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NO. 35533

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

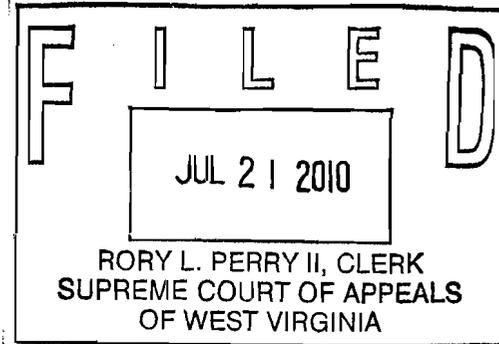
STATE OF WEST VIRGINIA,

*Appellee,*

v.

ELIZABETH DAWN THORNTON,

*Appellant.*



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AMENDED BRIEF OF APPELLEE,  
STATE OF WEST VIRGINIA

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TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. PROCEDURAL HISTORY .....	2
III. STATEMENT OF FACTS .....	4
IV. ISSUES .....	10
V. DISCUSSION .....	10
A. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, A REASONABLE JURY COULD HAVE FOUND CAUSATION BEYOND A REASONABLE DOUBT .....	10
1. The Appellant Failed to Raise a Causation Argument in the Lower Court, Denying the Lower Court the Ability to Decide the Issue and Providing No Judicial Record from Which an Appeal Can Be Reviewed; Therefore, If this Honorable Court Wishes to Address the Issue, the Standard of Review Is Plain Error .....	10
2. Viewed in the Light Most Favorable to the Prosecution, the Jury Could Have Found by Sufficient Evidence Beyond a Reasonable Doubt That Failure to Seek Immediate Medical Attention, Removing Alex’s Chance to Live, Was a Cause Contributing to Alex’s Foreseeable Death .....	14
a. Substantial evidence supports the finding that the Appellant contributed to Alex’s death because Alex had “a significant chance to live” if taken to the hospital immediately, that the Appellant could have waited up to two days before taking Alex to the hospital, and that the Appellant did not take him to the hospital for fear of explaining Alex’s injuries to authorities .....	21

b.	Alex’s death was foreseeable because the severity of the head injuries and subsequent symptoms such as obvious bruising, abnormal behavior, vomiting, and unconsciousness are the type of injuries/subsequent symptoms that would ordinarily lead to death if untreated .....	22
c.	Under this jurisdiction’s law, and the law of many other jurisdictions, a possibility that Alex’s life could have been saved is sufficient to prove beyond a reasonable doubt that the Appellant, as guardian, caused his death by removing that “significant” possibility .....	23
B.	THE TRIAL COURT CORRECTLY DENIED THE APPELLANT’S MOTIONS FOR MISTRIALS BECAUSE THE PROSECUTION’S USE OF THE WORDS “CHILD PROTECTIVE SERVICES” OR “CPS” DID NOT VIOLATE THE JUDGE’S RULING IN LIMINE REGARDING CPS “PROCEEDINGS.” THE JURY WAS NEVER INFORMED WHETHER OR NOT THE APPELLANT WAS SUBJECT TO CPS PROCEEDINGS, INVESTIGATIONS, OR OTHER ACTIONS, AND THE JUDGE WAS WITHIN HIS DISCRETION TO DENY THE MOTIONS .....	30
VI.	CONCLUSION .....	33

## TABLE OF AUTHORITIES

	Page
<b>CASES:</b>	
<i>Adams v. Consolidated Rail Corp.</i> , 214 W. Va. 711, 591 S.E.2d 269 (2003) .....	30, 31, 32
<i>Bunley v. Florida</i> , 538 U.S. 835, 123 S. Ct. 2020 (2003) .....	16
<i>Honaker v. Mahon</i> , 210 W. Va. 53, 552 S.E.2d 788 (2001) .....	31
<i>Johnson v. State</i> , 121 S.W.3d 133 (Tex. App. 2003) .....	25, 26, 27
<i>Jones v. Setser</i> , 224 W. Va. 483, 686 S.E.2d 623 (2009) .....	31
<i>Ex Parte Lucas</i> , 792 So. 2d 1169 (Ala. 2000) .....	25
<i>State ex rel. Morgan v. Trent</i> , 195 W. Va. 257, 465 S.E.2d 257 (1995) .....	12
<i>State v. Craig</i> , 131 W. Va. 714, 51 S.E.2d 283 (1949) .....	18, 19, 21, 22
<i>State v. Davis</i> , 200 W. Va. 590, 648 S.E.2d 354 (2007) .....	13
<i>State v. Durham</i> , 156 W. Va. 509, 195 S.E.2d 144 (1973) .....	<i>passim</i>
<i>State v. Fellers</i> , No. 13-08-688-CR, 2010 WL 2543900 (Tex. App. June 24, 2010) .....	25, 26, 27
<i>State v. Goff</i> , 166 W. Va. 47, 272 S.E.2d 457 (1980) .....	16
<i>State v. Green</i> , 220 W. Va. 300, 647 S.E.2d 736 (2007) .....	15
<i>State v. Harden</i> , 223 W. Va. 796, 679 S.E.2d 628 (2009) .....	15, 16, 24
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996) .....	11
<i>State v. Lively</i> , No. 34856, 2010 WL 2483441 (W. Va. June 16, 2010) .....	11
<i>State v. Martin</i> , ___ W. Va. ___, 639 S.E.2d 482 (2010) .....	11
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995) .....	10, 12

<i>State v. Muro</i> , 695 N.W.2d 425 (Neb. 2005) .....	25
<i>State v. Shane</i> , No. A06-1581, 2008 WL 660543 (Minn. App. March 11, 2008) .....	28
<i>State v. Smith</i> , No. 35133, 2010 WL 1838382 (W. Va. May 6, 2010) .....	30
<i>State v. Southern</i> , 304 N.W.2d 329 (Minn. 1981) .....	28
<i>State v. Thompson</i> , 220 W. Va. 246, 647 S.E.2d 526 (2007) .....	<i>passim</i>
<i>State v. Thompson</i> , 220 W. Va. 398, 647 S.E.2d 834 (2007) .....	12
<i>State v. Torkelson</i> , 404 N.W.2d 352 (Minn. App.1987) .....	28
<i>State v. Whittaker</i> , 221 W. Va.117, 650 S.E.2d 216 (2007) .....	15
<i>State v. Williams</i> , 172 W. Va. 295, 305 S.E.2d 251 (1983) .....	31
<i>State v. Woodson</i> , 222 W. Va. 607, 671 S.E.2d 438 (2008) .....	15

**STATUTES:**

W. Va. Code § 61-8D-4a .....	<i>passim</i>
------------------------------	---------------

**OTHER:**

W. Va. R. App. P. 3(b) .....	12, 13
W. Va. R. Crim. P. 37 .....	12
W. Va. R. Crim. P. 52(b) .....	11

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AMENDED BRIEF OF APPELLEE,  
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I.

INTRODUCTION

On May 29, 2008, 22-month-old Constantine Alexander (Alex) Washburn arrived at the hospital unconscious and dying. Hospital staff were alarmed by the sight of the bruised child and troubled by the inconsistencies between Alex's injuries and his parents' explanation. Due to their concerns, the staff immediately notified Child Protective Services (CPS). Alex had bruises on his forehead, chin, arms, legs, and back. Alex's forehead was swollen, and when the ICU doctor drilled the relief "bolt" into Alex's skull to relieve the pressure, she found "old clotted blood" around his brain (subdural hematoma) caused by severe head trauma. Doctor Schmidt associated this type of trauma with a violent assault, a car wreck, or a fall from a third story window, not a simple fall while playing or bathing as the Appellant maintains. By the time young Alex arrived at the hospital, the

doctors could not stop the pressure growing around his brain. It was too late. After less than two days of intensive care, the doctors pronounced Alex brain dead on May 31, 2008.

