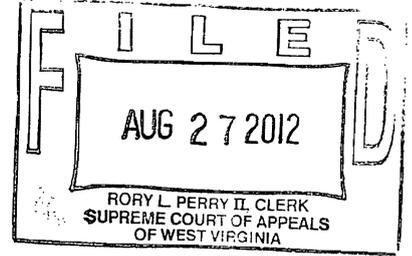


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0120



STATE OF WEST VIRGINIA,

*Plaintiff Below,  
Respondent,*

v.

WILLIAM R. JOHNSON,

*Defendant Below,  
Petitioner.*

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RESPONSE BRIEF

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RESPONSE BRIEF

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I.

RESPONDENT'S STATEMENT OF THE CASE AND STATEMENT OF FACTS

*Introduction.*<sup>1</sup>

Jada White ("Jada") was born on October 15, 2005. Jada's mother was Stephanie White and her father was Justin White. Jada's parents separated after Jada was born. In January of 2007, the

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<sup>1</sup>The summary factual statement in these introductory paragraphs, and the following detailed statement of facts with specific cites to the Appendix Record, are based on the evidence from the trial record in the instant case that supports the jury's verdicts below. An appellate court ordinarily views the facts of a case on review as being the facts and reasonable inferences from the admissible evidence that are consistent with the jury's verdict. *See, e.g., State v. Bull*, 204 W. Va. 255, 258 n.1, 512 S.E. 2d 177, 180 n.1 (1998) ("in light of the jury's guilty verdict, we view factual conflicts in the evidence as having been resolved by the jury in a fashion consistent with the jury's verdict."). *See also State v. Atkins*, 163 W. Va. 502, 515, 261 S.E.2d 55, 62 (1980) ("the jury's verdict of guilty is taken to have resolved factual conflicts in favor of the State . . ."); *State v. Kirk N.*, 214 W. Va. 730, 735, 591 S.E.2d 288, 293 (2003) ("We set forth in a footnote a summary statement of facts taken from the evidence at trial, assuming that the jury believed those pieces of evidence consistent with their verdict.").

Petitioner, William R. Johnson (“Johnson”), was living in Parkersburg, West Virginia with Stephanie White; with Jada (then fifteen months old); and with S.J. (then two months old), Stephanie’s child with Johnson. During the evening and early morning hours of January 12 and 13, 2007, while Stephanie was at work at a bar, Johnson severely injured Jada. Jada’s injuries included a badly fractured skull, caused by Johnson’s swinging Jada’s body against a metal bedframe. Johnson’s “motive” for injuring Jada was his inability to stop Jada from crying, fueled by Johnson’s jealousy of what he thought was a continuing relationship between Stephanie and Justin White. After Johnson fractured Jada’s skull, Johnson thought that he had killed Jada. Johnson was cleaning Jada’s bruised and bloody body in a sink when he discovered that Jada was still breathing. Johnson thought about getting medical attention for Jada -- but decided not to do so. Instead, Johnson finished cleaning Jada’s body, and placed Jada on the floor in her bedroom -- leaving her to suffer, and then die, sometime during the next several hours. *See* factual statement *infra* pp. 3-12.

In August of 2008, over the course of a seven-day trial, a Wood County jury heard sworn testimony from William Johnson; and from Stephanie White; and from a number of other witnesses. The jury convicted Johnson of Second Degree Murder, a violation of W. Va. Code § 61-2-1 [1991]; Murder by a Guardian by Failure to Supply Necessary Medical Care, a violation of W. Va. Code § 61-8D-2 [1994]; and Death of a Child by Guardian, a violation of W. Va. Code § 61-8D-2a [1994]. (App. vol. V at 234-37.) It is from these three convictions<sup>2</sup> that Johnson appeals, raising six enumerated Assignments of Error, each of which will be discussed in the Argument Section of this Response Brief in the order that it is presented in the Petitioner’s Brief.

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<sup>2</sup>It appears that Assignment of Error Number One (and by extension, possibly Number Two) challenge only Johnson’s conviction for Murder by a Guardian by Failure to Supply Necessary Medical Care.

*The Events Leading Up To Jada's Death.*

Stephanie White was Jada's biological mother; she and Jada lived with Johnson in Parkersburg, West Virginia. (App. vol. III at 506.) On the night before Jada's death, January 12, 2007, both Jada and S.J. were in Johnson's care; Stephanie was working at a local bar, and this was only the second time that Johnson had been left alone to care for both girls. (*Id.* at 508-09.) The first time was shortly after S.J. was born; on that occasion, Stephanie called home between 10:00 and 10:30 p.m., and Johnson complained about the two girls' persistent crying and unwillingness to "calm down;" and at Johnson's request, Stephanie left work early to return home and care for the children. (*Id.* at 509-10.)

Although Stephanie was reluctant to leave the children with William Johnson alone again, she needed to work, and Johnson again offered to watch both children. (*Id.* at 510.) On January 12, 2012, Stephanie left the children with Johnson, brought a 12-pack of beer for Johnson, and drove to some friends' house. (*Id.*) The friends then drove Stephanie White to work, and dropped off the beer at Johnson's residence. (*Id.* at 511.)

As before, Stephanie called Johnson from work at around 10:30 p.m., to check on Jada and S.J. (*Id.* at 513.) Johnson said that both girls were fine, and that S.J. was asleep and Jada was bathing. (*Id.*) Stephanie did not call again to check on the girls again; she finished her shift and returned home at about 3:45 a.m. (*Id.* at 514.)

Johnson admitted at trial to receiving a phone call from Stephanie White at around 10:30 p.m. (*Id.* at 1018.) Johnson claimed that before Stephanie's phone call, he had fed Jada a ham sandwich and had given her a bath. (*Id.*) Johnson also received a phone call at around midnight from his friend, Tony Sharp; in that call, Johnson taunted Sharp about not being able to drink due

to being on house arrest. (*Id.* at 1033-34.) Johnson told Sharp that Johnson had a “helluva buzz.” (*Id.* at 619.) Johnson claimed at trial that after the telephone conversation with Stephanie, Johnson put Jada to bed for the night in her separate room. (*Id.* at 1019.) S.J. was asleep in Johnson’s bedroom at the time. (*Id.*) Johnson claimed to have played video games “for a little bit” before going to bed himself. (*Id.* at 1020.)

