

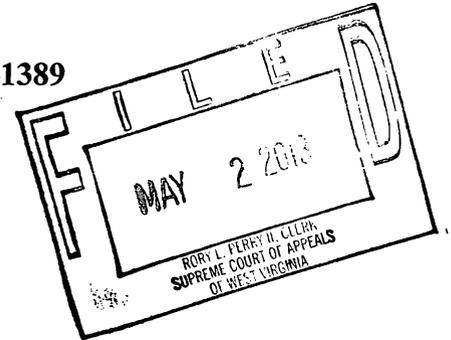
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**STATE OF WEST VIRGINIA**  
**Respondent,**

**Vs.**

**No. 12-1389**

**ANTONIO PROPHET,**  
**Petitioner,**



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**APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY**  
**HONORABLE CHRISTOPHER C. WILKES, JUDGE**  
**CASE NO. 11-F-67**

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**BRIEF OF PETITIONER**

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**STATEMENT OF THE CASE**

This is a Petition for Appeal from a Sentencing Order entered by the Circuit Court of Berkeley County on September 10, 2012, which wrongfully denied Petitioner Antonio Prophet's post-trial motions and sentenced Petitioner to the penitentiary. (A.R. 1525 ). Petitioner Antonio Prophet (hereinafter, Petitioner Prophet) was indicted by a Berkeley County Grand Jury in the February, 2011 term for the following offenses: two (2) counts of murder of the first degree in violation of West Virginia Code § 61-2-1 and (1) count of arson in the first degree in violation of West Virginia Code § 61-3-1. (A.R. 1-2).

The charges set forth in Petitioner Antonio Prophet's indictment stem from acts of murder and arson that occurred in the early morning hours of June 6, 2010 in a two-story residential garage apartment located in Berkeley County, West Virginia; acts which Petitioner Prophet vehemently denies. From the record made at trial, evidence was entered which established that, on June 6, 2010 victim A D , twenty-two (22) years of age, and her child, A W , three (3) years of age, were tragically murdered by assailants and the garage apartment at issue was intentionally set aflame. Evidence was further entered which established that Petitioner Prophet and A D 's six-week old child, D W , were present during the attack but were able to survive after Antonio Prophet did rescue D W from the blaze.

At trial, the State failed to produce any credible evidence, scientific or otherwise, which proved Petitioner had ever engaged in any of the charged acts. Despite the State's failure, on July 16, 2012, after trial by jury, Petitioner was wrongfully convicted of all three felonies upon which he was tried. A jury did recommend no mercy attach to both convictions of murder in the first degree.

Petitioner did timely file written post-trial motions including a “Renewed Motion for Judgment of Acquittal after Discharge of Jury” and a “Motion for New Trial.”

On September 10, 2012, Petitioner’s post-trial motions were denied and Petitioner was sentenced to life without mercy on both convictions for first degree murder and twenty (20) years for his conviction of arson in the first degree. All sentences were ordered to be run consecutively. (A.R. 1525) Petitioner Antonio Prophet does seek to appeal his criminal convictions under the three (3) counts of the indictment and the sentence imposed. Petitioner Prophet does request that said convictions be reversed or set aside.

### **SUMMARY OF THE ARGUMENT**

Petitioner Antonio Prophet respectfully asserts that the evidence presented, even when looked at in the light most favorable to the State, was insufficient to convict him of any of the counts brought against. As set forth in detail throughout, Petitioner Prophet believes that improper actions of the State and trial court caused the jury to wrongfully convict him of the charges brought against him. These wrongful acts included the State and the Trial Court making improper comments and communications to the jury and improperly using a novel Petitioner had written several years before the crimes to convict Petitioner. But for these wrongful acts and prejudicial rulings, Petitioner Antonio Prophet would have been acquitted of all charges and the real perpetrator, Joseph Medina, would not have been allowed to benefit from this wrongful prosecution.

Through the best efforts of counsel, counsel diligently attempted to meet the page limitation for briefs established by this Honorable Court, however, in order to assert all grounds requested by Petitioner Prophet, counsel has concurrently filed a motion to file brief in excess of page limitation.

## STATEMENT REGARDING ORAL ARGUMENT

1. Petitioner affirmatively states that some issues raised in this case as assignments of error are issues that may not have been previously authoritatively decided and oral argument should be considered necessary. If the Court determines that oral argument is necessary, this case is appropriate for oral argument pursuant to Rule 19 and Rule 20 of the West Virginia Revised Rules of Appellate Procedure.

## ARGUMENT

### VIII. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AGAIN AT THE CONCLUSION OF ALL THE EVIDENCE

Even when looking at the evidence in the light most favorable to the State, a review of the record establishes the State did not present sufficient evidence to meet its burden of proof in convicting Petitioner Antonio Prophet on the any of the counts contained in the indictment. Pursuant to Rule 29 of the West Virginia Rules of Criminal Procedure, Petitioner did properly move for a Judgment of Acquittal after the close of the State's evidence and again at the conclusion of all evidence. (A.R.1513). However, the Circuit Court of Berkeley County, West Virginia did improperly deny said motions.

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the Petitioner's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.”

Syl. Pt. 1. *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

In a criminal case, a verdict of guilty will not be set aside on the ground that it is contrary to the evidence, where the State's evidence is sufficient to convince impartial minds of guilt of the Petitioner beyond a reasonable doubt. The

evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilty on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

Syl. Pt. 1 *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1979).

As discussed throughout, the State improperly relied upon false testimony, improper and unethical trial practices, improper conduct of the trial court, and complete speculation to convict Petitioner of the crimes alleged to have occurred on June 6, 2010. In fact, the State failed to produce any credible evidence, scientific or otherwise, which proved Petitioner had ever engaged in any of the charged acts of murder or arson.

#### **MOTION FOR JUDGMENT OF ACQUITTAL AFTER STATE RESTED**

By reviewing the evidence the State presented at trial, it cannot be disputed that Petitioner's motion for judgment of acquittal should have been granted at the close of the State's case-in-chief. The State was never able to establish by any modicum of proof the intent or motive Petitioner Prophet is alleged to have possessed to commit these acts. After the close of the State's case-in-chief, Petitioner should have been acquitted of the charges brought against him or, at the very least, had his charges reduced to lesser included offenses. As discussed in other sections, it was only after the improper acts of the trial court and the State throughout the trial that the State was able to obtain a wrongful conviction against Petitioner and allow the real perpetrator of these crimes to go free, Joseph Medina.

The State attempted to use testimony from members of the D family to primarily attempt paint Mr. Prophet in a bad light and to establish that Petitioner most likely committed all of the acts charged against. However, after evaluating said testimony, the same was actually very helpful to Petitioner's case and actually confirmed that the victims died as the result of actions of Joseph Medina and his crew.

S W D

S W D is the father of A D (A.R. 463). S D testified that he and his wife have lived at for the twelve (12) years prior to the fire. (A.R. 463). is the home where the D family resided in and , the structure which burned, was a garage apartment where A D was residing.

S D described the structure located at as a fully functional "Cape Cod, two-story apartment" with a three-bay garage underneath that was being remodeled for infant D: W . (A.R. 465). According to his testimony, the apartment was remodeled for his daughter and her two children; it had a full kitchen, bathroom, two bedrooms, and a living room area. (A.R. 465). On June 5-6, 2010, a large, 42-inch flat screen television was inside the apartment. (A.R. 469-470). Mr. D described the home at as being "not very far" from the home located at . (A.R. 475-476).

S D testified that in June, 2010, A D did not have custody of her children as she was involved in an abuse and neglect proceeding caused by her dependency on drugs; heroin being her drug of choice. (A.R. 466). A D addiction problems were so great that she even had trouble staying off drugs while she was pregnant with D W. and the child experienced withdrawal symptoms upon being born. (A.R. 500).

On June 5, 2010, S D was hard at work with his construction company erecting a large barn in Jefferson County, West Virginia. (A.R. 505). On that day, he was on the job site performing hands-on manual labor with his workers from 7:30 a.m. until 8:30 p.m. that night without a lunch. (A.R. 506). At the request of A D , after S

D returned home from work, he picked up A D and A W and drove them to pick up Antonio Prophet. (A.R. 470). According to Mr. D , Antonio Prophet had visited the house three times prior to June 5, 2010 and had been treated like family. (A.R. 471-472, 502).

On June 5, 2010, Mr. D testified that he had absolutely no concerns about Antonio Prophet spending the night with A D and her two children in the garage apartment. (A.R. 502). Prior to June 5, 2010, S D thought Mr. Prophet was a “fair” and “decent” person. (A.R. 503).

On June 6, 2010, S D remembers going to bed between 12:00 a.m. and 12:30 a.m. (A.R. 473). S D believes that his wife reported that she heard the landline phone ringing at or around 12:50 a.m. on June 6, 2010. (A.R. 505). After going to bed on June 6, 2010, the next thing Mr. D remembers was a banging on the door at around 4:45 a.m. (A.R. 473). At that time, he woke up and saw four or five sheriff’s department cars already in the front of his driveway. (A.R. 474). Mr. D then walked out to his front yard and witnessed a “fire shooting 70, 80 feet in the air.” (A.R. 474).

Although Mr. D claimed that he normally could see and hear any cars, trucks, or vehicles, approaching the apartment at , it was apparent that on June 6, 2010, several emergency response vehicles and a large, raging fire roared on Mr. D ’s property unbeknownst to him until law enforcement officers attempted to wake him. (A.R. 474). By Mr. D ’s account, at the time he woke up, there were four to five cruisers already in the front of his house at and other emergency vehicles, including fire trucks, down at the apartment at . (A.R. 508). Mr. D admitted that he did not hear the emergency vehicles coming onto his property. (A.R. 509).

After waking up, S D testified that infant child D W was found sitting on the back of a lawn chair in his diaper and with a t-shirt on him on a concrete patio on the side of the house at . (A.R. 514-515).

From S D 's testimony several important aspects of the case were put before the jury. First, Mr. D 's testimony established the physical scene of the crime and the location of the victims and the D family on June 5-6, 2010. Second, Mr. D 's testimony established that A D had a drug problem and was most likely associating with dangerous criminals during this time period; however, Petitioner Prophet was not one of these dangerous criminals but actually a person that was trusted and respected by the D family. Lastly, Mr. D 's testimony established that a robbery, which included a single gunshot, the murdering of two individuals, and the setting of a fire at could have occurred without any members of the D family inside knowing or being woken up. By all accounts, members of the D family slept through the roaring fire and arrival of several emergency response vehicles without stirring, as such, it is highly conceivable the facts set forth in Mr. Prophet's testimony actually occurred without anyone in the D home until sometime after law enforcement had knocked on their door.

### E K D

E D 's testimony further confirmed the relevant testimony of S D . but added additional insight into certain acts occurring on the on June 5-6, 2010 and the behavior of A D during this time of her life. E D is the mother of A D and testified that she goes by both "E " and "K ." (A.R. 525). E D testified that A D was scheduled to go to inpatient

rehabilitation for drug addiction on Monday, June 7, 2010. (A.R. 526). Mrs. D testified that A D had difficulty with drugs and had committed certain criminal acts, including stealing from the family home, cash registers, and City Hospital. (A.R. 548).

According to Mrs. D , on the evening of June 5, 2010, Antonio Prophet came into her house and sat on the sofa. (A.R. 536). At that time, Mrs. D wished Antonio Prophet happy birthday. (A.R. 536). Mrs. D described A D 's demeanor on June 5, 2010 as "happy" and that she was "doing well". (A.R. 538).

Mrs. D testified that on June 6, 2010 she woke up at 1:00 a.m. and looked at the garage apartment and everything seemed "peaceful". (A.R. 532). E D testified that she also remembers the home phone ringing sometime around 1:00 a.m. and she did not answer the same. (A.R. 533). E D confirmed that she was having some difficulty with her home phone line at that time but that no messages as a result of the phone call at or around 1:00 a.m. (A.R. 534). Mrs. D testified that she did not remember whether she got up on her own at 1:00 a.m. or whether the phone call to the home woke her up at 1:00 a.m. (A.R. 543).

Mrs. D then testified she looked again at the garage apartment around 3:00 a.m. and everything also seemed peaceful. (A.R. 532). Mrs. D testified that the next thing she remembered was being woke up by her husband saying the place was on fire. (A.R. 533).

S D

S D s testimony was very important to the case as he was the last individual from the D family to see the victims, including Antonio Prophet, on June 5, 2010. S E is the brother of A D and lived with his parents at in June, 2010. (A.R. 519). On the evening of June 5, 2010, S

D received a call from A D for him to bring down a bag of baby supplies, including special formula, from the D house to the garage apartment at and, simultaneous to that request, S D was asked to bring the D 's car from the garage apartment and park it at the home. (A.R. 520). Upon reaching the apartment, S D witnessed A D and Antonio Prophet inside the apartment watching TV on the couch. (A.R. 522-523). At that time, S D stated that there was no arguing or fighting in the apartment when he arrived and that everything "seemed peaceful." (A.R. 523). After delivering the baby's supplies, S D drove the car back to the D home as requested without any concern. (A.R. 521).

**A W A W , AND T D**

A W is the twin brother of A W (the father of A W and D W ). (A.R. 916). A W testified that A D called him between 11:30 p.m. and 12:00 a.m. on June 5-6, 2010. (A.R. 919). A W testified that, at that time, A D wanted A W to get in contact with his brother A W . (A.R. 919). A W testified that he tried to call his brother a couple of times but his phone was dead so he called her back and let her know. (A.R. 919). A W could not remember from whose phone A D used to make the phone call (A.R. 919). Clearly, the phone call was made by A D to either get money to cover the debt alleged to be owed or to talk to Mr. W about the confrontation.

A W testified is the father of A W and D W . (A.R. 934). A W testified that he talked to A D at 3:45 p.m. on June 5, 2010 and that she told him she was "getting kind of serious" with Antonio Prophet. (A.R. 936, 941). On the evening of June 5, 2010, A W confirmed that his phone went dead around 8:00 p.m. and

that he spent the night with T D . (A.R. 937). T D confirmed that she was the significant other of A W in June, 2010 and that she was with A W from June 5, 2010 until June 6, 2010. (A.R. 925).

The State also called certain independent witnesses in order to attempt to establish the time and manner in which the deaths and fire occurred; said witnesses ranged from independent witnesses, experts, and law enforcement. Again, the relevant testimony set forth by these witnesses did not discredit Petitioner's theory of the case but actually supported it.

### **BILLY JOE FAIRCLOTH AND MARY KATHERINE KACKLEY**

Billy Joe Faircloth testified that on June 6, 2010 he left his home around 4:30 a.m. to drive to work and, when stopped at an intersection, glanced right and noticed flames. (A.R. 383-384). After noticing the flames, Billy Joe Faircloth did call 911. (A.R. 383-384). Billy Joe Faircloth described the flames as being "30 to 40 foot in the air" and "above the tree line." (A.R. 384).

Mary Kackley is employed as the director of 911 services for Berkley County, West Virginia. (A.R. 385). Mary Kackley testified that the 911 emergency call made by Billy Joe Faircloth was received at 4:36 a.m. (A.R. 388). Mary Kackley further testified that emergency units were dispatched to the D residence at 4:37 a.m. (A.R. 388). Mary Kackley confirmed that the time keeping mechanisms at Berkeley County 911 were very accurate. (A.R. 390).

The evidence presented through Mr. Faircloth and Ms. Kackley witnesses establishes that at 4:36 a.m. the home at was already on fire and that, even with a loud, roaring "30 to 40 foot" fire no one in the D was awoken; the same being confirmed through the testimony of Deputy Christopher Cochran.

**DEPUTY CHRISTOPHER COCHRAN**

Deputy Christopher Cochran testified that he was employed at the Berkeley County Sheriff's Office in June, 2010 and that he was working the overnight shift on June 6, 2010. (A.R. 391-392). Deputy Cochran testified that he was the first law enforcement officer to respond to the scene. (A.R. 393). However, Deputy Cochran did testify that a fire official and a brush truck had arrived on scene before he arrived. (A.R. 401). Deputy Cochran testified that when he arrived on the scene there were no other individuals present and that law enforcement tried to wake persons in the D home located at . (A.R. 395). On direct examination by the State, Deputy Cochran described the attempts of law enforcement to make contact with persons inside the D home:

A...We attempted to make contact with Mr. D who lives in a residence in front of this structure here and had no contact with him so we went back down to assist fire any way that we could at which time I guess us knocking and beating on the door had woken him up and he came down to meet us there at that time, him and his wife.