Parents are guardians, responsible for protecting their children too young to protect themselves. A young child has the right to at least minimal safety and welfare during his formative years, and young Alex deserved no less. Alex, less than two years old when he died, had an obvious, severe head injury that required immediate medical attention. Without immediate medical attention, Alex was going to die. Under West Virginia Code § 61-8D-4a, his parents had a legal duty to seek medical attention when necessary, regardless of how the injuries occurred or what questions authorities might raise. Unfortunately, the Appellant was too scared to explain young Alex's injuries to authorities, and so she failed her duty and neglected Alex's medical needs. That neglect contributed to, resulted in, and caused Alex's death beyond a reasonable doubt.

The Appellant now argues that causation was not satisfied and the fleeting CPS references at trial were in clear violation of a ruling in limine, thus requiring a mistrial. To the contrary, sufficient direct and circumstantial evidence proved causation beyond a reasonable doubt, and the ruling in limine stated that all "CPS proceedings" would be referred to as "other proceedings." Here, no "CPS proceedings" were ever mentioned. No prejudice resulted, no ruling in limine was violated, and no mistrial was warranted. Therefore, causation was sufficiently proven, and the State did not clearly violate the ruling in limine. The jury's verdict must stand.

## II.

### PROCEDURAL HISTORY

On June 5, 2008, the Kanawha County Sheriff's Department arrested the Appellant for violating West Virginia Code § 61-8D-4a (Child Neglect Resulting in Death). Warrant for Arrest,

08-F-1934, Magistrate Court of Kanawha County; (Tr. vol. I, 134, Jan. 7, 2009.) The Appellant was indicted in September 2008, tried by jury in January 2009, and found guilty by that jury on January 14, 2009.

The Appellant filed a Motion for a New Trial on January 26, 2009, based on 1) Denial of Motion for a Change of Venue; 2) Disclosure to Jurors that the Defendant is an Incarcerated Prisoner; and 3) Denial of a *Daubert* Hearing to Assess the Reliability of the Opinions of the State's Medical Examiner. The Motion for New Trial was denied.

On May 12, 2009, the Appellant was sentenced to an indeterminate term of not less than three (3) nor more than fifteen (15) years with credit for 333 days served, which means the Appellant is parole eligible in less than eleven (11) months from the date of this brief's filing. On August 17, 2009, the Appellant was re-sentenced to the same term of imprisonment with credit for 413 days served. The Appellant filed a Notice of Intent to Appeal on September 8, 2009, based on 1) Denial of Motion for a Change of Venue; 2) Disclosure that the Defendant is an Incarcerated Prisoner; 3) Denial of Motion for Mistrial for Disclosure of Civil Abuse and Neglect Proceedings; and 4) Denial of a *Daubert* Hearing to Assess the Reliability of the Opinions of the State's Medical Examiner. On December 17, 2009, the Appellant filed her Petition for Appeal. On March 31, 2010, this Honorable Court allowed the Appellant to appeal as to issues 2 and 4 only.<sup>1</sup>

On June 16, 2010, the Appellant filed her Brief of Appellant. Appellee then had 30 days from June 16, 2010, to file its Brief of Appellee.

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<sup>1</sup>Regarding the Petition for Appeal and acceptance of issues for appeal, in her Petition the Appellant challenged the lower court's ruling denying change of venue due to media exposure of the case. This Court denied appeal on that issue. However, the Appellant's Appellate Brief still includes several paragraphs regarding the media exposure issue.

### III.

#### STATEMENT OF FACTS

On May 29, 2008, around 6:00 p.m., the unconscious body of Constantine Alexander Washburn arrived at Charleston Area Medical Center (CAMC) with bruises on his forehead, chin, arms, legs, and back. (Tr. vol. I, 245, 257, 260, 295, 331, 335-38, 362; Tr. vol. II, 377-78, 389, 459, 485, 514, 537, 646, 667.) His forehead was swollen, and his brain had been traumatized to the point of lacerating and bleeding. (Tr. vol. I, 335, 362; Tr. vol. II, 370, 427, 470.) Hospital staff did not believe the Appellant's explanation of Alex's injuries, and the staff immediately notified Child Protective Services (CPS). (Tr. vol. I, 339; Tr. vol. II, 428-29.) After two days in the critical care unit of CAMC, young Alex was pronounced brain dead on May 31, 2008. (Tr. vol. II, 430.) Alex did not live to see his second birthday.

The exact events leading to Alex's admission to CAMC on Thursday, May 29, 2008, are unclear, as is the identity of the person who inflicted these injuries upon Alex and the exact time at which the injuries occurred. The injuries must have occurred between Tuesday and Thursday, May 27-29, 2008, but the Appellant did not seek medical attention for Alex until provoked by Christina Carnell who arrived at the Appellant's apartment around 6:00 p.m., Thursday, May 29. Alex died as a result of the underlying injuries and not being given medical attention in time.

In late May 2008, the Appellant lived at the Westwood Apartments in Cross Lanes, West Virginia, with the father of her children, Christopher Washburn (known as "Grimace"), her four children, and a friend, Christina Carnell. (Tr. vol. I, 292, 310, 321.) The Appellant had four children, but due to an eviction of all residents from the Westwood Apartments, the two oldest children were staying with the Appellant's mother during the move. (Tr. vol. I, 229-30, 316, 321; Tr. vol. II, 405.)

According to the Appellant's story, on Monday, May 26, Alex fell against a coffee table while watching *Dora the Explorer* and "spinning," hitting his forehead on the table. (Tr. vol. I, 292; Tr. vol. II, 640-42.) Alex allegedly fell again while bathing later that evening, Monday, May 26, and hit his chin on the toilet. (Tr. vol. II, 642.)

The Appellant maintained during trial that the injuries to Alex's forehead and chin were caused by these slight, accidental falls while playing and bathing on Monday, May 26, but the Appellant claimed Alex got better after these alleged falls. (Tr. vol. II, 645.) The Appellant, along with her witnesses Bobbi Oliver and Wendy Pauley, testified that Alex was relatively normal, though sick, on Tuesday and Wednesday, May 27-28. (Tr. vol. II, 516-17, 538.) However, by Thursday morning, May 29, even the Appellant testified that Alex was lethargic and lacked appetite. (Tr. vol. II, 648-50.)

The Appellant argued at trial that Alex's vomiting and diarrhea were normal because her other children had been sick. (Tr. vol. II, 636, 638.) However, the Appellant's own mother testified that the two older children stayed at her house the previous week and the week of these events and had not been sick. (Tr. vol. I, 316, 321.) Doctor Kaplan allowed for the possibility that this brain injury might cause vomiting, but in his expert medical opinion, it would not imitate other symptoms of a virus such as diarrhea or fever. (Tr. vol. II, 470.)

Around 6:00 p.m., Thursday, May 29, Christina Carnell arrived at the Appellant's apartment. (Tr. vol. I, 295.) The door was locked. (Tr. vol. I, 296.) The apartment was quiet. Carnell knocked. The Appellant asked through the locked door who it was, and Carnell answered. Only then did the Appellant unlock and open the door and say, "Tina, thank god you're here." Carnell entered the apartment to find Alex unconscious on the floor, his breathing labored. (Tr. vol. I, 297.) The

Appellant began CPR on the child, and told Carnell to call the father, Christopher Washburn, then 911, on the Appellant's cell phone. (Tr. vol. I, 297-98, 313.) An Ambulance arrived shortly, and Alex was then rushed to the hospital where doctors surveyed his body, mechanically breathed for him, drilled a relief "bolt" into his injured head, and monitored the pressure building around his brain. (Tr. vol. I, 331-35, 342-44, 346.)

Police investigated Alex's hospitalization and subsequent death. The Appellant and Christina Carnell told police that Alex had eaten some broth on Thursday, May 29, then become unresponsive while eating, immediately before the two called 911. (Tr. vol. I, 376.) Carnell later recanted this statement as a lie. (Tr. vol. I, 300.) Prior to the paramedics arriving on scene, the Appellant asked Carnell to lie and tell authorities she was present when Alex ate broth and became unresponsive. (Tr. vol. I, 299-300.)

