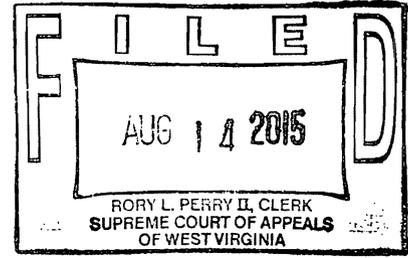


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0405



STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent*

vs.

OSCAR ROSS COMBS, SR.,

*Defendant Below, Petitioner*

---

BRIEF ON BEHALF OF THE RESPONDENT

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I.

STATEMENT OF THE CASE

The petitioner, his wife, and his son were jointly indicted for the felony offenses of murder in the first degree, first degree robbery and conspiracy. The victim was James Butler. (Appendix at 8-9.) Trial counsel filed a number of motions (suppression of statements, suppression of items derived from a search and others) including a motion for change of venue. The basis for such motion was a statement that the petitioner could not obtain a fair and impartial trial in Mercer County because of substantial prejudice. (*Id.* at 27.)

According to a poll performed for the defense, slightly more than half of those questioned had heard about the case. Less than a quarter of those who had heard about the case had an opinion about it; although those who had opinions leaned toward believing the defendants to be guilty, either “definitely or probably”. (*Id.* at 51, 56.) A survey was used; less than 75% of the surveys were completed, resulting in an error rate of nearly 6% in the survey results. (*Id.* at 52.)

“The majority of survey respondents familiar with the case indicated they had not formed an opinion or were not sure how they felt yet regarding the guilt of the defendants. . . .” (*Id.* at 59.)

At a pretrial motions hearing, (*Id.* at 132-288.) a ruling was deferred on the motion to change venue. During voir dire, apparently only one juror indicated that he had previously heard something about the case. (*Id.* at 318.) No prospective juror answered affirmatively to the questions about whether there was any reason he could not be impartial, and whether he felt prejudice for or against the petitioner. (*Id.* at 319.) No juror answered affirmatively to the question of whether he would not consider mercy. (*Id.* at 328.) When asked by the assistant prosecutor if anyone believed he could not be fair and impartial to both sides, no juror answered in the affirmative. (*Id.* at 331.)

Tommy Thomas was looking for scrap metal on April 22, 2011. (*Id.* at 468.) He found a body over the bank. He saw a pair of boots and a shirt, and called the Sheriff. (*Id.* at 470.) Trooper Wade was among the officers who responded to that call. (*Id.* at 475.) He saw the body. It was clothed in boots, jeans, and a shirt; remarkably the pockets of the jeans had been cut open. (*Id.* at 477.) The body was not readily identifiable because of decomposition. (*Id.* at 478.) No personal effects were found with the body. (*Id.* at 480.)

Dr. Nabila Haikel conducted the autopsy on James Butler. (*Id.* at 543.) Mr. Butler died as a result of a gunshot wound to the head. (*Id.*) The manner of death was homicide, or death at the hands of another. (*Id.*) The body was significantly deteriorated. (*Id.* at 544.) Mr. Butler had a gunshot wound entrance defect, and fragments of bullet were removed from his skull. The fragments were of a small caliber. (*Id.* at 545.) The entrance wound was on the left back part of the head, just below the skull. (*Id.* at 546.) The track was back to front, slightly upward, and left to right. (*Id.* at 547.) The person was shot from the back. (*Id.* at 548.) In spite of the decay, there

were still “persistent finger pads that were feasible to print and to compare with his James Butler’s fingerprints before death.” (*Id.* at 549.) The fingerprint comparison was done by law enforcement from prints taken and submitted by her office. (*Id.* at 550.) Dr. Haikal noted that a death investigation “. . . is a team effort. Everybody has their own different expertise and a portion of components of the death investigation. . . We just do our part and finally at end just put together all their results of various testing or examinations.” (*Id.* at 551.)

Death would have occurred rapidly after the gunshot, and there may not have been much bleeding. (*Id.* at 553.)

