
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0641

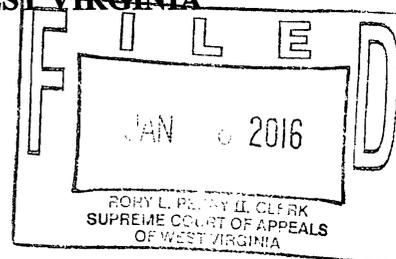
STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

SUMMER MCDANIEL,

Defendant Below, Petitioner.



RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

Petitioner claims the following eleven (11) assignments of error, which the State specifically and generally denies:

- A. The Trial Court erred by admitting into evidence 404(b) evidence of Petitioner's prior bad acts that occurred in the State of Colorado regarding Petitioner's failure to obtain prenatal care, hospital records, and toxicology report, without conducting a balancing test and without making any findings on the record, and for admitting the evidence for an improper purpose to show that the child was neglected from birth [until] death.
- B. The Trial Court erred by admitting into evidence 404(b) evidence of Petitioner's prior bad acts that occurred in the State of Colorado regarding the mother and infant testing positive for methamphetamines at birth, when the infant did not experience any withdraws within the first four days of birth, was released into Petitioner's care, and the infant passed away [at the age of] twenty-six days without any controlled substance in its system, and the cause of death was unknown.
- C. Petitioner was convicted of one count of "child neglect resulting in death" and one count of "child neglect creating substantial risk of death." Because the infant child passed away and the legislature intended the two charges to be a lesser and higher included offense, Petitioner asserts that these two charges should have been merged together or the failure of the merger resulted in double jeopardy.
- D. Because the Prosecuting Attorney repeatedly told the jury that the co-defendant plead guilty to four of the charges in the indictment early that day and commented about community standards during closing argument, the Prosecuting Attorney abandoned his quasi-judicial role and became a partisan eager to convict.
- E. The Trial Court erred by admitting into evidence five enlarged colored photographs of the infant's corpse, when the photos held no evidentiary value, the defense stipulated to the infant's death, and the photographs were gruesome in nature in that the photographs showed the infant's distorted face from being buried.
- F. The Trial Court erred by permitting the State Trooper to offer opinion testimony regarding the identity of a substance that was in the back of the vehicle that was untested and otherwise unknown, when the State Trooper was not qualified to identify the substance.
- G. The Trial Court erred by not dismissing the charge of "Concealment of a Deceased Human Body" because the death and location of the deceased infant was disclosed within forty-eight hours of the infant's death.

- H. The Trial Court erred in denying Petitioner's objection to the improper impeachment of a witness when the Prosecuting Attorney stated on the record that the witness [was] being called for the sole purpose of being impeached, the Prosecuting Attorney did not follow procedure when attempting to impeach the witness, and the Trial Court erred by showing and admitting into evidence the entire fifty-five minute child advocacy center video.
- I. The Trial Court erred by failing to give a timely limiting instruction under 404(b), when Petitioner requested that the instruction be given and by informing the jury of the possible sentence for concealment of a deceased human body.
- J. Trial Counsel provided ineffective assistance of counsel by crying during the trial of the matter, and by making false promises to the jury by asserting that Petitioner, Summer McDaniel, would testify in the matter, when Petitioner, Summer McDaniel, did not testify.
- K. Petitioner asserts that the evidence at trial was insufficient for the jury to convict the Petitioner of all of the charges stated in the indictment, with emphasis on the lack of jurisdiction with regard as to where and when the alleged acts occurred.

STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Revised Rules of Appellate Procedure, the State of West Virginia (hereinafter, the “State”,) accepts the procedural posture as stated by Summer McDaniel (hereinafter, “Petitioner”), with the following additions, regarding the evidence and arguments of the State, in contrast with the facts as supplied by Petitioner:

A. Statement of Facts

On July 5, 2014, following a report of a suspicious vehicle located outside of a Sheetz gas station located on Earl Core Road, Morgantown, West Virginia, officers of the Morgantown Police Department attempted to perform a stop of said vehicle as it was heading onto Interstate 68 West. (Appendix Volume (hereinafter, “App. Vol.”,) I at 117.) The vehicle, now identified by police as stolen, continued onto Interstate 68 West, and subsequently Interstate 79 South. (*Id.*) The vehicle was eventually stopped by the Sheriff’s Department, the West Virginia State Police, and the Morgantown Police Department at approximately mile-marker 143 ½. (*Id.*)

Inside the vehicle, the officers identified two adults and four children: Joseph Christy, who initially gave the false name of Joseph McDaniel; Summer McDaniel, Petitioner in this matter; and four minor children, T.R.S., N.R.C., D.F.M., and J.L.M., whose names have been redacted due to the children’s minor status. (*Id.*) The officers identified the vehicle as a Jeep stolen from Iowa, and identified Mr. Christy as a fugitive from justice in Colorado. (*Id.*) As a result, the Jeep was impounded, Mr. Christy was taken into custody, and Petitioner, with her minor children, was transported to the Morgantown Police Department for further investigation. (*Id.*)

While being transported to the police station, Mr. Christy admitted to police that he had lost and buried his infant son the previous day. (*Id.*) After processing, Mr. Christy was advised

of his Miranda Rights and subsequently asked for more information regarding the infant child. (*Id.*) Mr. Christy stated that he would not talk to police until he had an opportunity to speak with Petitioner. (*Id.*)

Meanwhile, police contacted Child Protective Services and requested that they respond to the police station to speak with Petitioner. (*Id.*) Petitioner, however, refused to cooperate with the representatives of Child Protective Services. (*Id.*) Upon speaking with the minor children, the Child Protective Services representatives were informed that Mr. Christy was in some way responsible for the infant child's death. (*Id.* at 119.) The minor children were then placed in the custody of Child Protective Services. (*Id.*) Petitioner was shortly thereafter placed under arrest for child neglect. (*Id.* at 118.) Petitioner was then advised of her Miranda Rights. (*Id.*) While Petitioner consented to speaking with a detective, she stated that she would rather just go to jail. (*Id.*)

Later that day, Petitioner and Mr. Christy consented to show police where the infant was buried. (App. Vol. V at 20.) Thereafter, the pair led police to a campsite in the George Washington National Park in Hardy County, West Virginia. (App. Vol. I at 119.) Petitioner and Mr. Christy then led police to an overgrown campsite and further into the woods before halting several feet from a rotting pine tree. (App. Vol. V at 21.) The infant child's body was thereafter found in a shallow grave, underneath a "basketball-sized rock." (*Id.*) Police noted that the burial site was located in an area where it could not be observed from the road. (*Id.* at 23.) Petitioner and Mr. Christy were then transported to the Monongalia County Holding Facility to await transportation to the North Central Regional Jail. (App. Vol. I at 119.)

B. Underlying Criminal Proceedings

On October 6, 2014, a grand jury sitting in the Circuit Court of Hardy County, West Virginia (hereinafter, “circuit court”), indicted Petitioner and Mr. Christy for one count of “Involuntary Manslaughter” in violation of W. Va. Code § 61-2-5 (hereinafter, “Count I”), one count of “Child Neglect Resulting in Death” in violation of W. Va. Code § 61-8D-4a(a) (hereinafter, “Count II”), one count of “Conspiracy to Commit an Offense Against the State of West Virginia” in violation of W. Va. Code § 61-10-31, for conspiring to commit “Child Neglect Resulting in Death” (hereinafter, “Count III”), one count of “Concealment of a Deceased Human Body” in violation of W. Va. Code § 61-2-5a(a) (hereinafter, “Count IV”), one count of “Conspiracy to Commit an Offense Against the State of West Virginia” in violation of W. Va. Code § 61-10-31, for conspiring to commit “Concealment of a Deceased Human Body” (hereinafter, “Count V”), and one count of “Child Neglect Creating a Substantial Risk of Death” in violation of W. Va. Code § 61-8D-4(c) (hereinafter, “Count VI”). (App. Vol. I at 110-13.)

1. The December 15, 2014, Rule 404(b) Hearing

On December 15, 2014, the circuit court held a Rule 404(b) hearing pursuant to Rule 404(b) of the West Virginia Rules of Evidence and *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). Therein, the State identified that it planned to use hospital records to show that both Petitioner and the deceased infant tested positive for amphetamines following the infant’s birth in Colorado, June 2014. (App. Vol. II at 4.) The State also identified that Petitioner tested positive for methamphetamine, as did the infant, following a test performed on the umbilical cord at birth. (*Id.* at 6.) The State further identified that it would have a toxicologist testify about the hospital records. (*Id.* at 4, 6.) The State identified that it planned to

call Dr. Stephanie Waltz, who would introduce the hospital records and toxicology report showing the positive test. (*Id.* at 6-7.)

