that if he had it to do over and he was working up the case that several of the items that were missed would have been worked up differently. (See page 30 of the Omnibus transcript). Ironically, at trial, Mr. Damron had nothing or very little to do,

but just sit at the counsel table.

Mr. Casey acknowledges on page 35 of the Omnibus transcript that it could be that just somebody dropped the ball and failed to obtain an expert and further that the cause of death in the case was crucial. Mr. Casey acknowledged the failure of his defense team in pages 36 and 37 of the Omnibus transcript and admitted that the work up by an expert on behalf of the defense very well could have provided "reasonable doubt."

Mr. Casey further testifies on page 43 of the transcript of the omnibus hearing of the defenses failure to subpoena a key witness being Ernest Templin. In fact, Mr. Casey testified on page 46 of the transcript that the strategy of having an investigator testify as to a telephone conversation with Mr. Templin hurt them in front of a jury because the jury could infer that they had access and chose not to call Mr. Templin to trial. Mr. Casey further testified on page 48 and thereafter in the transcript of his failure to properly appeal the case. The same is evidenced by the fact that during this period of time Mr. Casey was simply too consumed with his other affairs and life to properly handle this case which resulted in a finding by the State Bar of the extraordinary circumstances that Mr. Casey was suffering from and Mr. Casey was admonished for failure to file the appeal in the proper time frame.

Most importantly on page 53 of the transcript of the omnibus hearing, Mr. Casey admits that because of the improper work up of the case by himself and Mr. Damron when he consulted with his client about the second degree murder plea offer, he was not in a posture "to be fully armed to even properly advise the client."

On page 58 of the transcript Mr. Casey makes it clear that he and Mr. Damron did not even look into the defense or hiring of an expert as to diminished capacity although the same may have

been warranted. On page 62 of the transcript the ultimate question was asked of Mr. Casey and that question was whether in his opinion was Mr. Rosenberger was denied his constitutional right to effective assistance of counsel. Mr. Casey ultimately answered that "he didn't know but if he were to have that responsibility again, the case would be handled differently."

All of the above lead to the inescapable conclusion that the Appellant David Rosenberger did not receive effective assistance of counsel. The Appellant and his counsel begs this Court to read the entire transcript of the omnibus hearing that occurred on May 12, 2004 along with the opinion of Dr. Cyril Wecht (see attached as Exhibit "A") which primarily went undisputed and leads to the only conclusion that the Appellant was not treated fairly and suffered from ineffective assistance of counsel during this trial.

VI. Discussion of Law As To Ineffective Assistance of Counsel

When reviewing an ineffective assistance of counsel claim the Courts apply an objective standard to determine if, in light of all of the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refrain from engaging in hindsight or second guessing of trial counsel's strategic decisions. Syl. Pt. 4 *State ex rel Vanatter vs. Warden*, 207 W. VA. 11, 528 S.E.2d 207 (1999); *State vs. Miller*, 194 W. Va. 3, 459 S.E.2d 114, 1995. Therefore the Court should consider whether a reasonable lawyer would have acted under the circumstances defense counsel acted in the case.

Furthermore, this Court has in the past followed *Strickland vs. Washington*, 466 U.S. 668, 104 Sup. Ct. 2052 (1984) a two prong test which establishes and governs ineffective assistance of counsel claims. This test is as follows:

(1) Counsel's performance was deficient under an objective standard of reasonableness and (2) there is reasonable probability that but for counsel's unprofessional errors the result of the proceedings would have been different.

The conduct and performance of Mr. Rosenberger's counsel in his criminal case establishes that said defense team acted completely outside the scope of what was reasonable under an objective standard for counsel. This was basically admitted to by the counsel, Mr. Casey. We could not hear from Mr. Damron as he is now deceased, but it is clear based upon Mr. Casey's statements, which were clearly not in his best interest, that Mr. Damron's work on the case rose to incompetency.