Police interviewed the Appellant on Thursday evening, May 29, and Saturday evening, May 31. (Tr. vol. II, 410-11.) However, between Thursday evening and Saturday evening, the Appellant could not be found for continued questioning. On the afternoon of Friday, May 30, Detective Scurlock saw the Appellant smoking in front of the hospital. (Tr. vol. II, 395.) He learned the hospital was going to perform a retinal test to determine if the pressure felt by Alex's head was indicative of violent assault or abuse. (*Id.*) The hospital wanted to inform the Appellant of the test results and, moreover, that Alex was likely going to die from his injuries. (Tr. vol. II, 396.) When police heard the results of the test, they investigated the matter further. (*Id.*) Detective Scurlock tried to find the Appellant and could not. (*Id.*) Faye Escue, a social worker with the hospital, spoke with the Appellant by telephone on the evening of Friday, May 30, and the Appellant told Escue she was at her apartment packing. (Tr. vol. II, 416-17.) However, the policeman stationed at the

complex saw no one leave, and when Detective Scurlock arrived at the apartment, the Appellant was not home. (Tr. vol. II, 397-98.) On Saturday, May 31, doctors pronounced Alex brain dead at 1:30 p.m. Police spoke with the father, Christopher Washburn, by phone around 3:00-5:00 p.m. that evening Saturday, May 31. Washburn agreed to speak with police if he would not be arrested. (Tr. vol. II, 401-02.) Later in the afternoon/evening, Saturday, May 31, police interviewed Washburn and the Appellant.

An autopsy was performed several days later, and due to the medical evidence and autopsy report, an arrest warrant was issued on June 4, 2008, for violation of Child Neglect Resulting in Death. W. Va. Code § 61-8D-4a; Warrant for Arrest, Criminal Case No. 08F-1934, Magistrate Court of Kanawha County. The Appellant was arrested the next day. (*Id.*)

Before trial, the Appellant raised a series of motions in limine. For her motion in limine to exclude evidence of CPS proceedings, the Appellant argued that CPS proceedings carry “a lower standard of proof, so that any evidence about them referred to in this proceeding, especially any rulings made would be misleading and confusing to the jury”; CPS proceeding results are confidential; and introduction of evidence of CPS proceedings would be prejudicial. (Tr. vol. I, 176-77; Motion in Limine Testimony about Civil Neglect and Abuse Proceedings, Dec. 30, 2008.) Judge Kaufman orally granted the Appellant’s Motion in Limine to refer to CPS proceedings as “other proceedings.” (Tr. vol. I, 177.)

During the State’s opening statement, the prosecutor stated that Dr. McCagg at CAMC “asked that CPS be contacted, Child Protective Services, when she saw the child.” (Tr. vol. I, 206.) Then, during the State’s case-in-chief, the prosecutor asked Dr. McCagg: “And tell me if you recognize these photographs.” In Dr. McCagg’s long response, the doctor said “By this point we

had already even notified CPS . . . .” (Tr. vol. I, 339.) In both instances, the Appellant objected, moved for a mistrial, and was overruled. (Tr. vol. I, 208, 340.)

At trial, medical experts refuted the Appellant’s story that Alex accidentally hit his head while playing and bathing on Monday, May 26, causing these brain injuries, and that Alex appeared to get better Tuesday and Wednesday. Doctors Schmidt, Chebib, and Kaplan agreed that Alex’s massive injuries were inconsistent with a simple fall against a coffee table or a bathroom fixture. (Tr. vol. I, 363; Tr. vol. II, 428, 481.) Instead, Alex’s brain injuries were “consistent with a violent assault,” much like a car wreck or a fall from a third story window. (Tr. vol. I, 363-64; Tr. vol. II, 428, 463-64, 481.) Doctor Kaplan testified that the numerous bruises and injuries, along with their locations on the body, were indicative of non-accidental injuries—“a violent assault.” (Tr. Vol. II, 464, 485.) No evidence demonstrated who actually assaulted Alex causing these underlying injuries.

Moreover, Doctors Schmidt, Chebib, and Kaplan testified that Alex would likely have been immediately unconscious or noticeably abnormal from the time of the trauma or within a very short time thereafter—at most 24 hours—and that a caretaker should have seen the clear difference in the child. (Tr. vol. I, 369-70; Tr. vol. II, 431, 469-70.) These injuries would not allow for the appearance of improvement; brain injuries only get worse. (Tr. vol. II, 431.) According to Doctor Chebib, brain imaging did not show swelling when Alex was first admitted to the hospital on Thursday, May 29. (Tr. vol. II, 428-429.) The brain swelling started later that evening. (*Id.*) Because brain swelling occurs within 48 hours of injury, the injury to Alex’s brain was inconsistent with a fall on Monday, May 26—at least three days earlier. (Tr. vol. II, 429.) The Appellant’s story did not match the medical evidence.

Elizabeth Gerlach, the Appellant's mother, testified that the Appellant told her Alex was "a little delirious," wanted to sleep all the time, and was throwing up sometime during the week of May 26-29, though Gerlach did not remember the exact day. (Tr. vol. I, 317.) Gerlach and Pauley both told the Appellant she should take Alex to the doctor/emergency room. (Tr. vol. I, 318; Tr. vol. II, 539-40.)

While living in the Appellant's apartment during the week of Sunday, May 25-Thursday, May 29, Carnell overheard the Appellant and Washburn discussing whether to take Alex to the doctor. The Appellant and Washburn decided not to take Alex to the doctor because, among other reasons, "they were scared about the bruise." (Tr. vol. I, 294.) Detective Ferrell testified to a similar conversation she had with the Appellant. Det. Ferrell asked the Appellant, "[W]ere you afraid to take Alex to the hospital because of the bruise?" and the Appellant answered, "Yes." (Tr. vol. III, 722.)

The Chief Medical Examiner for the State, Doctor Kaplan, determined Alex's manner of death a homicide, and the *direct* cause of death was "*multiple* small injuries" to Alex's brain "as the consequence of a violent assault upon his person." (Tr. vol. II, 465, 482; emphasis added.) Doctors Chebib and Kaplan both testified that Alex could have lived if he had received immediate medical attention; Alex would have had "a significantly better chance to live." (Tr. vol. II, 431, 470, 503.)

According to Dr. Chebib, "[W]hen [Alex] came it was too late." (Tr. vol. II, 446.) In response to the question, "If [Alex] had come in earlier, he could have been saved?" Dr. Chebib answered unequivocally, "Yes." (*Id.*)

#### IV.

#### ISSUES

1. Viewing the evidence in the light most favorable to the prosecution, a reasonable jury could have found causation beyond a reasonable doubt. The jury could have found that failure to seek immediate medical attention, removing Alex's chance of life, was a cause of Alex's death.

2. The trial court correctly denied the Appellant's Motions for Mistrials because the prosecution's use of the words "Child Protective Services" or "CPS" did not violate the Judge's ruling in limine regarding CPS "proceedings." The jury was never informed whether or not the Appellant was subject to CPS proceedings, investigations, or other actions, and the Judge was well within his discretion to deny the motions.

#### V.

#### DISCUSSION

#### A. **VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, A REASONABLE JURY COULD HAVE FOUND CAUSATION BEYOND A REASONABLE DOUBT.**

1. **The Appellant Failed to Raise a Causation Argument in the Lower Court, Denying the Lower Court the Ability to Decide the Issue and Providing No Judicial Record from Which an Appeal Can Be Reviewed; Therefore, If this Honorable Court Wishes to Address the Issue, the Standard of Review Is Plain Error.**

This Honorable Court has noted, "One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result in the imposition of a procedural bar to an appeal of that issue." *State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995), quoting *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir. 1994). As Justice Cleckley stated in *LaRock*:

[The West Virginia Supreme Court] consistently ha[s] demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights[....] When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complain at a later time. The pedigree for this rule is of ancient vintage, and it is premised on the notion that calling an error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs. There is also an equally salutary justification for the raise or waive rule: It prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result). In the end, the contemporaneous objection requirement serves an important purpose in promoting the balanced and orderly functioning of our adversarial system of justice. [*State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996).]