The State next indicated that it planned to call Jason Shea, a caseworker with the Child Department of Human Services in El Paso County, Colorado, who would testify that “he gave [Petitioner] notice of [a] preliminary protective proceeding and [Petitioner] agreed to comply with family drug treatment services . . . [and further] comply with all recommendations by the Department of Human Services. . . .” (*Id.* at 7.) The State argued that the evidence was interrelated, due to the medical attention needed by the child as a result of the transferred drug addiction. (*Id.*) The State further identified that Petitioner never attended the required doctor’s appointment. (*Id.*)

In response, counsel for Petitioner argued that, even though the infant child died twenty-six (26) days after birth, there was no information in the toxicology reports regarding the infant’s cause of death. (*Id.* at 9.) As such, trial counsel continued, the State’s evidence was outweighed by the danger of unfair prejudice. (*Id.*) The State responded that the evidence showed that the infant was born with an addiction to methamphetamines, that Petitioner and Mr. Christy failed to seek any treatment, and that the neglect likely caused the death of the child. (*Id.* at 11.) The circuit court performed the full, four-part analysis provided under *McGinnis* and found that the State’s 404(b) evidence was necessary to “tell the story” of the infant’s death, that the evidence was “inextricably intertwined” with the crimes charged, that the evidence occurred close in time to the infant’s death, and that the probative value of the evidence outweighed the danger of unfair prejudice. (*Id.* at 15.) The circuit court further found the hospital records and toxicology reports to be credible evidence, and it ultimately ruled that such evidence would be admissible at trial. (*Id.* at 16-17.)

2. The January 13, 2015, Rule 404(b) Hearing

On January 13, 2015, the circuit court held another pretrial hearing regarding the State's 404(b) witnesses. Therein, the State informed the circuit court that, due to problems encountered while trying to subpoena medical witnesses through the State of Colorado, it was seeking a continuance in the matter. (App. Vol. III at 3-4.) Petitioner and Mr. Christy thereafter objected based upon speedy trial concerns. (*Id.* at 5-6.) The circuit court denied the motion for continuance. (*Id.* at 8.)

The State then moved the circuit court to allow evidence that Petitioner did not seek any prenatal care for the deceased infant. (*Id.*) The circuit court allowed such evidence based upon the same analysis performed during the December 15, 2014, 404(b) hearing. (*Id.* at 9-10.) Next, upon agreement by the State, the circuit court granted Petitioner's motion to dismiss Count III of the indictment. (*Id.* at 10.)

Finally, the circuit court considered Petitioner's motion to dismiss Count IV and Count V of the indictment, which dealt with concealment of the infant's body and conspiracy to do the same. (*Id.*) Trial counsel argued that Mr. Christy affirmatively informed police of the deceased infant within the forty-eight (48) hour window of the criminal statute, thereby avoiding conviction under the statute by virtue of an affirmative defense. (*Id.* at 11.) The circuit court, however, found that Petitioner and Mr. Christy had not informed police of the deceased infant until after fleeing police and being stopped on Interstate 79. (*Id.* at 13.) As such, the circuit court found that Petitioner and Mr. Christy were not afforded the protections granted by the statute. (*Id.*)

Finally, trial counsel for Mr. Christy raised an oral motion regarding Count VI of the indictment, arguing that Count VI was merely a lesser included charge of Count I, as both counts

related to the abuse of the deceased infant. (*Id.* at 14-15.) In response, the State identified that Count I required gross neglect, while Count VI required merely neglect, resulting in two different standards of proof at trial before the jury. (*Id.* at 15.) The circuit court denied the motion, but identified that it may reconsider the issue at trial. (*Id.*)

3. Trial Day One, January 27, 2015

The State was able to subpoena witnesses from Colorado, and Petitioner's trial commenced on January 27, 2015. Prior to the start of the trial, Mr. Christy pled guilty to four counts of the indictment. (App. Vol. IV at 17.) During opening statements, the prosecutor informed the jury that such had been the case. (*Id.*) During Petitioner's opening statement, trial counsel made numerous indications that Petitioner herself would testify to circumstances surrounding the deceased infant's birth and death. (*Id.* at 24-30.) Trial counsel stated as much to indicate that the facts would show Petitioner used methamphetamine once, when she was in labor with the deceased infant and could not get ahold of anyone to take her to the hospital. (*Id.* at 27.) Further, trial counsel indicated that Petitioner traveled to West Virginia only at the strong suggestion of her abusive husband. (*Id.* at 29-30.)

Following opening statements, the State first called Jeanne Moore, a medical social worker at Penrose-St. Francis Hospital in Colorado Springs, Colorado. (*Id.* at 31-32.) Ms. Moore indicated that she assessed the deceased infant at birth and decided to involve the Department of Human Services after concluding that the child was at risk. (*Id.* at 32.) Ms. Moore based her assessment off of a positive urine screen which showed both Petitioner and the deceased infant to be positive for amphetamines, which later showed results for both amphetamines and methamphetamines. (*Id.* at 33.) The State then published the drug screen report on the deceased infant to the jury. (*Id.*)

In the report, the deceased infant, at birth, showed positive for amphetamines and methamphetamines in both a urinalysis and umbilical cord examination. (*Id.* at 34.) Following authentication of the report, the State moved the report into evidence with no objection from Petitioner. (*Id.* at 35.)

Ms. Moore continued by noting that the 280 nanograms of methamphetamine found in the infant at birth was an extraordinarily high rate, being “56 times the cutoff limit.” (*Id.* at 36.) Moreover, Ms. Moore identified that Petitioner received no prenatal care, as “her plan was to deliver the baby at home.” (*Id.*) Ms. Moore stated that Petitioner asked her sister, who had taken a midwife class online, to help deliver the baby. (*Id.* at 37.)

Ms. Moore stated that Petitioner was not cooperative with her during her investigation. (*Id.*) Further, she challenged Petitioner’s plan to have a home birth, identifying that Petitioner’s prior births were by Caesarean section, “which [meant] that she had a very high likelihood of needing a Caesarean section again.” (*Id.*) The State then asked the circuit court to take judicial notice of methamphetamine as a Schedule II controlled substance with a high potential for abuse and dependency, to which Petitioner did not object. (*Id.* at 38.)

Upon cross-examination, trial counsel attempted to elicit testimony that the umbilical cord test would result in a high positive based upon the immediacy of use. (*Id.* at 39.) Ms. Moore, however, indicated that the umbilical cord test was “more of a backwards test” as compared to the urinalysis, meaning that the umbilical cord test showed that “the use was long-term.” (*Id.*)

The State then called Dr. Tracy Cerniglia, a pediatrician in Colorado Springs, Colorado. (*Id.* at 41.) Dr. Cerniglia first addressed the toxicology report on the deceased infant, agreeing with the prior assessment of Ms. Moore. (*Id.* at 42-43.) Dr. Cerniglia then identified that, while

she discharged Petitioner and the baby home, Petitioner was to report to the Department of Health Services for a medical evaluation the following week and cardiology at two (2) months of age. (*Id.* at 43.) Dr. Cerniglia then spoke of the discharge paper given to Petitioner at the hospital, which required “the baby [to] be seen anywhere from one day to three days after discharge.” Petitioner was also to notify the hospital if any kind of health problems became present, such as a fever, change in color, change in temperature, feeding problems, or if the baby vomited more than twice in a six-hour period. (*Id.* at 44.) Dr. Cerniglia also noted the importance of prenatal and post-natal care, especially for underweight babies who have been exposed to drug use. (*Id.* at 45.)

Dr. Cerniglia identified that babies born with exposure to methamphetamines would experience irritability, problems in temperament, problems with eating, sweating, and weight loss, as methamphetamine is a stimulant. (*Id.* at 46.) Dr. Cerniglia also warned of the danger of co-sleeping with an infant child due to the risk of suffocation. (*Id.* at 47.)