What the evidence presented at the habeas corpus omnibus hearing on the 12th day of May, 2004, makes clear is that pursuant to Stickland vs. Washington standard that Mr. Rosenberger received ineffective assistance of counsel. This was established by Mr. Rosenberger's expert called to testify in this matter being one William Forbes, a former prosecuting attorney. Mr. Forbes reviewed the transcript of the trial of this matter and the deposition transcript of Mr. Casey and concluded that there were at least two items that resulted in ineffective assistance of counsel. One, Mr. Forbes testifies on pages 110 through 112 of the omnibus hearing transcript about the crucial issue in this case as to the cause of death, whether it be by a blow to the head or by drowning. Mr. Forbes testified that "the first thing you had to do in defending this case was to hire an expert." Mr. Forbes testified that this would be helpful in the defense of this case as to being able to evaluate the cause of death and the likelihood that the victim was dead before hitting the water. According to Mr. Forbes there was also testimony by several witnesses in the trial that could have been effectively potentially rebutted by expert

witnesses. An example of would be one of the witnesses who testified about the statements made by Mr. Rosenberger about the victim's eyes "bulging out" at the time of his death. This is something that Mr. Forbes stated an expert may have been able to appropriately rebut. Mr. Forbes testified that the failure to obtain said experts fell below the standard of a reasonably effective counsel in the State of West Virginia. (See page 112 of the habeas transcript).

Mr. Forbes testified that Mr. Damron clearly was not competent to handle a case such as this and his investigation fell below the standard of care for a reasonably competent attorney in West Virginia. This coupled with the fact that Mr. Casey has testified that he depended upon Mr. Damron's work up leads to the inescapable conclusion that Mr. Rosenberger received ineffective assistance of counsel. Mr. Forbes after recounting an entire review of the file and the defense counsel's various and sundry failures to properly work up the case as identified above testified that he believed in his opinion that the Defendant was ineffectively assisted by counsel based upon the Strickland vs. Washington standard utilized in West Virginia.

What can be concluded from this is that obviously in retrospect, had the defense counsel properly evaluated this case and properly advised the Defendant, the Defendant would most likely have accepted the plea. It is uncontroverted and un rebutted that the defense counsel had not properly worked up the case and was not in a posture to properly advise the Defendant.

The next pertinent question for the Court in analyzing ineffective assistance is how can we know that the hiring of experts and the proper work up of the case would have made a difference. Attached to this appeal brief and submitted into the record of the court in the habeas corpus proceeding is an opinion by Cyril Wecht, J.D. M.D. (an expert obtained by Mr. Rosenberger's habeas counsel), that clearly established that the cause of death of the victim in his

opinion was other than drowning. This is an expert that would have rebutted Dr. Sopher and the cause of death if he would had been hired prior to trial. In fact, the question and answer in page 8 of his report was, "what was the immediate cause of death" and his answer was "the presence of mud in the airway and the upper gastrointestinal tract suggesting a gasping attempt. A terminal event that could occur as a reflex in dying or nearly dead individual. While drowning could not have been the terminal event, the main post mortem finding are the head injuries superimposed or diminished consciousness from intoxication." Cyril Wecht further found in his opinion that the attorneys representing Mr. Rosenberger did not provide an adequate representation of Mr. Rosenberger.

Dr. Wecht further found that Appellant's sentence was grave when there was a plea offer and had been denied the opportunity due to ineptness of counsel. Dr. Wecht further goes on to testify as stated in his opinion that the victim died from "cranial injuries." All of the above clearly establishes, pursuant to the West Virginia law as to ineffective assistance of counsel, that based upon an objective standard Mr. Rosenberger did not receive effective assistance of counsel and there is a reasonable probability that but for counsel's errors the result would have been different at trial and therefore his case should be reversed and habeas relief should have been granted. The proof is in the pudding. If Mr. Rosenberger's counsel for the habeas corpus proceeding found such an expert Mr. Rosenberger's trial counsel could have also. Dr. Wecht, a noted expert, gave an opinion that most likely would have resulted in the acquittal of Mr. Rosenberger. At least it would have effected plea negotiations.