(A.R. 395).

Deputy Cochran testified that the fire was a "full working structure" fire by the time he arrived. (A.R. 401). Further, Deputy Cochran testified that after he banged on the door and attempted to wake up the residents of , that he went back to assist fire officials there. (A.R. 402). Lastly, Deputy Cochran testified that it was not until 15 minutes after he banged on the door of that residents from the home made their way to the scene of the fire at . (A.R. 403).

**PATRICK JAMES BARKER**

Fire Marshal Patrick Baker did testify regarding his findings made at the scene of the fire at and the same did further detail the scene of the crimes at issue. With no

objection from defense, Patrick Baker was qualified as an expert in fire investigation. (A.R. 407). Patrick Baker testified that it appeared that the fire was extensive on the second floor apartment and the same caused the fire to burn through to the bottom floor. (A.R. 419). Patrick Baker testified that the floor area of the second floor apartment suffered a “heavy intense fire”. (A.R. 433). Patrick Baker testified that fire officials were able to locate the remains of A D and A W in the bays of the first floor garage area. (A.R. 437). Patrick Baker testified that in his expert opinion the fire that was set was incendiary in nature; meaning that the fire was intentionally set; a fact that was not contested by Petitioner Prophet. (A.R. 447).

Patrick Baker testified that the two-tiered wooden staircase leading from the ground to the second landing was the only means of access into and outside of the second floor apartment at . (A.R. 450). Patrick Baker agreed that the investigation and documentation of the fire scene through written and photographic evidence was very detailed, but from his review of the same, that he could see no evidence of any remnants of a television in the fire scene. (A.R. 454). The testimony of Patrick Baker gave physical support to the testimony of Antonio Prophet regarding the cause and position of the fire.

#### **DR. NABIOA HAIKAL**

Dr. Nabioa Haikal is the chief medical examiner with the Office of the Chief Medical Examiner in Charleston, West Virginia. (A.R. 549). At trial, the parties stipulated to the qualification of Dr. Nabioa Haikal as an expert in the field of forensic pathology. (A.R. 550). Further, by written stipulation, the parties agreed that the decedents in this case were in fact A D , age 22, and A W , age 3. Dr. Nabioa Haikal examined the bodies in this case in order to attempt to determine a cause of death.

Dr. Nabioa Haikal testified that the A W 's remains were damaged by fire but that he was deceased before being burnt. (A.R. 552). Dr. Haikal testified that the remains of A D were also damaged by fire and that her body exhibited evidence of a cut on the front part of her neck towards the throat area. (A.R. 553). Dr, Haikal testified that tests were performed on the bodies to determine the amount of the carbon monoxide bound to the hemoglobin in the blood and that these type of blood tests could be performed on persons who are alive to determine whether they had suffered smoke inhalation. (A.R. 557). Dr. Haikal testified that she could determine that A D was deceased prior to her death. (A.R. 554). Dr. Haikal testified that both deaths had been determined to be by homicide. (A.R. 556). Again, Dr. Haikal's testimony was not inconsistent with the testimony of Antonio Prophet.

#### **LIEUTENANT GARY HARMISON**

Lieutenant Gary Harmison is employed as a lieutenant in the criminal investigation division of the Berkeley County Sheriff's Office. (A.R. 558). Lieutenant Harmison testified that he arrived at the scene around 7:00 a.m. on June 6, 2010. (A.R. 622). Lieutenant Harmison testified that he, along with other officers, assisted the fire marshal in conducting the search of the scene but stopped investigating after the fire marshals discovered a body. (A.R. 565, 623). Lieutenant Harmison believes the body was found within an hour after he arrived at the scene. (A.R. 623). Lieutenant Harmison testified that no individuals sifted through the rubble or inventoried any of the property found at the scene of the fire. (A.R. 565).

Lieutenant Harmison testified that he first saw infant child D W inside the residence and was dressed in a blue sleeper. (A.R. 607-608). Lieutenant Harmison testified that certain brown spots were on the sleeper and portions of the sleeper were cut and sent to the State police lab in West Virginia for testing. (A.R. 609). Further, Lieutenant Harmison testified he

estimated the distance between the garage apartment and S D 's home was thirty (30) to fifty (50) yards and that he videotaped himself walking the distance. (A.R. 153).

Lieutenant Harmison testified that he had discovered certain medical records of treatment received by Antonio Prophet as the result of injuries he sustained; at that point in Lieutenant Harmison's testimony, the parties stipulated that the treatment records received were authentic. (A.R. 616). Ultimately, Mr. Prophet was taken into custody in North Carolina. (A.R. 617-618). When taking Mr. Prophet into custody, Lieutenant Harmison observed that Petitioner had suffered a laceration to his left inside forearm and also had surgery on his right hand.

Lieutenant Harmison admitted that officers working on the case had made a mistake about taking Mr. Prophet's cellphone into their possession and did not realize that Mr. Prophet's cellphone had been at the regional jail until the Friday before trial was set to begin. (A.R. 620). Lieutenant Harmison testified that there was no official determination that the victim's deaths resulted in a homicide until June 7, 2010, when an autopsy was performed. (A.R. 624).

The time that the bodies were found on scene, as confirmed by Lieutenant Harmison, is very important because it was not until after 7:00 a.m. on June 6, 2010 that anyone knew that A D and A W . died in the fire, and as discussed below, a critical point in demonstrating the deceitful and dangerous nature of Joseph Medina.

#### **JENNIFER HOWARD AND ANGELA GILL**

Jennifer Howard is a forensic analyst at the West Virginia State Police Forensic Crime Lab. (A.R. 738). All parties stipulated that Ms. Howard was an expert in forensic analysis. (A.R. 739). Jennifer Howard testified that she analyzed cuttings from the sleeper of D W and found blood on the same. (A.R. 744). Jennifer Howard testified that when she received the sleeper that it did have blood on it. (A.R. 746).

Angela Gill is a forensic DNA analyst with the West Virginia State Police Crime Lab. (A.R. 747). All parties stipulated that Ms. Gill was an expert in forensic DNA analysis. (A.R. 749). Ms. Gill testified that the areas tested were consistent with the DNA profile of Antonio Prophet. (A.R. 756-758).

As obviously noted through said experts' testimony, it is clear that Petitioner Prophet had suffered an injury that caused him to bleed after being attacked at the time in question as his blood was found on the sleeper of D W .

In order to attempt to alleviate Joseph Medina or his cohorts as potential suspects in this proceeding, the State called certain witnesses to establish that Joseph Medina was not present at the crime scene on June 5-6, 2010. For instance, John Tucker, radio frequency engineer for Sprint Nextel, spent and inordinate an confusing amount of time at trial attempting to establish that Mr. Medina's phone was at the Roadway Inn across Berkeley County instead of at

. (A.R. 703). Although Mr. Prophet believes Joseph Medina may have been the third party that showed up at the D residence on June 6, 2010, Mr. Tucker's testimony did not establish that Mr. Medina was not there at that time. But again, after reviewing the testimony regarding Joseph Medina's whereabouts, the only evidence proven was that Mr. Medina was the cause of these senseless deaths whether he was on the scene or working from behind the scenes.

## C F

On June 5, 2010, C F and her three (3) children were in a room at the Roadway Inn in Berkeley County, West Virginia with Joseph Medina and A S . (A.R. 693). Ms. F testified that Mr. Medina's friend, named P.J., picked her up and took her to the Roadway Inn. (A.R. 696). On direct examination, the State inquired of Ms. F if she had

stayed the night with Joseph Medina in Room 157 at the Roadway Inn and Ms. F responded that she had not. (A.R. 694). Ms. F explained that Joseph Medina had kicked her out because he wanted Ms. F to “prostitute for him.” (A.R. 694).

Ms. F testified that she did not know that Mr. Medina wanted her to prostitute for him when she arrived at the Roadway Inn with her three (3) children on June 5, 2010. (A.R. 696-697). Ms. F testified that Mr. Medina wanted her to prostitute for P.J. and for “other people but I don’t know who.” (A.R. 697). Mr. Medina withheld the names and identities of the other men he wanted Ms. F to sleep with and would not tell Ms. F this information. (A.R. 697). Ms. F readily admitted that these people were part of Mr. Medina’s “friends or crew”. (A.R. 697-698). When Ms. F declined, Mr. Medina got angry and yelled at her. (A.R. 700). Ms. F was then forced to walk from the Roadway Inn with her three (3) children to an Exxon gas station where she called her moth. (A.R. 700).

Ms. F testified that she was at the Roadway Inn for a couple of hours and that P.J. left after he dropped her off. (A.R. 699). Ms. F’s testimony should have been devastating for the State’s case at it clearly established that Ms. F was at the Roadway Inn to perform sexual favors for undisclosed members of Mr. Medina’s crew hours before assailants murdered and torched the home located at . Obviously, said sexual acts were for Medina’s crew members who were most likely the assailants Mr. Medina sent to the D home.

#### **SERGEANT DANIEL STEERMAN**

Sergeant Daniel Steerman testified that he was employed at the Berkeley County Sheriff’s Department on June 6, 2010. (A.R. 859). Sgt. Steerman was the investigating officer that attempted to track down murder and arson suspect Joseph Medina on June 6, 2010 at the Roadway Inn in the Northern area of Berkeley County, West Virginia. (A.R. 759).

Sergeant Daniel Steerman testified that Mr. Medina was renting rooms 157 and 159 at the Roadway Inn on June 4-5, 2010, but that on June 6, 2010 he had not yet checked out. (A.R. 761). Sgt. Steerman testified that he found several persons in both rooms associated with Joseph Medina and ran at least seven (7) names of persons he found that day. (A.R. 763).

On June 6, 2010, Sgt. Steerman arrived at the Roadway Inn in the afternoon looking for Joseph Medina, but when he arrived there, he did not find Joseph Medina. (A.R. 764).

A §

A S is the ex-girlfriend of Joseph Medina and was at the Roadway Inn with Joseph Medina and C F . (A.R. 768-769). A S testified that she was at the Roadway Inn for “about a day and a half” and checked in with Mr. Medina on June 4, 2010. (A.R. 769). A S spent the night with Joseph Medina at the Roadway Inn from June 5, 2010 until June 6, 2010 after she and Mr. Medina were transported there by Mr. Medina’s friend P.J. (A.R. 770). On direct examination, A S readily admitted that Mr. Medina kicked out C F after she would not sleep with Mr. Medina’s friend. (A.R. 770, 782). A S testified that she left the Roadway Inn for a time on June 5, 2010 and that the parties were smoking marijuana and that Mr. Medina abusing Xanax. (A.R. 772). Ms. S testified that it was possible that Mr. Medina was selling drugs out of the rooms at the Roadway Inn. (A.R. 786). Ms. S confirmed that Mr. Medina was very angry that C F would not sleep with his friend, that he expected her to sleep with his friend while her three children were present in the same room, and that he kicked her out because of this. (A.R. 787-788).

On June 6, 2010, A S testified that Mr. Medina successfully avoided Sgt. Steerman at the Roadway Inn by leaving the building. (A.R. 775). After the police left, A S testified that she and Medina left the Roadway Inn and went to a housing development to

call for another ride. (A.R. 776). Ms. S testified that they left the Roadway Inn because the family of A W was “circling around the hotel room so Joseph was scared.” (A.R. 776). Ms. S then testified that they went to a hotel in Hagerstown Maryland, checked in for the night, went to get something to eat, then never returned to the hotel. (A.R. 777). Ms. S then testified that she and Joseph Medina were transported to Virginia by an unnamed friend of Mr. Medina. (A.R. 777). Ms. S testified that the only reason she went to Virginia was because “Joseph wanted me to go with him” and that Mr. Medina never told her why he needed to immediately go to Virginia after checking into a hotel in Hagerstown, Maryland. From Ms. F and Ms. S s testimony, it appears that Mr. Medina was on the run on June 6, 2010 as he attempted to divert and avoid police by checking into a hotel in Hagerstown, Maryland and immediately fleeing to Virginia.

#### **JOSEPH MEDINA**

Joseph Medina’s testimony must be reviewed in full by this Honorable Court to understand the full extent to which his involvement and responsibility for these crimes is put on display. As the subject of Mr. Medina’s false testimony is the topic of a subsequent assignment of error, Petitioner Prophet respectfully asks that this section and the subsequent argument be read in *pari materia*. At the very least, it is clear from Mr. Medina’s testimony that his testimony is false and he is testifying against Antonio Prophet as the result of a plea deal reached with the State on unrelated charges and to push the blame for theses heinous crimes onto to Petitioner Prophet. Unfortunately, Mr. Medina has been allowed to usurp the system by getting a lighter sentence on unrelated charges and by totally avoiding criminal responsibility for the crimes at hand.

**C D. AND P. W.**

C D testified that she had phone contact with Joseph Medina on June 5, 2010 and that Mr. Medina wanted her to visit him at the Roadway Inn. (A.R. 901-902). C D also testified to being in a relationship with Mr. Medina and although he was the only boyfriend she had Mr. Medina was involved with several other women (A.R. 903, 908). C D testified that she learned about the death of A D on the morning of June 6, 2010 after being contacted by phone by Joseph Medina. (A.R. 904). C D testified that Mr. Medina contacted her about 8:00 a.m. on June 6, 2010 to tell her about the death of A D. (A.R. 904). This was a highly significant piece of testimony in this proceeding as it was confirmed by Lieutenant Harmison that by 8:00 a.m. on June 6, 2010 there is no way that Mr. Medina could have known that A D had died as that information was not known to the public at that time *unless Joseph Medina had a part in her death*. C D testified that Mr. Medina did know A D, that it was apparent that Mr. Medina knew where she lived, and on one occasion wanted Ms. D to go to her house. (A.R. 911, 914).

C D testified that she had a child that lived with her and that after she broke up with Joseph Medina he left her a nasty message. (A.R. 910). In that nasty message, Joseph Medina threatened to kill her and her whole family. (A.R. 913).

P.J. W's testimony was highly suspicious as he did testify testified that on June 6, 2010 he left the Roadway Inn, after smoking weed with Mr. Medina and went to Shepherdstown to "clean a church" and got home about 2:00 a.m. (A.R. 889).

In its case-in chief, the State lastly called certain witnesses to testify regarding Mr. Prophet's actions on June 6, 2010. Again, as with the other lines of testimony, these witness did

provide evidence that was in persuasive enough to merit of finding of guilt beyond a reasonable doubt.

### HEATHER ARONHALT

Heather Aronhalt was an employee at ROCS gas station on Winchester Avenue, Wilson Street. (A.R. 658). Ms. Aronhalt testified that on June 6, 2010 she was working at said ROCS store. (A.R. 658). On direct examination, Ms. Aronhalt testified that Mr. Prophet came into her store on June 6, 2010 around 9:00 a.m. (A.R. 658-659). Ms. Aronhalt described him as being “very disturbed, distraught, sweating.” (A.R. 659). Ms. Aronhalt testified that she observed Mr. Prophet to have been cut; Ms. Aronhalt noticed blood at the bottom of the cut and on Mr. Prophet’s shirt. (A.R. 662). Ms. Aronhalt described the cut as not being a clean cut and that it looked like it might have been made with a “jagged edge.” (A.R. 666).

Ms. Aronhalt testified that every morning when she comes into work that she looks at the headlines on the paper and on June 6, 2010 when Mr. Prophet came into the store no headlines had been printed about the fire. (A.R. 665).

Ms. Aronhalt’s testimony is important as it establishes that Mr. Prophet was clearly suffering from being attacked on the morning of June 6, 2010 and that, by 9:00 a.m. on June 6, 2010, there had been no paper media coverage of the fire.

S C , B M , C R

S C testified that she was an acquaintance of Antonio Prophet. (A.R. 648). S C testified that on June 5-6, 2010 that she had been drinking and that she had been driven home by B M . (A.R. 651). S C testified that Mr. Prophet had called her at 4:29 a.m. on June 6, 2010. (A.R. 656).

B M is a friend of S C . (A.R. 630). Mr. M testified that on June 6, 2010 his friend, S C , received a call from Antonio Prophet. (A.R. 631). After the phone call, S C asked B M if he could pick up Antonio Prophet. (A.R. 632). After receiving the call, S C and his friend, C R , took S C 's car and picked up Antonio Prophet. (A.R. 632). Mr. M testified that it was still pre-dawn while Mr. Prophet was in his car and that he never had the opportunity to look back and see him while in the car; specifically, he only saw Mr. Prophet through the rearview mirror and from his head up. (A.R. 640-641). C R testified to the same facts that Mr. M testified to but did note that he had been drinking and Mr. M had been the designated driver. (A.R. 646).

