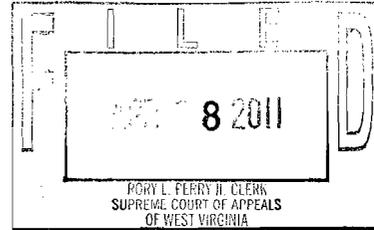


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 101581



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

BEN SKIDMORE,

Defendant Below, Petitioner.

BRIEF ON BEHALF OF RESPONDENT STATE OF WEST VIRGINIA

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I.

STATEMENT OF THE CASE

On April 26, 2009, Ben “Chase” Skidmore (“Petitioner”) intentionally, deliberately and premeditatedly murdered Steve Yarbrough. The facts and circumstances giving rise to this murder are as follows:

In November 2007, Jeff Mullenax (“Mullenax”) met Petitioner in Hagerstown, Maryland, where he and Petitioner worked construction jobs together. Trial Tr. 97, 98, 369-370, Mar. 16-19, 2010.

In the summer (around July) of 2008, Mullenax returned to Morgantown, West Virginia,¹ as the Company he was working for in Maryland had a job opening in Morgantown. *Id.* at 98, 153-154. In Morgantown, Mullinax began living with Tommy and Sherry LeFevers,² who he knew through

¹ Mullenax is a native West Virginian, originally from Shinnston. *Id.* at 97. Petitioner is originally from Los Angeles, California. *Id.* at 367.

² Tommy and Sherry are husband and wife. *Id.* at 98.

Tommy's brother, Timmy LeFevers.³ *Id.* at 98-99, 153-154.

Later in the summer (around August) of 2008, Petitioner also came to Morgantown to work construction⁴ and began living with the LeFevers. *Id.* at 99-100, 154, 369-370, 372.

A few months later (around January or February 2009),⁵ Charles "Willie" Stafford ("Stafford") returned home to Morgantown from North Carolina bringing with him the victim Steve Yarborough. In Morgantown, Steve and Stafford began working construction jobs⁶ and staying with the LeFevers.⁷ *Id.* at 100-101, 155-156, 180-181, 182, 209, 375.

At the time, all of these men – Steve Yarborough, Petitioner, Mullenax and Stafford – were working, got along for the most part, and shared in the household chores and expenses while living at the LeFevers. *Id.* at 102, 103, 155, 159, 168, 183-184, 373, 374, 375-376. Later, however, Petitioner was laid off from his job while Steve, Mullenax and Stafford continued to work on a full-time and/or part-time basis. *Id.* at 103, 156, 185. After a few weeks and with the LeFevers' trailer

³ Mullenax knew Timmy from working construction with him in Maryland. *Id.* at 99, 154, 371.

⁴ In Morgantown, Petitioner did not work at the same construction company as Mullenax. *Id.* at 99, 156.

⁵ Please note that the record is a little unclear on these January and February 2009 dates, as it could have been in December 2008. *See generally Id.* at 209, 374.

⁶ Steve and Stafford worked at different construction firms than did Petitioner and Mullenax. *Id.* at 101. Prior to moving to Morgantown, Steve was living and working in North Carolina. Steve also had a wife, Barbara Yarborough, and a son, who he was living with and supporting for much of the time, 26 – 28 years, that he was in North Carolina. Steve also continued to provide this support after he moved to Morgantown. *Id.* at 121, 155, 572-575, 582.

⁷ Stafford is Sherry LeFevers' brother. *Id.* at 101, 117, 180.

too crowded, Steve, Mullenax and Stafford moved out and into their own house.⁸ Petitioner, unemployed, continued to stay at the LeFevers.⁹ *Id.* at 104, 105, 157, 159, 186, 187, 211, 380-381.