When Stephanie returned home from work at around 3:45 a.m., there was no sound from anyone in the house. (*Id.* at 515) Stephanie testified at trial that if Jada had been awake when Stephanie came home, Jada would have heard Stephanie and called out. (*Id.*) Because Stephanie heard no sound, she did not go into Jada’s bedroom. (*Id.*) Stephanie White joined Johnson and S.J. in bed and slept until 10:30 a.m. the next morning. (*Id.* at 515-16.)

***The Morning That Jada’s Dead Body Was Found by her Mother.***

The next morning, January 13, 2012, Johnson was awake when Stephanie woke up. (*Id.* at 516.) Stephanie prepared to take care of the children by retrieving diapers and bottles. (*Id.*) Johnson followed Stephanie White to the bathroom, and then downstairs, with S.J. in his arms. (*Id.*) Stephanie went upstairs to Jada’s bedroom while Johnson remained downstairs; Stephanie found Jada lying on her bedroom floor, unresponsive. (*Id.* at 517-18.) Jada was “cold to the touch,” and showed no sign of breathing. (*Id.* at 518.) Stephanie noticed a large bruise on top of Jada’s head, abrasions on the side of Jada’s head, and more abrasions on Jada’s forehead and mouth. (*Id.*) Stephanie also noticed “brown stuff” on Jada’s nose and lip, which Stephanie wiped off with an old t-shirt. (*Id.*) Stephanie screamed for Johnson and he came upstairs. (*Id.*) Stephanie ran downstairs with Jada in her arms to call 911 and Johnson followed. (*Id.*)

At Johnson's trial, Stephanie testified that she initially told the police that she was at home on the night that Jada was killed to "protect" Johnson. (*Id.* at 534.) She explained that she was frightened and felt her family was "falling apart." (*Id.*) Stephanie testified that she and Johnson discussed the details of her story so Johnson would "know what to say." (*Id.*) Later, Stephanie admitted to authorities that she had been at work that night until about 3:00 a.m. (*Id.* at 568.)

Prior to Johnson's trial, Stephanie pled guilty to a charge of child neglect causing death for leaving Jada with an unfit caretaker, and received a three-to-fifteen-year sentence. (*Id.* at 576, 589.) She disclosed her plea and her sentence to the jury at Johnson's trial. (*Id.*)

#### ***Johnson's Prior Conduct Towards Jada.***

Timothy Caplinger was a neighbor of Johnson and Stephanie White; on several occasions Caplinger observed Johnson handling Jada roughly when placing her into the car. (*Id.* at 809-10.) Stephanie White and Thomas Jackson testified about prior incidents where Jada received injuries that were inflicted by Johnson -- including a fractured leg. (*Id.* at 543-48, 846-47.) The trial court ruled that this testimony by Caplinger, Stephanie, and Jackson was admissible as 404(b) evidence for the purpose of showing malice by Johnson toward Jada. (App. vol. II at 68-69.)

#### ***Jada's Injuries on the Night She Died.***

The most serious injuries inflicted on Jada on the night of January 12-13 were as a result of compound skull fractures. (App. vol. III at 700.) These fractures measured five and one-half inches long, extending from the left temporal parietal to the mid-occipital bone at the base of the skull. (*Id.* at 699.) A large six-by-five-inch skull hemorrhage, extending from the left temporal to the occipital area, resulted from these compound fractures. (*Id.*) An epidural hemorrhage of five by four inches

in diameter and subdural hemorrhages measuring six inches in diameter were also identified by the autopsy physician. (*Id.*) A contusion in the occipital lobe of the brain was also found. (*Id.*)

External injuries were also present on Jada's body. (*Id.* at 696.) The injuries were observed on all sides of her head. (*Id.* at 694.) On the front of Jada's head was a one and one-half inch purple contusion. (*Id.*) On Jada's forehead was a one and one-half by one and one-quarter inch irregularly shaped brown abrasion. (*Id.*) Two more purple contusions were identified on her head, measuring one-half inch and one and one-quarter inches. (*Id.*) On the back side of Jada's head a one-quarter inch indentation of the skull was found. (*Id.*) Her head's left side had an extensive five-by-four-inch purple contusion. (*Id.* at 695.) The right top side of Jada's head contained a one and one-quarter inch purple contusion. (*Id.*)

On Jada's face were several additional injuries. (*Id.* at 694.) Her left cheek had a three-quarter-inch purple contusion. (*Id.*) Her left front chin contained a one-quarter inch laceration to the skin. (*Id.*) The right side of Jada's mouth contained a one-quarter inch red abrasion. (*Id.*) Jada's trunk area contained a one-half inch contusion on the lower right chest area. (*Id.* at 696.) Jada's right buttock contained a one-half inch blue contusion. (*Id.*)

Jada's arms, legs, and hands also showed injuries. (*Id.*) A one-half inch blue contusion was found on her right hand. (*Id.*) Her right forearm contained a red contusion as well as a purple contusion. (*Id.*) On the base of her left palm was a one-half inch blue contusion. (*Id.*) Her right elbow had a three-quarter inch purple contusion. (*Id.* at 696-97.) Jada's right leg contained two purple contusions, including one one-quarter inches long at her knee, and one one-quarter-inches long below the knee. (*Id.* at 697.) Her right leg also possessed a group of four contusions measuring up to one-half inch. (*Id.*) Her left leg contained a group of purple contusions measuring up to three

inches in diameter. (*Id.*) The red and purple injuries coincided with the approximate time of Jada's death. (*Id.* at 695.)