#### **JOHN WILLINGHAM**

John Willingham testified that he is employed by Cam's Taxi in Berkeley County, West Virginia. (A.R. 667). John Willingham testified that in June, 2010 he received a request from a woman to transport an individual to Winchester. (A.R. 667-668). John Willingham testified that he picked up an individual at Paynes Ford Road, in Berkeley County, West Virginia and did transport him to Manassas, Virginia. (A.R. 670-671). John Willingham testified that he did not travel in his cab, but that he drove his own truck to transport the individual so that he could earn a little extra money. (A.R. 676). John Willingham testified that Mr. Prophet laid down in the back of his truck and only stopped once at Sheetz in Berryville, Virginia. (A.R. 676-677). John Willingham testified that he did not have hardly any conversation with Mr. Prophet and barely looked "eye to eye" with him. (A.R. 677).

**K D**

K D testified that she lives in Manassas, Virginia and that she used to be in a relationship with Antonio Prophet. (A.R. 678). Antonio Prophet and K D have a six year old child together. (A.R. 679). K D testified that she had contact with Antonio Prophet on June 6, 2010 and June 7, 2010. (A.R. 680). On June 6, 2010, Antonio Prophet called Ms. D around 8:00 a.m. told her he was stranded and needed a ride; Ms. D was unable to assist him at that time. (A.R. 681). On June 7, 2010, Antonio Prophet called K D at 1:30 a.m. and informed her that he had been “attacked” and “robbed” and needed her to come pick him up. (A.R. 682). Eventually, K D was able to secure the services of Mr. Willingham to transport Mr. Prophet to Manassas, Virginia for the fee of \$200.00. (A.R. 684). After being transported to Manassas, Virginia, Ms. D and her son met Mr. Prophet at an area near a mall. (A.R. 686). Ms. D did provide Mr. Prophet some clothes, a working cell phone, and a twenty dollar bill. (A.R. 687).

Ms. D noticed that Mr. Prophet’s left arm had been cut and that two of his fingers on his right hand couldn’t be bent because they looked “cut or broken”. (A.R. 689). The wounds sustained by Mr. Prophet were so severe that she had to look away because she could not stomach it. (A.R. 689).

K D testified that she knew Mr. Medina, but did not have any conversations with Joseph Medina on any day from June 5, 2010 until June 11, 2010. (A.R. 691). Further, Ms. D specifically testified that she never spoke with Joseph Medina to talk about how she paid for Mr. Prophet to get a ride in a taxi cab. (A.R. 692). Which conclusively discredits Joseph Medina’s continued claims that he spoke with K D during that time period and further establishes the guilt of Joseph Medina.

K D testified that on June 8, 2010 she contacted law enforcement regarding Antonio Prophet. (A.R. 679).

Despite the fact that their testimony benefitted Petitioner, all of the foregoing witnesses were presented on behalf of the State, and after their testimony, the State did rest its case and Petitioner Prophet did make a Motion for Judgment of Acquittal pursuant to Rule 29 of the West Virginia Rules of Criminal Procedure. (A.R. 946). Clearly, from the above evidence, even in the light most favorable to the State, there was not sufficient evidence entered at trial to establish that Petitioner committed all of the elements necessary to establish guilt for the three (3) crimes for which he was being tried. However, even if the Court felt that Petitioner's prosecution should continue, it should have at least dismissed the two first degree murder charges and, at best, allowed the case to proceed on the lesser included offenses of first degree murder. At no point could the State establish premeditation or deliberation in this case. At no point did the State enter any evidence regarding the circumstances that led to the death of A D and A W . In support of denying Petitioner's motion, the Court primarily relied on insignificant and irrelevant testimony from E D regarding the fact that the curtains were pulled shut when she looked at the window. (A.R. 952). Lastly, in order to proceed forward on the two (2) counts of first degree murder, the Court relied on testimony from Joseph Medina that Ms. D was "rifling" through Mr. Prophet's pockets so he did what he had to do. (A.R. 952). Even in the light most favorable to the State, at this stage of trial, the evidence required, at the very least, that the two counts of first degree murder be dismissed and denial further established that the Court held prejudice toward Petitioner.

#### **MOTION FOR JUDGMENT OF ACQUITTAL AFTER CLOSE OF EVIDENCE**

After these incorrect rulings from the Court, the Defense presented its case-in-chief.

## ANTONIO PROPHE T

Antonio Prophet took the stand in his own defense at the trial of this matter and testified to what really happened on June 6, 2010, instead of the speculation propounded by the State in its case-in-chief. (A.R. 955). Mr. Prophet's testimony should be read in *pari materia* with further arguments set forth below. Mr. Prophet testified that he came to Martinsburg, West Virginia at the request of Joseph Medina. (A.R. 956). Mr. Prophet testified that he got here around May 18, 2010. (A.R. 956). Mr. Prophet met Mr. Medina at the Capital Heights housing project and Mr. Medina was staying with a girl named S . (A.R. 957). In mid-May, Petitioner Prophet met A D while at S 's house when she came over to S 's home looking for drugs, including heroin. (A.R. 957, 958). At that time, Petitioner Prophet witnessed A D purchase marijuana from Joseph Medina. (A.R. 958).

After their initial meeting, Mr. Prophet and A D began contacting each other over the phone and their relationship progressed thereafter. (959). After that, Mr. Prophet testified about the "numerous" times he visited Ms. D 's home; specifically, in total Mr. Prophet visited the home between eight to nine times and actually stayed the night about five or six times. (A.R. 960, 961). On one occasion, Mr. Prophet was driven to the D home by Joseph Medina. (A.R. 978). Mr. Prophet testified that he remembered a large TV being in the living room area of the garage apartment at ; which is further consistent with the testimony of S D . (A.R. 968).

Mr. Prophet testified that on June 3, 2010, he and Mr. Medina went over to C D ' house early in the morning. (A.R. 972). While at Ms. D ' house, Mr. Prophet was leaving the residence to go to the store and Mr. Medina asked him to take his bag . (A.R. 973). However, after Mr. Prophet left and finally opened the bag, he found a laptop inside of it. (A.R.

973). Mr. Prophet testified that Mr. Medina ultimately called him, laughing, and said “did you look in the bag.” (A.R. 974). Mr. Medina then told Mr. Prophet that he was going to use Mr. Prophet to extort money from C D to get the laptop back. (A.R. 975). Mr. Prophet was angry at learning this and Mr. Medina began making threats to him at Mr. Prophet’s refusal to go along with the plan to extort C D . (A.R. 975). Mr. Prophet left the backpack at the Rocs station lap top. (A.R. 976). After this, Mr. Medina began making violent threats towards Mr. Prophet.

As a result of this argument, Mr. Medina then went on to make several, severe threats to Mr. Prophet. (A.R. 978). In addition to threatening Mr. Prophet, Mr. Medina threatened A D and her family. (A.R. 978). Specifically, Mr. Medina told Mr. Prophet that he was going to come to A D 's home and “kill you and that pill-popping bitch of yours and anybody else in that mother fucker.” (A.R. 980). As result of these threats, Mr. Prophet called the police.

On June 3, 2010 at 12:57 p.m. Mr. Prophet called 911 to report Medina’s threats. (A.R. 984). After speaking to the operator, Mr. Prophet was directed to another number. (A.R. 984-985). On June 3, 2010 at 12:59 p.m., Mr. Prophet called the Martinsburg Police Department. (A.R. 985). Mr. Prophet was then directed to the Berkeley County Sheriff’s Office and called the office on June 3, 2010 at 1:04 p.m. (A.R. 986). All of these phone calls were verified by Mr. Prophet’s phone records previously marked as an exhibit by the State and an audio recording of the phone call to the 911 operator was played for the jury. (A.R. 990).

In further support of these calls, CAD sheets reporting the call were entered at the trial. (A.R. 995). The CAD report indicated that the Caller wanted to report a crime that had not yet happened but that he believed “someone was going to get killed and didn’t want this to happen.”

(A.R. 995). The second CAD report generated at 1:10 p.m. on June 3, 2010 states in full, as follows:

“Caller advised that Joseph Madin[a] said he was going to kill a whole family and taking the drugs that in that house. Madin[a] is described as being a black male, five foot one inch, wears hair in braids, has multiple tattoos, teardrop on face, and a rocket, unknown location. Household would consist of one male, his wife, four year old, and eight to nine month old.”

(A.R. 996).

Mr. Prophet testified that he made these calls anonymously, but was trying to prevent the murders that ultimately happened in the early morning hours of June 6, 2010. (A.R. 998).

On June 5, 2010, Joseph Medina called Mr. Prophet to wish him a happy birthday but Mr. Prophet knew it was a “front” and that Mr. Medina had asked Mr. Prophet to call him when he got to A       ’s so Mr. Medina would know the exact whereabouts of Mr. Prophet. (A.R. 1000). Eventually, the he was picked up and driven to the D        residence by A       ’s father. (A.R. 1001). While in the garage apartment, everything was seemingly normal until Mr. Prophet fell asleep. (A.R. 1003). After falling asleep, A        D        woke him up around 12:30 a.m. and told him two guys were at the door and wouldn’t leave. (A.R. 1003-1004). Mr. Prophet testified that he came to know one of the individuals as Boogy but never learned the name of the other individual who wore a Baltimore Orioles Cap (A.R. 1005). Boogy was positioned right outside the door and the other individual was on the landing of the steps. (A.R. 1006). The individuals indicated they were looking for A        D        and spoke menacing words to Mr. Prophet. (A.R. 1006). Among other things, the individual referred to as “Boogy” asked Mr. Prophet if he knew that A        D        was a “Junky” and that “she owe me some money.” (A.R. 1007). After a verbal altercation and at the request of Mr. Prophet, the individuals left but were still trying to intimidate Mr. Prophet and Ms. D        by telling

them that they would be back. (A.R. 1007). Mr. Prophet and Ms. D had a conversation about the individuals and said that she did not owe them any money. (A.R. 1008).

Between 12:30 a.m. and 2:00 a.m. on June 6, 2010, A D was using Mr. Prophet's cell phone to make some calls to attempt to find out why the assailants were coming over there. (A.R. 1010). Mr. Prophet then testified regarding his phone records that indicated that she made certain phone calls between 12:48 a.m. until 1:18 a.m. (A.R. 1012). As testified to earlier and as confirmed by the phone records, A D did call A W with Mr. Prophet's cell phone at 1:10 a.m. (A.R. 1014). Further, as confirmed by E D, A D called the landline at on or around 1:00 a.m. on June 6, 2010.

At closer to 2:00 a.m., A D told Mr. Prophet that Boogy was an individual she had met through Mr. Medina around the Capital Heights area when she was looking for heroin. (A.R. 1009).

After learning this information, Antonio Prophet began calling Mr. Medina to confront him but every time he called his calls went to voicemail. (A.R. 1014). At 2:12 a.m. Mr. Prophet sent a text to Joseph Medina which stated in full "Slim, I'm in a situation. I need to holler at you ASAP." (A.R. 1016). Mr. Prophet explained that the message was sent so that Mr. Medina would give him a call back so that Mr. Prophet could tell him about the situation with the two guys coming over there and that Mr. Prophet knew that Mr. Medina had sent them over. (A.R. 1017-1018). After that, Mr. Prophet and Ms. D were both up and went on the deck to smoke a cigarette. (A.R. 1019). At that point, Boogy came out of nowhere and came running up the stairs. (A.R. 1019). A D immediately jumped up and ran back in the house. (A.R. 1019-1020). Antonio Prophet testified that he smacked Boogy with his phone

and then Mr. Prophet tried to run in and slam the front door, then Boogy crashed into it and Mr. Prophet and Boogy began fighting. (A.R. 1021).

The individual with the baseball cap came in right behind Boogy holding a gun with a red bandana tied around his face. (A.R. 1021). Mr. Prophet was sure that these individuals were the same individuals that had visited earlier. (A.R. 1021). Mr. Prophet testified that when he began fighting he didn't realize that Boogy had a knife and that it wasn't until he raised his hand instinctively and saw all the blood. (A.R. 1021). Mr. Prophet testified that he was cut on the underside of his left arm and that he still bears a two to three inch scar on his left inner forearm. (A.R. 1022). Further, Mr. Prophet indicated that he also had a scar above his left pinky finger and right forearm. (A.R. 1023).

After the struggle, Mr. Prophet was told to take a seat on the couch and Boogy was screaming at A D while she was kneeling down on the mattress holding A W . (A.R. 1025). The screaming referenced a debt owed to Boogy and she acknowledged she had the debt. (A.R. 1026). Boogy then grabbed her head and tried to slice her with the knife he had used on Mr. Prophet. (A.R. 1026). Mr. Prophet jumped up and then tried to grab Boogy's weapon. (A.R. 1026). The other individual then went over to Mr. Prophet and began hitting him with a gun, and as this happened, Mr. Prophet described that Boogy "pulls the knife and cuts my fingers." (A.R. 1027). The injury to Mr. Prophet's fingers was described as very painful and Mr. Prophet then wrapped his hand with a towel that was on the couch to stop the bleeding. (A.R. 1028). Boogy directed the other individual to shoot Mr. Prophet but he would not comply. (A.R. 1029). An inquiry was made about A D 's money and a threat was made that everything Ms. D owned would be taken and that the laptop was wanted too.

(A.R. 1029). Mr. Prophet then gave the assailants some money from his sock and promised that he would repay A D 's debt. (A.R. 1029-1030).

The individual with the gun then sent Boogy to the garage to check to see if anything could be stolen from the garage. (A.R. 1030). Boogy returned and said that a code was needed to unlock the garage and asked A to go down to unlock, but she refused and would not leave her children. (A.R. 1031). Mr. Prophet then was ordered at gunpoint to go to the garage and he complied and went downstairs. (A.R. 1031). While down at the garage, the doors could not be opened, and Mr. Prophet heard fighting and wrestling upstairs. (A.R. 1032). Mr. Prophet then begged the individual with gun and cap let him go upstairs, and Mr. Prophet then runs upstairs with the individual following. (A.R. 1032).

Upon entering the apartment, Mr. Prophet sees Boogy "getting up off the floor" covered in blood standing overtop of A D . (A.R. 1032). Mr. Prophet describes seeing Ms. D 's body on the topside of the mattress, face up, with her throat slit and A W laying face down in a puddle of blood. (A.R. 1023). At that time, A W was described as being motionless and A was still moving. (A.R. 1034). The individual with the gun screaming at "Boogy" about what he had done; this is when Mr. Prophet learned Boogy's name. (A.R. 1034). Mr. Prophet then reached for a can of mace and was able to spray the individual with the gun and Mr. Prophet ran out of the house; Mr. Prophet retained control of the mace and the same was presented at trial (A.R. 1035).

Mr. Prophet then ran down the staircase and went into the woods and, as he was running, someone fired one shot at him from a gun. (A.R. 1036). Mr. Prophet testified that he then hid out of site in the woods and he testified he heard voices, including the voice of a new individual; who may have been Joseph Medina. (A.R. 1037). The new voice asks "where did he go." (A.R.

1037). Mr. Prophet testified that he heard guys opening and closing doors and a car accelerate out of the woods.

Mr. Prophet testified that he saw smoke and ran in the house and grabbed D and sets him on the chairs on the porch of . (A.R. 1039). Mr. Prophet then grabbed some Timberland boots and picked up his cellphone pieces scattered in the fight, and picked up D W and made his way to the D home at . (A.R. 1041). Mr. Prophet then banged on a door at the D 's home and after hearing no response, placed D W on a lawn chair and left the scene. (A.R. 1042).

Mr. Prophet then testified that he “freaked out” and “panicked” and wanted to leave. (A.R. 1042). Mr. Prophet then began walking and called several persons, as set forth in his phone records. (A.R. 1044). Eventually, Mr. Prophet made his way to K D .

The remainder of testimony by Mr. Prophet is discussed at length in a subsequent section as it deals with the State’s improper cross examination of Defendant and the Court’s improper behavior and statements made during this portion of the trial.

### **DR. JOHN SPENCER DANIEL III**

Dr. John Spencer Daniel III is a forensic pathologist and was qualified as an expert in the same. (A.R. 1219). Dr. John Spencer Daniel III testified about the wounds Antonio Prophet sustained as a result of the fighting and found that the injuries sustained by Mr. Prophet were made with “sharp force” and appeared to be “defensive injuries;” defensive injuries being described as “an injury sustained during the process of defending oneself or during an altercation in which the other person is armed with a sharp object.” (A.R. 1231).