Several days before (Thursday or Friday) murdering Steve Yarborough on April 26, 2009 (Sunday), Petitioner was allowed to move in with Steve and Mullenax.¹⁰ When Petitioner left the LeFevers and moved in with Steve and Mullenax, Stafford, for the most part, moved back in with the LeFevers. *Id.* at 108, 110, 158, 187, 188, 212, 382, 384. As a condition of living there, Petitioner, who was unemployed, had to find a job and help out with the household chores and expenses. *Id.* at 109, 158, 216. To help him gain employment, arrangements were made for Petitioner to call Mullenax's employer about a job, which was to start on the same day that he was to make the call – April 25, 2009 (Saturday). All that was required for Petitioner to obtain this job was to call Mullenax's boss. *Id.* at 109-110, 160-161, 188-190, 213. However, Petitioner never made the call. *See generally Id.* at 111-115, 161, 189-190, 580. Petitioner also failed to keep his “end of the bargain” of helping out with the household chores as well. *See generally Id.* at 579.

On the morning of April 25, 2009 (Saturday), Petitioner and Steve Yarborough, who did not get along, were arguing with one another. *Id.* at 116-117, 168, 171-172. Later that same afternoon and evening, for the most part, Steve, Petitioner, Mullenax and Stafford sat around the house talking, drinking beer and watching television. *Id.* at 119, 120, 121. That night, Steve, Petitioner and

⁸ This house was located in the Sabraton area of Morgantown. *Id.* at 104, 187.

⁹ For a 2 to 3 week period at the end of February and the beginning of March 2009, Petitioner went to Toledo, Ohio to visit a girl he knew in the area. *Id.* at 156-157, 184-185, 210-211, 378-379.

¹⁰ This move came about because of a disagreement between Tommy LeFevers and Petitioner over Petitioner not having a job and contributing to the household expenses. *Id.* at 108, 158. *See also Id.* at 187, 383, 411.

Mullenax stayed at the house; Stafford spent the night at the LeFevers and returned to the house the next morning (Sunday) around 9:00 – 10:00 a.m.¹¹ *Id.* 121, 190-191.

On the morning of his death, April 26, 2009 (Sunday), Steve Yarborough and Mullenax left the house to take a drive and returned around 11:00 a.m. – 12:00 p.m.¹² *Id.* at 121-122. Once they got back, Steve began to clean the house, during which time Petitioner threw a cigarette butt on the floor, which caused an argument between him and Steve. *Id.* at 122-123. Around 12:30 – 1:00 p.m., Steve, Petitioner, Mullenax and Stafford began watching a NASCAR race on television. *Id.* at 123, 191. After about a half an hour, Steve and Mullenax left the house¹³ because Steve and Petitioner were continuously arguing with one another about Petitioner throwing the cigarette butt on the floor, not having any money, and not having his own place to live. *Id.* at 123, 191-192. Petitioner and Steve were also arguing about Petitioner's failure to call Mullenax's boss about a job on Saturday. *Id.* at 124. During this argument, Steve informed Petitioner that he needed to find a job or find another place to live. *Id.* at 123-124. *See also Id.* at 190.

Steve and Mullenax returned to the house around 2:30 – 3:00 p.m. and began watching the NASCAR race again with Stafford. *Id.* at 125, 193, Mar. 16, 2010. While they were watching the race, Petitioner, for the most part, stayed out on the porch drinking beer and talking on his cell phone. *Id.* at 125-126, 195, 216-217, 394, 395, 397.

¹¹ Again, the record is a little unclear on this point, as it indicates that Stafford stayed at the house on Saturday night. *See Id.* at 169, 390.

¹² Steve and Mullenax actually drove over to Cooper's Rock. *Id.* at 121.

¹³ When they left the house, Mullenax and Steve drove to the Suncrest Pub, where they played pool for about 1 to 1 ½ hours. *Id.* at 124.

Following the race,¹⁴ Steve, Mullenax and Stafford continued to sit around, talk and drink beer.¹⁵ *Id.* at 126-127. Throughout this entire time, Petitioner would occasionally come in the house to get a beer out of the kitchen refrigerator, use the restroom, stop and talk for a while, and then go back out on the porch, where he would talk on his cell phone¹⁶ and drink beer. *Id.* at 127, 128, 195-196, 216-217, 394, 395, 396, 397. During the times that he came into the house, Petitioner and Steve did not argue with one another. *Id.* at 127.