*State v. Lively*, No. 34856, 2010 WL 2483441 (W. Va. June 16, 2010).

Failure to assert an issue in the lower court results in waiver or forfeiture of that issue for appeal. Syl. Pt. 8, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. “Waiver” means the intentional abandonment of an issue, and upon waiver, all inquiry is then ended. (*Id.*) “Forfeiture” means the failure to timely raise an issue, and upon forfeiture, the Court “may” evaluate unpreserved issues for plain error “in the most egregious circumstances,” though the plain error doctrine is not mandatory in all cases. *Id.*; *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996); West Virginia Rule of Criminal Procedure 52(b). Under *Miller*, the plain error doctrine only applies if the Court finds “(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syllabus Point 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).” Syl. Pt. 3, *State v. Martin*, \_\_\_ W. Va. \_\_\_, 639 S.E.2d 482 (2010). “Plain,” in this context, means “clear” or “obvious.” *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129, quoting *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770 (1993).

Plain error is reserved for substantial, fundamental issues resulting in an egregious miscarriage of justice, affecting the outcome of the proceedings, and for which the Appellant carries the burden of proof. Syl. Pt. 9, *Miller, supra*. Thus, plain error is a high threshold to conquer, and as the Court has said: “. . . the [plain error] doctrine is to be used sparingly . . .” Syllabus Point 4, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988).” Syl. Pt. 2, in part, *State v. Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (2007).

Furthermore, the Court has intimated that it will not conduct a plain-error review for all unpreserved claims regarding statutory elements. In *Trent*, the petitioners and appellants were convicted of first degree sexual assault. In *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 260, 465 S.E.2d 257, 260 (1995). A material element of the crime in *Trent* was that the victims be “eleven years old or younger.” *Id.* Although the petitioners and appellants did not raise the issue of age in the lower court or on any previous appeal/habeas, the Court reviewed the issue of age under the plain error doctrine because the alleged error was a substantial element of the crime and the State must prove every element. *Id.* at 260-62, 465 S.E.2d at 260-62. However, the Court remarked for clarification that it does “not intend to consider every issue regarding a criminal statute to be plain error.” *Id.* at 262, 465 SE at 262.

Appellants may also waive or forfeit issues if they fail to concisely state the issue in the notice of intent to appeal. Although Rule 37 of the West Virginia Rules of Criminal Procedure say the notice of intent to appeal “*should* concisely state the grounds for appeal,” Rule 3(b) of the West Virginia Rules of Appellate Procedure clearly mandate a concise statement of each ground: “The notice of intent to appeal *shall* concisely state the grounds for appeal.” (Emphasis added.) If the

notice of intent to appeal does not state a ground for appeal, and the Appellant later argues that ground in her petition and briefing, Rule 3(b) has been violated.

Lastly, objections in the lower court should be clear and specific to receive ordinary review. In *State v. Davis*, 200 W. Va. 590, 648 S.E.2d 354 (2007), discussing a jury charge issue raised on appeal for the first time, the Court said “that ‘where a party does not make a *clear, specific* objection at trial to the charge that he challenges as erroneous, he forfeits his right to appeal unless the issue is so fundamental and prejudicial as to constitute ‘plain error.’” [*State v.*] *Guthrie*, 194 W. Va. [657,] 671 n.13, 461 S.E.2d [163,] 177 n.13 [(1995)].” *Davis*, 220 W. Va. at 593, 648 S.E.2d at 357 (emphasis added).

In this case, although the Appellant moved for acquittal due to insufficient evidence after the State’s case-in-chief, nowhere did the Appellant mention causation as an unfulfilled element in her motion. The Appellant cited several specific issues for insufficient evidence: 1) The inconsistencies in testimony by paramedic Albert LaRue about whether the mother gave Alex CPR; 2) The disagreement between doctors Chebib and Schmidt about whether the child would have been immediately unconscious after these injuries occurred or possibly lucid for 24-48 hours; and 3) The disagreement between Dr. McCagg and the four paramedics concerning when the child was intubated. (Tr. vol. II, 505-06.) These specific issues run to the neglect element, not the causation argument. Under the maxim “*expressio unius est exclusio alterius*,” when the Appellant included specific arguments for insufficient evidence of neglect, she excluded other arguments for insufficient evidence such as causation. Therefore, the causation issue was excluded from the argument and excluded from the judicial ruling now under appeal.

The Appellant did not raise this causation argument in its original motion for acquittal, nor in any pre- or post-trial motions, nor in her Notice of Intent to Appeal filed on September 8, 2009. Notice of Intent to Appeal, Criminal Case No. 08-F-538, Kanawha County Circuit Court. In other words, nowhere below did the Appellant raise an argument against the sufficiency of evidence pertaining to the causation element of this crime. This issue was raised for the first time in the Appellant's Petition for Appeal, and under the law, issues raised for the first time on appeal are deemed waived or forfeited because the lower court did not have a chance to decide the issue or create a record for review. The Appellant was silent as to causation below, and silence constitutes waiver or forfeiture for appeal. As Justice Cleckley advised, Appellants should not be able to raise an issue only after the case goes sour. Furthermore, as this Honorable Court has held, plain error is not necessarily appropriate for all issues regarding criminal statutes. Therefore, if this Honorable Court wishes to address this issue, the Court must apply the heightened plain error standard of review.

2. **Viewed in the Light Most Favorable to the Prosecution, the Jury Could Have Found by Sufficient Evidence Beyond a Reasonable Doubt That Failure to Seek Immediate Medical Attention, Removing Alex's Chance to Live, Was a Cause Contributing to Alex's Foreseeable Death.**

An appellant in a criminal case challenging the sufficiency of the evidence carries a heavy burden. Reviewing all evidence and inferences in the light most favorable to the prosecution, a jury verdict may only be set aside if *no evidence*, direct or circumstantial, supports guilt for each element:

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable

doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains *no evidence*, regardless of how it is weighed, *from which the jury could find guilt beyond a reasonable doubt*. Syl. Pt. 3, in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 5, *State v. Woodson*, 222 W. Va. 607, 671 S.E.2d 438 (2008) (emphasis added). The Court must only set aside verdicts for insufficient evidence when the court is “‘convinced that the evidence was manifestly inadequate and that consequent injustice has been done.’ Syl. Pt. 1, *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1978), *overruled on other grounds by State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).” Syl. Pt. 1, in part, *State v. Green*, 220 W. Va. 300, 647 S.E.2d 736 (2007).

Moreover, the reviewing court need not be convinced of the guilt of the Appellant. In evaluating decisions on directed verdicts, “[i]t is not necessary in appraising [the evidence’s] sufficiency that the trial or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.’ *State v. West*, 153 W. Va. 325, 168 S.E.2d 716, (1963).” Syl. pt. 1, *State v. Fischer*, 158 W. Va. 72, 211 S.E.2d 666 (1974).’ Syl. Pt. 10, *State v. Davis*, 176 W. Va. 454, 345 S.E.2d 549 (1986).” Syllabus point 1, *State v. Rogers*, 209 W. Va. 348, 547 S.E.2d 910 (2001).” Syl. Pt. 3, in part, *State v. Whittaker*, 221 W. Va. 117, 650 S.E.2d 216 (2007).