### **LAURA WINKLER**

Laura Winkler is a probation officer in Berkeley County West Virginia and she was called to testify regarding certain information Mr. Medina provided to her during her drafting of a presentence investigation report for an unrelated criminal case, and during the process, Mr. Medina told Ms. Winkler that he initially told Ms. Winkler that he didn't know anything about MR. Prophets case and that the "state just wanted him to testify about a text message that he received from Mr. Prophet. (A.R. 1245). After resting all of the evidence, Petitioner Prophet filed a renewed written Motion for Judgment of Acquittal and the same was improperly denied. (A.R.)

Throughout the entire case-in-chief of the State, the State was able to prove only opportunity and flight of the Defendant. Opportunity and flight, either individually or taken together, are not legally sufficient to convict a man of murder beyond a reasonable doubt. See *Commonwealth v. Goodman*, 465 Pa. 367, 370-371 (1976)(Mere presence on the scene both immediately prior to an subsequent to the commission of the crime and the flight therefrom is not sufficient evidence to prove involvement in the crime); *People v. Shaw*, 186 Ill. 2d 301(Mere presence at the scene of a crime, even coupled with flit, cannot establish criminal accountability.)

Guilt beyond a reasonable doubt, is the highest legal burden of proof in order to ensure that the innocent are not falsely convicted and the same prohibits more than inference or suspicion of some action to convict. When looking at the actions and circumstances of Petitioner Prophet versus the actions and circumstances of Joseph Medina, it is clear who was the real perpetrator of these acts.

Why would Petitioner Prophet, a person with no motive, no means of escape, no prior indication of hostility toward the victims, whose identity was well known to the victim's family, deliberately and premeditatedly murder persons whom he was friendly and intimate with? This

was question the State could not answer, so instead the State engaged in rampant speculation and asked the jury to believe that, after Petitioner Prophet deliberately and premeditatedly murdered a young mother and her three year old child, and after being injured himself and bleeding, would then risk detection and capture by removing the other small child from the crime scene, walk him up to and through the yard of the neighboring family's home, and safely place him on the back porch of that home in order for the child to be discovered at a later time, after knowing the child is covered in Petitioner's blood.

And all this from a defendant who, again, according to the State's theory, has just set a home on fire in order to cover up a crime, and is supposedly desperately fleeing for his life out of guilt for having just murdered two people, one being a young child himself, yet he pauses in his escape in order to safeguard a *second* young child who is covered in the Petitioner's blood, thus his DNA, which can later be used to identify him and thus place him at the scene of the murder that he has supposedly just set fire to in order to cover up? Are these reasonable inferences? Or is it exceedingly more reasonable to infer, based on the competent evidence adduced at trial, that Petitioner Prophet had a fatal falling out with Joseph Medina who, knowing where the female victim in this case lived, and knowing the Petitioner would be there sent and possibly escorted two members of his "crew"-the same members of his "crew" who were on "stand-by" in or near his hotel room in order to have sex with C F on the night of the crime and the same members of his "crew" who he had introduced to the adult female victim of this crime in the weeks prior, who had sold or extended her a line of credit for heroin the victim's home after informing them that the Petitioner would be there with an expensive laptop computer and \$300 in cash-the same \$300 in cash which the Petitioner had been offering to various people for information on the whereabouts of Joseph Medina in the days prior (A.R. 1217, line 7-13); that

once there these men attacked the Petitioner and the other victims of this crime, killing the female victim and her three year old son; that after killing the victims and after the injured Petitioner had managed to escape and hide in some nearby woods, the attackers set fire to the victim's home, removed her large flat screen television and fled; that the Petitioner, after hearing the perpetrators leave, came out of the woods, rescued the infant from the burning home, walked him up to the neighboring family's home, and, in a state of shock, and lacking moral strength and courage, and perhaps lacking common decency, placed the infant on the back porch of the family's home, and fled out of fear and feelings of guilt for having been the partial cause of this family's tragic misfortune? Which of these scenarios, based on the competent evidence adduced at trial, is the more reasonable inference?

Again, Petitioner was not required to prove his innocence at trial, it was the State's burden to prove Petitioner guilty of all elements, beyond a reasonable doubt, and the State simply failed to meet its burden. It is well established law in West Virginia that when "two inferences, equally plausible, may be drawn from evidence, the law does not permit the jury to adopt the one more unfavorable to the accused. *State v. Kelly*, 105 W. Va. 124, 141 S.E. 633 (W.Va. 1928) *quoting State v. Gill*, 101 W.Va. 242, 132 S.E. 490 (W.Va. 1926).

Even when looked at in the light most favorable to the State, the evidence presented at trial was wholly insufficient to sustain a conviction. In this case, there was not enough evidence to convict, so the State and the Court engaged in unethical and improper tactics to wrongfully convict Petitioner. Rule 29 of the West Virginia Rules of Criminal Procedure is designed to prevent these wrongs; this Honorable Court must use the same to correct the consequent injustice that has been done.

As noted throughout the subsequent assignments of error, it becomes clear that the Petitioner was convicted because of the combined errors in this case, not as a result of the evidence presented.

IX. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL AS THE USE OF PETITIONER'S PREVIOUSLY AUTHORED FICTIONAL NOVEL WAS IMPROPER AND UNDULY PREJUDICIAL

Petitioner Prophet respectfully asserts that the Circuit Court erred in denying Petitioner's motion for a new trial as improper use of his fictional novel, "Enter the Fire: Seven Days in the Life", caused Petitioner undue prejudice. Prior to trial, the parties to this proceeding stipulated that use of the Petitioner's novel would not be allowed during the State's opening statement or case-in-chief, however, the State would subject to the Rules of Evidence prior to it being used for purposes of rebuttal. (A.R. 1077-1078). Despite this stipulation, the trial court chose to abandon the rules of evidence and allow the prosecution free reign to use the novel however it pleased. The trial court's ruling regarding the novel was plain and reversible error on several different levels, including: (a) it was outside the scope of direct, (b) it was irrelevant to the issues in dispute, (c) it was improper impeachment evidence, (d) the required balancing-test under Rule 403(b) of the West Virginia Rules of Evidence was not applied, and (e) no instruction was given to the jury to limit the specific and, if one existed, legitimate purpose for this impeachment evidence.

**Outside of Scope of Direct**

At no point during Petitioner's direct examination did Petitioner in anyway reference the fictional novel, "Enter the Fire: Seven Days in the Life", which he had written over twelve (12) years prior to the crimes committed in this matter. However, the State attempted to impeach the

testimony of the Petitioner by questioning him regarding extraneous matters that were introduced outside of the scope of direct.

In applying Rule 611(b) of the West Virginia Rules of Evidence, the circuit court has considerable discretion to determine the proper scope of cross-examination, after weighing such factors as the importance of the evidence to the prosecution's case, the relevance of the conduct to the witness's truthfulness, and the danger of prejudice, confusion, or delay raised by the evidence sought to be adduced. It is a well settled rule that a defendant who voluntarily offers himself as a witness and testifies in his own behalf subjects himself to legitimate and pertinent cross-examination to test his veracity and credibility. Thus, by deciding to testify in a West Virginia criminal trial, a defendant brings into play the rules designed to implement the truth-finding process, i.e., cross-examination.

*State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995).

Despite the clear violation of WVRE 611, the trial court failed to weigh any of the above-mentioned factors before allowing the introduction of this evidence during the cross-examination of the Petitioner. Though the trial court has considerable discretion in determining scope, the notion that courts have unlimited discretion in regulating the scope of cross does not apply to a criminal Petitioner in the State of West Virginia. As such, allowing cross examination regarding any issues concerning Petitioner's novel was reversible error.

#### **Irrelevant to Issues in Dispute**

The State attempt to impeach the testimony of the Petitioner by questioning him regarding his fictional novel amounted to the use of irrelevant evidence.

Pursuant to Rule 401 of the West Virginia Rules of Evidence, relevant evidence is defined as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

First, Petitioner contends the fact that he authored a novel involving unrelated acts of violence over twelve years prior, has absolutely no tendency to make the existence of any fact that was of consequence to the determination of the actions of witness more or less probable. Thus making it irrelevant.

Second, the fact that the novel introduced has the word “Fire” in its title, and the Petitioner had been charged with arson, was irrelevant as well, as the word “Fire” used in the title of the novel was purely symbolic, as the novel had absolutely nothing to do with fire or the setting of fires.

Third, the fact that the novel was authored over a decade prior to the commission of the crime in question lends credence to Petitioner’s argument as the vast stretch of time between authorship and trial made the same to remote in time to be considered relevant.

Fourth, at the post-trial motions hearing, the trial court gave improperly reasoning in upholding its trial rulings by suggesting that the introduction of this evidence was relevant, thus admissible on cross, because it fell under an unidentified, all-encompassing “prior statement” clause. (A.R. 1408). However, Rule 613(a) and (b) of the West Virginia Rules of Evidence, which deals with prior statements of witnesses, in no way contemplate works of fiction to be introduced as prior statements of witnesses that can be used for purposes of cross examination. Finally, Rule 801 of the West Virginia Rules of Evidence does not apply and takes the novel outside the scope of a hearsay exception as it could not be considered a prior inconsistent statement as it was an unrelated, work of fiction that had no relation to the crimes at issue. As such, this so-called “prior statement” as phrased by the trial was completely irrelevant.

### **Improper Impeachment Evidence**

The State's attempt to impeach the testimony of the Petitioner by introducing improper evidence. In a completely improper trial strategy, the State introduced this evidence in an attempt to denigrate the character of Petitioner (i.e. "He wrote about similar criminal acts in the past, therefore he probably committed those criminal acts on this occasion.") (A.R. 1080-1081, 1094, A.R. 1317); which is an inference identical in nature to "he stole in the past, so he must have stolen on this occasion", which is an illegitimate "criminal disposition" inference according to WVRE Rule 404(a) and prior legal decisions. According to Rule 404(a), evidence of a person's character is not admissible for the purpose that he or she acted in conformity therewith on a particular occasion.

Furthermore, Rule 608(b) of the West Virginia Rules of Evidence provides that specific instances of conduct of a witness- (in this case the writing of a work of fiction that contains acts of violence)- for the purpose of attacking or supporting the witness' credibility, other than for a conviction of a crime as provided in Rule 609 of the West Virginia Rules of Evidence, may not be proved by extrinsic evidence. Extrinsic evidence requires the calling of a third party to testify to its existence and content, or presenting some documentary or recorded form of the evidence (i.e. a novel). The use of the Petitioner's novel was the clear use of extrinsic evidence for the purpose of attacking the credibility of the Petitioner, which is expressly prohibited under Rule 608(b) of the WVRE.

Pursuant to Rule 404 of the WVRE, the use of specific references to acts of violence described in the Petitioner's novel falls under the "other acts" clause of Rule 404(b), which is inadmissible.

The State may argue that this evidence was introduced properly as contradiction, counter-proof, or rebuttal evidence. However, this evidence was in no way inconsistent with the

Petitioner's testimony, therefore it did not contradict or rebut any statements that were made by the Petitioner at trial, thus it was inadmissible for contradiction, counter-proof, or rebuttal purposes. In addition, extrinsic evidence cannot be used to contradict a witness on a collateral issue. The Petitioner's novel was clearly a collateral issue; thus, the State's attempts to contradict the Petitioner by use of this evidence was inadmissible as well.

In every instance imaginable, as indicated in the preceding paragraphs, this evidence was clearly inadmissible. It is well established law, that inadmissible evidence cannot be introduced under the guise of impeachment. *See* Syl. Pt. 4, *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (W.Va. 1990); Rule 607 of the West Virginia Rules of Evidence. The State was well aware of the fact that this evidence was inadmissible, which is why it originally stipulated to not attempt to introduce this evidence in its case-in-chief or in its opening in the first place. The Petitioner's testimony as to what he witnessed on the night of the crime in question, however "plausible" or believable or credible it may or may not have been in the eyes of the prosecutor, in no way makes the introduction of his work of fiction admissible for the purpose of somehow impeaching his testimony. It is clear this evidence was, in reality, introduced for the purpose of misleading, confusing, and inflaming the passions and prejudices of the jury. Which, unfortunately for the interests of justice, the prosecutor for the State succeeded at doing. Thus, this was reversible error.

#### **Prejudicial Effect Substantially Outweighed by Its Probative Value**

The prosecutor for the State attempted to impeach the testimony of the Petitioner by questioning him regarding evidence that-even if deemed to have been within the scope of direct, relevant to the case, and proper impeachment evidence- was, still, vastly more prejudicial than probative.

Pursuant to Rule 403 of the West Virginia Rules of Evidence, although possibly relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudices. In this instance, the evidence in question is a work of fiction written by the Petitioner over twelve years prior to the crime in question, and was introduced by the State on cross in order to in some way impeach the testimony of the Petitioner. The evidence in question had absolutely no probative value; however, its prejudicial effect was substantial and astounding, as the Petitioner was accused of a grotesque act of violence in which he allegedly murdered a young mother and her child and then set their bodies on fire in order to cover up the crime; and, in which the prejudicial evidence introduced against the Petitioner on cross was in the form of a novel he had written over a twelve years prior, the title of the same being “Enter the Fire: Seven Days in the Life”, the content of which describes obscene acts of violence.

The Petitioner contends that it was the trial court’s obligation upon an objection by the Petitioner to this evidence being introduced to perform a balancing test of said evidence before allowing it to be presented to the jury. The Petitioner further contends that Rule 403 balancing-test of the WVRE was devised specifically for situations as encountered here; and that this balancing of interests test is required in order to determine whether possible relevant evidence is also actually legally relevant evidence.

In any conceivable argument by the State to present this evidence, whether as a state of mind evidence as contradiction or counter proof evidence, or as impeachment evidence (*State v. Collins*, 186 W.Va.), a balancing test is required prior to its admission and must affirmatively appear on the record. *See State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75 (1995)(state of mind); *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995)(contradiction or

counterproof); *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (W.Va. 1990)(impeachment evidence). Failure of the trial court to determine this balancing test was reversible error.

### **Failure To Give Instruction**

The State attempted to impeach the testimony of the Petitioner by questioning him regarding evidence that he contends, at its best, was highly prejudicial, having hardly any probative value, and at its worst, was wholly irrelevant and legally inadmissible; however, even if it is determined that said evidence was entirely admissible and considerably more probative than prejudicial, the Petitioner contends that because of its subject matter an instruction was required to be given to the jury that the evidence was given for a specific and legitimate purpose to impeach and not as evidence of a material or substantive fact. The trial court has an obligation to instruct the jury that impeaching evidence may only be considered as bearing on the witness' credibility and not as substantive evidence. *See State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (W.Va. 1990). Failure to give this instruction was plain and reversible error.

### **III. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL AS THE STATE IMPROPERLY USED PETITIONER'S POST ARREST/PRE-TRIAL SILENCE TO IMPEACH PETITIONER**

The State improperly questioned and attempted to impeach the testimony of the Petitioner by persistently attacking his pre-trial silence before the jury. The State specifically cross-examined the Petitioner as to his failure to inform law enforcement regarding his side of the story before the matter was brought to trial (A.R. 1094, lines 17-23; and pg. 35, lines 13-15). Although defense counsel properly lodged an objection to this line of questioning, the Court did allow the State to effectively cross examine him regarding his pretrial silence by allowing the Court to make an issue of the fact that he had not told anyone about his version of events. (A.R. 1095, lines 18-24, 1096, lines 1-5.) Seemingly, the Court changed its ruling as it teetered between

allowing pre-arrest silence and post-arrest silence, but ultimately the Court allowed the State to ask Petitioner whether he told anyone the story that he told yesterday prior to taking the stand. (A.R. 1095-1097).

Beyond the improper questioning, the State also inundated the jury with statements and assertions made in her closing argument that the Petitioner, simply due to his exercising of his rights to remain silent and consult with an attorney, had two years to go line by line through the evidence and concoct a believable story for the jury. The use of the Petitioner's pre-trial silence in order to impeach his testimony was plain and reversible error.

Under the Due Process Clause of the W.Va. Constitution, W.Va. Const. Art. III, 10, and the presumption of innocence embodied therein, and art. III, 5, relating to the right against self incrimination, it is reversible error for the prosecutor to cross-examine a Petitioner in regard to his pre-trial silence or to comment on the same to the jury.