Testimony at trial showed that an infant's skull, at Jada's age, is more difficult to fracture. (*Id.* at 705-706.) The examining autopsy physician testified that a fall could not have caused the damage found on Jada's skull. (*Id.* at 705.) This type of damage required a "very powerful blow to the bone." (*Id.*) Jada's injuries included multiple skull contusions and abrasions consistent with multiple powerful impacts, epidural and subdural hemorrhaging, a compound skull fracture, and multiple blunt force injuries to the trunk and extremities. (*Id.* at 710-11.) The physician testified that Jada died sometime between 11:00 p.m. on January 12 and 4:00 a.m. on January 13 could not be determined exactly how long Jada lived after her injuries were inflicted, but that it was some period of time, and that she did not die immediately. (*Id.* at 717.)

At trial, Johnson testified that he put Jada to bed early in the morning of January 13, sometime around 12:30 a.m.; and that he then went to sleep, woke up the next morning, and found that Jada was dead. (*Id.* at 1020-21.) Johnson testified that he had no idea how Jada was injured. (*Id.* at 1022.)

***Johnson's Anger and Jealousy Toward Jada and her Biological Father.***

Jada's father was Justin White, who had been with Stephanie White on and off for four years before Petitioner Johnson began to live with her. (*Id.* at 524-25.) According to Stephanie, Justin White had begun to come around to Stephanie's home and workplace, to see Jada and to attempt to get Stephanie back with White. (*Id.* at 525.) When Stephanie told Johnson about her interactions between Stephanie and Justin White, Johnson was unhappy. (*Id.* at 526.)

Stephanie made arrangements for Justin White to visit Jada at her residence; Johnson insisted that he must be present in order for the visit to occur. (*Id.* at 528.) When communication between Stephanie and Justin White increased, so did Johnson's suspicions concerning their relationship. (*Id.*)

***Thomas Jackson's Testimony About Petitioner Johnson's Inculpatory Statements.***

Thomas Jackson was Petitioner Johnson's "pod mate" while both men were incarcerated in the North Central Regional Jail. (*Id.* at 836.) Jackson was charged with several fraudulent schemes, mostly involving credit cards. (*Id.* at 830.) Jackson testified that he was motivated by his pregnant wife and financial pressure to commit the crimes, but he admitted that these circumstances were no excuse. (*Id.*)

Before April of 2008, and before any involvement in the instant case, Jackson's lawyer had negotiated a plea agreement with the prosecution. (*Id.* at 832.) The agreement was for Jackson to plead guilty to use of an access device and to receive a sentence of seven years. (*Id.*) In return, other Wood County charges would be dismissed. (*Id.*) The final plea agreement had not been committed to writing. (*Id.* at 833.) At the time Jackson testified against Johnson, he had received no promise of a better plea deal from the Wood County Prosecutor's office. (*Id.* at 835.) Jackson was aware, however -- and he so told the jury -- that his plea deal could change for the better as a result of his testifying. (*Id.*) See discussion *infra* at pp. 10-13.

Jackson and Johnson traveled together to Wood County on April 7, 2008 because they both had court hearings to attend. (*Id.* at 840.) That evening, when the two men returned to their cell for lock-down, Johnson began to open up about his case to Jackson. (*Id.* at 844.) Johnson began the conversation by telling Jackson how Johnson believed that Stephanie was cheating on him with

Justin White. (*Id.* at 845.) Johnson said that when Stephanie left him home alone, and he had trouble contacting Stephanie, he imagined her cheating on him. (*Id.*) Johnson said that Justin and Stephanie were trying to make a fool out of him. (*Id.* at 845.)

Jackson testified that the more Johnson talked about the situation, the more angry he became. (*Id.*) As previously noted at p. 5 *supra*, Johnson also told Jackson about two previous occasions when Johnson had injured Jada. (*Id.* at 846-47.)

***Johnson Tells Jackson How Jada Died.***

Johnson told Jackson that on January 12-13, 2007, Johnson was drunk and didn't have control of his emotions; and that when Stephanie called home from work, Johnson was angry because Stephanie also seemed to be intoxicated. (*Id.* at 850) Johnson said that, as before, he demanded that Stephanie come home and tend to her daughters, because Jada was "raising hell". (*Id.*) This time Stephanie told Johnson that she would not return until after her work was over and ended the conversation. (*Id.*)

Johnson said that he began to pace around back and forth, becoming more upset as Jada continued to cry. (*Id.*) Jada was crying in her bed. (*Id.*) Johnson went into Jada's room, picked her up, and began to shake her, telling her to "shut up!" (*Id.*) Johnson then put Jada down, and left the room. (*Id.*) Jada's crying escalated. (*Id.* at 850) Johnson went back to Jada; this time, he told Jackson, Johnson saw in Jada the combination of Stephanie and Justin. (*Id.*)

Johnson lost control; he grabbed Jada by her leg and swung Jada's head "as hard as he could" into the metal bed rail. (*Id.* at 851) Johnson told Jackson that Johnson could feel and the hear the

“crunch” of Jada’s skull at impact. (*Id.*) Johnson saw blood and “some sort of brown stuff,” resembling vomit on Jada’s face. (*Id.*)

Johnson took Jada to the sink in the kitchen to wash her off. (*Id.*) Johnson told Jackson, “**I could see she was still breathing and I wondered if I could save her or not or if I should try to,** but then I saw the indentation in her head and I knew she was ruined.” (*Id.* at 852, emphasis added.) After cleaning Jada, Johnson put Jada back in her room on the floor. (*Id.*)

Johnson returned to bed with S.J., and fell right asleep, because he was “so f-----ng drunk.” (*Id.* at 854.) Johnson woke for a moment when Stephanie came home, and worried that she might check on Jada -- but he fell back asleep after Stephanie got into bed for the night without checking on Jada. (*Id.* at 854-55.) Johnson told Jackson that he felt lucky because the night of January 12 was the first night that Jada had not slept in her playpen -- so Johnson felt that he could better explain the injuries. (*Id.* at 856-57.)