The Court’s determination in sufficiency-of-the-evidence cases is twofold: 1) It must construe the facts in favor of the prosecution, and 2) it must apply the relevant legal standard to those facts as the jury might have applied it. *State v. Harden*, 223 W. Va. 796, 814, 679 S.E.2d 628, 647 (2009). In all criminal cases, the relevant legal standard for conviction is proof beyond a

reasonable doubt as to the essential elements of the crime. *Bunley v. Florida*, 538 U.S. 835, 840, 123 S. Ct. 2020, 2023 (2003). However, *beyond a reasonable doubt does not mean beyond all doubt*. This court has clearly stated: “It is not required that the government prove guilt beyond all possible doubt.” *State v. Goff*, 166 W. Va. 47, n.9, 272 S.E.2d 457 n.9 (1980).

The Court defines “reasonable doubt” as a reasonable person’s hesitation to act on the evidence. In *Harden*, the Court restated its definition:

A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it.

*Harden*, 223 W. Va. at 814, 679 S.E.2d at 647, quoting *Goff*, 166 W. Va. at n.9, 272 S.E.2d at n.9.

Under West Virginia Code § 61-8D-4a, a person is guilty of Child Neglect Resulting in Death if the person neglects a child and that neglect “causes” the child’s death. The West Virginia Legislature did not define “cause” or “causation” in Chapter 61 of the West Virginia Code, but the Legislature did title the statute “Child neglect *resulting in death*,” adding legislative intent to the meaning of “cause” intended. W. Va. Code § 61-8D-4a (emphasis added). Additionally, in *Thompson* (discussed below) this Court upheld conviction against a sufficiency-of-the-evidence claim where the Appellant “contributed to” a “foreseeable” death.

Causation in criminal cases does not have to be the direct and only cause beyond all doubt, as the Appellant seems to argue. A “host of cases” nationwide impose guilt where the direct cause of death is separate and distinct from the underlying criminal conduct. *See State v. Durham*, 156 W. Va. 509, 517, 195 S.E.2d 144, 149 (1973). This Court has found sufficient evidence to convict in the case where the criminal conduct contributed to the death—allowing for multiple causes--and in the case where medical experts testified only to the possibility that the conduct caused death. *If*

*strong possibilities weighed by reasonable juries were not enough to impose guilt, then the standard in criminal cases would be beyond ALL doubt, not simply beyond REASONABLE doubt.*

In *State v. Thompson*, 220 W. Va. 246, 647 S.E.2d 526 (2007), a case similar to the case at bar, this Honorable Court upheld a guilty verdict under West Virginia Code § 61-8D-4a because the Appellant, Thompson, neglected his son and that neglect “contributed to” the “foreseeable” death of his son, despite the fact that the direct cause of death was hypothermia. Around 10:00 a.m. on a hot day, Thompson fell asleep in his trailer while Luke, his toddler son, suffering from a fever at the time, sat strapped in a car seat in a hot car with all but one window rolled up. *Thompson*, 220 W. Va. at 248, 647 S.E.2d at 528. Thompson claimed he unintentionally fell asleep due to extreme exhaustion, and when he awoke around 3:00 p.m., he immediately ran to the car and administered CPR to the child. *Id.* Tragically, the child died of hypothermia. *Id.* Despite his unintentional sleep and CPR claims, Thompson was convicted of Child Neglect Resulting in Death under West Virginia Code § 61-8D-4a. On appeal, Thompson argued, *inter alia*, insufficient evidence to support the conviction. The Appellant’s brief misinterprets this Court’s opinion in *Thompson*. Although the Court did not directly state that it was interpreting the causation element of this statute, the Court declared that “the evidence was there for the jury to conclude that the appellant contributed to the circumstances which led, inexorably, directly to Luke’s death from hypothermia. The death was foreseeable.” *Id.* at 254, 647 S.E.2d at 534. The Court was clearly interpreting causation. Although the direct cause of death was hypothermia, the parent in *Thompson* contributed to a foreseeable death by leaving his feverish son in the hot car for hours. Therefore, the question this Court must ask regarding causation under West Virginia Code § 61-8d-4a is whether the Appellant contributed to a foreseeable death by neglecting to seek immediate medical attention for Alex’s clearly life-

threatening injuries. As will be discussed below, the answer is yes—the Appellant did contribute to Alex’s foreseeable death.

The word “cause” is a flexible legal term. Different courts apply different understandings of the term to different cases, tort or criminal. “Cause” may be described as “legal cause,” “proximate cause,” “but-for cause,” “cause in fact,” “substantial factor cause,” “direct/indirect cause,” “primary/second cause,” its more common sense meaning of “bring about,” “contribute to,” or “result in,” or it may be a combination thereof. Each unique phrase courts give “cause” also carries a unique test. Most criminal causation is cause in fact or but-for cause (meaning without the criminal conduct the result would not have occurred), but as in *Thompson*, this Court has applied different types of causation in certain criminal cases, such as manslaughter or neglect cases.

In *State v. Craig*, 131 W. Va. 714, 51 S.E.2d 283 (1949), for example, this Court implemented a foreseeability causation (was the death reasonable anticipated from the criminal conduct)—similar to *Thompson*. The *Craig* court reversed a conviction for involuntary manslaughter due to insufficient evidence where a driver struck a road worker on a foggy road. *Id.* The accident was apparently a calm one. When the collision occurred, the automobile’s speed was “nearly at a stop,” and the impact did not even knock the road worker to the ground. *Id.* at 717, 51 S.E.2d at 285. The road worker complained of pain in his hips, and it was later discovered he suffered a fractured pelvis. *Id.* at 719, 51 S.E.2d at 286. The road worker was taken to the hospital, where he contracted pneumonia several days after the accident. *Id.* He died of pneumonia complications eight days after being admitted to the hospital. *Id.* The only medical expert testified that the victim was prone to disease and died as a direct cause of the pneumonia complications. *Id.* at 720, 51 S.E.2d at 287. The expert further testified that the contributory factors that lead to death were amnesia causing

pneumonia, paralysis of the bowel, and lung congestion, not the underlying hip injury, and the expert unequivocally stated the victim would not have died from the underlying injury. *Id.* The *Craig* court reasoned that the evidence was insufficient to fulfill causation under involuntary manslaughter because the type of injury inflicted (a simple fracture) would not ordinarily result in death and did not result in death. *Id.* at 725-26, 51 S.E.2d at 289-90. The testimony showed the injury was not one of the contributory factors and was not an ordinary consequence of a hip fracture injury.

Although the *Craig* court did not use the word “foreseeable” in relation to causation, the Court determined that the injuries were too far attenuated from the death to impose guilt. In other words, the injuries did not contribute to a foreseeable death. The Court also used the terms “cause” and “result in” interchangeably. *Id.*, Syl. Pt. 3, in part.

In *State v. Durham*, 156 W. Va. 509, 195 S.E.2d 144 (1973), this Court allowed for a *possibility* of cause in fact to prove guilt beyond a reasonable doubt. The *Durham* court upheld a conviction for voluntary manslaughter where the defendant shot her husband, and the husband later died in the hospital as the direct result of improper anaesthesia or a preexisting liver condition. *Id.* The Court stated that in corpus delicti cases foreseeability is not the test; instead, the evidence must prove beyond a reasonable doubt: 1) a death occurs, and 2) criminal agency is a cause. *Id.*, Syl. Pt. 1. In *Durham*, the victim was clearly dead, but the evidence revealed only possibilities as to the cause of and proportionate contribution to death from any one cause. The Court answered the question of whether the defendant’s criminal agency caused the death of the victim by examining the medical evidence. Medical experts testified that the gunshot wound was minor and by itself probably would not have caused death, but the gunshot wound may have accelerated death. *Id.* at 520, 195 S.E.2d at 150. Neither medical expert could testify to complete certainty that the gunshot

wound did in fact accelerate death, only that it was possible. *Id.* Yet, the Court upheld guilt because criminal cause may be found from direct evidence or “cogent and irresistible grounds of presumption.” *Id.* The Court clearly said probability of acceleration of death by criminal conduct, along with the indirect, circumstantial evidence that the victim was shot, taken to the hospital, and died 22 hours later, was sufficient evidence to prove the initial wound indirectly caused the victim’s death. *Id.*

Therefore, in *Durham*, because sufficient probabilities and circumstantial evidence proved the gunshot may have contributed to the death, the evidence was sufficient for a jury to find guilt. *Medical expert testimony as to possibilities was sufficient to uphold the conviction under a causation challenge.*

Therefore, *to reverse, this Court must find that NO evidence proved the Appellant was a cause contributing to Alex’s foreseeable death beyond a reasonable doubt*, considering that previous cases have held that the proof need not be beyond ALL doubt, that multiple direct and indirect causes may contribute to one death, and that possibilities, not absolute certainties, of cause may be sufficient to impose guilt. In the case at bar, substantial evidence existed to prove both elements of this crime beyond a reasonable doubt.