Finally, Dr. Cerniglia commented on the weight loss at the time of the deceased infant’s death. (*Id.* at 48.) Again identifying that the infant weighed six pounds, fifteen ounces (6 lbs. 15 oz.) at birth, yet only six pounds (6 lbs.) at death, Dr. Cerniglia noted that the infant had experience weight loss of 13.5 % of the child’s bodyweight at death, which again occurred twenty-six (26) days later. (*Id.* at 48.) Dr. Cerniglia opined that a healthy child would begin gaining weight within that time-frame, and opined that the deceased infant should have weighed approximately eight pounds (8 lbs.). (*Id.*) Dr. Cerniglia opined that the estimated 25 % difference between what the child actually weighed at death and what the child should have weighed could be the result of multiple causes, including malnutrition, starvation, dehydration, exposure to the elements, infection, and other causes. (*Id.*)

Most importantly, however, Dr. Cerniglia identified that all of the aforementioned causes could have been abated by proper medical care or treatment. (*Id.* at 49.) Upon cross-examination, Dr. Cerniglia admitted that she had no contact with Petitioner until four (4) days after the birth, meaning that she could not comment on any prenatal issues. (*Id.* at 50.) Trial counsel also identified that Petitioner broke no laws through her alleged plan to have a natural childbirth at home, nor her decision to forego post-natal treatment. (*Id.* at 52.) Finally, Dr. Cerniglia identified that the infant had no methamphetamine in his system at the time of discharge. (*Id.* at 53-54.) Further, Dr. Cerniglia identified that the infant child “was doing great.” (*Id.* at 54.) When asked about Sudden Infant Death Syndrome (“SIDS”), Dr. Cerniglia identified that, while uncommon, the syndrome still exists. (*Id.* at 56-57.) If parents observe necessary safety protocols, however, the risk factors greatly decrease. (*Id.* at 57-58.)

Next, the State called Jason Shea, an intake caseworker for the Department of Human Services in El Paso County, Colorado. (*Id.* at 61.) Mr. Shea identified that he had been assigned to investigate Petitioner with regards to her positive test for amphetamine. (*Id.* at 61-62.) Mr. Shea identified that he asked Petitioner about her methamphetamine use, and that Petitioner contended that she had only used the drug once, about a year prior to the birth. (*Id.* at 62.)

Mr. Shea identified that, through drug court procedure in Colorado, he was able to get Petitioner into a drug court program administered through a company called Savio. (*Id.* at 63.) Mr. Shea further noted that he informed Petitioner of this and preliminary protective proceedings while she was still at the hospital, on June 13, 2014. (*Id.*) Petitioner was therefore allowed to maintain physical and legal custody of the newborn baby, but was obligated to appear on June 17, 2014, for further proceedings involving the drug court. (*Id.* at 64.) As an additional requirement, Petitioner was to notify Savio should there be any change in her address or

telephone number. (*Id.* at 65.) The document informing Petitioner of the aforementioned obligations clearly showed Petitioner's signature at the bottom, and was published to the jury. (*Id.*)

Thereafter, trial counsel requested a sidebar. Trial counsel argued that, given the 404(b) nature of the evidence admitted up to that point in the trial, the circuit court should have given a limiting instruction following every admission of State evidence. (*Id.* at 66.) The State agreed, asking the circuit court to give such an admonishment following Mr. Shea's testimony, and acknowledging that the admonishment existed for every witness who had testified up to that point. (*Id.*)

The State then continued the direct examination of Mr. Shea, who identified that Petitioner was informed that the State of Colorado could potentially take legal and physical custody of her minor children should she willingly refused to comply. (*Id.* at 67.) Regardless, Mr. Shea informed the jury that abuse and neglect proceedings were eventually filed against Petitioner based upon the positive test for Petitioner and the appearance of neglect of her minor children. (*Id.* at 69.) The preliminary protective proceeding thereafter commenced as planned on June 17, 2014. (*Id.*) At the hearing, Petitioner admitted to breast-feeding the infant child despite not yet passing a clean urinalysis. (*Id.* at 70.) At a later appointment, Petitioner admitted to using methamphetamine, but contended that she had stopped five months prior after realizing she was pregnant. (*Id.* at 71.)

Regardless, Mr. Shea identified that the Department of Human Services left Petitioner with physical custody due to her financial dependency on local family, opining that she would not have the means to flee the jurisdiction. (*Id.* at 72.) Sadly, a Savio worker showed up at the

hotel where Petitioner was currently living on or about June 24, 2014, only to find that Petitioner and her children were gone. (*Id.* at 73.)

During cross-examination, Mr. Shea admitted that during his visit, nothing seemed to indicate that the minor children, including the infant, had been neglected. (*Id.* at 75-76.) Mr. Shea, however, stated that in a later Savio report, concerns were listed regarding the condition of the hotel room in which Petitioner and her children were living. (*Id.* at 76-77.) Mr. Shea also admitted that a subsequent urinalysis performed on Petitioner indicated no presence of methamphetamine. (*Id.* at 77.) Mr. Shea identified that the main reason Savio subsequently contacted him was due to Petitioner's absence. (*Id.* at 78.) Mr. Shea admitted that up until that point, Petitioner had been cooperative with the investigation. (*Id.*) Finally, Mr. Shea identified that, to his understanding, Petitioner and her children left the hotel after being locked out for failure to pay. (*Id.* at 81.)

Following Mr. Shea's testimony, the circuit court provided a limiting instruction for the three witnesses called during the trial up to that point regarding 404(b) evidence. (*Id.* at 84.) The State then called T.R.S., one of Petitioner's minor children, as a witness for the express purpose of impeachment. (*Id.* at 84.) T.R.S. stated that it was his father's idea to leave Colorado, and that the family traveled to West Virginia on or about June 31 or July 1, 2014. (*Id.* at 86.) T.R.S. stated that the family eventually began camping out in West Virginia on July 1 or July 2, 2014, and that the infant child became sick, although he denied seeing the baby vomit. (*Id.* at 87.) T.R.S. further stated that the infant child looked pale, but denied that the child was not eating. (*Id.* at 88.) T.R.S. finally denied telling a social worker that the infant child was sick, that the infant child would not eat, or that "nobody would really help [the infant child]." (*Id.* at 89.)

As a result, the State moved to introduce the video interview of T.R.S. by Kristin Kelly on July 9, 2014, under Rule 613(b) of the West Virginia Rules of Evidence, as extrinsic evidence of a prior inconsistent statement, based upon T.R.S.'s availability to explain or deny the statement and Petitioner's availability to cross-examine T.R.S. about the statement. (*Id.* at 89.) Trial counsel for Petitioner then questioned T.R.S. about the care he received from Petitioner, and again identified that the idea to leave Colorado was Mr. Christy's. (*Id.* at 90-95.)

Following cross-examination, the State requested to show the video of the interview of T.R.S. (*Id.* at 98.) The circuit court removed the jury from the courtroom, and entertained the arguments of counsel. (*Id.*) The State requested permission to show the video based upon an express prior inconsistent statement by T.R.S. that he had knowledge that the infant was sick. (*Id.*) Trial counsel objected on the ground that the State was merely trying to impeach its own witness. (*Id.* at 99.) The State, however, relied upon Rule 607 of the West Virginia Rules of Evidence, which clearly indicates that a witness may be impeached by the party calling the witness. (*Id.*) The circuit court, based upon the age of T.R.S. and the nature of the prior inconsistent statement, granted the State's request and allowed the video to be played for the jury. (*Id.* at 100.)

The State then authenticated the video by calling Ms. Kelly, who was employed by the Monongalia County Child Advocacy Center at the time she interviewed T.R.S. (*Id.* at 101.) Ms. Kelly properly authenticated the interview video of T.R.S., and the video was played for the jury. (*Id.* at 103.)¹

¹ In the video, which the State received as part of the Appendix to this matter, T.R.S. clearly indicates that everyone, Petitioner included, was aware that the deceased infant was sick while the family was staying at the campsite. Further, T.R.S. indicates that Mr. Christy took the two oldest children to the grave, to show them where the deceased infant had been buried before leaving the campsite.

The State then called N.R.C., another of Petitioner's minor children. (*Id.* at 103.) Quickly thereafter, however, the State determined that the witness was nonresponsive, and the State asked the circuit court that she be dismissed as she could provide no substantive testimony. (*Id.* at 104.) The State then called Officer Matthew McCabe, a lieutenant with the Morgantown Police Department. (*Id.* at 105-06.)