Oscar Combs, Jr., testified. In April, 2011, he was 18. (*Id.* at 578.) He learned of the victim’s existence when his father started working with him at Headwaters. (*Id.* at 579-580.) Junior was aware of a meeting that was to take place between the two of them (Junior and Senior, the petitioner) and the victim. (*Id.* at 580.) Early in the morning on the day Bo (victim’s nickname) died, Junior’s mother (and co-defendant) Linda Combs awoke him very early. (*Id.*)

When his mother came back into the living room where Junior had been sleeping, she was walking behind the petitioner with a shotgun and a .22 pistol. (*Id.* at 582.) Junior identified a .22 caliber pistol (already admitted into evidence) as one of the guns he saw that morning. (*Id.* at 583.) Senior picked up a shotgun and handed the pistol to Junior. (*Id.*) Junior wasn’t too concerned that his father had handed him a pistol to carry to the meeting with Bo Butler. (*Id.* at 583-584.)

Junior and Senior drove in a Ford Bronco to the bottom of Herndon Mountain. They pulled off the road, on the Mercer County side of the line. (*Id.* at 584.) While sitting there, the petitioner pulled a .32 out of his pocket and told his son he was going to shoot Mr. Butler. Junior first told him no. (*Id.* at 586.) The petitioner told his son he was going to shoot Mr. Butler “or

else” and poked him in the ribs with the gun. (*Id.* at 586-587.) Mr. Butler then pulled into the waiting spot, with his truck parked behind the petitioner’s vehicle. (*Id.* at 587.) Mr. Butler got out of his truck, got some clamps from the back of the Bronco, and started back to his truck. Junior felt a gun in his back when “he” (petitioner) came up behind him. Mr. Butler still had his back turned toward Junior; Junior closed his eyes and pulled the trigger. (*Id.* at 588.)

He shot Mr. Butler in the back of the head. Mr. Butler fell to the ground. The petitioner and Junior picked up the body and loaded it in the back of Butler’s truck. (*Id.* at 589.) The petitioner drove Mr. Butler’s truck; Junior followed in the Bronco. Using paint and rollers in the Bronco, the petitioner and Junior painted Mr. Butler’s truck from red to black. (*Id.* at 590.) Mr. Butler’s body was still lying in the bed of his truck. (*Id.* at 591.) After disposing of Mr. Butler’s body, the two of them returned to the Combs’ residence, where they started chopping up the truck. (*Id.* at 592.) The petitioner put Mr. Butler’s ID, checkbook, and personal stuff from the victim’s wallet into a coffee can. The petitioner put the items in the can, put the lid on it, and gave the can to his son to bury. (*Id.* at 593.) The petitioner overheard his father say to his mother “Bo wasn’t worth doing.” This was apparently in reference to robbing the victim in order to get money either owed to the petitioner, or to pay past due bills. (*Id.* at 594.) Junior and his mother threw pieces of the victim’s truck by dumping them at “the logging road.” (*Id.* at 596.) Junior testified pursuant to a plea agreement regarding his indictment for the murder, robbery and conspiracy charges regarding James Butler’s death. (*Id.* at 8-9.) Junior pled guilty to murder and robbery and received a sentence of life with mercy, plus twenty five years. (*Id.* at 601.)

Junior readily admitted having told the police that his father actually shot Mr. Butler. (*Id.* at 615.) He then stated that he told the police that he “shot Mr. Butler. And I told him point blank detail by detail exactly what happened.” (*Id.* at 616-617.) On redirect, when asked why he

shot Bo Butler in the back of the head, Junior replied because he believed his father would shoot him if he didn't shoot the victim. (*Id.* at 627.)