Around 6:30 – 7:00 p.m. of this same day, April 26, 2009, Mullenax and Petitioner went to the store to buy some more beer. *Id.* at 128-129, 386. When they returned, Mullenax rejoined Steve and Stafford in the living room; Petitioner put his beer in the refrigerator and went back out on the porch. *Id.* at 129. During this time period, Petitioner called for Mullenax to come out on the porch, which he did. *Id.* at 129-130, 172. There, Mullenax told Petitioner that he would talk to Steve later about working things out so that Petitioner could stay at the house until April 27, 2009 (Monday night) – Petitioner seemed fine with this idea. *Id.* at 129-130, 172, 174, 175. However, Mullenax never had a chance to actually talk to Steve. *Id.* at 174.

Following this conversation, Mullenax came back in the house to the living room where he rejoined Steve and Stafford; Petitioner remained on the porch where he continued to talk on his cell phone.¹⁷ *Id.* at 130-131. While on the porch, Petitioner was overheard on the phone saying that “I

¹⁴ The race ended around 5:00 p.m. *Id.* at 126.

¹⁵ All of the men – Steve, Petitioner, Mullenax and Stafford – consumed a considerable amount of beer on the day before as well as the day of Steve’s death, April 25 and 26, 2009. *Id.* at 165, 169, 214-215.

¹⁶ While talking on the phone, Petitioner sounded calm. *Id.* at 128.

¹⁷ Again, Petitioner sounded calm while talking on the phone. *Id.* at 131.

got a place to stay now.” *Id.* at 132. Petitioner was also overheard saying something about having “three hots and a cot” now.¹⁸ *Id.* at 196-197, 217.

Thereafter, Petitioner came in the house to get another beer out of the kitchen. *Id.* at 132, 197, 217. On his way out of the kitchen, Petitioner approached Steve Yarborough from behind, who was sitting in a living room chair, and struck him several times with a hammer¹⁹ on the top of his head and killing him.²⁰ *Id.* at 133-134, 146, 147, 163, 197, 199-200, 217, 228-229, 236, 256, 265-266, 277, 278, 284, 313, 326, 334. Both Mullenax and Stafford witnessed this attack. *Id.* at 133, 134, 135.

Shocked by what he had just seen, Mullenax asked Petitioner, “Chase, what are you doing? What did you do?” *Id.* at 135, 139. Petitioner then pointed at Mullenax and said “don’t come no farther,” “you’ll be next.” *Id.* at 135. Petitioner also stated to Mullenax and Stafford, “I love you guys to death, but I’ll kill you too.” *Id.* at 200-201. When Mullenax tried to help Steve, Petitioner angrily told him, “don’t bother him, he’s dead,” “don’t touch him, he’s dead.” *Id.* at 138. *See also Id.* at 201, 204. Referring to Steve and that he was “fed up” with him, Petitioner also commented that “I hope the motherfucker’s dead.”²¹ *Id.* at 204, 208.

Unable to find his cell phone, Mullenax could not call the police. *Id.* at 138, 139, 140.

¹⁸ Again, when he made this statement, Petitioner sounded calm and was not screaming. *Id.* at 132. In fact, throughout the entire afternoon and evening of April 26, 2009, Petitioner spoke in clear and understandable tone. *Id.* at 152.

¹⁹ Petitioner struck Steve with the hammer as many as 3 to 4 times. *Id.* at 134, 282, 283.

²⁰ The autopsy revealed that Steve died as a result of a blunt force head injury intentionally inflicted by a hammer. *Id.* at 277, 278, 284.

²¹ On the day of or day before killing Steve, Petitioner commented that he was going to “fuck” him up. *Id.* at 168, 171.