Ofc. McCabe identified that he was the officer who initially reported to the call of a suspicious individual at the Sheetz on Earl Core Road. (*Id.* at 106-07.) Ofc. McCabe informed the jury that he ran the plates of the Jeep, and that they came back stolen. (*Id.* at 107.) He then detailed the stop. (*Id.* at 107-09.) Ofc. McCabe also identified that, during the stop, Mr. Christy mentioned he had "just buried his kid on the 4th of July." (*Id.* at 109.)

Ofc. McCabe stated that the Jeep "was a mess . . . [and that] there was stuff all over the place." (*Id.* at 110.) He further stated that none of the children were restrained in the Jeep. (*Id.* at 111.) With regards to the case at hand, Ofc. McCabe identified that at the stop he did not know of the deceased infant or the burial. (*Id.* at 113.) He further identified that he was not informed of the deceased infant or the burial in Hardy County until Mr. Christy and Petitioner were back at the police station. (*Id.* at 114-15.) Finally, Ofc. McCabe acknowledged that Mr. Christy, upon seeing Ofc. McCabe at the Sheetz station, opted to lead police on a minor chase rather than inform them about the death of the infant. (*Id.* at 116.)

4. Trial Day Two, January 28, 2015

On the following day, the State opened by called Officer Douglas Montague of the Morgantown Police Department. (App. Vol. V at 3.) Ofc. Montague identified that he also took part in the pursuit of the Jeep, although he was the last officer to arrive. (*Id.* at 3-4.) Ofc. Montague, however, was responsible for transporting Petitioner to the police station. (*Id.* at 4.)

During the transport, Petitioner stated “well, my six-month-old just died days ago.” (*Id.*) When asked why, Petitioner responded that the death was the result of SIDS. (*Id.*) Petitioner further informed Ofc. Montague that the baby had died in Virginia, insinuating that it had occurred in a hospital, and refused to say anything more. (*Id.*) Overall, Ofc. Montague reported that Petitioner “seemed more – more angry maybe than upset.” (*Id.*)

The State then called Detective Lawrence Hasley of the Morgantown Police Department. (*Id.* at 7.) Det. Hasley identified that he spoke with and Mirandized Petitioner, although Petitioner refused to speak about the deceased infant. (*Id.* at 8.) Det. Hasley stated that when asked about finding the deceased infant, Petitioner simply responded that the “baby wasn’t lost.” (*Id.* at 8.) Petitioner refused any additional information until she was allowed to speak with Mr. Christy. (*Id.*)

Next, the State called Jeff Fraley, the owner and manager of the Fraley Funeral Home in Moorefield, and the county coroner for Hardy County, West Virginia. (*Id.* at 11.) Mr. Fraley identified that he received a call requesting a coroner to report outside of Wardensville, West Virginia, for a deceased. (*Id.*) Mr. Fraley stated that he traveled to the scene and met police approximately three-tenths of a mile inside the forestry. (*Id.*)

Mr. Fraley recalled that the deceased infant had been excavated from the grave by the troopers by the time of his arrival. (*Id.* at 12.) Mr. Fraley helped the troopers photograph the deceased infant and then transported him back to Moorfield, where he contacted the Chief Medical Examiner. (*Id.*) Mr. Fraley then identified that, in West Virginia, the Department of Health and Human Resources has a program in place for an indigent burial program. (*Id.* at 13.) Additionally, he stated that all deaths in West Virginia are required to be reported. (*Id.* at 14.)

Upon cross-examination, Mr. Fraley agreed that a person may occasionally evacuate their bowels or lose control of other bodily fluids upon death, leading to a lower body weight. (*Id.* at 17.)

The State then called Trooper C.S. Hartman of the West Virginia State Police as its final witness. (*Id.* at 18-19.) Tpr. Hartman identified that he was the lead investigator in the matter, and had traveled with Mr. Christy and Petitioner into the national forest to retrieve the body of the deceased infant. (*Id.* at 20.) Tpr. Hartmen further identified that Mr. Christy took the lead while leading the police to the body, while Petitioner followed behind. (*Id.* at 21.)

The State then began introducing and admitting pictures taken by police of the campsite on the day they recovered the deceased infant's body. (*Id.* at 22.) Tpr. Hartman opined that the body had been strategically placed to conceal it from detection. (*Id.* at 23.) The State continued outlining the investigation with the photographic evidence. (*Id.* at 25.) During admission of the pictures, a brief recess was taken due to the intensity of the pictures. (*Id.* at 28.)

Upon reaching exhibit sixteen (16) (attached as App. Vol. I at 87), trial counsel objected to any further pictures of the deceased infant on the grounds that such photographs have no purpose other to inflame the jury. (App. Vol. V at 29-30.) The State, however, argued that the pictures were necessary to show the extent Mr. Christy and Petitioner chose to conceal the deceased infant's body. (*Id.* at 30.) Further, the State said the photographs were necessary to refute Petitioner's argument that the child merely lost weight following its death due to a posthumous bowel movement. (*Id.* at 30-31.) The circuit court permitted the State to show the pictures, finding that the pictures were "not that gruesome" and that the pictures were "part of the evidence of the crime for which [Petitioner] is charged with." (*Id.* at 31.) The remaining pictures were thereafter admitted into evidence. (*Id.* at 31-33.)

Next, Tpr. Hartman detailed his legal search of Petitioner's vehicle. (*Id.* at 33.) He identified that the vehicle had been stored in a locked facility, and that both diapers and formula were located within the vehicle. (*Id.* at 35.) Tpr. Hartman also identified finding what appeared to be baby vomit within the vehicle. (*Id.* at 36-37.) Amongst trash and other debris, Tpr. Hartman also identified finding "numerous documentation, documentations by authorities, the hospital, DHHR." (*Id.* at 37-40.) In support of Tpr. Hartman's assessment of neglect, he stated:

Again, this is what I'm basing my arrest and the charges in the investigation on. Again, we're talking about abuse or neglect. You've got several kids, four younger children, a couple with no income, they're living out of a tent, they appear to be evading law enforcement and authorities. They've got a seven- to ten-day-old baby that they're taking what they're saying [was] camping. In the vehicle when I conducted the search warrant and talked to other law enforcement officers and DHHR there were no baby supplies, no diaper bags, no child seats. I did find some maybe a -- one container of ointment.

Q. Did you find any baby bottles?

A. No, I did not.

Q. You didn't find anything necessary to feeding the child?

A. I didn't find any baby blankets, I didn't find any baby powder, diaper rash cream, any baby binkies. . . .

(*Id.* at 42.) Tpr. Hartman continued to list supplies that were lacking from the vehicle concerning the proper care of an infant. (*Id.* at 42-43.) Tpr. Hartman further identified that no emergency call was ever placed in the area regarding a sick or dead infant. (*Id.* at 44.)

Overall, Tpr. Hartman perhaps summed the case up best by stating that, rather than attempted to afford the infant child with the best available care, "they did their best to, in fact, just do the opposite, try to avoid law enforcement, authorities, [and] CPS at every turn." (*Id.*) Tpr. Hartman further substantiated this hypothesis by recognizing that Petitioner's minor

children had even stated that “the baby was sick, sickly, pale, throwing up, consistently vomiting.” (*Id.* at 45.) Further, T.R.S. had stated during his interview “that no one seemed to be able to or could give [the infant] help.” (*Id.*)

After Tpr. Hartman’s testimony, Petitioner called Otis Spell, Petitioner’s grandfather. (*Id.* at 57.) Mr. Spell identified that Petitioner arrived at his home on July 2, 2014, and stayed for approximately one hour before leaving to go camping. (*Id.* at 57.) Mr. Spell stated that the children did not appear sickly, although throughout the course of the hour visit, the infant simply “lay[ed] there resting.” (*Id.* at 58.) Upon cross-examination, the State questioned Mr. Spell’s assessment that the infant was healthy using the other children’s statements that the infant was sick and vomiting. (*Id.* at 61.)

Petitioner then called Lisa Shockey, a friend of Petitioner’s for approximately seven or eight years. (*Id.* at 62.) Ms. Shockey identified that on or around July 4, 2014, Petitioner borrowed blankets. (*Id.* at 63.) Ms. Shockey recalled that, upon Petitioner’s arrival, she observed the infant and “talked to him a little bit.” (*Id.*) Ms. Shockey further stated that the infant did not look ill. (*Id.* at 64.) Surprisingly, Ms. Shockey reported that the infant was in a car seat, despite the several officers’ prior testimony that a car seat was not present in the vehicle at the time of the stop. (*Id.* at 65.) Upon cross-examination, Ms. Shockey identified that she had no awareness of Petitioner’s history of drug abuse and drug court obligation. (*Id.* at 66.)