Anthony Reed worked for the state police and in April, 2011, received a phone call from the Butler family reporting that the victim had not shown up for work and no one had been able to contact him. (*Id.* at 635-636.) The victim did not appear for work on April 4, and that was very out of character for him. (*Id.* at 636.) Corporal Reed knew Mr. Butler and his family. When he received the call from the family, he took the initial information for a complaint about a missing person and made several attempts to contact the victim via cell phone. Corporal Reed followed the routes the victim would have taken from home to work, and stopped at various locations. The victim's house was searched and revealed nothing. (*Id.* at 638-639.) The victim stopped at the same convenience store every day on his way to work, but hadn't stopped there on April 4. That led to the conclusion that the victim hadn't made it that far. Corporal Reed kept checking his bank account which showed no activity. The last ping from the victim's cell phone was at 4:41 a.m. the day he went missing. The phone pinged in Mercer County. (*Id.* at 639-640.) Fire departments from Summers, Mercer, and Wyoming counties, as well as civilians and the Civil Air Patrol searched for Mr. Butler until his body was discovered on April 22, 2011. (*Id.* at 642.)

Corporal Reed stayed involved with the murder investigation. During the course of the investigation, from discovering the body to when "you got an actual break in the case" the police investigated ten or eleven people of interest who were all cleared. (*Id.* at 644.) Information led Corporal Reed to the Combs family. He first interviewed Linda Combs in October 2013. (*Id.* at 646.) Corporal Reed recovered what Junior identified as the murder weapon from the Colbert

family. (*Id.* at 648.) Corporal Reed arrested the petitioner at a convenience store, and Mirandized the petitioner. (*Id.* at 650.)

When informed he was under arrest for first degree murder, the petitioner asked “For who?” (*Id.* at 651.) The petitioner gave a statement which was recorded and transcribed. (*Id.*) The statement was played for the jury. The petitioner was interviewed about the murder of James Butler, nicknamed Bo. The petitioner knew Bo because they worked together. (*Id.* at 878.) The petitioner was aware that Bo didn’t make it to work on April 4, 2011. He had talked to Bo on the phone a day or two before that. (*Id.* at 879.) The victim called the petitioner because he needed cable clamps. (*Id.* at 881.) The petitioner agreed to meet Mr. Butler to give him the clamps in the morning, because the victim often worked late in the evening. (*Id.* at 882.)

The petitioner and his son met Mr. Butler at a pull off place near Herndon. (*Id.* at 883.) The petitioner acknowledged he had talked with his son about needing money for food and to pay the power bill. (*Id.* at 884-885.) The petitioner “figured” Bo would have money because it was close to payday. (*Id.* at 885.) The petitioner stated he got the clamps from his vehicle, walked back to Bo’s truck; put the clamps in the bed of the truck. The petitioner and Bo were looking at the clamps when Junior shot Bo. (*Id.* at 889.) The petitioner stated that his son shot Bo in the back of the head. (*Id.* at 891.) The only thing Junior said was that they needed to “load it up and get out of there.” When asked what was to be loaded, the petitioner answered “Him, Bo.” (*Id.* at 891.) The petitioner stated Bo hit the ground and wasn’t moving or saying anything. The petitioner and Junior “loaded him up”. (*Id.* at 892.) The victim was put in the back of his own truck, with the petitioner and Junior both picking him up. The petitioner picked up Bo’s feet. (*Id.* at 893.) The petitioner and Junior drove both vehicles away from the crime scene. (*Id.* at 894.) The petitioner was in the lead vehicle and pulled over at Jug Hollow. Junior also pulled

over. The petitioner helped drag “him” out of the truck and “laid” him over the edge of the bank. (*Id.* at 896-897.) The petitioner stated that his son cut the victim’s pockets open looking for money. (*Id.* at 897.) The petitioner acknowledged that his son stole pocket change and that “they” got the victim’s checkbook out of the vehicle. (*Id.* at 898.) The victim’s wallet was taken from his back pocket. (*Id.* at 899.)

The petitioner stated that they painted the victim’s vehicle. (*Id.* at 905.) They also cut the vehicle apart. (*Id.* at 906.) The petitioner stated that his wife knew that the son would kill the victim. The petitioner told his wife that his son shot someone in the head and killed him. The petitioner stated that the wife was planning on sharing the proceeds of the robbery. (*Id.* at 908-909.) The petitioner had blood on his clothing, and Ms. Combs washed their clothes. The petitioner reiterated that when there were talking about killing Bo, she knew that the son would do it. (*Id.* at 911.)