Knowing that he wanted his phone to call the police, Petitioner told Mullenax, “don’t call the cops on me yet, just give me a few hours,” to which Mullenax agreed. *Id.* at 140, 143. *See also Id.* at 167. Mullenax finally located his phone in his bedroom and called the police, during which time Petitioner was on the porch.²² *Id.* at 140, 141, 163-164, 201. Petitioner then came back into the house, grabbed some beer out of the refrigerator, and then left; Mullenax remained at the house waiting on the police and EMS workers to arrive; Stafford left the house and went to the LeFevers.²³ *Id.* at 142-143, 147-148.

Thereafter, the police located and arrested Petitioner just after midnight on April 27, 2009.²⁴ *Id.* at 243, 260, 263, 264, 316. During this arrest, Petitioner again commented numerous times about now having “three hots and a cot.” *Id.* at 248, 266, 268, 316, 319, 320, 321-322. Petitioner also asked the police whether West Virginia had the death penalty; when he was informed that it did not, Petitioner commented that was good and he would just have to spend the rest of his life in jail. *Id.* at 266. When the police asked him what he meant by that comment, Petitioner stated, “well, I did what I did, so I gotta get caught for it.”²⁵ *Id.* at 266.

²² In order to locate his phone, Mullenax asked Petitioner to call his phone so that he could determine its location by listening to it ring; Petitioner obliged by calling Mullenax’s phone. *Id.* at 139-140, 203, 343, 420.

²³ While Mullenax was at the police station being interviewed, Petitioner called him; again, his voice was clear and understandable. *Id.* at 151, 341.

²⁴ Petitioner was actually found behind a nearby gas station. *See generally Id.* at 243-245, 260.

²⁵ After he was taken into custody by the police, Petitioner’s demeanor was calm, he spoke with a clear and understandable voice, he understood and was answering appropriately to the officers’ questions, and he did not have any trouble standing or controlling his movements. Trial Tr. 247-248, 262-263, 317, 318, Mar. 17, 2010. In fact, Officer Jeff Wells of the Morgantown Police Department indicated that if he had encountered Petitioner on the street that

On May 15, 2009, the Monongalia County Grand Jury indicted Petitioner for the first-degree murder of Steve Yarborough. Indictment No. 09-F-125, May 15, 2009. Arraignment Hrg, 2, May 21, 2009.

On February 18, 2010, the prosecution moved the Circuit Court (“court”) to bifurcate Petitioner’s trial, in order that it could introduce evidence of Petitioner’s prior criminal history during the penalty phase of the trial, which would not have been admissible during the guilt phase. State’s Mot. for Bifurcation, Feb. 18, 2010; Pre-Trial Motions Order, 1, Mar. 10, 2010; Pre-Trial Motions Hrg, 2, 3, 4, Mar. 8, 2010. On March 8, 2010, following a hearing, the court granted the prosecution’s Motion to Bifurcate Petitioner’s trial. Pre-Trial Motions Order, 1, Mar. 10, 2010; Pre-Trial Motions Hrg, 4, Mar. 8, 2010.

The guilt phase of Petitioner’s bifurcated trial began on March 16, 2010, and ended on March 18, 2010, with the jury convicting him of first-degree murder. Trial Tr. 541, Mar. 18, 2010; Verdict and Sentencing Order, 1, Mar. 19, 2010. The penalty phase of Petitioner’s trial took place on March 19, 2010, with the jury returning a supplemental verdict of no recommendation of mercy. Trial Tr. 593, Mar. 19, 2010; Verdict and Sentencing Order, 1, Mar. 19, 2010. On this same day, March 19, 2010, the court sentenced Petitioner to life in the penitentiary without the possibility of parole. Trial Tr. 597, Mar. 19, 2010; Verdict and Sentencing Order, 1, Mar. 19, 2010.

Following his trial and sentencing, on May 20, 2010, Petitioner moved the court to set aside the jury’s verdict or, alternatively, to grant him a new trial.²⁶ Mot. to Set Aside Verdict or Grant

night, he would not have arrested him for public intoxication. *Id.* at 319.