After a brief recess in which the circuit court considered the jury instructions in the matter, the State called an additional expert witness, Dr. Vernard Adams, a professor of pathology at West Virginia University. (*Id.* at 80.) Dr. Adams performed the autopsy of the deceased infant, and reported that “[t]he fibrous gland was depleted of lymphocytes to some degree which is usually indication of stress over a period of more than a few days.” (*Id.* at 82.)

Such a finding was consistent with the prior reports of the infant vomiting. (*Id.* at 83.) Dr. Adams reported that he was unable to determine a cause of death to a degree more likely than not. (*Id.* at 84.) Dr. Adams did state, however, that if the infant was suffering from dehydration and hypovolemia and Petitioner sought medical treatment, the infant would still be alive. (*Id.* at 87.)

Additionally, Dr. Adams identified that, because the body of the infant was found “quite quickly,” it would not have lost much weight in death. (*Id.* at 88.) Upon cross-examination, Petitioner again identified that the cause of death was inconclusive. (*Id.* at 89.) Further, Dr. Adams admitted that no drugs or alcohol were found in the infant’s system. (*Id.* at 90.) Dr. Adams did indicate, however, that he only found a “small quantity” of food in the baby’s stomach. (*Id.* at 92.) Still, Dr. Adams surmised that it was unlikely that the deceased infant starved to death. (*Id.* at 94.)

Following the testimony of Dr. Adams, the State formally rested its case and Petitioner moved for a judgment of acquittal, which the circuit court denied. (*Id.* at 96-100.) The circuit court specifically found that enough evidence was proffered to submit the charges to the jury as a question of fact. (*Id.* at 100-01.) Petitioner then informed the circuit court that she was not going to testify, and rested her case. (*Id.* at 104.)

Following closing arguments, the jury retired to deliberate. (*Id.* at 152.) Thereafter, the jury returned, finding Petitioner guilty of all remaining counts of the indictment. (*Id.* at 155.) The circuit court then sentenced Petitioner to a cumulative term of seven (7) to thirty-one (31) years, with the involuntary manslaughter sentence of one (1) year subject to adjustment following the reception of a presentence report. (*Id.* at 160-61.)

5. Post-Trial Motions Hearing, June 9, 2015

The circuit court held a post-trial motions hearing on June 9, 2015. (App. Vol. VI at 1.) Therein, the circuit court entertained arguments from counsel regarding Petitioner's post-trial motions. (*Id.* at 1-9.) The circuit court then found that Petitioner was not entitled to an affirmative defense to concealment, as Petitioner did not affirmatively report the death as required by statute. (*Id.* at 9.) The circuit court also found that the 404(b) issues were previously and correctly balanced in pretrial hearings. (*Id.*) The circuit court further held that the previous sentencing was to be served consecutively, and ordered that Petitioner receive credit for time served. (*Id.* at 10.) Petitioner now appeals to this Honorable Court. The State maintains that Petitioner's claims are without merit.

SUMMARY OF THE ARGUMENT

The State maintains that the entirety of Petitioner's assignments of error in this matter are harmless. Petitioner's first two assignments of error, that the circuit court improperly admitted evidence under Rule 404(b), ignores the balancing performed by the circuit court and the ultimate determination that evidence of Petitioner's neglect of the deceased infant while in Colorado was admitted for purposes of *res gestae*. Similarly, Petitioner's third assignment of error, that of double jeopardy, is affirmatively disproven given the unique elements within the two, separately-codified neglect statutes.

Petitioner's fourth assignment of error, that of prosecutorial misconduct, is presupposed on the fallacy that the prosecutor cannot zealously and vigorously prosecute the State's case, and is therefore meritless. Petitioner's fifth assignment of error, arguing that the photographs at trial were disproportionately gruesome, is similarly meritless and based upon case law which is no longer observed in the State of West Virginia.

Petitioner's sixth assignment of error, regarding the opinion testimony of a state trooper, is affirmatively disproven through application of Rule 701 of the West Virginia Rules of Evidence and supporting case law. Petitioner's seventh assignment of error, arguing that Petitioner had an affirmative statutory defense, is clearly disproven by a thorough reading of W. Va. Code § 61-2-5a(b) and all elements therein.

Petitioner's eighth assignment of error, that the circuit court erred by allowing the State to impeach T.R.S. via admission of a prior inconsistent statement, is meritless. The State introduced the video to call into doubt that no one knew that the deceased infant was sick. Further, the State followed the proper restrictions set forth by Rule 613 of the West Virginia Rules of Evidence. Even assuming, *arguendo*, that the circuit court admitted the statement in error, the State contends that such error is harmless given the extraordinary value of the remaining evidence within the State's case.

Petitioner's ninth assignment of error, that the circuit court failed to give a proper limiting instruction under Rule 404(b), fails for two reasons. First, the 404(b) evidence was not introduced to show prior bad acts for purposes of character evidence. Rather, the evidence was admitted under *res gestae* considerations. Second, the error was cured by the circuit court by a limiting instruction, as soon as the issue was raised by Petitioner during trial.

Petitioner's tenth assignment of error, ineffective assistance of counsel, is improper for purposes of direct review. Finally, Petitioner's eleventh assignment of error, the catch-all of insufficient evidence, is plainly meritless.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State contends, based upon the completeness of the underlying record and the issues of law at hand, that oral argument in this matter is unnecessary. This matter may be properly settled via Memorandum Decision pursuant to Rule 21 of the West Virginia Revised Rules of Appellate Procedure through application of current and longstanding West Virginia law.

ARGUMENT

This Honorable Court has previously set forth that the findings of fact and conclusions of the underlying circuit court are subject to a two-pronged deferential standard of review. Syl. Pt. 1, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006) (citing Syl. Pt. 1, *Pub. Citizen, Inc. v. First Nat'l Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996)). “The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court’s underlying factual findings are reviewed under a clearly erroneous standard.” *Id.* “Questions of law are subject to a *de novo* review.” *Id.*

A. The State’s Use of 404(b) Evidence to Show the Complete Story of Petitioner’s Neglect Adheres to the Permitted Uses of Such Evidence Under 404(b)(2).

Despite Petitioner’s argument that Rule 404(b) evidence was merely proffered to cast Petitioner in a negative light, the State, at all times, requested that such evidence be admissible to “tell the complete story” under the long-standing doctrine of *res gestae*. This Honorable Court recently upheld long-standing case law stating that “[e]vents, declarations and circumstances which are near in time, causally connected with, and illustrative of transactions being investigated are generally considered *res gestae* and admissible at trial.” Syl. Pt. 7, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014) (citing Syl. Pt. 3, *State v. Ferguson*, 165 W. Va. 529, 270 S.E.2d 166 (1980), *overruled on other grounds by State v. Kopa*, 173 W. Va. 43, 311, S.E.2d 412 (1983)). Indeed, Rule 404(b)(2) permits evidence of crimes, wrongs or other

acts to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” WVRE 404(b)(2).

Here, as appropriately balanced and determined by the trial court during the December 15, 2014, hearing, and weighed pursuant to the test espoused by this Honorable Court in Syl. Pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). First, the circuit court surmised that the 404(b) evidence was introduced to tell the complete story under *res gestae* considerations. (App. Vol. II at 15.) Further, the circuit court found that the acts occurred close in time to the death of the infant. (*Id.*) The circuit court next found that the evidence was relevant, and “is necessary to a full presentation of the case.” (*Id.*) Then, the circuit court found that the probative value of the evidence was high, thus outweighing the risk of unfair prejudice. (*Id.* at 16.) Finally, the circuit court found that a limiting instruction would be effective in preventing the use of the evidence improperly. (*Id.* at 16-17.)

While Petitioner is correct in her assertion that such evidence would be improper if used simply to inflame the jury on the basis of her prior drug use, a thorough reading of the underlying transcripts clearly shows that such evidence was used to show a repetitive and ongoing willful neglect of the needs of the deceased infant by Petitioner. This, in addition to making the evidence admissible under *res gestae* concerns, easily falls within 404(b)’s permissible use of evidence to show an absence of mistake, or lack of accident. Thus, this Honorable Court should deny Petitioner’s first and second assignment of error and affirm her underlying conviction.

B. “Child Neglect Resulting in Death,” Codified Under W. Va. Code § 61-8D-4A(a), and “Child Neglect Creating a Substantial Risk of Death,” Codified Under W. Va. Code § 61-8D-4(c), Are Two Separate Crimes, With Unique and Separate Elements.