Jackson testified that Johnson was pleased that Stephanie had told the police that she was not at work when Jada was killed. (*Id.* at 858.) Johnson told Jackson, “Now she’ll look like a liar.” (*Id.*) Johnson explained that the shirt Stephanie wore while handling Jada’s body on the morning of January 13, 2007 were stained with fluids from Jada’s body. (*Id.*) Johnson felt this would strengthen his case -- because everything that Johnson had been wearing he had cut up and flushed down the toilet. (*Id.* at 854, 859.)

#### ***Jackson’s Plea Agreement.***

During Jackson’s direct testimony at Johnson’s trial, the prosecutor asked Jackson about his plea agreement:

CONLEY: But as you gave your statement and as you sit there today, you have no promise of any better plea from the Wood County Prosecutor's Office?

JACKSON: No. In fact, my lawyer just received a letter yesterday or the day before that had the same exact plea that you just read and that I had long before I ever came forward.

CONLEY: But you're a smart guy, you've been through the system before; right?

JACKSON: Once, yeah.

CONLEY: And you know that the state can come in and change the plea right up until the judge accepts the plea; correct?

JACKSON: I guess so, yeah.

CONLEY: Okay. No promises have been made, but I want the jury to know and for you to confirm to them that is something that could happen?

JACKSON : It could, I guess yeah.

(App. vol. III at 835.)

In the prosecutor's closing argument, she again reminded the jury that there was a real possibility that Jackson would receive more favorable plea treatment as a result of coming forward to testify against Johnson:

PROSECUTOR: The bottom line is, [Jackson came forward and] gave the statement with the plea that he already had, and **we have made it perfectly clear that after this case his plea could be changed** and he knows it could be.

(*Id.* at 1171.) (emphasis added).

During a hearing on Johnson's post-trial motion for a new trial, prosecutor Conley was asked why Jackson's plea was not finalized before Johnson's trial. (App. vol. IV at 53-54, May 11, 2011 Hr'g)

CONLEY: Because part of -- I don't know. I really thought that we would have him testify, and when he sat on the witness stand he was look[ing] at seven years, I think, and I wanted the jury to know exactly what his situation was. I wanted them to know the whole picture. And I feel like we explained that to the jury probably more than people on my side of the table would have liked me to, but that's why.

*(Id.)*

PETITIONERS COUNSEL: So when Thomas Jackson first came forward to give this statement, George Cosenza never inquired whether his client was going to get a better deal based on his cooperation?

CONLEY: He did, he asked, and I said, "I'm not giving him a better deal based on his cooperation." I mean, I think it was something like, well what are you going to do for him?"

PETITIONERS COUNSEL: Right.

CONLEY: And I said, "Nothing." I said he -- and Mr. Jackson was adamant about wanting to assist in this case because he thought it was the right thing to do. I mean, from the beginning he was adamant about that, and I don't know if that's reflected in the statement. I can't remember that right now. But he had a child of his own and he really felt like this was the right thing to do.

PETITIONERS COUNSEL: And, I mean, that --

CONLEY: Without anything in return, yes.

*(Id. at 59-60.)*

Later in the same hearing, Johnson's post-trial counsel questioned Jackson's defense attorney, G. Cosenza, about Jackson's plea agreement:

PETITIONERS COUNSEL: Okay. And you were aware that Mr. Jackson was giving a statement in a major murder case that was going to be tried in Wood County that was helpful to the State of West Virginia?

COSENZA: Yes.

PETITIONERS COUNSEL: So you asked for something in return didn't you? For your client I mean.

COSENZA: It was made clear to me when that happened by Ms. Conley that there should be no quid pro quo for his cooperation.

PETITIONERS COUNSEL: And how did she make this clear?

COSENZA: She told me.

PETITIONERS COUNSEL: She said --

COSENZA: She said, I'm not promising anything . . . .

PETITIONERS COUNSEL: Did she say, I'm absolutely not going to deviate one iota from the August 15, 2008 plea agreement?

COSENZA: I don't remember her exact words. She was very, very adamant though that -- I just remember that she was very adamant that, you know, this wasn't going to be if he testifies, then he's going to get this, but I don't remember her exact words. That was the gist of our conversation.

(*Id.* at 83-84.)

***A Courtroom Spectator Outburst.***

During Johnson's testimony, a courtroom spectator said, out loud, "Liar." (App. vol. III at 1025-26, 1047-50.) Although the trial judge could not make out what was said at the time, the judge instructed the bailiff to remove the spectator and not to allow the spectator in the courtroom. (*Id.* at 1026.) The judge told the jury to "disregard the comments that were made by the spectator." (*Id.*) The judge denied a subsequent motion for a mistrial. (*Id.* at 1050.)

***The Issue of Mercy.***

Johnson's trial counsel only briefly addressed the issue of mercy during his closing argument. (*Id.* at 1138.) Johnson's counsel stated,

You have an issue of mercy on two of these charges. We don't believe the State has met its burden of proof on any of these charges, and I'll tell you why in a little bit. But I have to address that issue, and we want you to consider that if you have to. And I'm obligated to say that.

(*Id.*)

***Unsolicited and Unobjected-To Testimony About a Marijuana Pipe.***

During the defense cross-examination of Coroner Michael St. Clair, he was asked what he saw when he walked through the house where Jada's body was found. (App. vol. III at 678-79.) St. Clair said that he walked through the kitchen and living room, then upstairs, and finally to the bedrooms and bathrooms. (*Id.* at 678.) St. Clair said that he did not recall seeing any vodka bottles or beer cans, but this line of questioning caused St. Clair to remember noticing a marijuana pipe.

(*Id.* at 679.)

Johnson's trial counsel did not move to strike St. Clair's testimony about the pipe as unresponsive. Subsequently, after Johnson testified, a juror submitted a proposed question to the trial judge, asking whether Johnson was on drugs the night Jada died. (*Id.* at 1078-79, App. vol. V at 237D.) After discussion among the prosecution, defense counsel, and the court, all agreed not to ask the question submitted by the juror. (App. vol. III 1078-80.)