²⁶ As discussed more fully below, the basis for Petitioner’s Motion, which is also his basis on appeal, was twofold – (1) that the court improperly instructed the jury by allowing them to find that premeditation and deliberation could be negated by their finding that Petitioner had

New Trial, Mar. 31, 2010; Post-Trial Motions Hrg, 2, May 20, 2010; Post-Trial Mot. Order Denying Mot. to Set Aside Verdict or Grant New Trial, 1, May 24, 2010. Following a hearing on this same day, May 20, 2010, the court denied Petitioner’s Motion. Post-Trial Motions Hrg, 13-18, May 20, 2010; Post-Trial Mot. Order Denying Mot. to Set Aside Verdict or Grant New Trial, 3, May 24, 2010. Thereafter, Petitioner brought the current Petition for Appeal.

II.

SUMMARY OF ARGUMENT

The penalty phase of Petitioner’s bifurcated trial took place on March 19, 2009. At that time, it was unnecessary to conduct a *McGinnis* hearing to determine the admissibility of Petitioner’s prior voluntary manslaughter conviction at the penalty phase of the trial. Thus, although no *McGinnis* hearing was held, the court correctly admitted Petitioner’s previous conviction during the penalty phase of the trial.

“Simple intoxication” was not sufficient to prevent Petitioner from forming the necessary elements for first degree murder – premeditation and deliberation. Thus, the court correctly instructed the jury that if they found that Petitioner was “grossly intoxicated” so as to make him incapable of deliberating and premeditating the murder of Steve Yarborough, then they must acquit Petitioner of first-degree murder and then deliberate his guilt on the lesser included charge of second-degree murder.

been “grossly intoxicated” at the time of the commission of the crime; and (2) that the court impermissibly granted the prosecution’s Motion to Bifurcate his trial into guilt and penalty phases, with the prosecution being permitted to introduce evidence of Petitioner’s past criminal history during the penalty phase. Mot. to Set Aside Verdict or Grant New Trial, Mar. 31, 2010; Post-Trial Motions Hrg, 5-6, May 20, 2010; Post-Trial Mot. Order Denying Mot. to Set Aside Verdict or Grant New Trial, 2-3, May 24, 2010.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Rules of Appellate Procedure, the State believes that oral argument is necessary in this case for the following reasons:

1. This is a first-degree murder case resulting in Petitioner being convicted and receiving a life sentence without the possibility of parole;
2. Petitioner's assignments of error concern the application of settled law – the admissibility of Rule 404(b) evidence during the penalty phase of the trial, as well as the Circuit Court's intoxication instructions to the jury;
3. The Circuit Court has discretion as to the admissibility of evidence and jury instructions and Petitioner claims that it committed an unsustainable exercise of this discretion; and,
4. This case involves narrow issues of law.

See R. App. Proc. 19(a).

Because Petitioner has been convicted of first-degree murder and sentenced to life in the penitentiary without the possibility of parole, the State believes that this case is not appropriate for a memorandum decision. The State does not believe that additional time is needed for oral argument. However, the State will defer to the discretion and wisdom of the Court on both these points.

IV.

ARGUMENT

A. **THE TRIAL COURT DID NOT ERR BY GRANTING THE PROSECUTION'S MOTION TO BIFURCATE PETITIONER'S TRIAL INTO GUILT AND PENALTY PHASES, WITH THE PROSECUTION BEING PERMITTED TO INTRODUCE EVIDENCE OF PETITIONER'S PAST CRIMINAL HISTORY DURING THE PENALTY PHASE.**

1. **Standard of Review**

On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.

Syl. pt. 7, *State v. Hager*, 204 W. Va. 28, 511 S.E.2d 139 (1998) (internal quotations and citations omitted). “The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syl., *State v. Fox*, 207 W. Va. 239, 531 S.E.2d 64 (1998) (internal quotations and citations omitted).