Despite Petitioner’s argument that W. Va. Code § 61-8D-4(c) is merely a lesser-included crime of W. Va. Code § 61-8D-4A(a), both criminal statutes include unique and separate elements to succeed under the analysis of *Blockburger v. United States*, 248 U.S. 299 (1932), and this Honorable Court’s acceptance of the same in Syl. Pt. 4, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992). W. Va. Code § 61-8D-4(c) reads as follows:

If a parent, guardian or custodian grossly neglects a child and by that gross neglect creates a substantial risk of death or serious bodily injury, as serious bodily injury is defined in section one, article eight-b of this chapter, of the child then the parent, guardian or custodian is guilty of a felony and, upon conviction thereof, shall be fined not less than \$1,000 nor more than \$3,000 dollars or imprisoned in a state correctional facility for not less than one nor more than five years, or both.

Meanwhile, W. Va. Code § 61-8D-4A(a) states:

If any parent, guardian or custodian shall neglect a child under his or her care, custody or control and by such neglect cause the death of said child, then such parent, guardian or custodian shall be guilty of a felony and, upon conviction thereof, shall be fined not less than one thousand dollars nor more than five thousand dollars or committed to the custody of the division of corrections for not less than three nor more than fifteen years, or both such fine and imprisonment.

Plainly, each individual crime has an element which differs from the other. For conviction under W. Va. Code § 61-8D-4(c), the State has the burden of proving gross neglect resulting in the risk of significant harm. In contrast, the State must only prove neglect in W. Va. Code § 61-8D-4A(a), but has the added caveat of proving that such neglect resulted in death.

In *Gill*, this Honorable Court held that “[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are

two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Syl. Pt. 4, *Gill* (citing *Blockburger*, 284 U.S. at 304). Additionally, “[a] claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment.” Syl. Pt. 7, *Gill*. To ascertain the legislative intent of a statute, this Honorable Court should examine the statutory language. Syl. Pt. 8, *Gill*, in part. If the legislative intent cannot be determined through the express language of the statute, however, this Honorable Court must presume that inclusion of differing elements indicates that the legislature intended to create separate offenses. *Id.*

As identified by Petitioner, the circuit court did, in fact, relate to the jury that the State must prove “gross neglect” to succeed on a charge of substantial risk of death. (App. Vol. V at 128 (“In order to prove the offense of child neglect resulting in serious bodily injury, the State must . . . prove beyond a reasonable doubt that [Petitioner] . . . grossly neglected the child. . . .)) The circuit court earlier defined “gross neglect” as “reckless or intentional conduct, behavior or inaction by a parent . . . [in] clear disregard for the minor child’s health, safety, or welfare.” (*Id.* at 123.)

In contrast, the circuit court informed the jury that they could only find Petitioner guilty if the State proved that Petitioner negligently caused the death of the deceased infant. (*Id.*) As such, the circuit court defined “neglect” as an “unreasonable failure by a parent . . . to exercise a minimum degree of care to assure a minor child’s safety or health.” (*Id.*) Further, it was necessary for the State to prove that the infant had died as a result.

Petitioner makes no further argument regarding the legislative intent of the two statutes beyond their mere similarity. Such an argument is insufficient to overcome the clear indication by the legislature of two separate offenses by virtue of differing elements. Thus, this Honorable

Court should deny Petitioner's third assignment of error and affirm her conviction in the circuit court below.

C. The Prosecutor in the Underlying Criminal Action Did Not Abandon His Quasi-Judicial Role.

In *State v. Kendall*, this Honorable Court reaffirmed the holding of Syl. Pt. 3, *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977), holding that “[t]he prosecuting quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.” Syl. Pt. 2, *State v. Kendall*, 219 W. Va. 686, 639 S.E.2d 778 (2006).

As such, this Honorable Court has set forth a four-factor analysis to determine whether a prosecutor abandoned his quasi-judicial position:

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pt. 3, *Kendall*. Put simply, “[t]hough the public interest demands that a prosecution be conducted with energy, skill and zealously, the State's attorney should see that no unfair advantage is taken of the accused.” *State v. Britton*, 157 W. Va. 711, 715-16, 203 S.E.2d 462, 466 (1974).

Petitioner, in an effort to bolster her argument of prosecutorial misconduct, relies on four easily distinguishable cases. First, Petitioner cites *State v. Moose*, 110 W. Va. 476, 158 S.E. 715 (1931), wherein this Honorable Court found a prosecutor to be operating outside of acceptable guidelines when his closing argument was “wholly bent upon convicting the defendant and having no regard for what the evidence was, as testified to by the witnesses from the witness stand.” Second, Petitioner cites *State v. Critzer*, 167 W. Va. 655, 280 S.E.2d 288 (1981), arguing that a prosecutor cannot “assert his personal opinion as to the justness of a cause, as to the credibility of a witness, or as to the guilt or innocence of an accused.” Syl. Pt. 3, *Critzer*. This Honorable Court further elaborated, however, that the rule does not “prevent a prosecutor from arguing any position based on his analysis of the evidence.” *Id.* 167 W. Va. at 660, 280 S.E.2d at 292. In *Critzer*, the prosecutor opined that the defendant was guilty, improperly bolstered his own witnesses, improperly attacked the credibility of defense witnesses, compared the defendant to a vulture who came to West Virginia to “victimize dumb hillbillies,” and often specifically pointed to and directly addressed the defendant rather than the jury. *Id.* 167 W. Va. at 660-61, 280 S.E.2d at 292. The prosecutor similarly introduced facts and arguments that were not based on any evidence adduced at trial. *Id.*

Similarly, in *State v. Graham*, 119 W. Va. 85, 191 S.E.2d 884 (1937), the prosecutor began introducing evidence of the defendants bad character before the defendant put on any character evidence. *Graham*, 525 S.E.2d at 885-86. The prosecutor also openly directed two officers to take an important defense witness to jail for rape during cross-examination. *Id.* at 886. The prosecutor also asked the defendant inflammatory questions on cross-examination that had nothing to do with the criminal case at bar.

Finally, in *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977), this Honorable Court was asked to consider thirty-six (36) incidents of prosecutorial misconduct, including:

1. Interruption by the prosecutor as defense counsel was interrogating witnesses, by commenting on the form of the question, or by laughing, or by talking to persons at the prosecutor's counsel table.
2. Responding to objections made by defense counsel sarcastically; as, "I guess he would object" or by statements as, "If (he) doesn't want the jury to hear the answer to that I withdraw it;" "Have you got something to hide?"
3. Making derisive remarks at witnesses, addressing one as "boy" and another as "granny" and cutting short adverse witnesses' answers on cross-examination.
4. Belittling the defense attorney by remarks that he was misquoting the evidence; that if he would come to court occasionally he would know the routine; and in one instance, after asking a witness if he had gone over his testimony with the defense counsel to which the witness replied he had not, and defense counsel stated this was true, demanding that defense counsel be put under oath.
5. Accusations categorizing a defense witness' testimony as a "cock and bull" story; attacking the defendant's testimony by remarks such as, "(T)his is a dead man he is talking about who can't come in and deny;" "You think . . . it is the way you can lie yourself out of it?"; "(Y)ou won't lie under oath but will when you are not"
6. Injecting collateral and inflammatory issues by stating to a female witness that she was familiar that the defendant had a lot of guns, and also asking the defendant, who was married, whether he had offered \$3,000 to another woman to run away with him.

Boyd, 160 W. Va. at 242, 233 S.E.2d at 716-17.

Here, the prosecutor relied upon evidence admitted at trial and witness testimony in making a zealous and properly impassioned closing argument. The prosecutor had the benefit of evidence which showed that Petitioner, a drug abuser on the run from drug court in Colorado,

selfishly, voluntarily, and negligently took a risk-prone newborn infant into the woods and failed to seek necessary, life-saving medical support. The prosecutor had witness testimony and evidence which showed that the baby was sick, fussy, and likely dehydrated, yet Petitioner did nothing. The prosecutor had evidence that such care was not a one-time mistake, but the result of months-long prenatal and post-natal neglect. The prosecutor had proof that the father of the child, who was present during the infant's death and performed its burial, had already pled guilty to the charges. Finally, the prosecutor had proof that a tiny, underweight newborn was unceremoniously dumped back in the woods in a shallow grave, and covered by a basketball-sized rock.