Here, the State had to fulfill two major elements of this crime to warrant a conviction: 1) The Appellant neglected Alex, and 2) the Appellant “caused” Alex’s death. Substantial evidence existed from which any rational trier of fact could find guilt for both elements beyond a reasonable doubt.

First, the Appellant neglected Alex. Alex’s direct cause of death was a series of severe brain injuries caused by “a violent assault,” but the Appellant contributed to that death by failing to seek immediate medical attention until the child was unconscious with labored breathing and Christina

Carnell arrived around 6:00 p.m., Thursday, May 29. According to Doctor Chebib, these injuries were so severe Alex would likely have been unconscious immediately, and these injuries could have occurred up to almost two days prior to Alex being taken to the hospital. The jury might have found that Alex lay unconscious for up to almost two days. Testimony by Christina Carnell and Detective Ferrell revealed that the Appellant was afraid to take Alex to the doctor because she did not want to explain his injuries to authorities. Several doctors testified that a caregiver would have known immediately or within a short time that something was horribly wrong with Alex, and a caregiver should have known he needed immediate medical attention. Doctors also testified that if Alex had received medical attention sooner, he could have lived. He had a chance. In this case, the neglect was failure to seek immediate medical attention, and substantial evidence supports the finding that the Appellant neglected Alex.

Second, the Appellant's neglect "caused" Alex's death. Again, under *Thompson*, the Court has concluded that evidence is sufficient under this statute when the evidence shows that neglect "contributed to" a "foreseeable" death. The question is whether Alex would have foreseeably died if the Appellant neglected to seek immediate medical attention, and the answer is yes. Substantial evidence supports this finding.

- a. **Substantial evidence supports the finding that the Appellant contributed to Alex's death because Alex had "a significant chance to live" if taken to the hospital immediately, that the Appellant could have waited up to two days before taking Alex to the hospital, and that the Appellant did not take him to the hospital for fear of explaining Alex's injuries to authorities.**

The Appellant contributed to Alex's death. Unlike *State v. Craig* wherein only one medical expert testified and did not link the Appellant's negligence to the victim's death in any way, here

multiple doctors connected the Appellant's neglect to Alex's death. Two doctors, including the Chief Medical Examiner for the State of West Virginia, testified that Alex could have lived if he had received medical attention earlier. To a reasonable degree of medical certainty, Alex had "a significant chance" to live. The jury could have found that the Appellant removed Alex's chance to live by neglecting to seek immediate medical attention because the Appellant was afraid to explain Alex's injuries to authorities. Alex is now dead as a result of the underlying injuries AND the neglect of not seeking immediate medical attention. The Appellant contributed to Alex's death by allowing crucial moments to slip away, moments doctors could have used to save Alex. It is unclear who inflicted the underlying injuries upon Alex, but it is clear that the Appellant allowed those severe injuries to go untreated until it was too late. The Appellant removed Alex's chance when she had a clear legal duty to help him regardless of the authorities' questions.

- b. Alex's death was foreseeable because the severity of the head injuries and subsequent symptoms such as obvious bruising, abnormal behavior, vomiting, and unconsciousness are the type of injuries/subsequent symptoms that would ordinarily lead to death if untreated.**

Alex's death was foreseeable if not given immediate medical treatment after the underlying brain injuries occurred. In other words, Alex would have died beyond a reasonable doubt if the Appellant neglected him. Unlike the minor hip fracture injury in *Craig*, severe head injuries often ordinarily result in death. Several medical experts testified as to the severity of Alex's brain injuries. According to Doctors Schmidt, Chebib, and Kaplan, Alex would likely have been unconscious or noticeably abnormal immediately or within a short time after these injuries initially occurred. Many witnesses testified to the number of bruises on Alex's body, and testimony revealed Alex was physically ill, vomiting, at some point between Tuesday and Thursday, May 27-29. Viewed in the

light most favorable to the prosecution, Alex suffered a severe head injury Tuesday or Wednesday, showed obvious swelling/bruising to his forehead and bruising to other parts of his entire body, began acting abnormally immediately, vomiting, not eating, appearing lethargic, lost consciousness immediately or within a short time, and while unconscious experienced labored breathing, and the Appellant did not seek medical attention until Christina Carnell arrived Thursday evening (to a locked door and quiet apartment) discovering Alex unconscious, prompting the Appellant to call 911. Under this scenario, death would be a foreseeable consequence of failing to seek immediate medical attention for Alex.

The Appellant's brief incorrectly frames the causation argument. Instead of asking whether Alex would have *lived* beyond *all* doubt if immediate medical attention were sought, the question is: would Alex have *died* beyond a *reasonable* doubt if immediate medical attention were not sought? The answer is yes—Alex would have died beyond a reasonable doubt if the Appellant did not seek immediate medical attention for these severe head injuries. Because the Appellant did not seek immediate medical attention, Alex died, and the Appellant violated this state's law against neglect and neglect causing death. Her neglect contributed to Alex's foreseeable death when she failed to seek immediate medical attention for his severe head injuries.

- c. **Under this jurisdiction's law, and the law of many other jurisdictions, a possibility that Alex's life could have been saved is sufficient to prove beyond a reasonable doubt that the Appellant, as guardian, caused his death by removing that "significant" possibility.**

Even applying the Appellant's test of whether Alex would definitely have lived if immediate medical attention were sought, the Court must still uphold guilt. As this Court decided in *Thompson*, guilt may be upheld when neglect indirectly causes death, and as this Court decided in *Durham*, a

possibility is sufficient to prove guilt beyond a reasonable doubt. Clearly, the direct cause of Alex's death was a series of brain injuries, but just as hypothermia was the direct cause of little Luke's death in *Thompson*, the direct cause is not the only "cause" sufficient under this statute. Indeed, in failure-to-see-medical-attention cases, the direct cause of death will never be the neglect itself; it will be starvation, dehydration, severe brain injuries from abuse, etc. However, the neglect will still be a cause of death when the neglect contributes to the foreseeable fatal outcome. Allowing Alex to die as a result of the underlying brain injuries by failing to take him to the hospital immediately is a sufficient "cause" under this statute—it contributed to and resulted in Alex's foreseeable death.

Possibilities are enough to prove guilt beyond a reasonable doubt. In the American legal system, all evidence is a possibility until the jury decides fact. The reasonable doubt standard, as defined by this Court in *Harden*, asks whether a reasonable person would hesitate to rely on the evidence. If a reasonable person would hesitate, doubt exists. Here, if a doctor told a reasonable person that she had a "significantly better chance to live," "could" live, had a "possibility" to live, only if she went to the hospital immediately, then a reasonable person would not hesitate to rely on that information and would go to a hospital immediately. As in *Durham*, wherein the medical expert could only testify to the possibility that the Appellant's gunshot caused her husband's death, medical testimony here revealed that Alex could have lived if he had been taken to the hospital immediately. Medical testimony strongly supporting a given possibility is sufficient for a jury to find that possibility is fact. Given the medical testimony that Alex could have lived, the jury could have found beyond a reasonable doubt that the Appellant contributed to Alex's death by removing that chance to live. Determining fact from possibilities is the essential goal of our trial-by-jury system.