2. **At the Time of the Penalty Phase of the Trial, the Trial Court was not Required to Conduct an Analysis Under Rules 403 and 404(b) of the West Virginia Rules of Evidence Before Admitting Evidence of Petitioner's Prior Criminal Record at the Penalty Phase.**

Although it virtually is impossible to outline all factors that should be considered by the trial court, the court should consider when a motion for bifurcation is made: (a) whether limiting instructions to the jury would be effective; (b) whether a party desires to introduce evidence solely for sentencing purposes but not on the merits; (c) whether evidence would be admissible on sentencing but would not be admissible on the merits or vice versa; (d) whether either party can demonstrate unfair prejudice or disadvantage by

bifurcation; (e) whether a unitary trial would cause the parties to forego introducing relevant evidence for sentencing purposes; and (f) whether bifurcation unreasonably would lengthen the trial.

Syl. pt. 6, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

With these, if you will, *LaRock* factors in mind, the court correctly bifurcated Petitioner's trial and permitted the prosecution to introduce evidence, during the trial's penalty phase, of Petitioner's previous conviction for voluntary manslaughter. To begin with, the prosecution, in moving the court for bifurcation, sought the introduction of Petitioner's previous conviction solely for sentencing purposes, rather than as evidence to establish his guilt. Furthermore, Petitioner was not unfairly prejudiced or disadvantaged by the court's decision to bifurcate his trial into guilt and penalty phases. As discussed more fully below, the jury's recommendation of no mercy was justified alone on the evidence it heard during the guilt phase of the trial. Additionally, again as discussed more fully below, a unitary trial would have forced the prosecution to forego relevant evidence for sentencing purposes of Petitioner's previous voluntary manslaughter conviction. Finally, the bifurcation of Petitioner's trial did not delay or lengthen the trial "one bit," as the penalty phase took place immediately after the guilt phase.

On appeal, Petitioner asserts that the court committed error by allowing the prosecution to introduce evidence during the sentencing phase of Petitioner's trial of his prior conviction for voluntary manslaughter.²⁷ Petitioner takes particular issue with the court's admission of this prior

²⁷ This conviction occurred in 1987 in California and resulted in Petitioner being sentenced to 12 years in the penitentiary. Trial Tr. 568, Mar. 19, 2010. The homicide took place in a Los Angeles laundromat when the victim approached Petitioner and asked him for a drink of his beer. *Id.* at 564. Petitioner found the victim to be an "obnoxious mother fucker" and refused him a drink of his beer thus resulting in an altercation between Petitioner and the victim, during which the victim was killed. *Id.* The autopsy on the victim revealed that he died as a result of a blunt force trauma to his head. *Id.* at 567. Interestingly, like here, Petitioner was drinking prior

conviction without first conducting a *McGinnis* hearing²⁸ to determine the prior conviction's admissibility under Rules 403 and 404(b) of the West Virginia Rules of evidence. *See generally* Pet. for Appeal, 5-11. However, at the time of penalty phase of Petitioner's trial, March 19, 2010, the admissibility of Petitioner's previous conviction for voluntary manslaughter was governed by *State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 691 S.E.2d 183 (2010) (per curiam), which was decided on March 4, 2010.²⁹ Even Petitioner admits this to be the case:

By the time the trial began, the *Dunlap* decision had been reviewed by everyone and its decision governed the procedural

to this altercation and claimed that he was "an alcoholic" and "blacked out" during the fight between himself and the victim. *Id.* at 565.

²⁸ As the Court is well aware, a *McGinnis* hearing consists of the following:

Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an in camera hearing as stated in *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Syl. pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).

²⁹ The March 4, 2010 *Dunlap* decision was also the controlling law during the hearings on the prosecution's Motion to Bifurcate the trial and Petitioner's Motion to Set Aside Verdict or Grant New Trial, respectfully held on March 8, 2010 and May 20, 2010.

aspects of the penalty phase of the bifurcated trial and the introduction of the Defendant's prior criminal record into evidence. Consequently, *Dunlap* set the back drop for the sentencing phase of the Defendant's trial.