Because it is constitutionally mandated that a person be advised immediately upon being taken into custody that he has the right to remain silent, the warning itself can create the act of silence. It would, therefore, be unfair to permit the State to obtain an advantage of being able to utilize that silence to then impeach the Petitioner.

In this instance, the Petitioner had been arrested and taken into custody after having already been charged with murder. At the time of his apprehension, and upon questioning the Petitioner advised the detectives questioning him that he was indeed on the scene of the crime on the night in question and that he would like to talk with them about what transpired, but that he would first like to exercise his right to remain silent in order to consult with an attorney beforehand. At that point, the detectives ended their interview of the Petitioner and the criminal action proceeded to trial. At trial, the Petitioner took the stand in his own defense and testified to

what he observed and what actions he took on the night of the crime, The State's position at trial was that Petitioner had somehow retroactively forfeited his rights to remain silent and consult with an attorney upon initially being taken into custody by the authorities, and that he had somehow also forfeited his rights to have constitutional silence shielded from unfair attacks at trial. The Petitioner respectfully disagrees with the State and trial court's position.

Whether Petitioner subsequently testified at trial as to having been a victim, an accomplice before or after the fact, or as to having been elsewhere at the time of the crime makes no difference as to his right to remain silent upon his arrest. It is this presumption of innocence which blocks any attempt of the State to infer from the silence of the Petitioner that such silence is motivated by guilt rather than the innocence which the law presumes- (as quoted in State v. Boyd, 160 W.Va.). Furthermore, the Petitioner is never in a position to have to justify his exercising of his right to silence. To imply that he does plants in the mind of the jury, the dark suspicion that the Petitioner had something to hide, and that any alibi subsequently proffered at trial is pure fabrication.

The State improperly informed the jury that Petitioner, had he truly been a victim, would have so immediately advised the police, and since he didn't he was, therefore, lying. For the State to assert as much in order to impeach an explanation subsequently offered at trial is fundamentally unfair and a deprivation of due process. To permit the State to do what occurred in this case would effectively make the Constitutional rights to remain silent and consult with an attorney meaningless and void. Additionally, when the prosecutor uses post arrest silence to impeach an exculpatory story offered by the Petitioner at trial and the prosecutor directly links the implausibility of the exculpatory story to the Petitioner's apparently inconsistent act of

remaining silent, reversible error results. Thus, this line of inquiry and argument by the state was clearly plain and reversible error.

IV. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL AFTER THE TRIAL COURT REFUSED TO GIVE A JURY INSTRUCTION AS PROFFERED BY DEFENDANT PRIOR TO THE CASE BEING SUBMITTED TO THE JURY

Prior to jury instructions being given in this case, Petitioner offered a jury instruction regarding opportunity of others to commit the crime. The offered instruction, stated in full as follows: "Proof of opportunity of the accused to commit a crime is not sufficient to establish guilt; the evidence must exclude all reasonable opportunity by others to have committed it". (A.R. 1579). This instruction was derived from case law found in *State v. Dobbs*, 163 W.Va. 630, 259 S.E.2d 829 (1979). The failure of the trial court to give this instruction was reversible error.

Pursuant to West Virginia law, a criminal Petitioner is entitled to an instruction on the theory of his defense if he has offered a basis in evidence for the instruction, and the instruction has support in law. Thus, an instruction offered by the Petitioner should be given if the instruction: (1) is substantively correct, (2) is not covered substantially in the charge actually delivered to the jury, and (3) involves an important issue in the trial so that the trial court's failure to give the instruction seriously impairs the Petitioner's ability to effectively present a defense. If these prerequisites are met, the trial court abuses its discretion in refusing the instruction no matter how tenuous the defense may appear to the trial court.

As noted in detail above, in this instance, there was the testimony of the Petitioner himself and numerous other pieces of evidence and testimony presented that could have led to

the jury finding that others had been present at the crime scene on the night in question, and that those others could have committed this crime.

As to the second prerequisite, Petitioner asserts the offered instruction was not covered substantially in the charge delivered to the jury by the trial judge. At the sentencing hearing, the Court stated that the instructions given to the jury, in essence, covered the Petitioner's proffered instruction because the given instructions charged that they jury had to find that this Petitioner did each of the acts that he is accused of doing in arriving at their verdict. However, the given instructions can in no way even remotely be argued as having substantially covered the specifics alluded to in the Petitioner's "evidence-based" proffered instruction. The instruction referred to by the trial judge which was given to the jury was a relatively vague and imprecise instruction, and not at all evidence specific to the facts and circumstances alluded to at trial. Thus, the second prerequisite for a proffered jury charge to be given has been met by the Petitioner.

The third prerequisite regarding the proffered instruction being given is: "does the proffered instruction involve an important issue in the trial so that the trial court's failure to give the instruction seriously impairs the Petitioner's ability to effectively present a defense." The Petitioner contends that the instruction offered goes to the very heart of the matter in dispute.

The trial court's refusal to give the Petitioner's proffered instructions regarding "others" involvement would suggest that the Court deemed the Petitioner worthy of punishment and that the burden was on the Petitioner to show that "others" committed the crime, rather than on the State to show that "others" did not. These notions, however, are so interchangeable that to disprove one we must prove the other, and to prove one disprove the other. Therefore, if the given instructions make no mention as to the matter or possibility of "others", then the jury may consider that line of reasoning abandoned, and give it little if any consideration- thereby

prejudicing the Petitioner. Hence, the Petitioner has the right to have the matter of “others” brought prominently to the attention of the jury by the proper instruction.

In summation, all of the required prerequisites have been met for the proffered instruction to have been given: (1) basis in evidence was thoroughly established; (2) the instruction has support in law, as it was derived from case law in *State v. Parsons*, 39 W.Va., and *State v. Dobbs*, 163 W. Va.; (3) it was not covered substantially in the charge actually delivered to the jury; and (4) it involves an important issue in the trial so that the trial court’s failure to give the instruction seriously impaired the Petitioner’s ability to effectively present a defense. Therefore, since all the necessary prerequisites have been met, the trial court abused its discretion by refusing the proffered instruction. As a result plain and reversible error was committed.

V. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER’S MOTION FOR NEW TRIAL AND MOTION FOR JUDGMENT OF ACQUITTAL AS THE STATE KNOWINGLY ALLOWED JOSEPH MEDINA TO PRESENT FALSE AND PERJURED TESTIMONY

During the State’s case-in-chief, the State knowingly presented false and perjured testimony. During the testimony of Joseph Medina, said witness for the State consistently perjured himself and presented false testimony to the jury. The Petitioner contends that the State either knew or should have known that key pieces of Joseph Medina’s testimony were false, yet they allowed this egregiously false testimony to go uncorrected. Furthermore, there is a definite likelihood that the false testimony could have affected the verdict of the jury. Thus, the State’s failure to correct Joseph Medina’s perjured/false testimony was plain and reversible error.

In the State of West Virginia, the knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Additionally, in order to obtain a new trial on a claim that the

prosecutor presented false testimony at trial, the Petitioner must demonstrate that: (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict. The Petitioner contends that on at least three separate and distinct occasions during his testimony, and while testifying about three separate and distinct incidents, Joseph Medina presented false testimony to the jury which the State either knew or should have known was false, the State failed to correct the false testimony, and the false testimony was material.

### **Alleged Confession of Petitioner**

Joseph Medina presented false testimony in the form of a supposed confession made by the Petitioner to this crime- during Joseph Medina's testimony, he relayed to the jury that the Petitioner had called him and confessed to the crime in question by stating that the Petitioner told him that the adult female victim of this crime "was digging around in his pockets so he said he did what he had to do" ( A.R. 823, 828-829). The Petitioner contends that this was indeed false testimony. The Petitioner also contends that with all of the facts and circumstances that came out prior to and during trial, the State either knew of should have known that this was false testimony.

Joseph Medina initially spoke to the authorities regarding this crime two years prior to his testimony at trial, and, at that time, though Medina had made as many as a dozen separate and distinct incriminating accusations against the Petitioner regarding this crime and others. (A.R. 1532). Mr. Medina never once mentions, alludes to, indicates, or implies that the Petitioner had allegedly admitted a role in this crime to him. In fact, at that time, Medina actually feigned speculation in a very incriminating fashion as to what he thought the Petitioner's motive may have been for the crime in questions and as to what weapon he believed the Petitioner allegedly

used during the crime. (A.R. 1532). It was clear then, as it is now, that Medina, based on his clearly unbridled enthusiasm to implicate the Petitioner in this crime during his initial interview with police, would have, no doubt, brought up this supposed confession at that time if it were indeed true.

### **Change of Story**

Over a year and a half prior to the Petitioner's trial and prior to Medina's so called change of heart regarding the supposed confession made by the Petitioner, Medina had negotiated a plea deal with the State in an unrelated felony case against him. Pursuant to said plea, Joseph Medina did receive time served for charges which originally placed him at risk of serving 4-20 years in the State penitentiary, in exchange for his adverse testimony in the case against the Petitioner regarding a text message which was by in no means inculpatory. ( A.R. 860, lines 4-21; A.R. 1015, lines 17-18; and A.R. 1016, lines 21-23). Two months before the start of the Petitioner's trial, Medina's negotiated plea deal in his unrelated case was rejected by the same trial judge that presided over Petitioner's trial. (A.R. 862, lines 3-11). Only days after his plea deal was rejected, Medina, now back in jail and facing the reality of doing 4-20 years in prison for his unrelated charges, contacted the lead detective in the case against the Petitioner, and it was then that Medina relayed the bogus story about a supposed confession made by the Petitioner to this crime. (A.R. 1567). It is abundantly clear to any fair minded person, based on the circumstances and timing of this, at that time, new claim by Medina, that Medina concocted this false confession story in hopes of gaining newfound leniency in the case in which his initial plea deal had been rejected.

### **Confession Over Phone Impossible**

Joseph Medina testified that the Petitioner had confessed to him regarding this crime over the phone of Medina's girlfriend, A S (Refer to Medina's 5/9/2012 transcribed interview, pg. 1, lines 7-8; pg. 2, lines 1-2; and pg. 3, lines 17-20; and A.R. 879, lines 3-18). However, through phone records and A S l's testimony, it was conclusively proven that A S 's pre-paid cell phone did not have any funds on its service at the time (Refer to A S l's cell phone records; Johnny Tucker's testimony; and A S l's testimony- A.R. 776, lines 8-10 and A.R. 777, lines 3-10). Making it inoperable during the time period Medina claims that the Petitioner confessed to him over it. Thus, proving that this claim by Medina was wholly impossible.

### **911 Records**

During trial, through 911 records and corroborating testimony, it was proven that Joseph Medina and the Petitioner had a severe "falling out" over a particular incident that took place less than 72 hours before the crime in question was committed, and that the Petitioner, immediately after this "falling out" and immediately after receiving telephonic threats from Medina, had actually called several different law enforcement agencies to report to them that Medina had made violent threats to murder a man, woman, and two young children in the area as a result of this "fall out". (A.R. 972-998).

Based on this, it is absolutely inconceivable that the Petitioner would then allegedly confess to Joseph Medina a crime involving the grisly murders of a mother and her young child when just 3 days prior to these murders the Petitioner had actually called the police on Joseph Medina in order to report Medina's threats of murder regarding the exact same mother and young child. Even if one believes the State's theory of the reason for this telephone call to police- which is that Petitioner made it in order to set Medina up - one would still have to

acknowledge that the Petitioner would not confess to an act of murder to the very man he was allegedly trying to set up for the murder. Clearly, the testimony regarding this supposed confession was indeed false testimony invented by Joseph Medina in order to ensnare the Petitioner for a crime that Medina himself orchestrated.

**“They would kill his child”**

At one point during the cross-examination of Medina by the Defendant's attorney, Medina stated that if "they" would kill this child, then "they" would kill his child as well ( A.R. 852, *lines 14-16*). The Defendant contends that Medina could not have been referring to the Defendant alone, because the Defendant alone is clearly not a "they". The Defendant contends that this "they" was a slip of the tongue in which Medina was subconsciously and inadvertently expressing the fact that at least two members of his "crew" had committed these murders and that he was afraid to say as much out of possible fear of retaliation.

**Complete Impeachment Establishing False Testimony**

Finally, in the case of *Behler v. Hanlon*, 199 FR. D. 553, 558 (D. Md. 2001), it was noted that there are six primary types of impeachment evidence. Those being: (1) impeachment by demonstration of bias, prejudice, interest in litigation, or motive to testify in a particular fashion; (2) impeachment by contradiction; (3) impeachment by demonstration of capacity to perceive, remember, or relate; (4) impeachment by untruthful character, bad acts; (5) impeachment by conviction of a crime; and (6) impeachment by prior inconsistent statements.

During the course of the cross-examination of Joseph Medina, the defense was effectively able to impeach Medina's testimony on *each* and *every* one of the six primary types of impeachment evidence listed above, and was able to do so primarily regarding the contrived confession that was attributed to the Defendant. For example: (1) attorney for the Defendant

impeached Medina regarding his bias, prejudice, or motive to testify in a particular fashion by showing that his testimony came in hopes of a renewed plea deal for his, at that time, current criminal charges (A.R. 860, *lines 11-21*); and by showing that a conviction of the Defendant would in effect shield Medina from the possibility of facing any criminal charges for his alleged role in the crime in question (A.R. 872, *lines 4-7*). (2) attorney for the Defendant impeached Medina by contradiction, showing that it would have been impossible for Medina to have received a confession by the Defendant in the way that he attested to because the phone that he claimed to have received the confession on was inoperable at the time ( A.R. 879, *lines 3-18*). (3) attorney for the Defendant impeached Medina's testimony by demonstrating his capacity, or incapacity as it were, to perceive, remember, or relate, by showing that his statements regarding this supposed confession, among other things, kept changing. The attorney for the Defendant impeached Medina's testimony by demonstrating his untruthful character, his prior convictions, and his numerous prior inconsistent statements..

#### **Refusal to Speak with Police without Attorney**

Joseph Medina presented false testimony by asserting that the reason he didn't inform police of the Petitioner's alleged confession when he was initially interviewed by them was because he didn't talk to police about crimes at his first interview and without first consulting an attorney. During the direct-examination of Joseph Medina, Medina stated that the reason why he hadn't initially told the police about the Petitioner's supposed confession when he was first apprehended and interviewed by the authorities two years before the Defendant's trial was because it was his habit to not answer questions posed to him by the authorities regarding crimes and criminal conduct without first consulting with an attorney, and that he didn't speak to the police about any crimes at that time because of this reason (A.R. 799, *lines 18-22*; *pg.67, lines 4-*

6; A.R. 825, lines 15-24, and A.R. 826, line 1). The Petitioner respectfully asserts that this claim by Medina was indeed false testimony, and was false testimony of the sort that can be proven false beyond all doubt. And it can be proven false simply by referring to the recorded statement and transcript of Medina's first interview with the detectives in this case.

As reflected in said audio recording, Medina can be heard doing exactly what he had claimed on direct-examination to not have done: he can be heard speaking deliberately, repeatedly, and extensively about crimes, criminal conduct, and criminal planning in regards to himself, the Defendant, and all without the presence or consultation of an attorney.

This audio recorded and transcribed initial interview with Medina by agents of the State of West Virginia, which took place on June 23, 2010, 17 days after the crime in question was committed, conclusively proves that Medina's testimony was completely false on this issue, because Medina can be heard at this very first interview speaking to the authorities about criminal conduct, without the presence or consultation of an attorney, and can be heard specifically and consistently speaking about the supposed criminal conduct of the Petitioner; specifically as relating to this crime in particular-in which Medina clearly tries to repeatedly implicate the Petitioner. (A.R. 1532).

Joseph Medina simply couldn't admit to the jury that in his initial interview with police he had implicated the Petitioner in upwards of a dozen distinct criminal acts-*many* of which were directly related to this particular crime-but for some inconceivable reason had failed to inform police of this supposed confession at that time, because, of course, his confession testimony wouldn't have been believed. He had to lie and say that the reason he hadn't told the police about this supposed confession made by the Petitioner during his initial interview with police was because he didn't speak to the police about things such as that in his first interview with them

because he didn't have a lawyer at the time (*A.R. 825, lines 22-24, and 826, line 1*). Implying that once he got a lawyer at a later date, that is when he immediately informed the police about the Petitioner's supposed confession. But this is wholly disingenuous. Not only did Medina *indeed* speak to the authorities extensively about criminal conduct in general, and *indeed* tried to directly implicate the Petitioner in *this* crime in particular, during his very first interview with them-and did so without the presence or consultation of an attorney-but he also didn't report to the police anything at all relating to an alleged confession made by the Defendant until almost 2 years later and *after* he was already back in jail on his unrelated charge and his plea deal had been rejected by a judge, thus placing him in direct jeopardy of going to prison for 4 to 20 years.