V. Argument - Cumulative Error

This Supreme Court in State vs. Smith, 193 S.E.2d 550 (W. Va. 1992) provides in Syl. Pt. 5 that the cumulative error rule will not be applied unless the cumulative effect of numerous errors committed during the trial prevented the Defendant from receiving a fair trial. The Appellant declares that the cumulative error doctrine enunciated in Smith and applied in State vs. Wilson, 202 S.E.2d 828 (W. Va. 1974) mandates reversal of his conviction, and that he is being held contrary to law. The Appellant is first to acknowledge that all of the errors that will be stated below were previously appealed however, it is there cumulative effect along with the ineffective assistance that mandates a new trial and habeas relief. These cumulative errors are as follows:

- a. **The trial court committed reversible error when it failed to grant a mistrial after the prosecuting attorney repeatedly and impermissibly vouched for and bolstered the testimony of the State's witnesses.**

The West Virginia Supreme Court of Appeals has previously addressed the role of the prosecuting attorney in criminal cases:

The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with his position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.

State v. Critzer, 280 S.E. 2d 288 (1981), quoting Syl. Pt. 3, State v. Boyd, 233 S.E. 2d 710 (1977).

Furthermore, the Supreme Court of Appeals has stated that it is improper for a prosecutor to

assert his personal opinions. State v. Moore, 409 S.E. 2d 490 (1990). Also, it is improper for the prosecution to call the defense witnesses liars. United States v. Cooper, 827 F.2d 991, 995 (4th Cir. 1987). The Fourth Circuit Court of Appeals has defined vouching, and has found it to be an improper bolstering of a witness.

Vouching occurs when a prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to the jury. United States v. Sanchez, 118 F.3d 192 (4th Cir. 1997) citing United States v. Lewis, 10 F.3d 1086, 1089 (4th Cir. 1993)

After closing arguments and prior to the reading of the verdict, former counsel for the Appellant, James M. Casey, made a motion for a new trial based on the improper statements made by the Prosecuting Attorney during closing arguments. Mr. Casey directed the court to various instances of improper statements as follows:

Each trial has a defining moment. And you've all seen the Perry Mason shows where somebody back in the gallery jumps up and says "I did it." Or, Matlock, where that have a chair that's partially faded or a video camera that secretly appears. Those are defining moments. In real life what the defining moment in a trial is is when everybody in their own mind says "That's where he's telling the truth." That was Kathy Cottrill. No doubt when she was sitting up there and telling you what David Rosenberger told her, she was telling the truth. How would she know? She only knew Kevin Warner in passing, didn't know Ernie Templin. It has to come from David Rosenberger."
(Trial Transcript, pp. 505-505)

And I submit to you what you do is you say, "Everybody believe Kathy Cottrill?" And when you say, "Yeah," then you say, "Let's pick a foreman." And then you say, "Do we give him mercy or no mercy?" That's the process I submit to you you go through." (Trial Transcript, p. 506)

So let's look at David Rosenberger's testimony a minute. Of course, we all know he's got a motivation for lying. He's looking at spending the rest of his life in the penitentiary. (Trial Transcript, p. 508)

And one thing that I didn't - couldn't figure it out. I was like Columbo. This bugged me. (Trial Transcript, p. 509)

David had to fabricate something to put a hole in there. And he worked on that. And the reason the car had to be moved is because Kevin Warner told you the truth... (Trial Transcript, p. 510)

Now, had Kevin Warner been our coached witness, our Mark Furhman, whatever you want to call him, doesn't it make sense that he would have told us, "I saw David Rosenberger hold him under." He didn't say that. He was honest with you. (Trial Transcript, p. 511)

Without question, the most unbelievable statement uttered in this trial is when he said he and Jack walked up the hill and they were doing their little bonding thing out in the woods here, and Jack telling him, "I want to go home. I want to go back." And he tells him, "Yeah, buddy, lets go home." Now that is not believable. (Trial Transcript, p. 513)

I think he was hopping mad, he was out of his mind. His term "visibly upset." (Trial Transcript, p. 513)