Pet. for Appeal, 7.

Under *Dunlap*, “[a] trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy.” Syl. pt. 6, *Dunlap, supra* (quoting Syl. pt. 4, *LaRock, supra*. Furthermore, and more to the point, as found by the *Dunlap* Court:

As a general matter, “[t]he rules of evidence, including Evid.R. 404(b) regarding ‘other acts,’ do not strictly apply at sentencing hearings.” *State v. Combs*, No. CA2000-03-047, 2005 WL 941133, at *2 (Ohio Ct. App. 2005). See *Patton v. State*, 25 S.W.3d 387, 392 (Tex.App.2000) (“It has been held that Rule 404(b) does not apply to the penalty or punishment phase of a bifurcated trial.”). Moreover, “[a] trial court has wide discretion in the sources and types of evidence used in determining the kind and extent of punishment to be imposed. And a sentencing court is not restricted by the federal constitution to the information received in open court.” *Elswick v. Holland*, 623 F.Supp. 498, 504 (S.D. W. Va. 1985) (citations omitted).

Dunlap, 225 W. Va. ___, 691 S.E.2d 193 (emphasis added).

Clearly, under *Dunlap*, a *McGinnis* hearing, which requires the trial court to conduct an analysis under Rules 401, 402, 403 and 404(b) of the West Virginia Rules of Evidence before it allows prior bad acts and crimes to be admitted into evidence, does not apply to, as in this case, the penalty phase of a trial. Based on *Dunlap*, the court correctly admitted Petitioner's previous conviction for voluntary manslaughter during the penalty phase of his trial, despite not having conducted a *McGinnis* analysis. In doing so, the court found as follows:

[B]ased on my reading of . . . [Dunlap] you don't have to go through

a 404(b) McGuinness [sic] analysis, that that only applies during the guilt phase of the trial.

It would appear that the rules of evidence are relaxed in a sentencing proceeding. We very often hear matters in sentencing hearings that would not be admissible in the trial itself. And, in fact, the reason that the Court bifurcated the issue of mercy from the issue of guilt in this case is because of the fact that the State intended to offer evidence at this proceeding that would not have been admissible during the guilt phase, and that is, Mr. Skidmore's prior conviction.

Trial Tr. 553, Mar. 19, 2010 (emphasis added).

Petitioner argued below, and continues to argue on appeal, that the court's use of *Dunlap* in admitting his previous conviction for voluntary manslaughter is error, as *Dunlap* failed to provide him with "the safeguard of [a] *McGinnis* 404(b) and Rule 403 balancing analysis of its prejudicial vs probative value." Pet. for Appeal, 9. In support this argument, Petitioner relies on Syl. pt. 7, *State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010), *cert. denied*, 131 S. Ct. 1056 (2011) wherein this Court found that:

The type of evidence that is admissible in the mercy phase of a bifurcated first degree murder proceeding is much broader than the evidence admissible for purposes of determining a defendant's guilt or innocence. Admissible evidence necessarily encompasses evidence of the defendant's character, including evidence concerning the defendant's past, present and future, as well as evidence surrounding the nature of the crime committed by the defendant that warranted a jury finding the defendant guilty of first degree murder, so long as that evidence is found by the trial court to be relevant under Rule 401 of the West Virginia Rules of Evidence and not unduly prejudicial pursuant to Rule 403 of the West Virginia Rules of Evidence.