In regards to the victim’s truck, it was painted, the top cut off, the fenders taken off, and both doors removed. (*Id.* at 912, 913.) The petitioner stated that he later cut up the rest of the vehicle and took it to WV Recycling. (*Id.* at 914.) The petitioner stated he only got pocket change off Bo. He didn’t get any bills because he didn’t look in the wallet. (*Id.* at 915.) The petitioner was aware that the body had been found, but thought that others had been blamed for it. (*Id.* at 917.) The petitioner stated that he had given the gun used to murder Bo to the Colberts. (*Id.* at 923.) No one ever questioned the petitioner about Bo. (*Id.* at 924.) The petitioner never talked to Bo’s family, but his son told him that they were talking about Bo at the Athens Flea Market. The petitioner asked Junior what was being said, and he was told the sister was trying to get information. (*Id.* at 925.)

In summary, the petitioner admitted that they needed money to feed the family and pay bills, and that “you all was gonna rob Bo?” “Yes sir.” (*Id.* at 926.) The petitioner professed to believe that they were only going to rob, not kill Bo. (*Id.* at 927.) The petitioner went to the scene with the idea of robbing Bo, and knew his son had the gun. (*Id.* at 929.)

Corporal Reed testified on re-direct that the petitioner was the one who knew Bo, who’d worked with him, knew it was close to payday, and that Bo was known to carry cash. Junior would not have had that knowledge. They used Senior’s vehicle to go to the murder site. (*Id.* at 671.) The petitioner set up the meeting and owned the fatal weapon. (*Id.* at 672.) Following a jury view of the scene, the state rested. (*Id.* at 693.) The petitioner chose not to go forward with evidence. (*Id.* at 704.)

The petitioner was convicted of murder in the first degree, robbery in the first degree, and conspiracy. The jury did not recommend mercy. (*Id.* at 47-48.) At disposition, the petitioner expressed that he was sorry for what happened, that Bo called him for cable clamps, and that when the petitioner went there only to give him the clamps, “my son shot him.” (*Id.* at 865.) The petitioner was sentenced to life in prison, without the possibility of parole, for murder; eighty years on the robbery, to be served consecutively to the sentence for murder; and finally a consecutive sentence of one to five years for conspiracy. (*Id.* at 870.)

The petitioner’s brief does not cite any particular error in either the robbery or conspiracy conviction, although respondent acknowledges that the motion to change venue would have addressed all three charges. However, the robbery and conspiracy convictions are not attacked on other grounds.

## II.

### SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in failing to grant the Petitioner's motion for a change of venue. Although there certainly was publicity about the homicide, and the Combs' family involvement in the murder, the jury was not empaneled until months after the arrest. Additionally, although some jurors may have had some knowledge of the crime, there is no evidence of record that there was a pervasive, hostile sentiment against the Petitioner rendering selection of an impartial jury impossible. The standard for granting a change of venue is not whether or not prospective jurors have some knowledge, for example from media coverage, about the offense, but whether or not such a pervasive, hostile community sentiment exists rendering an impartial jury impossible. Such sentiment did not exist, and the change of venue motion was correctly refused.

As to the issue of whether or not the state presented sufficient evidence from which the jury could conclude that James Butler was the victim, such evidence was presented. Clearly the *corpus delicti* was sufficiently proven as there was indeed ample evidence to show that a human being died as a result of criminal behavior. The petitioner is challenging the sufficiency of the evidence introduced at trial to demonstrate that the human being who died as a result of the petitioner's (and his son's) actions was James Butler. The body was identified by the medical examiner via fingerprints, and by name by the petitioner's son who reported that his father's idea was for the son to shoot Butler. There was additional evidence introduced at trial from which the jury could reasonably infer that the victim was Butler.

As the petitioner did not demonstrate that he was entitled to a change of venue and as the victim was sufficiently identified at trial, the jury verdict should be affirmed.

### **III.**

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The respondent believes that the dispositive issues have been authoritatively decided and that the facts and legal arguments are adequately presented in the briefs and record on appeal. The decisional process would not be significantly aided by oral argument. However, if the matter is scheduled for argument, the respondent wishes to participate, and believes that any argument would be Rule 19 argument. Either a memorandum decision or full opinion would be appropriate in this matter.