In examining the four-factor test under *Kendall*, the prosecutor's remarks (1) did not mislead the jury or unfairly prejudice the accused; (2) were not extensive; (3) were based upon the evidence entered at trial, which strongly suggested Petitioner's guilt on all counts charged; and (4) were not deliberately placed to divert attention to extraneous matters. Rather, the prosecutor's remarks simply utilized the evidence adduced at trial to show the selfish and negligent attitude of Petitioner, which tragically resulted in the infant's death at twenty-six days of age. Therefore, this Honorable Court should deny Petitioner's fourth assignment of error and affirm her conviction in the circuit court below.

D. The Color Photographs of the Deceased Infant Were Necessary Evidence for Purposes of the Concealment Charge, and Were Not Gruesome or Inflammatory to the Extent That They Should Have Been Withheld from the Jury.

In the underlying criminal trial, admission of the photographs of the deceased infant was necessary to show the extent to which Petitioner and Mr. Christy attempted to conceal the infant's body. In support of her argument, Petitioner relies upon *State v. Rowe*, 163 W. Va. 593, 259 S.E.2d 26 (1979), which has been expressly overruled by *State v. Derr*, 192 W. Va. 165, 451

S.E.2d 731 (1994). In *Derr*, this Honorable Court “concluded that the *Rowe* ‘gruesome photograph’ rule was not codified as part of the West Virginia Rules of Evidence, . . . [and held] that the admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403.” *Derr*, 192 W. Va. at 178, 451 S.E.2d at 744.

Thus, “[w]hatever the wisdom and utility of *Rowe*, and its progeny, it is clear that the *Rowe* balancing test did not survive the adoption of the West Virginia Rules of Evidence.” Syl. Pt. 6, *Derr*, *in part* (internal citations omitted). “Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence.” Syl. Pt. 9, *Derr*. “Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.” *Id.* Finally:

Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse.

Syl. Pt. 10, *Derr*.

W. Va. Code § 61-2-5a(a), concealment of a deceased human body, states as follows:

Any person who, by any means, knowingly and willfully conceals, attempts to conceal or who otherwise aids and abets any person to conceal a deceased human body where death occurred as a result of criminal activity is guilty of a felony and, upon conviction thereof, shall be confined in a correctional facility for not less than one year nor more than five years and fined not less than one thousand dollars, nor more than five thousand dollars.

In the underlying criminal matter, the State was required, as part of its burden of proving its case against Petitioner beyond a reasonable doubt, to affirmatively show that Petitioner violated every element of W. Va. Code § 61-2-5a(a). As a result of this burden, the State sought to admit photographs of the deceased infant's burial site, and the manner in which the infant was buried.² The best evidence for doing so was the photographs. While the photographs showed impression marks on the deceased infant's skin from being buried under six inches of dirt and a large rock, the photographs contained no other gruesome attributes.

The State identified the purpose of admitting the photographs into evidence: "Judge, they're relevant to show what they did to this baby[;] [t]hey concealed the baby. . . ." (App. Vol. V at 30.) Further, the State argued that the pictures were necessary to show that the baby was not soiled, and did not have any bowel movements, to combat Petitioner's suggestion that the baby lost waste weight posthumously. (*Id.* at 30-31.) The circuit court agreed that the photographs were relevant, and were "part of the evidence of the crime for which [Petitioner was] charged. . . ." before explicitly finding that the photographs were "not that gruesome." (*Id.* at 31.)

As such, the circuit court complied with the express holding of *Derr*, and found the photographs to be relevant under Rule 401. Further, the circuit court found that the probative value of the photographs, as "part of the evidence," outweighed the danger of unfair prejudice, as

² The full-color photographs are attached as part of Vol. I of Petitioner's Appendix.

the photographs were “not that gruesome.” (*Id.*) This Honorable Court should additionally refuse to set aside the circuit court’s discretion, as there is no evidence that the circuit court clearly abused the same. Therefore, this Honorable Court should deny Petitioner’s fifth assignment of error and affirm her conviction in the circuit court below.

E. Trooper Hartman Could Clearly Opine That the Substance Found on the Interior Floor of the Jeep Was Vomit Under Rule 701.

Tpr. Hartman was clearly able, as a lay witness, to opine that the substance found in the Jeep was vomit. As identified by Petitioner in her brief, Rule 701 of the West Virginia Rules of Evidence allows a lay witness to offer opinion-based testimony so long as it is “(a) rationally based on the witness’s perception, (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue[,] and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”

“Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.” Syl. Pt. 7, *Lewis v. Mosorjak*, 143 W. Va. 648, 104 S.E.2d 294 (1958). “The opinion of a witness, not an expert, as to any fact in issue before the jury is not generally admissible, unless from the very nature of the subject in issue it cannot be stated or described in such language as will enable persons not eye witnesses to form an accurate judgment regarding it, and an opinion based on an inconclusive fact and argumentative in character should not be admitted.” Syl., *State v. Dushman*, 79 W. Va. 747, 91 S.E. 809 (1917). “Though opinion evidence as a general rule is not admissible, still when the facts are such, that it is manifestly impossible to present them to the jury with the same force and clearness as they appeared to the observer, then opinion is admissible as to the conclusions and

inferences to be drawn therefrom.” Syl. Pt. 6, *State v. Taft*, 144 W. Va. 704, 110 S.E.2d 727 (1959) (citing Syl. Pt. 4, *Kunst v. City of Grafton*, 67 W. Va. 20, 67 S.E. 74 (1910)).

Here, a white substance was seen in a photograph published to the jury. Tpr. Hartman identified that the substance appeared to be vomit. Tpr. Hartman expressly stated “[i]t appears to be baby puke.” He opined that the substance appeared to be baby puke based upon his firsthand knowledge as the investigating officer who was examining the Jeep in which the deceased infant died. Such testimony to clarify something visible only in a picture, based upon the rational knowledge of the investigating officer, and not based upon some scientific analysis is clearly allowed under Rule 701. This Honorable Court should therefore refuse to find that the circuit court abused its discretion by allowing Tpr. Hartman to opine that the substance “appeared to be” baby vomit, deny Petitioner’s sixth assignment of error, and affirm Petitioner’s underlying conviction.

F. Petitioner Was Not Entitled to the Affirmative Defense to Concealment of a Deceased Human Body, As She Did Not Affirmatively Contact and Inform Law Enforcement of the Deceased Infant’s Body Prior to Being Investigated by Police Regarding the Same.

Petitioner’s argument that she is entitled to the complete defense established by W. Va. Code § 61-2-5a(b) is without merit, as she and Mr. Christy informed police about the existence and location of the deceased infant’s body only after the police began formally investigating the matter. W. Va. Code § 61-2-5a(b) specifically states that a complete defense will only be available to a defendant if the defendant, within 48 hours of concealing the body, informs police of the existence *and* location of the concealed body prior to being contacted regarding the death.

Here, as displayed by the underlying transcripts, Petitioner affirmatively tried to conceal the body and the crime, telling Ofc. Montague that the baby had died in a hospital in Virginia. (App. Vol. III at 4.) Moreso, Petitioner refused to speak with Det. Hasley about the deceased

infant's location, telling Det. Hasley that "the baby wasn't lost." (*Id.* at 8.) As such, Petitioner's argument that she should have been entitled to a complete defense under W. Va. Code § 61-2-5a(b), without acknowledging the entirety of the requirements that must be met for such a defense, beyond the mere 48-hour requirement, is simply without merit. This Honorable Court should therefore deny Petitioner's seventh assignment of error and affirm her conviction in the circuit court below.

G. The State Properly Impeached T.R.S. with Extrinsic Evidence of a Prior Inconsistent Statement Under Rule 613(b).

The State contends that the prior interview of T.R.S. was admitted as a prior inconsistent statement under Rule 613(b) of the West Virginia Rules of Evidence. WVRE 613(b) states that "[e]xtrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it." *See also* Syl. Pt. 5, *State v. Carrico*, 189 W. Va. 40, 427 S.E.2d 474 (1993). "After the foundation therefor is properly laid by calling attention to his prior statements inconsistent with his testimony, a witness may be impeached by proving such statements, and whether the witness denies or fails to recollect them is not material." Syl., *State v. Worley*, 82 W. Va. 350, 96 S.E. 56 (1918).