Premeditation and deliberation. I don't believe there's any question that when you make the statement "I'm going to go do something" that you have it framed in your mind the requisite premeditation, pre-mindset. (Trial Transcript, p. 514)

He saw his eyes, he saw his eyes as he was holding him under water and the life was going out of him. He saw those eyes, and I don't doubt he still sees them today. (Trial Transcript, p. 515)

And I'm not even sure that he hit water. He may have landed on the bank and was drug into the water. I don't know. (Trial Transcript, p. 515)

But any reasonable doubt Kathy Cottrill is telling you the truth? No. (Trial Transcript, p. 517)

And remember, people told you he's a good story teller. He's a clown, whatever. He told you a story right there. That's all it was. (Trial Transcript, p. 517)

Ladies and gentlemen, don't buy it. I'm going to harp on Kathy Cottrill till you're tired of hearing about her. She told you the truth. She gave you the premeditation, the malice, the forethought, the murder in the first degree without mercy, a man underwater, looking up at him, dying. (Trial Transcript, p. 517-518)

I don't believe you could tell Wendy Warner to talk about eyes bugging out and she could sit her and do it without being tripped up. I don't think you could tell Wendy Warner a story to tell and she could sit there under cross-examination and sit through it unless it's the truth. (Trial Transcript, p. 548)

He deserves to be gotten, and that's exactly what I based my decision on in how to handle this case. (Trial Transcript, p. 550)

The Prosecuting Attorney's statements clearly went beyond the boundaries of vigorously

pursuing the State's case. The Prosecuting Attorney was "eager to convict" and improperly expressed his personal opinion as to witnesses credibility. He repeatedly stated that the Appellant had not told the truth when he testified. The Prosecuting Attorney's comments unfairly prejudiced the Appellant and denied him his constitutional right to a fair trial.

- b. The trial court committed reversible error when it failed to instruct the jury to disregard the improper, prejudicial and partial testimony Dr. Sopher, denying the Appellant his constitutional right to a fair trial.**

The trial transcript of the original trial (pages 330-331 and 560-565) establishes this point sufficiently and makes it clear that the Judge himself did not believe Dr. Sopher's testimony to be proper and yet he did not instruct the jury to disregard the same. Since Dr. Sopher's testimony established the cause of death, said testimony's inadmissibility was key to Defendant's case. It should be noted that Dr. Sopher's improper conduct did not occur in the Defendant Ernest Templin's subsequent trial and he was acquitted. Allowing this testimony denied Petitioner his constitutional right to a fair trial. (See attached excerpts from original appeal attached hereto as Exhibit "B").

- c. The trial court committed reversible error when it failed to grant the Appellant a new trial on the basis that the State had not proven that the alleged offense occurred in Putnam County, West Virginia.**

Pursuant to Article III, Section 14 of the West Virginia Constitution, criminal trials shall be held in the county where the alleged offense was committed. The only evidence presented at trial to establish that the alleged crime occurred in Putnam County was the testimony of State

witness Kevin Warner. Mr. Warner testified on cross-examination as follows:

Q. Today you're swearing you were in Putnam County?

A. No. I told the Prosecutor I did not know where we were at until recently when it was pointed out to me.

Q. So you're not saying that you know where you were, you are testifying to what somebody told you where you were?

A. No, I'm testifying I know where we were. I did not know the geographical location as to the place where I was at.

Q. What county is was in?

A. Yes, exactly.

R. So you can't swear today you were in Putnam County?

A. No. (Trial transcript, p. 212-213)

Since no testimony was presented to prove that the alleged first degree murder of John Fallecker occurred in Putnam County, the trial court should have granted the Appellant a new trial. The denial of this right constitutes reversible error. The failure to grant a new trial constitutes clear error.

- d. The trial court committed reversible error when it failed to direct a verdict or acquittal on the charge of first degree murder due to insufficient evidence which constitutes plain error and denied Appellant his right to equal protection under the law.**

At the close of the State's case and at the close of all the evidence, counsel for Appellant

moved for a directed verdict on the charge of first degree murder on the basis that the State had failed to meet its burden with regard to first degree murder.¹ The trial court's failure to grant these motions constitutes reversible error.