The Appellant cites three cases for the proposition that other jurisdictions do not allow juries to find guilt when medical experts testify to the possibility of a particular outcome—*Johnson v. State*, 121 S.W.3d 133 (Tex. App. 2003); *Ex Parte Lucas*, 792 So.2d 1169 (Ala. 2000); and *State v. Muro*, 695 N.W.2d 425 (Neb. 2005). Jurisdictions that exclude a jury from finding guilt where a defendant removed a child’s chance to live, no matter how small the chance, clearly run afoul of the policy behind West Virginia Code § 61-8D-4a, which is to protect life—to give a child the safety it cannot give itself. However, even of the three jurisdictions cited, Texas has upheld guilt in a sufficiency-of-the-evidence challenge in a child-abuse-causing-death case where medical testimony showed a child had a “chance” to live.

In the highly analogous 2010 Texas case of *State v. Fellers*, No. 13-08-688-CR, 2010 WL 2543900 (Tex. App. June 24, 2010) (Memorandum Opinion), a child complained of sickness, vomited, looked pale, and had bruises in various places on his body, including his forehead. On the morning of November 7, 2007, the child’s breathing was labored, and he was rushed to the hospital by the appellant’s girlfriend and her sister. *Id.* The child died shortly after arriving at the hospital. *Id.* Testimony revealed that the child had been in a similarly troubled physical state at around 6:00 p.m. the night before, and the appellant had not sought medical attention. *Id.* The medical examiner testified that blunt trauma caused the bruises to the child’s forehead and directly caused the death. *Id.* In answer to the question “could” the child’s injuries have been treated if hospitalized immediately, the medical examiner testified, “I would say early on, the chances for treatment and survival are good. Later, chances are not good.” *Id.* Under the court’s Analysis section, the Texas court decided this statement of “coulds” and “chances” was sufficient to mean that “a rational jury could reasonably conclude that J.F. suffered a serious bodily injury as a result of appellant's failure

to seek medical treatment for him.” *Id.* Therefore, chances and possibilities are sufficient for a jury to find guilt in Texas.

Moreover, the Texas case cited by the Appellant, *Johnson*, does not stand for the proposition that a doctor testifying to possibilities is insufficient evidence. In *Johnson v. State, supra*, among other dissimilarities with this case, the state presented NO evidence that there was a possibility the child would have lived if taken to the hospital faster and NO evidence that the appellant was aware of the child’s serious injury. In *Johnson*, a mother noticed a problem with her daughter around 10 a.m. and drove the girl to the hospital, arriving shortly thereafter but stopping at McDonald’s and a convenience store first. 121 S.W.3d at 134. Shortly after admittance to the hospital, the girl died. The state prosecuted the mother, and a jury convicted her of recklessly causing injury to her daughter. *Id.* On appeal, the state claimed the appellant should have been convicted of intentional abuse, and the appellant claimed the verdict of reckless injury should be reversed. The Texas Court analyzed both issues, interpreting a statute very different from West Virginia’s. The court sided with the appellant on both issues due to insufficient evidence. *Id.*

The evidence in *Johnson* was insufficient: At trial, the medical expert testified that he did not notice any bruising or any other symptoms of trauma upon seeing the child, the major blood loss was not even apparent to him--the medical doctor--and “the blood loss would not have been apparent to anyone else.” *Id.* at 136. The doctor claimed he could not testify at all as to whether the appellant should have known there was a serious problem. *Id.* He merely said generally, not in relation to this child and this appellant, that if an injured person gets to the hospital sooner, they have a better chance. *Id.* He could not testify that the appellant acted unreasonably. *Id.* The Texas court rightly focused on this lack of ANY testimony as to whether this child could have survived or whether this

appellant should have known to call 911 instead of driving leisurely. Although the doctor testified that “anyone would have been able to recognize the child was ill,” being ill is not the same as an obvious, severe injury requiring immediate medical attention to stop foreseeable death.

As to the intentional claim, the state in *Johnson* had to prove that an unreasonable delay caused injury, and as the court stated, “there was no evidence that it was unreasonable for the appellant to drive her child to the hospital herself.” *Id.* As to the reckless verdict, the Texas court answered the question: was the appellant aware that her conduct would lead to injury (death)? In other words, was injury foreseeable? The Texas court decided the evidence was insufficient to prove the appellant was aware her conduct would lead to injury because the appellant was not aware of the severity of the injury due to the complete lack of bruises, symptoms of trauma, or blood loss and the complete lack of any testimony that the child would or even could have survived. *Id.* at 138. Therefore, causation was not satisfied as to the intentional claim, and the evidence was generally insufficient as the recklessness conviction.

Unlike *Johnson*, the State in this case provided ample evidence to uphold guilt--similar to *Fellers*. Testimony showed Alex was badly bruised, suffered symptoms such as vomiting, lose of consciousness, etc., and medical testimony showed the appellant should have known something was wrong after this severe head injury and should have sought medical attention immediately. Furthermore, unlike *Johnson*, several medical experts testified with specificity that Alex could have lived if he arrived at the hospital sooner.

Other jurisdictions have allowed possibilities to be sufficient evidence for juries to find guilt. In addition to the Texas case cited above, the Minnesota Supreme Court has upheld guilt against a sufficiency-of-the-evidence claim where causation was found by evidence of a possibility. In *State*

*v. Southern*, 304 N.W.2d 329, 330 (Minn. 1981), a woman hit a child with a truck and drove away. While driving away, she dragged the boy 175 feet. *Id.* The woman was convicted of negligent vehicular homicide, which required gross negligence causing death. The State could not prove beyond a reasonable doubt that hitting the boy was gross negligence, but the court determined that driving away was gross negligence and that gross negligence caused the child's death because the fatal injuries *could* have occurred during the dragging (the grossly negligent act), not the original accident. *Id.* The Minnesota court reasoned: "But for defendant's gross negligence, the child *may* well have survived." *Id.* (emphasis added). In 2008, the Minnesota Court of Appeals restated this position on "chances" where a child had "only a ten percent chance": "Shane's neglecting to seek immediate medical attention caused A.C.'s death by depriving her of any chance of survival, even though death did not occur until after A.C. received medical care." *State v. Shane*, No. A06-1581, 2008 WL 660543 (Minn. App. March 11, 2008). In *Shane*, the court upheld the guilty verdict despite the appellant's argument that the child had "only a ten percent chance of survival even with immediate medical attention." *Id.* Deprivation of any chance of survival is sufficient to affirm the verdict. Moreover, in *Torkelson*, Minnesota also followed a contribute-to test, similar to this Court in *Thompson*, for causation: "The State must prove that [the defendant's] acts contributed to the death." *State v. Torkelson*, 404 N.W.2d 352, 357 (Minn. App. 1987).

If a mother neglects her son, as happened here, and that neglect contributes to the son's death, however slightly, the mother should be held accountable. Here, the evidence shows the contribution was not slight; Alex had "a significantly better chance," and the Appellant removed that chance.

Consider a slight change to the facts of *Thompson*. If two-year-old Luke's mother had come home to find her husband passed out in the trailer and her feverish child strapped into a hot car on a hot day, would she neglect Luke if she did not remove him from the car? Yes. Would she be as guilty as the father of the child's death by neglect if she failed to remove the child from the hot car on the hot day, and the child subsequently died from heat-related injuries? Yes. Just because the mother did not place the child in the car, did not inflict the direct injuries that directly killed him, the mother who fails to give or seek aid for her child when that aid is obviously necessary also commits a crime. The death results from her neglect as well as the inflicter's.

The same is true in Alex's case. Even though the Appellant may not have inflicted the underlying brain injuries, not seeking immediate medical attention for fear of explaining Alex's injuries to authorities is the same as the mother in *Thompson* example failing to remove little Luke from the hot car. Alex experienced a severe head injury, bad bruising, abnormal behavior, vomiting, unconsciousness, and labored breathing. Parents are bestowed with the societal and legal responsibility to protect their children, even before themselves, and children deserve better than fatal neglect. Alex deserved not to be assaulted and to go to the hospital immediately after he was.