Furthermore, the audio recorded and transcribed initial interview of Medina by agents of the State of West Virginia proves that the State knew or should have known that Medina's testimony, as relating to the issue above, was false because the agents of the State are the very ones who recorded Medina's initial statement and provided it to the Defendant. Additionally, this false testimony by Medina was material because the jury could have very well determined, based on this specific false testimony, that the only reason that Medina did indeed not report this alleged confession by the Defendant initially is because Medina indeed didn't tend to speak to the police about crimes, whether his or someone else's, without first obtaining the presence or consultation of an attorney. And though the Defendant's attorney was able to question Medina regarding this blatant contradiction on cross (*A.R. 848-852*), the fact it was irrefutably false testimony, and the fact that the jury could've believed this false testimony in spite of the Defendant's cross, and the fact that the State didn't correct it and it could've played a part in the jury's deliberations and verdict of guilt, makes it reversible error.

### **False Testimony Concerning Flight to Virginia**

Joseph Medina presented false testimony by asserting that the reason he fled from authorities in West Virginia was because he had violated his probation in the State of Virginia. Defendant contends that there was no proof provided by the State that Joseph Medina was indeed on probation in the State of Virginia at the time of the incident, and even if Medina was on probation in the State of Virginia, there is no proof that he was he was indeed fleeing from the WV authorities for this reason. In fact, the Defendant contends that Medina was fleeing from the WV authorities at the time because he had played a direct role in the crime in question and was fleeing from a consciousness of guilt. Medina had made many prior inconsistent statements regarding his flight from the State of WV and why it was undertaken, and surely the prosecutor for the State must have suspected that Medina was testifying falsely regarding this flight. Also, it should be noted that Medina fled *into* the State that he was supposedly fleeing a probation violation from.

As opposed to fleeing away from Virginia-which he likely would have done had he truly been fleeing from a probation violation there-he fled *into* it. Evidencing the contention by the Defendant that Medina was not fleeing from a probation violation in Virginia, but was instead fleeing from the murders he orchestrated in WV. Yet the prosecutor for the State used this false testimony by Medina to bolster her claim that Medina did not flee WV because he played a direct role in the crime for which the Defendant had been charged, as the Defendant asserted. And the jury could've believed Medina's false testimony, thus making it material.

In closing, it is clear that the prosecutor for the State (1) presented false testimony, (2) knew or should have known it was false testimony, (3) didn't correct the false testimony, and (4) the false testimony had a material effect on the jury verdict.

VI. PETITIONER'S CONVICTION SHOULD BE REVERSED AS HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN PROSECUTION MADE

## IMPROPER REMARKS AND ENGAGED IN PROSECUTORIAL MISCONDUCT

It is the belief of Petitioner Prophet, that during, the State engaged in several acts of prosecutorial misconduct. In fact, Petitioner Prophet has asked that the two assignments of error regarding prosecutorial misconduct and judicial misconduct be set forth, in full, as he has drafted on his own. As previously noted, Petitioner Prophet has concurrently filed a motion to surpass page limitation to assure that all of his arguments he wishes to raise are properly before this Honorable Court.

In the State of West Virginia an attorney for the State may prosecute vigorously as long as he deals fairly with the accused, but he should not become a partisan, intent only on conviction. *State v. Moose*, 110 W Va. 476, 158 S.E.2d 715 (A.R. 1931). An attorney for the State "must set a tone of fairness and impartiality ". *State v. Critzer*, 167 WVa. 653, 270 S.E.2d 787. The standard fair and impartial presentation required of the prosecutor for the State may become more elevated when the offense charged is of a serious or revolting nature, as a jury in such a case may be more easily inflamed and less inclined to give the benefit of all doubt to the accused as the law requires. *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 719(W. Va. 1977).

### **Prosecutor Used her Position to Undermine Credibility and Bolster State's Witnesses**

First, the Prosecutor for the State infused into the trial her personal beliefs and opinions as to the veracity of Petitioner and his version of events regarding the crime in question. Specifically, the prosecutor's entire closing argument essentially regarded her personal belief that the Petitioner's testimony was a concocted story that had been conceived after "two years of going line by line through the Discovery evidence" in the case. (A.R. 1318-1310, 1322-1323, 1329, 1334-1335, 1340|341). Juries very properly regard the prosecutor as unprejudiced, impartial, and non-partisan: and insinuations thrown out by her regarding the credibility of witnesses for the defense are calculated to prejudice the Defendant. *State v. Hively*, 103 W. Va. 230, 150 S.E.2d 729 (W.Va. 1929)

and “It is improper for a prosecutor in this State to assert her personal beliefs as to the credibility of a witness ... or as to the guilt or innocence of the accused. *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (1990); ABA Code DR7-106; and Rules 3.4(c) and 3.5(a) of the West Virginia Rules of Professional Conduct.

Second, the prosecutor for the State used her position and status to bolster State witness Joseph Medina's testimony in regard to his reason given for his flight from the State after the crime in question. The prosecutor stated in her closing that Medina fled because he didn't want to get arrested for violating his probation in Virginia (A.R. 1314, *lines 20-24*; *pg.37, lines 1-2*; and A.R. 1340, *lines 17-20*). This was a major point of contention in the trial, as the Petitioner contends that Medina fled because he orchestrated the crime in question. For the State to blatantly bolster the testimony of a witness on such a contentious issue, a witness mind you, whose testimony had conclusively been proven to be wholly unreliable and misleading during cross, severely prejudiced the Petitioner.

#### **Prosecutor Attacked the Petitioner’s Constitutionally Protected Rights**

As discussed above, during cross-examination, the prosecutor questioned Petitioner Prophet regarding his use of his Constitutionally protected right to silence by questioning him as to why he hadn't told police his story at the time of his arrest or before this matter was brought to trial (A.R. 1094, *lines 17-23*; and A.R. 1097, *lines 12-15*). The Defendant contends that the prosecutor for the State, having a thorough knowledge of the law after years and years of practicing it, knew that this was constitutionally protected ground, and attacked it anyway, simply to unfairly prejudice the Defendant before the jury and to illicitly avoid his acquittal she feared imminent absent her misconduct. Pursuant to the Due Process Clause of the W Va. Constitution. Art. III, § 10 and the presumption of innocence embodied therein, it is reversible error for the prosecutor to cross-examine a Defendant in regard to his pre-trial silence or comment on the same to the jury. *State v. Boyd*, 160

W. Va. 234, 233 S.E.2d 719(W. Va. 1977); *State v. Adkins*, 209 W. Va. 212, 544 S.E.2d 914 (W. Va. 2001).

The prosecutor for the State, in her closing argument, inundated the jury with assertions that the Petitioner, simply by the exercising of his Constitutionally protected rights to remain silent and consult with an attorney, had two years to go line by line through the evidence and concoct a believable story for the jury. (A.R. 1318-1319, 1331, 1341-1342). The fact that the prosecutor recognized the Petitioner's testimony as "plausible" demonstrates that the Petitioner had indeed raised a reasonable doubt of his guilt, at least in the prosecutor's mind (A.R. 1217, *lines 7-13*), and that the prosecutor therefore decided to openly disregard the law and rules of evidence and attack the Petitioner's Constitutionally protected rights simply to mislead, confuse, and inflame the passions and prejudices of the jury and to secure a legally unsustainable conviction against the Petitioner for the sake of subverting the protections provided the Petitioner by the Double Jeopardy clause of the Fifth Amendment of the United States Constitution. (A prosecutor may argue all reasonable inferences from the evidence in the record. It is misconduct however for a prosecutor to intentionally misstate the evidence or mislead the jury as to the inferences it may draw. *Syl. Pt. 7, State v. England*. 180 W Va. 342, 376 S.E.2d 548 (W.Va. 1988): *State v. Poore*, 226 W. Va. 727, 704 S.E.2d 727 (2010).(Great latitude is allowed counsel in the argument of cases. but counsel must keep within the evidence, not make statements calculated to inflame. prejudice or mislead the jury.).

#### **Prosecutor Knowingly Elicited and Used False Testimony**

The State knowingly and deliberately elicited and utilized the false testimony of Joseph Medina in order to present a seemingly stronger case against the Defendant in order to avoid an acquittal she feared was imminent absent the perjured testimony. The prosecutor also abandoned her oath and failed to correct Medina's materially false testimony, knowing it was false and contrived.

#### **Prosecutor Intentionally Irrelevant and Highly Prejudicial Evidence – After Stipulating In Writing Not to Present the Same**

At the conclusion of the Defendant's very persuasive direct-examination and as the court was recessing for the evening, the prosecutor for the State, while smirking, said to the Defendant's attorney, "Oh, by the way, *now* I'm bringing in his (the Petitioner's) book." The Petitioner's attorney responded that there was a written stipulation to the effect that she wouldn't attempt to present it, at which the prosecutor replied, "I stipulated that I wouldn't present it in my case-in-chief or on rebuttal...this is *your* case-in-chief." The Petitioner contends that the prosecutor decided to use this deceptive and conniving tactic in an attempt to undermine justice and simply to confuse, mislead, and inflame the passions and prejudices of the jury. The Petitioner's evidence and testimony was so "plausible", as the prosecutor put it (A.R. 1322, *line 24*; A.R. 1342, *lines 10-13*; and A.R. 1385, *lines 14-15*), and sufficient in raising a reasonable doubt, that the prosecutor discarded all pretense of impartiality and decided to disregard the law and flaunt irrelevant, inadmissible, and extremely prejudicial evidence before the jury simply to illicitly avoid an acquittal of the Petitioner she feared was imminent. And what was initially introduced as supposed impeachment evidence on cross was somehow magically transformed into evidence offered for the truth of the matter asserted during her closing argument (A.R. 1317, *lines 1-16*). Additionally, the prosecutor openly flaunted the cover of the Petitioner's novel in front of the jury-which featured a skull engulfed in flames-after the trial judge, as tentatively as it may have been, the Court did in fact rule that the cover could not be exhibited to the jury (A.R. 1082, *lines 23-24*, and A.R. 1083, *lines 1-5*); which, considering the circumstances of the crime charged, was highly inflammatory and unduly prejudicial.

**Prosecutor Willfully and Deliberately Misstated and Misrepresented Scenes From the  
Petitioner's Novel for the Express Purpose of Illicitly Prejudicing Petitioner**

The prosecutor for the State purposely misrepresented and distorted a dialogue scene in the Petitioner's novel and described it as a scene in which one of the characters covers up a murder by setting a home on fire (A.R. 1088, *lines 19-24*). This was a gross misrepresentation of

a simple dialogue scene, and was totally distorted by the prosecutor in a brazen attempt to liken her description of said scene to her theory of the crime in question.

The prosecutor for the State described a narrative in said novel as a scene in which a particular character named "Baby Jah" was killed by decapitation, and tried to draw parallels between said narrative and the crime in which the Petitioner was on trial (A.R. 1091, lines 16-23; and A.R. 1317, lines 11-13). It is clear that the prosecutor specifically chose to misrepresent and distort this particular narrative because the character involved in said narrative had the nickname of "Baby Jah"-"baby" being the operative word, as one of the victim's of the crime for which the Petitioner was on trial was a baby of 3 years of age.

Second, the State intentionally misrepresented, distorted, and embellished other scenes in order to draw parallels from the Petitioner's novel to the crime in question. For example:

a. The prosecutor likened a female character in the novel who had purchased drugs in one particular scene to the adult female victim in this case. (A.R. 1317, lines 7-9).

b. The prosecutor likened the main male character in the novel to the Petitioner, and suggested they shared a similar fate in regards to the story line in the novel and the crime in question. (A.R. 1088, lines 13-17).

c. The prosecutor likened a mother and young daughter that were attacked in the novel to the adult female victim and young child that were killed in this case. (A.R. 1091).

All of the above was done in a calculated attempt to confuse and mislead the jury and to illicitly prejudice the Petitioner in order to secure his unlawful conviction.

### **Prosecutor Intentionally Misquoted Witness Testimony**

The prosecutor for the State consistently misquoted, misrepresented, and outright altered the testimony of numerous witnesses in an attempt to confuse and mislead the jury. For example:

1) the prosecutor, during the cross-examination of the Petitioner, said that State witness

Katie Draughon had testified that the Petitioner told her that he had been robbed in the woods in Summer Hill, WV ( A.R. 1187, lines 23-24, and A.R. 1188, lines 2-3). Which was not Ms. Draughon's testimony at all (Refer to A.R. 682 lines 15-18).

2) the prosecutor said during her cross-examination of the Petitioner and during her closing argument that State witness John Willingham testified that the Petitioner had washed up at a gas station on the morning after the crime (A.R. 1188, lines 3-4; and A.R. 1337, lines 21-24), which was not Mr. Willingham's testimony. Mr. Willingham stated only that the Petitioner had a shirt wrapped around his head (Refer to A.R. 672, lines 13-15).

3) the prosecutor stated in her closing argument that there was testimony that the adult female victim had a land-line home phone in her apartment ( A.R. 1321, lines 7-9). There was no testimony to that effect. In fact, the mother of the victim testified that there was no home phone in the victim's apartment (Refer to A.R. 535, lines 1-7).

4 )the prosecutor stated in her closing that State witness Heather Aronhalt, the convenience store clerk, testified that the Petitioner had blood "all over his shirt" (A.R. 1332, lines 14-16). This was totally inaccurate. Heather Aronhalt testified only that there was a "little bit" of blood on the Petitioner's shirt, and that they appeared to have originated from a cut on the Petitioner's neck (Refer to A.R. 662, lines 4-15).

5) the prosecutor stated in her cross-examination of the Petitioner that C D testified that the Petitioner had asked C D for \$300 (A.R 1071, lines 11-17; as compared to Vol. VI, pg.173, lines 14-17). This was intentionally placed before the jury in an inaccurate form in order to confuse and mislead the jury.

6) the prosecutor stated that A ' W was in Hagerstown, Md. on the night of the crime (A.R. 1313, lines 10-12); when, in fact, the evidence was clearly otherwise (Refer to A.R. 907, lines 18-24 and A.R. 929, lines 1-2; and A.R. 937, lines 8-17).

7) the prosecutor intentionally chopped up and deliberately altered numerous parts of the Petitioner's testimony in a blatant attempt to confuse and mislead the jury into thinking that there were many inconsistencies in the Petitioner's testimony, but the only inconsistencies in his testimony were the ones the prosecutor made up in her closing argument. For example: ( 1) The prosecutor stated that the Petitioner had testified that the men who had committed this crime were from A W 's family. This was totally inaccurate and misleading (A.R. 1318, lines 9-10, as compared to A.R. 1004, lines 6-10). (2) A.R.1320, lines 10-14, as compared to A.R. 1004-1007; and A.R. 1150, pg.88, lines 11-15. (3) A.R. 1321, lines 14-15, as compared to A.R. 1010, lines 9-12 and A.R. 1014, lines 9-11. (4) A.R. 1324, lines 20-22, as compared to A.R. 1020, lines 6-20. (5) The prosecutor asserted that the Petitioner testified to seeing a fatal injury on the child victim of this crime and also that Petitioner's testimony was dramatically inconsistent at two critical points (A.R. 1325, lines 1-12, as compared to A.R. 1033, lines 8-24 and A.R. 1034, lines 1-4). This was a totally egregious and outrageous misstating of the Petitioner's testimony, and all by itself constitutes intentional prosecutorial misconduct and justifies reversal of the Petitioner's conviction. (6) Refer to A.R. 1328, lines 13-17, as compared to A.R. 1040, lines 5-10. (7) Refer A.R. 1328, lines 21-24, as compared to A.R. 1173-1174. (8) A.R. 1329, lines 7-8, as compared to Vol. VI, pg.306, lines 17-20. (9) A.R. 1334, lines 11-12, as compared to A.R. 1026, lines 5-11. (10) Refer to A.R. 1340, lines 5-8, as compared to A.R. 990, lines 10-24. Here the prosecutor deliberately distorted the Petitioner's testimony in order to purposely confuse and mislead the jury. (11) Refer A.R. 1341, lines 1-2, as compared to A.R. 1127, lines 14-24, and pg.66, lines 1-14. And, lastly, (12) refer to A.R. 1385, lines 18-20, as compared to A.R. 1059, lines 6-11.