West Virginia Code §61-2-1 defines first and second degree murder in pertinent part, as follows:

Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnaping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivery a controlled substance . . . is murder of the first degree. All other murder is murder of the second degree.

This Court has consistently resorted to the common law in defining the term "premeditated" in West Virginia Code §61-2-1. In State v. Hatfield, *supra*² this Court made an effort to distinguish the degrees of murder by indicting that the element that separate first degree murder and second degree murder are deliberation and premeditation in addition to the formation

¹If the State would elevate the offense to murder of the first degree, the State must establish the characteristics of that crime. State vs. Stevenson, 127 S.E.2d 638 (W. Va. 1962), cert. Denied, 372 U.S. 938, 83 S. Ct. 886, 9 L.Ed.2d 768 (1963).

²Hatfield was discussed later in this Petition which regard to instruction error. In light of the Guthrie court's declaration that a first degree murder instruction adopted in Guthrie should not be applied retroactively (and thus to this matter). Counsel for Petitioner Rosenberger suggested instruction language from Hatfield which was quoted in Guthrie as follows:

To be guilty of this form of first degree murder the defendant must not only intend to kill but in addition he must premeditate the killing and deliberate about it. It is not easy to give a meaningful definition of the words "premeditate" and "deliberate" as they are used in connection with first degree murder. Perhaps the best that can be said of "deliberation" is that it requires a cool mind that is capable of reflection, and of "premeditation" that it requires that the one with the cool mind did in fact reflect, at least for a short period fo time before his act of killing. Guthrie at 180, citing Hatfield at 409.

of the specific intent to kill. Guthrie, supra, at 179-180. Quoting Hatfield, this Court further stated in Guthrie:

Deliberation and premeditation mean to reflect upon the intent to kill and make a deliberate choice to carry it out. Although no particular amount of time is required, there must be a least a sufficient period to permit the accused to actually consider in his mind the plan to kill. In this sense, murder in the first degree is a calculated killing as opposed to a spontaneous event. Guthrie at 180.

This Court further stated in Guthrie that “[a]lthough premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicated the killing is by prior calculation and design.” Guthrie at 181. The Court further stated:

... [T]here must be an opportunity for some reflection on the intention to kill after it is formed. The accused must kill purposely after contemplating the intent to kill. Although an elaborate plan or scheme to take life is not required, our Schrader's notion of instantaneous premeditation and momentary deliberation is not satisfactory for proof of first degree murder. Guthrie at 181.

... Thus, there must be some evidence that the defendant considered and weighed his decision to kill in order for the State to establish premeditation and deliberation under our first degree murder statute. This is what is meant by a ruthless, cold-blooded, calculating killing. Any other intentional killing, by its spontaneous and nonreflective nature, is second degree murder. Guthrie at 181-182.

Warner testified under direct examination, as follows:

Q. Let me back up. Did you three individuals have any discussions as to what you were

going to be doing?

A. No.

Q. Okay. At that point?

A. No.

Q. What did you do?

A. David went and got in the car, we placed him in the car and drove out Route 60 off across Coal Mountain and turned out Route 34.

Q. Were you taking Jack home?

A. No.

Q. What were you doing with him?

A. We was going to whip his ass.

Q. Why?

A. Because I believe he raped my sister. (Transcript of Jury Trail, pp. 189-190)

Kevin Warner testified that he hit the victim, Jack Fallecker, with a tire iron:

Q. Then what happened?

A. Myself and Ernie were sitting on the back bumper of the car, and when Jack reached- almost reached back to the side of the car, he was heading down the driver's side of the car he was struck several times and hit the ground.