"When a prior inconsistent statement is offered to impeach a witness and the claimed inconsistency rests on an omission to state previously a fact now asserted, the prior statement is admissible if it also can be shown that prior circumstances were such that the witness could have been expected to state the omitted fact, either because he or she was asked specifically about it or because the witness was then purporting to render a full and complete account of the accident, transaction, or occurrence and the omitted fact was an important and material one, so that it

would have been natural to state it.” Syl. Pt. 3, *State v. Blake*, 197 W. Va. 700, 478 S.E.2d 550 (1996).

“Where the witness cannot recall the prior statement or denies making it, then under WVRE 613(b), extrinsic evidence as to the out-of-court statement may be shown—that is, the out-of-court statement itself may be introduced or, if oral, through the third party to whom it was made.” Syl. Pt. 4, *State v. Schoolcraft*, 183 W. Va. 579, 396 S.E.2d 760 (1990). A prior inconsistent statement use for impeachment purposes, however, may not be used as substantive evidence unless the prior statement was given under oath. *State v. Moore*, 189 W. Va. 16, 23, 427 S.E.2d 450, 458 (1992). As such, the trial court must admonish the jury that the prior inconsistent statement introduced and admitted at trial shall only be used for impeachment purposes, helping the jury to weigh the impeached witness’s credibility. (*Id.*)

Here, the State was able, under the rules of evidence, to impeach T.R.S. with his prior inconsistent statement given during an interview with Kristin Kelly on July 9, 2014. The State questioned T.R.S. as an adverse witness, asking whether he saw the deceased infant vomit, and whether the deceased infant appeared to be sick. T.R.S. answered in the negative. The circuit court then gave Petitioner an opportunity to cross-examine T.R.S. When it was clear that the interview with Ms. Kelly yielded answers different to the trial testimony of T.R.S., the circuit court allowed the State to play the authenticated video tape of the prior inconsistent statement to the jury.

While the circuit court identified that “the jury will be properly instructed,” in the interest of candor, the undersigned admits that the record is unclear at the time that the video was played. (App. Vol. IV at 100.) Regardless, trial counsel failed to object if no instruction was given. The

circuit court did, however, instruct the jury on the impeachment and credibility of a witness during its formal reading of the jury instructions in open court. (App. Vol. V at 116-18.)

Should this Honorable Court determine that admission of the prior inconsistent statement was in error, the State argues that such error was harmless. This Honorable Court has previously held, in Syl. Pt. 6, *State v. Smith*, 178 W. Va. 104, 358 S.E.2d 188 (1987):

Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

While beneficial, the prior inconsistent statement of T.R.S. was hardly the crux of the State's case against Petitioner given her long history of prenatal and post-natal abuse of the deceased infant. Removing such evidence does not result in the removal of guilt beyond a reasonable doubt. Such evidence, if admitted in error, was harmless. Therefore, this Honorable Court should deny Petitioner's eighth assignment of error and affirm her conviction in the circuit court below.

H. Petitioner's Argument Regarding a 404(b) Instruction Should Be Denied, As the Evidence Was Clearly Admitted for Purposes of *Res Gestae*, to Show the Ongoing and Long-Standing Neglect Which Ultimately Caused the Deceased Infant's Death.

The State strongly maintains that the circuit court's limiting instruction regarding Rule 404(b) testimony was sufficient for purposes of Rule 404(b) considerations under *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), as the evidence admitted at trial was purely for purposes of *res gestae*, to show the complete story of the deceased infant's neglect. As shown by the transcript, and more fully developed in Subsection (A) of this Section, the evidence

put forth by the State was simply not used to show the bad, unrelated acts of the mother in terms of character, but used to show ongoing neglect suffered by the deceased infant. Therefore, the circuit court's limiting instruction, provided after the testimony of the Colorado witnesses, was sufficient in terms of Rule 404(b) bad act evidence, as very little evidence was set forth.

Further, the State argues that Petitioner failed to timely object to the circuit court's arguable failure to provide an allegedly necessary limiting instruction until the third witness, Mr. Shea, testified at trial. It was at that point that the issue of a limiting instruction was raised, and the circuit court, immediately after Mr. Shea's testimony, read a limiting instruction to the jury. In sum, based off of the foregoing, this Honorable Court should deny Petitioner's ninth assignment of error and affirm her conviction in the circuit court below.

I. Petitioner's Argument Regarding the Possible Sentence for Concealment Has Not Been Preserved for Purposes of Appeal.

Petitioner's argument that the circuit court erred by instructing the jury of the penalty associated with concealment of a deceased human body should not be entertained by this Honorable Court, as no objection to the same occurred at trial, and the issue has therefore not been preserved for purposes of a direct appeal. Petitioner further admits to finding no legal basis upon which to grant such relief.

J. Petitioner's Ineffective Assistance Claim Is Improper for Purposes of Direct Appeal.

This Honorable Court has previously held that "[i]t is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal." Syl. Pt. 9, *State v. Woodson*, 222 W. Va. 607, 671 S.E.2d 438 (2008) (citing Syl. Pt. 10, *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992)). Instead, the record should be developed through *habeas corpus* proceedings, thereby creating a base upon which to more thoroughly review any claims of ineffective assistance. *Id.*

Should this Honorable Court deem Petitioner's case one of the rare exceptions, "[i]n the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Here, Petitioner's arguments fail on both fronts. The underlying record is absent of the necessary attorney-client communications typically investigated during *habeas corpus* proceedings, to the extent that any such privileges have been waived for proper examination of a convicted defendant's claim. This Honorable Court should therefore demand that Petitioner follow the proper channels for relief in order to make a more informed decision upon the matter should Petitioner eventually file a *habeas* appeal.

Similarly, this Honorable Court is without sufficient evidence to determine if trial counsel's actions were indeed deficient. Rather, this Court is left with only the substantial evidence of Petitioner's guilt put forth by the State. As a result, regardless of the veracity of Petitioner's claims under the first prong of *Strickland* analysis, Petitioner's claims clearly fall short of the second prong. There is simply nothing in the record to suggest that, but for trial counsel's alleged deficiencies, Petitioner would have achieved a more favorable result.

This Honorable Court should therefore deny Petitioner's tenth assignment of error and affirm her underlying conviction.

K. Sufficient Evidence Existed Upon Which to Base Petitioner's Conviction

The State asserts that it proffered sufficient evidence to warrant Petitioner's conviction in the underlying matter. In *State v. Guthrie*, this Honorable Court set forth the applicable standard for challenges to the sufficiency of the evidence by a convicted criminal defendant upon appeal:

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

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

Further, "a verdict of guilt 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 the guilt of the defendant beyond a reasonable doubt." Syl. Pt. 1, *State v. Phelps*, 172 W. Va. 797, 310 S.E.2d 863 (1983) (citing Syl. Pt. 1, *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1978)). "The evidence is to be viewed in the light most favorable to the prosecution." *Id.* "To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that the consequent injustice has been done." *Id.*

Put simply, Petitioner cannot surpass the unfavorable evidence put forth by the State of Petitioner's long-standing and continued prenatal and post-natal neglect of her newborn baby, which tragically resulted in the infant's untimely death. Looking at the evidence in a light most

favorable to the State, Petitioner gave birth to a drug-addicted baby, and refused to comply with the Colorado drug court which was allowing her custody of the child but attempting to ensure the child's safety. Petitioner then fled to West Virginia with her fugitive husband, and camped out in the forest without proper supplies to care for the infant. Petitioner refused to call for medical help despite her own children acknowledging that the baby was ill. When the baby tragically died at twenty-six days of age, it was 25% below its projected healthy weight. The deceased infant was then haphazardly buried under six inches of dirt in the middle of nowhere, and a large rock was placed on the burial site to further conceal it from any passers by.

In essence, the State did that which it set out to do from the earliest 404(b) hearing -- tell the complete story of the infant's tragic neglect. Petitioner cannot overcome the evidence of that story, and this Honorable Court should affirm her conviction in the circuit court below.

CONCLUSION

WHEREFORE, based upon the foregoing, the State of West Virginia respectfully directs this Honorable Court to affirm the conviction of Summer McDaniel within the Circuit Court of Hardy County, West Virginia.

Respectfully Submitted,
STATE OF WEST VIRGINIA,
Respondent, By Counsel,

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CERTIFICATE OF SERVICE

I, Shannon Frederick Kiser, Assistant Attorney General and counsel for the Respondent State of West Virginia hereby verify that I have served a true copy of “**RESPONDENT’S BRIEF**” upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 8th day of January, 2016, addressed as follows:

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