#### IV.

#### ARGUMENT

##### **A. The court did not abuse its discretion in denying a change of venue.**

Bo Butler was killed on April 4, 2011, and his body found April 22, of that same year. Some two years later, the petitioner was indicted, with trial commencing January 6, 2015. A motion to change venue was made, and a public opinion survey commissioned. Counsel for the respondent could not actually find in the appendix an order definitively denying the motion for change of venue, rather the court deferred such ruling. Rather, a questionnaire regarding pre-trial publicity was given to the prospective jurors.

The results of the aforementioned survey were as follows. Only about half of those polled had even heard of the case. Of that half of those responding, less than one-fourth had any opinion about the case whatsoever. (*Id.* 51, 56.) The error rate was nearly 6% meaning that perhaps fewer than 10% of the prospective venire had any knowledge of or opinion about Oscar Combs, Jr.

Apparently all available jurors were called in so that there was an ample pool. During voir dire only one juror indicated he had heard something about the case. No juror indicated that he had prejudged the case or was not impartial, and no juror expressed any prejudice against the

petitioner. No juror expressed that he would not consider mercy, if appropriate. (*Id.* at 318, 319, 328, 331.)

Although the appendix does contain several news clippings, none of those appear to be unduly inflammatory. They seem to be factual in nature, and simply comment that arrests had been made in 2013 about a murder that occurred in 2011. The public opinion survey commissioned by petitioner's trial counsel, and the actual voir dire from trial make it abundantly clear that although there had been news coverage of the murder and arrests, the knowledge about the case from the news was not particularly widespread—again only about half those polled in the survey had heard about the case and fewer than one-fourth of that half had an opinion. No prospective juror actually questioned for service on the jury expressed any opinion about the petitioner's guilt, and most had only vague recollections, if that, of ever seeing or hearing news coverage of the crime.

The standard for granting a change in venue in West Virginia is not whether there has been widespread news coverage about a particular event. Syl. Pt. 1 of *State v. Gangwer*, 169 W. Va. 177, 286 S.E.2d 389, (1982) states that “[w]idespread publicity, of itself, does not require change of venue, and neither does proof that prejudice exists against an accused, unless it appears that the prejudice against him is so great that he cannot get a fair trial.” Further, the trial court's ruling on a motion for change of venue rests in its discretion, and will not be disturbed unless such discretion has been abused. (*Id.* at Syl. Pt. 2.)

The burden rests upon the defendant to show good cause for a change of venue. As stated in Syl. Pt. 3 of *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731, (1994), the inquiry is not whether the community had heard about the case, but whether the jurors had such fixed opinions they could not judge impartially the guilt or innocence of the defendant. Ordinarily, a change of

venue should be granted only when it is shown that there is a present hostile sentiment against the accused, extending throughout the entire county. Syl. Pt. 1, *State v. Goodmon*, 170 W. Va. 123, 290 S.E.2d 260 (1981).

The petitioner has failed to provide any evidence that there was a pervasive, hostile sentiment against him so that it was impossible, or even difficult, to empanel an impartial jury. The public opinion survey did demonstrate that those who had heard about the case believed the petitioner to be definitely or probably guilty. However, it must be stressed—again—that it was quite a small number of those responding in the poll who had an opinion about the case.

As noted, at the pre-trial motions hearing in September, 2014, the court deferred ruling on the motion to change venue. Obviously, the motion was not granted because the trial was held in Mercer County. However, a reading of the voir dire indicates that the court was very liberal in excusing individuals. In fact, it does not appear as if the defense made any motions whatsoever to strike any juror for any cause. In questioning the panel as a whole, and with those jurors who were questioned in chambers, the responses do not indicate anything other than this jury panel was fair and impartial and did not harbor any pervasive, hostile sentiment against the petitioner. There is no proof of such substantial prejudice against the petitioner that he could not have received and did not receive a fair trial. There is not a scintilla of evidence in the appendix that a pervasive, hostile sentiment against the petitioner existed against him, county-wide. No prospective juror, during voir dire, expressed a fixed opinion about the petitioner's guilt. Indeed, the panel's responses to the questions posed by the judge, prosecutor and trial counsel all indicated that these prospective jurors, and those who actually served, were fair and impartial.