Q. Now, who hit him?

A. I hit him, David hit him, and Ernie

Q. Did you have anything? What did you hit him with?

A. I hit him with a tire tool. (Transcript of Jury Trial, p. 194)

Q. You're not denying you had your licks at Jack Fallecker, are you?

A. No, sir.

Q. Do you recall where you hit him?

A. No, sir. In the chest, in the front as he was walking, as he was coming back down the hill towards the car. (Transcript of Jury Trial, p. 202)

Under cross-examination, Appellant Rosenberger testified as follows:

Q. What do you believe was the purpose for putting Jack into the car? Why were you taking Jack?

A. As Kevin state, to teach him a lesson. That's what I thought was the purpose was.

Q. You were going along with that?

A. Yes, sir, I was. (Transcript of Jury Trial, P. 460).

Under redirect examination, Appellant Rosenberger testified as follows:

Q. Secondly, on the night in question, either on top of the hill or on the bridge, or when you went under the bridge, did you have any tire irons, hammers, any sort of weapons, rocks, anything, either then you were up taking a leak upon the hill, on the bridge, or when you went under the bridge? Did you have any sort of weapon whatsoever?

A. No, sir, I did not. (Transcript of Jury Trial, P. 462.)

With regard to the criminal standard of review concerning the sufficiency of evidence,

this Court stated in Syllabus Point 3 of Guthrie³ as follows:

A criminal defendant is 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 was weighed, from which the jury could find built beyond a reasonable doubt.

The record in this case does not support the verdict of guilty of first degree murder beyond a reasonable doubt. There was no competent evidence on which the jury could rely to make a finding of first degree murder with premeditation and deliberation. Kevin Warner, the State witness who received immunity for testifying against the Appellant, offered no evidence supportive of a charge of first degree murder. His testimony revealed no evidence of premeditation or deliberation. Following the Court's analysis in Guthrie, there was no evidence that Appellant "considered and weighed his decision to kill." There was no evidence that this was a "ruthless, cold-blooded, calculating killing." Due to its spontaneous and non-reflective nature, Appellant's actions did not constitute murder in the first degree. The Court's failure to grant a directed verdict of acquittal on first degree murder prejudiced Appellant to the point of reversible error and denied him his constitutional right to a fair trial.

- e. **The trial court committed reversible error when it failed to undertake any analysis regarding missing, potentially exculpatory handwritten Department of**

³Syllabus Point 3 of Guthrie was quoted in State vs. Mann, 518 S.E.2d 60 (W. Va. 1999).

Public Safety investigation notes, pursuant to considerations set forth in Osakalumi.

State v. Osakalumi, 194 W. Va. 758, 461 S.E. 2d 504 (1995), sets for the analysis which a trial court should use when approached with the issue of missing evidence.

When the State had or should have had evidence requested by a criminal Defendant but the evidence no longer exists when the defendant seeks its Production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's Request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a Duty to preserve the material, whether the duty was breached and what Consequences should flow from the breach. In determining what Consequences should flow from the State's breach of its duty to preserve Evidence, a trial court should consider (1) the degree of negligence or Bad faith involved; (2) the importance of the missing evidence considering The probative value and reliability of secondary or substitute evidence that Remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction. Syl. Pt. 7, State v. Paynter, 206 W. Va. 521, 526 S.E. 2d 43 (1999) citing Syl. Pt. 2, State v. Osakalumi, 194 W. Va. 758, 461 S.E. 2d 504 (1995).

Pursuant to Osakalumi and subsequent case law, the trial court must undertake this analysis when confronted with missing evidence. Charles R. Martin, master sergeant for the West Virginia Department of Public Safety testified at trial that his handwritten notes were missing, and that he was testifying from his own memory (Trial Transcript, p. 260). The trial court's failure to even consider the above analysis constitutes reversible error.

- f. **The trial court committed reversible error when it failed to grant the Appellant a new trial on the basis that Kathy Cottrill testified for the State after the State advised that she would not be utilized as a witness at trial.**

During the week prior to trial, the Prosecuting Attorney advised counsel for the Appellant that the State would not be calling Kathy Cottrill as a witness at the trial of this matter as she was living in Glendale, Arizona. The State did ultimately bring back Kathy Cottrill to testify. Pursuant to the West Virginia Rules of Civil Procedure, the State is required to provide the Appellant with notice of witnesses who are to be called at trial. Although the Prosecutor initially identified Ms. Cottrill as a witness, he essentially withdrew her from the list when he advised counsel for the Appellant that Kathy Cottrill would not be testifying. This unexpected trial testimony should have been excluded as it constituted unfair surprise to the Appellant. Since the trial judge failed to exclude this testimony, the Appellant should have been granted a new trial.