It should be noted that these injuries were severe, but they were not necessarily fatal until they were allowed to go without immediate treatment. As the Appellant points out, Doctor Kaplan referred to the underlying injuries as "fatal injuries," but he also testified that Alex could have lived if immediate medical attention was given. Therefore, the underlying injuries themselves were not necessarily fatal until coupled with the Appellant allowing them to go untreated for too long. The lack of immediate medical attention was the final death blow, the lethal ingredient that turned severe into "fatal."

**B. THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTIONS FOR MISTRIALS BECAUSE THE PROSECUTION'S USE OF THE WORDS "CHILD PROTECTIVE SERVICES" OR "CPS" DID NOT VIOLATE THE JUDGE'S RULING IN LIMINE REGARDING CPS "PROCEEDINGS." THE JURY WAS NEVER INFORMED WHETHER OR NOT THE APPELLANT WAS SUBJECT TO CPS PROCEEDINGS, INVESTIGATIONS, OR OTHER ACTIONS, AND THE JUDGE WAS WITHIN HIS DISCRETION TO DENY THE MOTIONS.**

A trial court's decision to deny a motion for mistrial is proper unless the trial judge abused his discretion. This Court has stated: "'The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard.' *State v. Lowery*, 222 W. Va. 284, 288, 664 S.E.2d 169, 173 (2008)." *State v. Smith*, No. 35133, 2010 WL 1838382 (W. Va. May 6, 2010). Furthermore, for due process and other concerns, a trial court shall only wisely declare a mistrial when the court finds "manifest necessity" to do so:

The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. A trial court is empowered to exercise this discretion only when there is a 'manifest necessity' for discharging the jury before it has rendered its verdict. This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court's discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy. *State v. Williams*, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983).

*State v. Smith*, No. 35133, 2010 WL 1838382 (W. Va. May 6, 2010).

A trial court's decisions regarding rulings in limine and modifications thereto are also proper unless the trial judge abused his discretion or acted under some misapprehension of law or evidence: "'A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.' Syl. pt. 2, *Stewart v. Johnson*, 209 W. Va. 476, 549 S.E.2d 670 (2001)." Syl. Pt. 3, *Adams v. Consolidated Rail Corp.*, 214 W. Va. 711, 591 S.E.2d 269 (2003). Although given "great respect and weight," decisions regarding rulings in limine are

improper if the trial court “acted under some misapprehension of the law or the evidence.’ Syl. pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976).” Syl. pt. 1, *Adams*.

Rulings in limine, which are evidentiary rulings, carry the effect of law, but the trial court may modify rulings in limine at any time. As restated by this Court in *Adams*: “Once a trial judge rules on a motion in limine, that ruling becomes the law of the case unless modified by a subsequent ruling of the court. A trial court is vested with the exclusive authority to determine when and to what extent an in limine order is to be modified.’ Syl. pt. 4, *Honaker v. Mahon*, 210 W. Va. 53, 552 S.E.2d 788 (2001).” Syl. pt. 2, *Adams*.

The Appellant’s brief incorrectly relies on *Honaker* for reversal in this case. In *Honaker*, this Court held that

“‘[a] deliberate and intentional violation of a trial court’s ruling on a motion in limine, and thereby the intentional introduction of prejudicial evidence into a trial, is a ground for reversing a jury’s verdict. However, in order for a violation of a trial court’s evidentiary ruling to serve as the basis for a new trial, the ruling must be specific in its prohibitions, and the violation must be clear.’ Syl. Pt. 5, *Honaker v. Mahon*, 210 W. Va. 53, 552 S.E.2d 788 (2001).”

Syl. Pt. 3, *Jones v. Setser*, 224 W. Va. 483, 686 S.E.2d 623 (2009).

In *Honaker*, the circuit court granted a motion in limine specifically preventing any discussion of “[t]he time or circumstances under which plaintiff employed an attorney.” *Honaker*, 210 W. Va. at 59, 552 S.E.2d at 794. The defendant’s counsel later asked a witness pointedly: “Q: Well, by April 1st, Mrs. Honaker already has hired Marvin Masters to bring a lawsuit, correct?” to which the witness answered, “A: That’s my understanding, yes.” *Id.* This Court held that violations of specific rulings in limine “must be clear” to be reversible error, and in the *Honaker* case, it was a clear violation of the specific ruling in limine.

In this case, however, the prosecutor's/witness' statements did not clearly violate a specific ruling in limine, and certainly not intentionally to introduce prejudicial evidence. The Appellant moved the court to exclude references to CPS "proceedings," specifically citing the exclusion of rulings made in CPS proceedings due to the lower burden of proof. The trial court agreed, and the court orally ruled in limine to refer to all CPS proceedings as "other proceedings." At trial, the prosecutor and one witness referred to the hospital contacting CPS upon seeing the extent of Alex's injuries. Whether CPS took any action was not disclosed. No CPS proceedings, investigations, rulings, or testimony were disclosed. The only two references made regarding CPS were to the reaction of the hospital to the sight of Alex's body. The references highlighted the severity of the injuries Alex suffered, and the evidence of the hospital's reaction was proof of the Appellant's crime, not prejudicial evidence of CPS proceedings, investigations, or any results. The evidence showed that the appellant should have known, as any reasonable person would have, that the injuries to Alex's body clearly, obviously required immediate medical attention.

At both references, the Appellant objected and moved for mistrial. Judge Kaufman denied both motions. Judge Kaufman did not find a "manifest necessity" to discharge the jury because his ruling in limine regarded CPS proceedings, not hospital actions. The references to CPS were passing, slight, did not prejudice the Appellant in any way, and did not violate the ruling that concerned CPS "proceedings." Furthermore, under *Adams*, even if, *arguendo*, these references violated the ruling in limine, which they did not, Judge Kaufman was well within his discretion to modify his previous ruling to allow for these references upon objection.

Therefore, the ruling in limine was not violated, and the motions for mistrials were properly denied. These CPS references pertained to the hospital's reaction to the severity of Alex's injuries,

which is evidence of the Appellant's crime that she should have known these severe injuries required immediate medical attention, and Judge Kaufman was well within his discretion to modify his earlier ruling to allow these references if necessary. The motions for mistrials were properly denied.

VI.

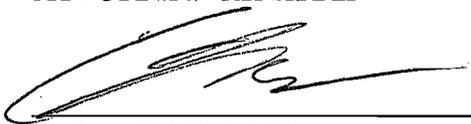
CONCLUSION

Therefore, this Court should decide in favor of the State. First, the State did not violate a judicial ruling to regard CPS proceedings as "other proceedings" because the two passing references to CPS did not discuss proceedings, investigations, or any other action taken by CPS. Second, the jury had sufficient evidence to find that the Appellant's failure to seek immediate medical attention was a cause of Alex's death. The proceedings and verdict below were proper and sufficient under the law, and the jury's verdict must stand.

STATE OF WEST VIRGINIA,

By Counsel

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL



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C. CASEY FORBES  
THIRD YEAR LAW STUDENT  
PROSPECTIVE RULE 10 ADMITTEE



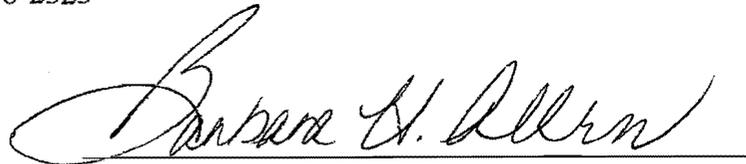
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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that the foregoing "Amended Brief of Appellee, State of West Virginia" has been served upon the following counsel of record by mailing a true copy thereof this 21<sup>st</sup> day of July, 2010, addressed as follows:

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