The petitioner has failed to demonstrate that there was such sentiment existing in Mercer County that the Petitioner could not receive a fair trial; the judge did not abuse his discretion in

denying the motion for change of venue. The panel did not have fixed opinions about the petitioner's guilt and a change of venue was not warranted.

**B. The state had sufficient evidence to prove that James Butler was the victim of the homicide.**

The petitioner asserts that the state did not produce sufficient evidence from which the jury concluded that the dead body found in Mercer County on April 22, 2011, and whose murder was the subject of the criminal trial was, in fact, James Butler.

The principles regarding the sufficiency of the evidence as to the guilt petitioner overall, or as to the proof of any of the elements of an offense are well settled in West Virginia law.

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 defendant'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).

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilty so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

Syl. Pt. 3, *Guthrie*. Further, the *Guthrie* court states on page 668 of its opinion, that a jury verdict will not be overturned lightly. The Court notes on that same page that "It is possible that we, as an appellate court, may have reached a different result if we had sat as jurors. However, . . . it does not matter how we might have interpreted or weighed the evidence." *Id.* 194 W. Va. at

668, 461 S.E.2d at 668. The *Guthrie* Court adds that “appellate review is not a device for this Court to replace a jury’s finding with our own conclusion. On review, we will not weigh evidence or determine credibility. Credibility determinations are for a jury and not an appellate court.” *Id.* at 669, 461 S.E.2d. at 669. The Court in *State v. Sharp*, 226 W. Va. 271, 275, 700 S.E.2d 331, 335 (2010), repeated that a reviewing court should not reverse a case on the facts as found by the jury, unless there is reasonable doubt of guilt.

When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor’s coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution’s favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecutions’ theory of guilt.

Syl. Pt 2, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

Further, the Court notes that the reviewing court “must scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict’s favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt.” *Id.* 196 W.Va. at 304, 470 S.E.2d at 623.

The facts produced to this jury, that is the evidence, both direct and circumstantial, as well as the reasonable inferences deduced therefrom sufficiently proved that the decomposed body found in a remote area of West Virginia was in fact James Butler. James Butler did not report for work on April 4, 2011, and his family immediately reported him missing. The state police attempted to locate Mr. Butler and were unsuccessful. The last ping from Mr. Butler’s cell phone came in at about 4:41 a. m. on April 4. The location was Mercer County. (App. at 637, 640.)

Although the petitioner blamed his son for shooting James Butler claiming he (petitioner) was surprised), the description that Junior gave and the petitioner gave regarding Mr. Butler's murder was remarkably consistent. Junior stated that he knew that his father and the victim worked together. In April, 2011, Junior was aware that his father was going to meet Mr. Butler. On the day of that meeting, he was awakened very early by his mother. The petitioner was armed with a shotgun, and gave Junior a .22 pistol. (*Id.* at 579, 580, 583.)

On that morning in April, 2011, Junior and the petitioner drove to Herndon Mountain. The petitioner told his son that he (Junior) was going to shoot Mr. Butler "or else." (*Id.* at 586-587.) Mr. Butler pulled into the waiting spot. Junior closed his eyes and pulled the trigger, shooting Mr. Butler in the back of the head. The two disposed of the body. According to Junior, the petitioner disposed of Mr. Butler's personal effects. Junior heard the petitioner tell Ms. Combs that "Bo wasn't worth doing." (*Id.* at 588, 589, 593, 594.) Junior pled guilty to the first degree murder of James Butler. (*Id.* 8-9, 601.)

A weapon identified by Junior as the murder weapon was recovered from the Colbert family. (*Id.* at 648.)

The petitioner gave a statement. The petitioner knew Bo Butler because they worked together. A day or two before Bo did not report for work (April 4, 2011, the day petitioner murdered Bo), the petitioner talked to him on the phone. The petitioner and Bo agreed to meet in the morning so that the petitioner could loan some cable clamps to the victim. (*Id.* at 878, 879, 881.)