- g. In refusing to give the jury instruction from Hatfield requested by defense counsel and in giving the new Guthrie instruction that this Court held should not be applied retroactively, the trial Court held should not be applied retroactively, the trial court committed reversible and prejudicial error and denied Appellant his constitutional right to equal protection under the law.**

At trial, counsel for Appellant Rosenberger objected to the State's Instruction No. 2, a verbatim enunciation of an instruction approved in *State vs. Guthrie*, 461 S.E.2d 163 (W. Va. 1995), and argued that this Court specifically stated in *Guthrie* that the instruction was not to be applied retroactively. The trial court gave the following instruction from *Guthrie* over defense counsel's objection:

The Court instructs the jury that murder in the first degree consists of an intentional, deliberate and premeditated killing which means that 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 intention 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.

Guthrie at 182.

This matter was tried in October, 1995 and the murder in question allegedly occurred in October, 1987. The Guthrie Court specifically stated as follows:

Having approved a new instruction in the area of homicide law, we do not believe today's decision should be applied retroactively. Applying the test articulated in Teague vs. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), a "new rule" should not be given retroactive effect.

Guthrie at 183.

Counsel for Appellant Rosenberger suggested that the following instruction, set fort in Guthrie and originally enunciated in State vs. Hatfield, 286 S.E.2d 402 (W. Va. 1982), he used by the Court:

To be guilty of this form of first degree murder the defendant must not only intend to kill but in addition he must premeditate the filling and deliberate about it. It is not easy to give a meaningful definition of the words "premeditate" and "deliberate" as they are used in connection with first degree murder. Perhaps the best that can be said of "deliberation" is that it requires a cool mind that is capable of reflection, and of "premeditation" that it requires that the one with the cool mind did in fact reflect, at least for a short period fo time before his act of killing.

Guthrie at 180, citing Hatfield at 409.

The trial court, therefore, committed reversible and prejudicial error in not only in giving the Guthrie instruction that was specifically prohibited by this Court (State's Instruction No. 2), but in refusing to give the instruction from Hatfield suggested by defense counsel.

CONCLUSION

For all the above stated reasons and because it is absolutely abundantly clear that the Appellant, David Rosenberger was denied, in violation of the West Virginia and United States Constitutions, effective assistance of counsel and because of the cumulative error in his trial, he should be granted a new trial and the decision of the Putnam County Circuit Court denying habeas relief should be reversed. The Appellant begs this Court to review the transcripts of this matter and especially the omnibus hearing conducted before the Honorable N. Edward Eagloski in the Putnam County Circuit Court as to the Habeas Corpus Petition and Dr. Wecht's opinion attached hereto and moves this Honorable Court to reverse this decision of the lower court and to grant Habeas Corpus relief and a new trial.

Submitted this 25th day of February, 2009.

DAVID ROSENBERGER

By Counsel

CICCARELLO, DEL GIUDICE & LAFON



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SUPREME COURT OF WEST VIRGINIA

**STATE OF WEST VIRGINIA, ex rel.
SER. DAVID ROSENBERGER,**

Appellate/Petitioner,

v.

Appellate No. 34700

**HOWARD PAINTER, WARDEN,
Mt. Olive Correctional Complex,**

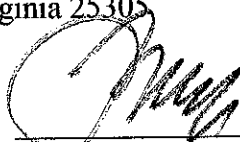
Appellee/Respondent.

CERTIFICATE OF SERVICE

I, Timothy J. LaFon, counsel for the Petitioner, does hereby certify that service of the foregoing **“APPELLANT, DAVID ROSENBERGER’S BRIEF IN SUPPORT OF APPEAL”** has been made upon counsel of record by placing a true copy thereof in the United States mail, postage prepaid, on the 25th day of February, 2009, addressed as follows:

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