***Juror Reeder's Feelings About Children.***

During jury selection, the court asked Juror Reeder if he thought he could be fair and impartial, despite the fact that Reeder worked with children at church. (App. II at 119-20.) Reeder

responded that it was terrible that children were involved, but Reeder felt that he could be fair, and that he had no personal ill feelings towards Johnson. (*Id.*) Reeder said he would base his verdict solely on the evidence and not his emotions. (*Id.* at 120-23.) The trial court denied a Motion to strike Reeder for cause. (*Id.* at 125.)

***Exhibit 60.***

During the testimony of Detective Shawn Graham, Exhibit 60, which showed Stephanie's work schedule (which included the time Jada was killed), was admitted over the objection of defense counsel. (App. vol. III at 939-40.) Defense counsel claimed that this evidence was inadmissible hearsay; the prosecution argued that evidence showed how Detective Graham conducted his investigation, leading to his conclusion that Stephanie had initially lied to police. (*Id.*) Stephanie testified directly about her schedule and work times. (*Id.* at 513.)

**II.**

**RESPONDENT'S SUMMARY OF ARGUMENT**

The jury in the instant case was faced with unrefuted evidence of the infliction of severe and obviously life-threatening injuries to Jada White, a fifteen-month-old child. The jury decided that the Petitioner William Johnson had inflicted those injuries. The jury also decided that Johnson had deliberately and maliciously chosen not to seek medical attention for Jada's injuries; so that Jada suffered and died, alone on her bedroom floor, without any chance of living that prompt medical attention could have provided. Johnson's conduct was a violation of W. Va. Code § 61-8D-2(a) [2002]. For this and all of the other reasons set forth herein, Johnson's convictions should be upheld.

### III.

#### RESPONDENT'S STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent State of West Virginia believes that oral argument may be helpful, but is not necessary to, a decision in the instant case.

### IV.

#### RESPONDENT'S ARGUMENT

- A. Response to Petitioner's Assignment of Error Number One: The circuit court did not err in allowing the jury to consider whether William Johnson was guilty of murder of a child by a guardian by failure to supply necessary medical care.**

W. Va. Code § 61-8D-2(a) [2002] states:

If any parent, guardian or custodian shall maliciously and intentionally cause the death of a child under his or her care, custody or control by his or her failure or refusal to such child with necessary food, clothing, shelter, or medical care, then such parent, guardian or custodian shall be guilty of murder in the first degree.

In the instant case, the Petitioner Johnson argues that there was insufficient evidence from which the jury could find that Johnson's failure to supply necessary medical care to Jada was a legal cause of her death.

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 the 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. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

There can be no doubt that there was ample evidence at trial from which a jury could find that Johnson intentionally and maliciously failed to supply Jada with necessary medical care, after he severely injured her. Johnson told Jackson that he considered seeking help for Jada, but he instead returned her to her bedroom. *See* p. 10 *supra*. The issue then, is whether there was sufficient evidence presented at trial for the jury to conclude that Johnson's conduct in deliberately not seeking medical attention for Jada's injuries was a legal cause of Jada's death.

This issue was developed in a post-trial hearing, where the trial court initially recognized that expert medical evidence was not necessary to establish the legal causation of Jada's death. (App. vol. IV at 7, Sentencing Hr'g, December 8, 2008.) On this point, it is black-letter law that:

[t]o prove [the] *corpus delicti* in a case of homicide, two facts must be established: (1) The death of a human being and (2) the existence of a criminal agency as the cause of death. These two facts carry different requirements of proof: the death of the victim must be proven by direct testimony or by presumptive evidence "of the strongest kind," but criminal agency may be established by circumstantial evidence or by presumptive reasoning from the adduced facts and circumstances.

*State v. Hall*, 172 W. Va. 138, 144, 304 S.E.2d 43, 49 (1983) (citations omitted.) *See also* Syl. Pt. 6, *State v. Beale*, 104 W. Va. 617, 141 S.E.7 (1928.)

The trial court then went on to conclude that the jury could have concluded from the evidence, taken in the light most favorable to the prosecution, that after Johnson had inflicted his injuries upon Jada, "Jada was alive for several hours after the injuries. . . . And so the jury could have concluded that if medical treatment had been sought immediately, that Jada would not have died." (App. vol. IV at 8, Sentencing Hr'g, December 8, 2008.)

There is no requirement under West Virginia law that a person's misconduct -- in this case, Johnson's failure to supply necessary medical care for Jada -- be the "sole cause" of a person's death, in order for criminal liability for the death to attach to that misconduct. *See, e.g., State v. Jenkins*,

\_\_\_\_ W. Va. \_\_\_\_, \_\_\_\_, 729 S.E.2d 250, \_\_\_\_ (2012) (“Nothing in our prior jurisprudence leads us to conclude that the State was required to prove that the delivery of the oxycodone was the sole cause of C.C.J.'s death.”). *See also State v. Durham*, 156 W. Va. 509, 517, 195 S.E.2d 144, 149 (1973) (the bullet that injured the victim was not the sole cause of death of a person who died during surgery, but the defendant who fired the bullet was nevertheless guilty of homicide of the person; noting that a “host of cases” nationwide impose guilt where the direct cause of death is separate and distinct from the underlying criminal conduct.).

Although no West Virginia cases are directly on point, a number of cases from other jurisdictions, under facts similar to the instant case, have held that a criminal defendant’s failure to obtain prompt medical care for a victim, including after the same defendant inflicted an ultimately fatal injury on the victim, would support a jury’s verdict convicting the defendant of homicide by failure to obtain necessary medical care.