All of the above was done in bad-faith to confuse and mislead the jury and to illicitly prejudice the Petitioner in order to secure his unlawful conviction.

### **Prosecutor Attacked Petitioner Regarding his Legal Name Change**

The prosecutor for the State, during her cross-examination of the Petitioner and in her closing argument, on several occasions informed the jury that the Petitioner had had his last name legally changed many years previously to Prophet (A.R. 1193-1194; and A.R. 1340, *lines 14-16*). This fact had no relevance or bearing whatsoever on the issues in dispute and was done in a clear attempt to inflame the religious passions of the jury by implying that the Petitioner's name change had come about because he considered himself a prophet of God (A.R. 1194; and *refer to T. Tr. Vol. IX, pg.38, lines 2-6*), and possibly to suggest that he was a Muslim. The persistent bringing up of the Petitioner's name change was done strictly for its prejudicial effect, which constitutes misconduct. (*See WVRPC Rules 3.4(e) and 3.5(a)*).

### **Prosecutor Inundated the Trial with Improper Remarks**

The prosecutor for the State made innumerable improper remarks throughout the entire trial in regards to characterizing the Petitioner as an animal, deliberately misstating and inventing evidence and testimony, and making statements of supposed facts outside of the record.

1) In the State's opening statement, the prosecutor described the Petitioner as a wolf in sheep's clothing. And she cleverly used this phrase and terminology in conjunction with the Petitioner's last name in order to strike a chord with jury members possibly familiar with the Bible passage: Mathew 7: 15, which refers to a *false prophet* and a wolf in sheep's clothing.

2) During the cross-examination of the Petitioner, the prosecutor for the State described the Petitioner as a young black male in response to his testimony during his direct examination in which he referred to his culture as being a reason for which he wished to remain anonymous when reporting death threats made to him by Joseph Medina. To bring up the Petitioner's African-American heritage in this fashion was improper, as race alone in today's society rarely makes up for what one considers as "culture", and as the Petitioner is also half-Italian and could have very well been referring to that aspect of his "culture" as well. Also, it was clear that he used the word "culture" indicative of not

wanting to be labeled as a snitch, which is a common label used in modern *American* culture for those who report crimes to the police. Also, the prosecutor intentionally altered the Petitioner's testimony regarding his statement about his "culture" in order to illicitly prejudice him before the jury (A.R. 1122, lines 13-19; and A.R. 1340, lines 5-9, as compared to A.R. 990, lines 18-24).

3) The prosecutor stated several times throughout her cross-examination of the Petitioner and in her closing that there was no "soot" found on the infant child that was rescued from the fire by the Petitioner. (A.R. 1215, *pg.153, lines 1-7; and* A.R. 1336, *lines 21-24*). And though the prosecutor announced this as if it were a fact, not one witness testified to or even remotely implied this on the stand.

4) Almost the entirety of the prosecutor's closing argument was improper, as it was essentially in regards to the Petitioner's pre-trial silence, the various distortions regarding the Petitioner's novel, her intentional misstatements of evidence and testimony, and her persistent voicing of her personal belief that the Petitioner had spun a tall tale for the jury.

5) During her closing argument, the prosecutor stated that both victims of this crime had had their throats cut (A.R. 1310, *line 11*). There was absolutely no evidence presented whatsoever that supported the prosecutor's claim that the child had died in this fashion. This statement was clearly made by the prosecutor in order to confuse, mislead, and thoroughly inflame the passions and prejudices of the jury in order to secure an unlawful conviction against the Petitioner and/or to goad the Petitioner into moving for a mistrial.

6) During her closing argument, the prosecutor stated that Medina had quote "ratted (the Petitioner) out" and "Medina broke the code", apparently by supposedly "ratting out" the Petitioner in regards to the laptop computer (A.R. 1333, *lines 19-23; and* A.R. 1340, *lines 21-23*). The prosecutor said these things in order to give the jury a different reason to consider for why the Petitioner called the police on Medina other than for the threats that Medina did in fact make to the Petitioner. The prosecutor's assertions were wholly improper, however, as not one person testified to this supposed "ratting out" of the Petitioner by Joseph Medina that the prosecutor spoke of. (In

fact, the only person that can truly be described as having "ratted" someone out around the time of this crime was the Petitioner, because it was he (the Petitioner) who contacted the authorities on Medina, not the other way around.) This misconduct by the prosecutor was typical behavior throughout the entirety of her closing argument, as she repeatedly made up evidence and testimony in order to purposely confuse and mislead the jury.

7) During her closing argument, the prosecutor, on a large projection screen, and in big, bold red lettering, presented the title of the Petitioner's novel as being, and likewise pronounced it as, "*Into the Fire ...*", knowing full well that the novel's title is "*Enter the Fire*" (A.R. 1317, lines 4-5). And though this may seem like a trivial difference at first glance, the Petitioner contends that the prosecutor purposefully mispronounced and renamed his book in this fashion in order to equate the Petitioner's novel and its so-called title "*Into the Fire*" with the crime in question and how the Petitioner had allegedly placed the victims of this crime "into the fire", so to speak, when he allegedly set their home on fire. This despicable display was clearly a premeditated effort by the prosecutor to confuse, mislead, and inflame the passions and prejudices of the jury, and to goad the Petitioner into moving for a mistrial. WVTCR Rule 42. 04(b): and WVRPC Rules 3.3(a)(J) and (4), 3.4(b), and 3.5(a) and (c)).

8) During her closing argument, the prosecutor stated "that's what writer's do in their craft, go line by line (through the evidence) and concoct a believable story", and repeatedly suggested that the Petitioner had crafted his version of events regarding this crime only after thoroughly studying the discovery evidence provided by the State (A.R. 1318-1342, A1384-1385). This was improper, as no evidence or testimony reflected this sentiment in any way whatsoever. Furthermore, this was an illegitimate inference for the prosecutor to suggest for the jury to draw, as the Petitioner's Constitutional rights to due process of law allows for him to know and inspect certain evidence against him before trial, and that he has absolutely no control over WV trial court rules and legal

procedures as it pertains to the discovery and disclosure of evidence either for or against him. For the prosecutor to suggest as much to the jury violated the Petitioner's Constitutional right to due process and is just another example of how low the prosecutor was willing to stoop to secure an unlawful conviction against an innocent man. Furthermore, all of the evidence beneficial to the Petitioner during his trial was known by him well before he had even been charged with this crime. (For example: (1) the calls to police regarding Medina's threats against the victims of this crime were known to the Petitioner well before discovery was disclosed in this case because it was *he* (the Petitioner) who had made those particular phone calls; (2) the text message to the father of the victim, S D , which alluded to certain aspects of the Petitioner's version of events, was known by the Petitioner well before discovery was disclosed in this case because it was *he* (the Petitioner) who had sent that particular text message to S D partially explaining what had happened to the victims of this crime and how the Petitioner was sorry he wasn't able to protect them (A.R. 1057, lines 14-24, and A.R. 1058, lines 1-19); and (3) the various other facts and circumstances relating to the Petitioner's defense at trial was known by him well before any discovery was provided by the State in this case because *he* (the Petitioner) had actually *witnessed* these events. In fact, with the exception of certain phone records and records of Medina's conflicting statements, the State provided *almost no discovery evidence* that was in any way beneficial to the Petitioner or his defense. (And even in regards to the phone records, the State absolutely refused to investigate the many calls made by the Petitioner's phone to certain unknown numbers called near the time of the crime, which the Petitioner, through several motions for discovery, had requested for the State to investigate for well over a year prior to his trial, and which the Petitioner contends were calls made by the adult female victim of this crime to, among others, her possible attackers.)

9) The prosecutor, in another blatant example of intending to inflame the passions and prejudices of the jury, informed them in her closing argument that, "If you convict Mr. Prophet, he

goes to prison for life, but if you buy his story (or, in other words, if you acquit him), you get to buy his book". (A.R. 1342, *lines 10-13*). Illicitly suggesting to the jury that if they followed the law and had a reasonable doubt as to the Petitioner's guilt and acquitted him, that the Petitioner would gain some sort of financial windfall or literary success as a result thereof; or, that he would capitalize off of a verdict of acquittal by writing a book about this tragic crime and selling it to the public. Whatever the prosecutor's implication, it is abundantly clear-especially by her use of the words "if you buy his story, you get to buy his book"-that this wholly improper and totally outrageous statement was made only for the express purpose of inflaming the jury in a blatant attempt to illicitly avoid the Petitioner's acquittal the prosecutor feared was imminent absent her misconduct and/or to goad the Petitioner into moving for a mistrial.

10) The prosecutor, in her closing argument, used her position and status as an agent of the State to discredit the Petitioner's testimony about others committing this crime by stating, "These types of things don't happen like that. Drug dealers don't collect debts in this fashion."-or words to that effect. (A.R. 133-1337). This was improper and plain and reversible error in at least two ways:

First, the jury, possibly not being privy to crime and criminal disposition on a regular basis, might believe the above-described quote by the prosecutor to be true simply because the prosecutor deals with crime and criminals everyday as a part of her profession, therefore, the jury may reason, *she should know- and* if she says that people don't get robbed and killed this way, and drug debts don't get addressed in this fashion, then they probably don't. This was an improper and illegitimate use of the prosecutor's position as an agent of the State to undermine the Petitioner's testimony;

Second, this was clearly an intentionally misleading statement made by the prosecutor because, unfortunately, criminal history is replete with cases and stories of crimes and murders which happen for trivial and baffling reasons, such as minor drug debts or relatively minor disagreements.

Furthermore, the Petitioner's attested-to scenario is no more implausible or less likely-(in fact, it is exceedingly *more* plausible)-than the State's contention that this crime was committed by the Petitioner for no discernable reason at all; or, if one believes Joseph Medina, that it was committed simply because the adult female victim dug in the Petitioner's pocket-which would be the height of triviality and implausibility.

11) The prosecutor, in wrapping up her closing argument, told the jury, "Don't let him get away with it" (A.R. 1385 *lines 23-24*), referring to the Petitioner and the prosecutor's sentiment that the jury should convict him. It should be noted that the prosecutor never said, "look at the evidence in a rational and unbiased way"; she didn't say, "remember the testimony as you heard it and draw all reasonable inferences therefrom"; she didn't say, "be diligent in your search for the truth"; she said "don't let him get away with it." Suggesting that if the jury were to follow the law in finding the Petitioner not guilty because they had a reasonable doubt of his guilt that the Petitioner would have succeeded in tricking and deceiving the jury, and, therefore, would be "getting away" with murder. This was an improper remark for the prosecutor to make to the jury. And considering that the prosecutor and her primary witness against the Petitioner, Joseph Medina, were the only ones who have conclusively been proven to have clearly engaged in attempting to trick and deceive the jury throughout the entirety of the trial, it would seem that the only ones who "*got away*" with anything was the prosecutor-( *who got away with obtaining an unlawful and unsustainable conviction against an innocent man*)-and Joseph Medina-( *who got away with only 5 months imprisonment for being an accomplice to felony murder.*)

In *State v McCartney*, 228 W.Va. 315, 719 S.E.2d 785 (2011), the court noted four factors in determining whether improper prosecutorial comments are so damaging as to require reversal. They are: (1) degree to which the remarks have a tendency to mislead the jury and prejudice the accused; (2) whether remarks were isolated or extensive; (3) absent the remarks, the strength of the competent

proof to establish the guilt of the accused; and ( 4) whether comments were deliberately placed before the jury to divert attention to extraneous matters. In analyzing the four factors above in conjunction with the remarks and misconduct by the prosecutor at trial, the Petitioner contends:(!) the degree to which the remarks misled the jury and prejudiced the Petitioner was substantial and astounding; (2) the remarks were super-extensive, as they essentially took up the entirety of the prosecutor's closing argument; (3) absent the remarks the strength of competent proof to establish the guilt of the Petitioner was exceptionally weak to non-existent; and ( 4) the comments were clearly and deliberately placed before the jury to divert attention away from the Petitioner's wholly "plausible" evidence and testimony. Indeed, manifest injustice resulted from this prosecutor's misconduct insofar as its cumulative effect, if not individual effect, deprived the Petitioner of his fundamental right to a fair trial and constituted plain and reversible error.

VII. PETITIONER'S CONVICTION SHOULD BE REVERSED AS HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN TRIAL COURT MADE IMPROPER REMARKS AND ENGAGED IN JUDICIAL MISCONDUCT

As noted above, Petitioner Prophet has asked that the assignment of error regarding judicial misconduct be set forth as he has drafted. It is Petitioner's belief that the trial court engaged in acts of judicial misconduct which caused him great prejudice.

During the pre-trial hearings leading up to trial and into and through the trial itself, the trial court committed egregious acts of judicial misconduct, and willfully and deliberately made *bad-faith* judgments and rulings against the Petitioner in order to illicitly avoid an acquittal feared imminent by the trial judge absent his misconduct and adverse rulings, and to secure a conviction that the trial court knew was legally unsustainable and would surely be reversed on appeal simply to subvert the protections afforded the Petitioner by the United States Constitution's 5th Amendment Amendment's Double Jeopardy Clause. The Petitioner lists the following acts of judicial misconduct.

First, during a pre-trial motions hearing, the trial judge, in open court, made a very passionate

and prejudicial argument expressing his opinion of the Petitioner's guilt and culpability in the crimes he had been charged. (A.R. 1295, *lines 17-24*). At one point during this hearing, the trial judge, upon a partial description by the Petitioner's lawyer of their anticipated defense to the charges against the Petitioner, stated, again in open court, that the Petitioner's defense, quote, "doesn't hold water" with him (*this quote was either inadvertently or intentionally omitted from the enclosed transcripts by the court reporter*). And though these statements by the trial judge did not take place before an empanelled jury, these statements made during the Petitioner's pre-trial hearing clearly demonstrates the bias that the trial judge had and was more than willing to express toward the Petitioner and his defense long before one witness had testified or one piece of evidence had been presented at trial. And the Petitioner contends that this bias expressed toward him by the trial judge well before trial demonstrates exactly why the prosecutor for the State was permitted to violate so many of the Petitioner's rights, and why so many plain and reversible errors were permitted on the trial judge's watch. Furthermore, it should be noted that the trial judge apparently never once entertains the notion that the Petitioner may have possibly made this phone call to 911 for the evident purpose of trying to prevent a possible future crime (A.R. 1291, lines 21-24, and A.R. 1291, lines 1-4), which, considering the obviousness of the call, clearly shows the trial court's bias toward the Petitioner well before any official presentation of evidence to the contrary.

Second, two months prior to the Petitioner's trial, and in another criminal matter not directly related to the Petitioner's case, the Petitioner's trial judge, while also the sitting judge in a separate criminal matter against Joseph Medina, an anticipated witness in the Petitioner's fast approaching trial, and for reasons that have not been fully made clear by the judge, but for reasons the Petitioner contends leads back to the trial judge's bias against him, rejected a plea deal previously negotiated by Joseph Medina and the State of West Virginia almost two years beforehand in which Medina had agreed to testify adversely against the Petitioner in the present case, regarding his memory of an

ambiguous text message made by the Petitioner to Medina near the time of the crime in question (A.R. 1016, *lines 2-23*), in exchange for time served (which amounted to only a few months jail time) on a charge in which Medina was originally facing 4-20 years imprisonment. At that time, it has been reported that Judge Wilkes intimated that he would not accept that negotiated plea deal for Medina because he felt that Medina had more information than he was letting on to regarding the Petitioner and the case against him. Only days after that hearing-and almost two years after Medina's initial interview with police in which Medina practically bent over backwards in his attempts to implicate the Petitioner in this crime, yet never once mentioned an alleged confession made by the Petitioner to this crime; and only two months before the scheduled start of the Petitioner's murder trial-Medina contacts the lead detective in the case against the Petitioner and now claims to have heard a confession made by the Petitioner to the crime in question.