The petitioner (with Junior) met James Butler at a pull off place near Herndon. Before going to the meeting, the petitioner had discussed with his son the necessity of getting money for food and the power bill. The petitioner figured Bo would have money because it was close to

payday. The petitioner stated that he got the clamps from his vehicle, and Junior shot Bo in the back of the head. Bo hit the ground and wasn't moving or saying anything. (*Id.* at 883, 884-885, 891, 892.)

The petitioner and Junior "loaded him up", that is put Bo Butler in his truck to dispose of his body. (*Id.* at 892.) The petitioner stated that Junior cut open Bo's pockets looking for money. The two disposed of the body by putting it over the bank. "They" took pocket change, the victim's checkbook and his wallet. (*Id.* at 897, 898, 899.)

The petitioner and his wife talked about the death of Bo, with the petitioner telling his wife his son had shot someone. The petitioner told the police that he gave the gun his son used to murder Bo to the Colberts. (*Id.* at 908-909, 911, 923.) The petitioner acknowledged that he needed money and that "you all was going to rob Bo?" "Yes, sir." (*Id.* at 926.)

Tommy Thomas found a body over a bank on April 22, 2011. The pockets of the jeans the decomposed body wore were cut open. (*Id.* 478.) The medical examiner testified that, despite the decomposition, there were finger pads that were printed and useful for comparison purposes. She further testified that a death investigation was a team effort, with different individuals and departments having different areas of expertise, and that ". . . We just do our part and finally at end just put together all their results of various testing or examinations." The fingerprint comparison was done by law enforcement from prints taken and submitted by the medical examiner's office. (*Id.* at 549, 551, 550.) Mr. Butler died as a result of a gunshot wound to his head, with the entrance being the back of the head. (*Id.* at 543.)

In sum, the petitioner knew Mr. Butler, and called him to set up a meeting in the early morning hours in a remote location. The petitioner testified that Butler showed up for the meeting and his son shot him in the back of the head. Mr. Butler's pockets were cut open. The

son testified about meeting an individual known to his father as Bo Butler, and admitted shooting him in the back of the head. Both the petitioner and his son admitted dumping the body over a bank. Mr. Butler disappeared on April 4, 2011, and was never seen alive again. The petitioner talked to Butler a day or two before April 4 to arrange the fatal meeting. The petitioner, his son, and apparently Ms. Combs discussed robbing Butler. The petitioner described watching his son shoot Bo, who hit the ground and didn't move. The petitioner described watching his son cut the pockets of the jeans open. The petitioner told his wife that "Bo wasn't worth doing" after the robbery and murder. When a decomposed body was found, it was over the bank, and the jeans pockets were cut open. Finally, the body was conclusively identified by fingerprints.

This evidence, that is the fingerprints, the petitioner's statement, Junior's testimony, the disappearance of James Butler, the discovery of a body with a gunshot wound to the head and the pockets cut open, all lead, directly, circumstantially, inferentially, and inevitably to the conclusion that the state proved the identity of the victim.

## V.

### CONCLUSION

Based upon the foregoing statement of facts and legal arguments, the respondent respectfully requests that this Honorable Court affirm the jury verdict finding the Petitioner guilty of murder in the first degree, robbery and conspiracy, all felonies; and further affirm the judgment of the Circuit Court of Mercer County sentencing the Petitioner to incarceration for the rest of his natural life without the possibility of parole, and imposing consecutive sentences for the robbery and conspiracy convictions.

Respectfully submitted,

STATE OF WEST VIRGINIA

*Plaintiff Below, Respondent*

By counsel

PATRICK MORRISEY  
ATTORNEY GENERAL



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*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, LAURA YOUNG, Deputy Attorney General and counsel for the Respondent, hereby verify that I have served a true copy of "BRIEF ON BEHALF OF THE RESPONDENT" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 14th day of August, 2015, addressed as follows:

Colin Cline, Esquire  
P.O. Box 1870  
Princeton, WV 24740

and

Ward Morgan, Esquire  
3217 E. Cumberland Road  
Bluefield, WV 24701



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LAURA YOUNG