In *People v. Steinberg*, 595 N.E.2d 845 (NY 1992), the evidence was held sufficient to support a charge of manslaughter based on an assault and failure to obtain medical care. The court recognized that there are situations where the need for immediate medical attention is obvious to anyone – such as a child lying unconscious after a blunt head trauma. (*Id.* at 848.) The court stated that a jury could reasonably infer that the defendant, like Johnson, maliciously assaulted the child, and then purposefully did not summon medical assistance. (*Id.*)

In *Lott v. State*, 686 S.W.2d 304 (Tex. App.1985), the court held that where a child suffered from life-threatening injuries that were visible before the child’s death, and the defendant failed to seek medical attention, there was sufficient evidence to support a conviction of murder by failure to

obtain care. (*Id.* at 308.) In the instant case, as in *Lott*, Johnson inflicted visible and life-threatening injuries, and he deliberately refrained from seeking medical help.

In *People v. Knapp*, 495 N.Y.S.2d 985 (App. Div. 1985), the court held that evidence showing that the victim did not die instantly, and that the defendant acted to prevent timely awareness of victim's condition, was sufficient to take the case to the jury. The court stated that "While it will never be known exactly what chance of survival the victim had, it is clear that, by his conduct, the defendant deprived her of that chance." (*Id.* 993.) In the instant case, as in *Knapp supra*, Jada did not die instantly from the fatal injury inflicted by Johnson, and Johnson deliberately deprived Jada of any chance that medical assistance could have provided.

See also Eric A. Johnson, *Criminal Liability For Loss of Chance*, 91 Iowa L. Rev. 59 (2005), stating that courts in "lost chance" homicide cases do not do violence to the meaning of the word "cause" when they hold that a defendant caused the victim's death by reducing the victim's chance of survival. (*Id.* at 106.) See also *State v. Southern*, 304 N.W.2d 329 (Minn. 1981), where a woman hit a child with a truck and drove away, dragging the boy 175 feet. The Minnesota court reasoned:

But for defendant's gross negligence, the child may well have survived. Of course, we will never know this because [the] defendant, . . . made it impossible to determine this. . . . [the defendant's] conduct also had the effect of ensuring the child's death. . . . the evidence established that defendant's [conduct] to be a substantial causal facta in the child's death.

(*Id.* at 330.)

In 2008, the Minnesota Court of Appeals restated this "loss of a chance" analysis: "Shane's neglecting to seek immediate medical attention cause AC.'s death by *depriving her of any chance of survival . . .*" *State v. Shane*, No. A06-1581, 2008 WL 660543 at \*3 (Minn. App. March 11, 2008, emphasis added.).

In the instant case, the jury concluded that William Johnson knew about the details of Jada's suffering and death -- even though Johnson denied knowing anything about how Jada died. As in *Knapp, supra*, Johnson deliberately acted to prevent timely awareness of Jada's condition. Any lack of information about exactly how long Jada lived, and thus when and how her life might have been saved, was not the fault of the prosecution. The absence of such information was precisely because Johnson sought to cover up his assault against Jada. *Cf. Truschel v. Rex Amusement Co.*, 102 W. Va. 215, 136 S.E. 30 (1926) (where evidence is not presented at trial as a result of the defendant's conduct, the defendant cannot successfully complain that the verdict is not sufficiently sustained for want of such evidence.)

The Petitioner cites to the case of *State v. Muro*, 695 N.W.2d 426 (Neb. 2005) ("*Muro II*"). However, the decision in *Muro II* is not *stare decisis* for this Court. In fact, in *State v. Thornton*, 228 W. Va. 449, 720 S.E.2d 572 (2011) this Court recently discussed -- but did not adopt -- the principle of law relied upon by the Nebraska court in *Muro II*.

In *State v. Thornton*, this Court upheld a guilty verdict on a charge of child neglect resulting in death a violation of W. Va. Code § 61-8D-4a [2010], against a sufficiency of the evidence challenge -- in a case where there was conflicting evidence about the significance of the defendant's delay in seeking medical attention for an injured child. The petitioner in *State v. Thornton* argued, based on *Muro II*, "that the State must prove that the child would have survived, not that the child might have survived." 228 W. Va. at \_\_\_\_, 720 S.E.2d at 584 (2011). This Court upheld the conviction.

This Court's decision in *State v. Thornton* not to adopt the *Muro II* "would have survived" standard was wise, because a standard that prohibits a jury from finding guilt where there is evidence

that a defendant deliberately removed a child's chance to live, whatever that chance was, would run afoul of the clear policy behind W. Va. Code § 61-8D-2(a) [2002], which is to punish those who deliberately violate their duty to children who are in their care, in a situation where they know that the child's life is at stake. To require proof beyond a reasonable doubt that a child would have survived if care were provided would be to impose an almost impossible evidentiary burden.

The Respondent asks this Court to adopt the standard in the well-reasoned and persuasive lower court majority opinion in *State v. Muro*, 688 N.W.2d 148 (Neb. 2004), which held that evidence from which the jury could infer that there was a possibility of survival -- and that the defendant removed that possibility of survival -- was sufficient to support a jury determination that the defendant's conduct was a legal cause of the victim's death. (*Id.*)

The jury in the instant case did not find that Johnson had deliberated or premeditated his vicious attack on Jada -- hence the jury's Second Degree Murder verdict. However, the jury did find that Johnson deliberated about whether or not he was going to seek medical attention for Jada -- and they found that he intentionally and maliciously decided not to do so. That cold-hearted decision, to deprive Jada of any chance of survival that medical care could have offered, and Jada's subsequent death without that chance, is a proper basis for Johnson's conviction of murder by a guardian by failure to supply necessary medical care.