The Petitioner contends that the trial judge in both his and Medina's unrelated case-Judge Wilkes-utilized his judicial power and position to effectively manipulate or otherwise coerce Medina into artificially strengthening the State's case against the Petitioner-whom it is clear Judge Wilkes was already prejudiced against. As a direct result of the trial judge's actions, Joseph Medina testified falsely at the trial of the Petitioner, leading to the Petitioner's conviction. Immediately after the Petitioner's conviction, and apparently with his work here in West Virginia satisfactorily complete, Joseph Medina was released from jail after serving only a total of about 5 months on a sentence for which he was originally facing 4-20 years on and allowed to return to his home in Virginia. Judge Wilkes signed off on Medina's release order on the very same week of the Petitioner's conviction and for essentially the exact same time-served sentence that the judge had just 2 months earlier rejected as a plea deal for Medina. This clear yet conspiratorially subtle manipulation by Judge Wilkes of Joseph Medina is the epitome of judicial misconduct. (Code of Judicial Conduct-Canon 2 (A)- a judge shall avoid impropriety and the appearance of impropriety ... )

Third, during the cross-examination of the Petitioner, the trial judge allowed the prosecutor for the State to impeach the testimony of the Petitioner by allowing her to question the Petitioner-and, in her closing, make argument-regarding the Petitioner's exercising of his Constitutional right to remain silent (A.R. 1097, *lines 13-22*.) The Petitioner contends that the trial judge, after years of practicing law and elevating to the prominent position of judge, knew that to allow the prosecutor to question and make argument regarding the Petitioner's right to pre-trial silence was improper and reversible error, yet he allowed her to do so anyway simply because of his bias toward the Petitioner and to illicitly avoid the Petitioner's acquittal the trial court feared was imminent absent his misconduct and faulty rulings. And as evidenced by the trial court's colloquy with the Petitioner's attorneys at side bar, it is clear that the judge knew and acknowledged that the attacking of the Petitioner's post arrest/pre-trial silence was inadmissible and unconstitutional (A.R. 1094-1097), yet immediately after the side bar had concluded and immediately after the prosecutor had disregarded the just-seconds-earlier ruling, the trial judge decided to allow in this clearly unconstitutional attacking of the Petitioner's pre-trial silence out of a desire to see the Petitioner unlawfully convicted of this crime. The trial judge's deliberate and willful flouting of the law and the rights of the Petitioner simply because of bias and his desire to see the Petitioner convicted amounts to judicial misconduct.

Fourth, during the cross-examination of the Petitioner, the trial court permitted the State to impeach the testimony of the Petitioner by allowing the prosecutor to present irrelevant, unduly prejudicial, highly inflammatory, and improper impeachment evidence in the form of a novel the Petitioner had authored some twelve or so years prior (A.R. 1077-1079)-*and* all without conducting the requisite balancing-of-interests test (A.R. 1085, *lines 13-22*). In arguing his position to allow in this improper impeachment evidence in the form of a work of fiction, the trial judge said to the Petitioner's attorneys, "*Well, I allowed you to get his statement in to 911, which is a perfect act of*

*fiction because it says Joseph Medina is going to kill a family tonight and nobody was killed that night"* (A.R. 1085 lines 3-7). The Petitioner contends that this absurd argument made by the trial judge clearly demonstrates his bias toward the Petitioner and his defense, and clearly shows that the trial judge was willing to do almost anything to undermine the Petitioner's efforts to successfully defend himself against these false charges against him. (In the trial judge's estimation, apparently all those schools and courthouses that evacuate their buildings and report to the authorities bomb threats made by individuals are engaging in fiction as well simply because the person who made the threat fails to immediately follow through with it. *Absurd!*) The Petitioner contends that the trial judge allowed in this otherwise inadmissible evidence simply to assist the prosecutor in misleading, confusing, and inflaming the passions and prejudices of the jury in an effort to secure an illicit and unsustainable conviction against the Petitioner in order for the prosecutor to have an opportunity to retry the Petitioner at a later date after having better understood and prepared for the Petitioner's very persuasive defense (*Refer to T.Tr. Vol. III, pg.20, lines 5-24; pg.21, lines 1-21; pg.22, lines 15-21; and pg.23, lines 1-15*). It is also clear from the colloquy during the side bar regarding this issue that the trial judge exercised bad-faith in making his ruling regarding the admissibility of this evidence (A.R. 1079, lines 21-24, 1080, lines 1-24, and 1081, lines 1-18); (A.R. 1081, lines 19-24, and 1082 lines 1-2, as compared with 1082, lines 20-22); and (A.R 1083, lines 5-14; and pg.22, lines 1-19. And as indicated by the judge's remarks in A.R. 1083 ,pg.21, lines 6-10, where the judge states: "*I mean, it just downright isn 't fair to let somebody (the Petitioner) have created a story here (at trial) and then have done the same thing (created a story by writing a book)-I don 't know, I've not read the book-but not let the State make inquiry into it (the book)*"; it is clear that the trial judge had already determined in his mind that the Petitioner's version of events was a concocted story, and *that* (the trial judge's prejudiced belief) is the *real reason* why the trial judge allowed in this otherwise inadmissible evidence, and not because he had some genuine misunderstanding of the law. (And it should also be noted that the trial judge's belief that the Petitioner's version of events was a concocted

story was not conceived *after* the Petitioner's evidence and testimony-which may have been understandable if that were the case-but was conceived by the trial judge well before trial (*Refer to T. Tr. Vol. III, pg.32, lines 22-24, and pg.33, lines 1-23*). The allowing in of this evidence, especially without first having conducted the required balancing-of-interests test, was willful and deliberate misconduct by the trial judge. (*Code of Judicial Conduct-Canons 2(A) and 3(B)(2) and (5) states in part that a judge shall be faithful to the law and maintain professional competence in it.*)

Fifth, during the Petitioner's testimony, the trial judge looked away from the Petitioner as he testified-yet had watched attentively as others testified-creating the visual perception that he chose not to look at the Petitioner as he testified to make clear to those watching that he neither liked nor believed the Petitioner. The only time the trial judge looked at the Petitioner throughout his testimony was to scowl at, interrupt, or chastise the Petitioner. This was misconduct.

Sixth, during the cross-examination of the Petitioner by the prosecutor for the State, the trial judge, for no reasonable provocation, and after the Petitioner had been very candid and forthcoming throughout the entirety of his testimony, interrupted the testimony of the Petitioner and essentially accused him of being evasive and "argumentative" in his answers to the prosecutor (A.R. 1174-1175; which, for all intents and purposes could've easily been perceived by the jury to mean being "deceptive" in his answers to the prosecutor. Which-considering the absolutely critical nature of the Petitioner's testimony, and how his testimony, and whether the jury believed his testimony or not, would directly determine the outcome of the trial-severely and unduly prejudiced him before the jury. During this relatively harsh scolding, especially considering that the Petitioner had done nothing improper by trying to thoroughly understand the prosecutor's question before committing to an answer, the trial judge was openly hostile to the Petitioner-his tone, expression, and body language clearly conveying to the jury that he neither liked nor believed the Petitioner. Furthermore, the trial judge altered and misquoted the Petitioner's previous testimony regarding this "fire on the

floor underneath you" question, and did so to the Petitioner's detriment, implying that the Petitioner's previous testimony was inconsistent with his current answer (*Refer to A.R. 1174, lines 3-6 as compared to A.R. 1169, lines 21-24 and A.R. 1170, lines 1-7*). The Petitioner contends that this outburst by the judge was done, again, because of the trial judge's bias toward the Petitioner, and to unduly prejudice him (the Petitioner) in the eyes of the jury in order to secure his unlawful conviction. The trial judge should express to the jury no opinion on the testimony, either directly or indirectly, explicitly or by innuendo. *State v. Hively*, 103 W. Va. 230, 150 S.E.2d 729 (W.Va. 1929) and the court should make no comments on the testimony in the presence of the jury at the expense of the accused. Syl. Pt. 2. *State v. Vineyard* 108 W. Va. 5, 150 S.E. 144 (1929); and a trial judge should not intimate any opinion on evidence bearing on any material issue or credibility of a witness. *State v. Ferrell*, 186 W.Va. 307, 412 S.E.2d 501 (W.Va. 1991); and in criminal cases, conduct of the trial judge which indicates his opinion on any material matter will result in a guilty verdict being set aside and a new trial awarded. *State v. McGee*, 160 W.Va. 1, 230 S.E.2d 832 (1976) and a trial judge should carefully avoid making remarks in the presence of the jury which would cause the jury to ascertain his opinion of the force and effect of any evidence offered in a case. Code of Judicial Conduct-Canons 2(A) and 3.

Seventh, throughout the pre-trial motions leading up to trial and into and through the trial itself, the trial court consistently attempted to guide and advise the prosecutor on how to conduct her prosecution of the case against the Petitioner. And considering that the judge is supposed to be neutral in a proceeding of this nature, the fact that he repeatedly attempted to advise and/or guide the prosecutor clearly shows his bias for the Petitioner and shows that the judge had already convicted the Petitioner in his mind long before any verdict had been handed down by a jury. (The many instances of the trial court's misbehavior regarding this issue makes it impractical for the Petitioner to list and interpret each and every instant of this specific misconduct, however, the Petitioner will

list just a few unambiguous examples. For example: A.R. 1286-1293 shows the trial court's attempts to guide and advise the prosecutor on how to attempt to combat at trial the Petitioner's *call-to-911* evidence, and at the same time he tries to dissuade the Petitioner's attorney from attempting to present this clearly exculpatory evidence at trial; (2) (A.R. 1080, *lines 2-5* shows the trial court's attempt to provide the prosecutor with a possible legitimate argument as to why this book evidence would be admissible; (3) (A.R. 1085, *lines 3-8* shows the trial court's attempt to provide the prosecutor with an argument to use to imply that the Petitioner's call to police was a work of fiction, which the prosecutor indeed tried to use later in her cross of the Petitioner. (*A.R. 1118, lines 18-24, and pg.57, lines 1-4*); and (4) A.R. 1095,*lines 7-13, and A.R. 1096, lines 2-6* shows the trial court's attempts to guide and advise the prosecutor on how to question the Petitioner regarding his pre-arrest silence.)

Accordingly, manifest injustice resulted from the trial judge's actions and remarks insofar as their effect, whether individually or collectively, deprived the Petitioner of his fundamental right to a fair trial and constituted plain and reversible error.

### **CONCLUSION AND RELIEF REQUESTED**

For the reasons set forth above, Petitioner respectfully requests that this Petition be granted; that the judgment of the Circuit Court of Berkeley County be reversed and that Petitioner be immediately released from incarceration and that the State be precluded from further trying him.

In further support of this request, Petitioner requests that the Court consider the following argument Petitioner Antonio Prophet drafted in support of his position:

In conclusion, as presented in the foregoing pages and as evidenced by the numerous and outrageous plain and reversible errors that took place in the trial against the Petitioner, it is clear that the State, with the approval and assistance of the trial court, knowingly, intentionally, deliberately,

and with premeditation violated the due process rights of the Petitioner, and deliberately and repeatedly attempted to mislead, confuse, and inflame the passions and prejudices of the jury throughout the entirety of the second half of the trial against the Petitioner, in a blatant effort to illicitly ensure a verdict of guilt against the Petitioner after he had put on a very persuasive and believable case-in-chief, and after concluding that his acquittal was imminent. This conclusion is supported by the fact that the prosecutor went out of her way to deliberately violate the Petitioner's Constitutional rights in several fundamental ways by: ( 1) introducing knowingly irrelevant and inadmissible evidence, (2) eliciting and utilizing perjured testimony, and (3) deliberately inundating the jury with outrageous remarks calculated specifically to mislead, confuse, and inflame the jury; and doing so only after the Petitioner had begun to present his case-in-chief-which included his very convincing evidence and testimony-and after the prosecutor had determined that this highly publicized trial would likely very well end in the Petitioner's acquittal. The Petitioner contends that the prosecutorial misconduct dramatically and transparently intensified after the Petitioner had begun his case-in-chief specifically because the prosecutor personally believed that the Petitioner had indeed raised a reasonable doubt of his guilt, and would therefore get an acquittal, and that the prosecutor had decided to do *anything* in her power to prevent this. And considering the overall atmosphere of the trial immediately after the Petitioner's direct testimony, which can't be made part of any record but was palpable to all present, it is clear the Petitioner, at the very least, had *likely* raised a reasonable doubt of his guilt in the minds of the jurors and would have likely been acquitted of this crime had they not been unlawfully inundated with inadmissible, improper, and unduly prejudicial evidence and remarks by the prosecutor. With the State's intentions clear, it is only fair, in the pursuit of justice, to reverse and/or set aside the conviction of the Petitioner and to dismiss with prejudice all charges levied against the Petitioner in regards to this crime. It is clear that if not for the prosecutor's and trial judge's willful and deliberate transgressions the Petitioner would no

doubt have been acquitted of these charges by a fair and impartial jury, as every single piece of competent evidence that was used against the Petitioner was thoroughly and believably explained and all adverse testimony, specifically that of Medina, was thoroughly and unwaveringly impeached . Additionally, the prosecutor herself conceded that the Petitioner had raised a reasonable doubt of his guilt by implying that the Petitioner's testimony and evidence was not only "plausible", but was in fact *believable*). And, in practical terms, it can hardly be disputed that if a jury actually "believes" the testimony of a Petitioner who denies his culpability in a crime, then an acquittal is virtually certain. And though the prosecutor can hardly be said to speak for the jury, the fact that the prosecutor-the one person in the courtroom who is admittedly and whole-heartedly against the Petitioner and whose job it is to convince impartial minds of his guilt-openly acknowledged the Petitioner's evidence and testimony as being *believable* lends weight to the reasonable if not foregone conclusion that a fair and impartial jury, with absolutely no stake in the outcome of the case and whose duty it is to view the Petitioner as innocent until proven guilty beyond all reasonable doubt, would definitely be in a more likely position to consider as "believable" the testimony and evidence of the Petitioner significantly more so than the prosecutor would, and would thus be in a duty-bound position to find him not guilty.

Therefore, there is not only a reasonable probability, which is the legal standard, but is a reasonable or definite likelihood, that if not for the many improprieties of the prosecutor and trial judge, that the outcome of the trial would have been favorable for the accused. Under these circumstances, the Petitioner contends that to force him to endure another highly publicized and stressful trial for such heinous charges, in which rational minds within the confines of the law could not possibly find guilt beyond a reasonable doubt, simply because the prosecutor and trial judge chose to flout the law, would be fundamentally unfair, a deprivation of due process, and would thoroughly offend the Double Jeopardy clause of the United States Constitution. Furthermore, a clear message must be sent to the State that in this great country of ours, which was founded on certain

ideals and principles of justice, that the prosecutor for the State cannot purposely and deliberately violate the Constitutional rights of a Petitioner, make innumerable outrageous and improper remarks, invent evidence and testimony, sanction and elicit perjury, and purposely mislead, confuse, and inflame the passions and prejudices of the jury, either with or without the approval and assistance of the trial court, simply to secure an immediate conviction-a conviction which can assuredly be expected to be overturned on appeal-against a Petitioner who had done a sufficient job of raising a reasonable doubt of his guilt, in a blatant attempt to circumvent justice and the law against Double Jeopardy, and simply to ensure that the State can try the Petitioner again at a later date after having better prepared itself for a second prosecution in the future. The prosecutor's contempt for the law and rules of evidence established by higher authorities is clear, which makes it abundantly clear that this Petitioner could not and would not possibly receive a fair retrial under these conditions and under the guidance and direction of this prosecutor or trial judge. Additionally, numerous witnesses, after having testified on behalf of the State, were then permitted to sit in the courtroom and observe the remainder of the proceedings against the Petitioner, including the testimony of other State witnesses and, more importantly, the entire case-in-chief of the Petitioner, which included the entirety of his absolutely critical testimony. And these are State witnesses who have a major stake in the outcome of this case, and who whole heartedly seem to believe, based on their testimony at trial and their statements made at the Petitioner's sentencing, that the Petitioner is indeed guilty of this crime, and who, if summoned to testify at a second trial in this matter could reasonably be expected to use their knowledge of the Petitioner's prior testimony to alter their testimony in order to try to ensure an unfavorable outcome for the Petitioner. And since the prosecutor has shown she has no qualms about sanctioning perjury and engaging in misconduct this would surely and unduly prejudice the Petitioner. And since the prosecutor and trial judge, collectively, were the sole and purposeful causes of the likely reversal of the first trial, which, again, was reasonably likely to have ended in the Petitioner's acquittal if not for the many willful and fundamental reversible errors that took place

after his direct testimony, it would be fundamentally unfair to force the Petitioner to bear the burden of another trial. Thus, further prosecution of these charges should forever be precluded by the State.



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Respectfully submitted,  
Antonio Prophet,

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**STATE OF WEST VIRGINIA**  
**Respondent,**

**Vs.**

**No. 12-1389**

**ANTONIO PROPHET,**  
**Petitioner**

**CERTIFICATE OF SERVICE**

I, Christopher J. Prezioso, counsel for the Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing Brief of Petitioner upon the following persons, by hand delivery, on this 19th day of November, 2012:

Cheryl K. Saville  
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