Applying the principles established in the foregoing-cited cases, it was reasonable for the circuit court to hold that the jury, applying their common sense and experience to all of the available information, could infer beyond a reasonable doubt that there was a substantial period of time before Jada died -- in which prompt medical care was absolutely called for, and could have increased Jada's chances of survival, albeit to an unknown degree. Most importantly, **there is no doubt, under the**

**jury's findings, that William Johnson, Jada's guardian and caretaker, by deliberately, intentionally, and maliciously not supplying Jada with urgently and obviously needed and necessary medical care, completely deprived Jada of any chance she had to survive the injuries that Johnson inflicted on her. *Knapp, supra.***

For the foregoing reasons, the circuit court did not err in ruling that there was sufficient evidence to convict the Petitioner William Johnson of murder of a child by a guardian by failure to supply necessary medical care, a violation of W. Va. Code § 61-8D-2(a) [2002]. The Petitioner's Assignment of Error Number One is without merit.

**B. Response to Assignment of Error Number Two: The jury's verdicts convicting Johnson of Second Degree Murder on Count I and of Murder by a Guardian by Failure to Supply Medical Care on Count II are not inconsistent.**

The jury's Count I Second Degree Murder conviction meant that the jury did not find that Johnson had premeditated his vicious, attack on Jada. In the absence of a finding of such premeditation, a conviction for Second Degree Murder was appropriate. The jury's Count II conviction of Murder by a Guardian by Failure to Supply Medical Care meant that the jury found that Johnson had intentionally and maliciously failed to supply necessary medical care for the injuries that Johnson inflicted, and that this failure was a legal cause of Jada's death. As demonstrated *supra*, there was ample evidence supporting this finding as well.

There is nothing factually or legally inconsistent between these two convictions and these two jury determinations. Neither conviction requires a finding that is contrary to a finding that is necessary to the other. Johnson's Brief concedes at page 34 that there is no legal bar to conviction on these two charges.

Furthermore, Johnson's argument that his convictions should be voided for inconsistency -- assuming *arguendo* that some inconsistency existed -- is not well-grounded in West Virginia law. *See, e.g., State v. Hall*, 174 W. Va. 599, 602, 328 S.E.2d 206, 210 (1985) (appellate review of a claim of inconsistent verdicts is not generally available.). Whether for lenity or compromise, juries are not required to observe consistency in their verdicts on multiple-count indictments. (*Id.*) Furthermore, the circuit court properly answered the jury's questions about Counts I and II -- and notably the Petitioner does not assert any legal error in the court's answer. (App. vol. III at 1181-90.)

The Petitioner's Assignment of Error Number Two is without merit.

**C. Response to Petitioner's Assignment of Error Number Three: The circuit court did not err in refusing to order a new trial on the ground that the witness Thomas Jackson received favorable treatment from the prosecution for his testimony.**

As shown *supra* at pp. 10-13, the prosecution properly and accurately disclosed in testimony and argument that the witness Thomas Jackson might receive favorable treatment as a result of coming forward to testify against Johnson. The prosecution specifically disclosed to the jury that: (1) when Jackson first came forward as a witness, he already had a tentative plea in place; and (2) that it was possible that Johnson would obtain favorable treatment as a result of his testimony. (*Id.*) The circuit court thoroughly reviewed the matter and took evidence post-trial, concluding that no binding agreement between the prosecution and Johnson existed and that all evidence about possible favorable treatment had been disclosed. (*Id.*)

In *U.S. v. Gallagher*, 735 F.2d 641 (1st Cir. 1984), the defendant argued the district court erred in not granting a mistrial because of an alleged failure to disclose an agreement between the government and a key witness to not prosecute in exchange for the witness' testimony. (*Id.* at 644.) The district court's decision to deny the motion for a new trial was upheld because the "fatal flaw"

in Gallagher's argument was that the Petitioner did not prove any such agreement. (*Id.*) The Court stated that the district court's finding of no agreement was supported by an affidavit from the U.S. Attorney. (*Id.*)

In the instant case, the jury was aware of the tentative plea agreement that had been arrived at when Jackson came forward, and also that Jackson knew that his plea deal could change as a result of his cooperation with the State.

The Petitioner seems to be arguing that a co-operating witness's testimony must be excluded, and a conviction based on that testimony reversed, unless the prosecution has put an *irrevocable* plea agreement in place, prior to a co-operating witness's testimony. Such a rule would play havoc with the ability of prosecutors to reward co-operating witnesses who assist in gaining convictions. Mr. Jackson, who had no firm better plea deal in hand, clearly "took a chance" when Jackson testified -- with respect to any possible favorable treatment as a result of his testimony. The jury saw what Jackson was doing, and what chance he was taking -- because the prosecution went out of their way to tell the jury, on multiple occasions. The jury could and did assess Jackson's testimony that it was his having his own child that motivated him to come forward. They were entitled to believe Jackson, and they did. The jury made their decision in the face of all potential impeachment evidence available; the trial judge had ample grounds to conclude that the prosecution did not mislead the jury; and the Petitioner's due process rights were not violated. For the foregoing reasons, there was ample grounds for the circuit court to conclude that the Petitioner's right to a fair trial was not violated by the testimony of Thomas Jackson. Therefore the Petitioner's Assignment of Error Number Three is without merit.

**D. Response to Petitioner’s Assignment of Error Number Four: The circuit judge did not abuse his discretion in failing to grant a mistrial following a spectator’s outburst.**

This Court has stated:

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. The 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 the plea of double jeopardy.

*State v. Lowery*, 222 W. Va. 284, 288, 664 S.E.2d 169, 173 (2008).

In *Lowery*, a courtroom spectator yelled “you bastard!” during the testimony of the victim. (*Id.*) The judge ordered the spectator to be promptly removed from the courtroom and instructed the jury to disregard the outburst. (*Id.*) The motion for a new trial based on this outburst was denied immediately after the outburst and when renewed as a post-trial motion. (*Id.*) This Court held that the trial court acted within appropriate bounds of discretion in deciding that a brief outburst, followed by an immediate ejection of the spectator from the courtroom, and a curative instruction, did not create a manifest necessity for a declaration of a mistrial. *State v. Lowery*, 222 W. Va. at 288-89, 664 S.E.2d at 173-74. For the same reasons as stated in *Lowery*, the Petitioner’s Assignment of Error Number Four is without merit.

**E. Response to Petitioner’s Assignment of Error Number Five: The instant appeal is not an appropriate forum to argue the ineffectiveness of Johnson’s trial counsel and the issue of mercy; that issue should be addressed in Habeas Corpus.**

*State ex rel. Shelton v. Painter*, 221 W. Va. 578, 587, 655 S.E.2d 794, 803 (2007) is an example of the proper (*habeas corpus*) forum for addressing the issue of whether the Petitioner’s trial counsel was ineffective in how he handled the mercy issue. In *habeas corpus*, the Petitioner’s

counsel's strategic reasons for his approach to the issue of mercy can be assessed; that is not possible in the instant appeal. *Id.* For this reason, the Petitioner's Assignment of Error Number Five is without merit.

**F. Response to Petitioner's Assignment of Error Number Six: There were no other errors, taken alone or cumulatively, that denied Johnson a fair trial. The trial court did not abuse its discretion in its 404(b) rulings regarding evidence of Johnson's prior treatment of Jada; a witness' unsolicited and unobjected-to testimony about a marijuana pipe did not constitute plain error; the trial judge did not commit error in refusing to strike Juror Reeder for cause; and the circuit court did not commit reversible error in admitting State's Exhibit 60.**

As to the issue of the trial court's 404(b) pre-trial rulings admitting certain evidence from Timothy Caplinger about Johnson's rough treatment of Jada, and from Stephanie White and Thomas Jackson about Johnson's prior injuries to Jada, *see supra* p. 5: the trial judge heard the witnesses, and permissibly concluded that the events in question had occurred -- and, importantly, that the evidence was highly probative for a proper purpose. (*Id.*) The evidence showed Johnson's malice toward Jada, an element of the crimes for which Johnson was charged; and showed the absence of accident and mistake in Jada's injuries, also a proper purpose under Rule 404(b).

This Court reviews

the trial court's decision to admit evidence pursuant to Rule 404(b) under an abuse of discretion standard. *State v. Bell*, 189 W. Va. 448, 453, 432 S.E.2d 532, 537 (1993); Syl. pt. 1, *State ex rel. Tinsman v. Hott*, 188 W. Va. 349, 424 S.E.2d 584 (1992). Our function on this appeal is limited to the inquiry as to whether the trial court acted in a way that was so arbitrary and irrational that it can be said to have abused its discretion. In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence, in this case the prosecution, maximizing its probative value and minimizing its prejudicial effect.

*State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994). Applying this standard, the trial judge did not abuse his discretion in admitting the 404(b) evidence. The alleged deficiencies in that evidence claimed by the Petitioner go to the weight that the jury should have given the

evidence -- not to its admissibility. This element of the Petitioner's Sixth Assignment of Error is without merit.

As to the issue of Juror Reeder: as set forth *supra* at p. 15, the trial court made a full inquiry about Juror Reeder's feelings about children, and determined that Reeder could serve. This ruling is reviewed under an abuse of discretion standard, and no abuse has been shown. Reeder did not make a clear statement indicating a disqualifying bias. Reeder did disclose his protective feelings about children generally -- feelings that are shared by most jurors and that simply are not disqualifying. This element of the Petitioner's Sixth Assignment of Error is without merit.

Turning to the issue of the brief mention of a marijuana pipe by a witness in an unsolicited and unobjected-to remark in cross-examination, *see* p. 14 *supra*,: that mention was of no consequence, except as reflected in a juror's later proposed question about whether Johnson was on drugs when Jada was injured. (*Id.*) Johnson's trial counsel (properly, from a strategic perspective) agreed with the court not to ask the proposed question. Counsel had an opportunity to, but did not, seek any curative instruction from the court. (*Id.*)

In the instant appeal, Johnson asserts that the trial court's failure to give a curative instruction was "plain error." In order to apply the "plain error doctrine" there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *State v. Miller*, 194 W. Va. 3, 17-18, 459 S.E.2d 114, 128-29 (1995). The plain error doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth finding process is substantially impaired, or a miscarriage of justice would otherwise result. (*Id.*) Plain error does not apply when a waiver has occurred -- when there was a "relinquishment or abandonment of a known right." In the instant case, the

Petitioner's counsel affirmatively agreed to not have the court address the drug issue (*see supra* p. 15), and this constituted a waiver. Moreover, the witness' inadvertent remark was clearly not something that undermined the trial's fundamental fairness. This element of the Petitioner's Sixth Assignment of Error is without merit.

With respect to the admission of Exhibit 60, Stephanie White's work schedule: the trial court expressly instructed the jury that the Exhibit 60 was not admitted for any truth in its contents, but to explain the course of the police investigation. *See* p. 15, *supra*. Stephanie White testified to the truth of the contents of the Exhibit, and this testimony was not challenged. (*Id.*) This element of the Petitioner's Sixth Assignment of Error is without merit.

**V.**

**CONCLUSION**

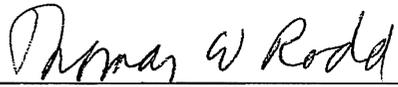
William Johnson had a fair trial. For the foregoing reasons, William Johnson's convictions should be upheld.

Respectfully submitted,

STATE OF WEST VIRGINIA  
*Plaintiff Below, Respondent*

*By counsel*

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL



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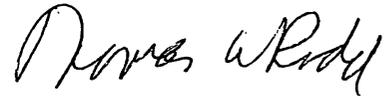
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CERTIFICATE OF SERVICE

I, THOMAS W. RODD, Assistant Attorney General and counsel for Respondent, herein, do hereby certify that I have served a true copy of the *RESPONSE BRIEF* upon Counsel for Petitioner by depositing said copy in the United States mail, with first-class postage, on this 27<sup>th</sup> day of August, 2012, addressed as follows:

To: Michele Rusen, Esq.  
Rusen and Auvil, PLLC  
1208 Market Street  
Parkersburg, WV 26101



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THOMAS W. RODD