Obviously, *McLaughlin* counsels that, although the type of evidence that is admissible during the sentencing phase of a bifurcated trial is broader than the type of evidence that would be admissible during the guilt phase, the evidence still needs to be "run" through the relevancy

requirements of Rule 401, as well as the balancing test of Rule 403. However, *McLaughlin* did not overrule *Dunlap* – rather, it refined it. Equally important, *McLaughlin* was decided on June 8, 2010, well after the penalty phase of Petitioner’s trial, which took place on March 19, 2010. Furthermore, there is nothing in the *McLaughlin* decision indicating that the Court intended that it be applied retroactively.³⁰ Even Petitioner readily admits that *McLaughlin* applies prospectively only: “the *McLaughlin* . . . decision is to be applied prospectively as stated in Footnote 16.”³¹ Pet. for Appeal, 10.

Finally, assuming that a *McGinnis* hearing was required in this case, which it was not, before the court allowed the jury to hear evidence concerning Petitioner’s prior conviction for voluntary manslaughter during the penalty phase, the result would have been the same – the evidence would have been admissible. First, there is no doubt, and Petitioner does not dispute, that he was previously convicted for voluntary manslaughter and that he received a 12 year sentence on this conviction.

Secondly, Petitioner’s prior conviction is very relevant to the issue of whether he should receive a recommendation of mercy in his sentencing for first degree murder. As with this case, Petitioner’s prior conviction also involved a homicide. Obviously, the fact that Petitioner was previously convicted for a homicide is relevant to the type of sentence that he should be given in this

³⁰ Understandably so, as a retroactive application of *McLaughlin* would create a real mess. Applied retroactively, *McLaughlin* would require all previous convictions where evidence of prior bad acts and/or convictions of criminal defendants that were admitted during the penalty phase of their first-degree murder trials be revisited to determine whether these prior bad acts and/or convictions were relevant and not unduly prejudicial under Rules 401 and 403.

³¹ Footnote 16 of *McLaughlin*, as referenced by Petitioner, states that “[t]his holding is to be applied prospectively.” *McLaughlin*, 226 W. Va. ___ n.16, 700 S.E.2d 295 n.16.

case, which involves his conviction for first-degree murder. "To satisfy the relevancy requirement under Rule 401 of the West Virginia Rules of Evidence, the offered evidence merely needs to make a fact of consequence more or less probable than it would be without the evidence." *State v. Sugg*, 193 W. Va. 388, 404, 456 S.E.2d 469, 485 (1995) (citing *State v. Derr*, 192 W. Va. 165, 178, 451 S.E.2d 731, 744 (1994))

Third, the probative value of Petitioner's prior conviction is not substantially outweighed by its prejudicial effect. That is, there is nothing to indicate that the jury was inflamed by hearing about Petitioner's prior actions that led to his earlier homicide conviction, and that the jury did not recommend mercy because of this previous conviction, rather than basing their decision not to recommend mercy based on Petitioner's guilt in this case. "Unfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *LaRock*, 196 W. Va. 312, 470 S.E.2d 631 (citations omitted). Stated in a different manner, evidence causing unfair prejudice relates to evidence tending "to lead the jury, often for emotional reasons, to desire to convict a defendant for reasons other than the defendant's guilt." *State v. Guthrie*, 194 W. Va. 657, 683, 461 S.E.2d 163, 189 (1995). Prior to the jury being presented with evidence of Petitioner's prior conviction for voluntary manslaughter during the penalty phase, the jury, during the guilt phase, heard direct evidence showing that Petitioner, in an intentional, deliberate and premeditated manner, beat the victim, Steve Yarborough, to death with a hammer. The jury's decision to not recommend mercy was warranted by this evidence alone, and Petitioner's prior voluntary manslaughter conviction did not inflame the jury in making its decision. Rather, the jury's no mercy recommendation was based on all the evidence presented to it during the guilt and penalty phase of

Petitioner's trial.

B. THE TRIAL COURT DID NOT ERR WHEN IT INSTRUCTED THE JURY ON PETITIONER'S VOLUNTARY INTOXICATION BY ALLOWING THEM TO FIND THAT TWO NECESSARY ELEMENTS FOR FIRST DEGREE MURDER, PREMEDITATION AND DELIBERATION, COULD BE NEGATED BY THEIR FINDING THAT PETITIONER HAD BEEN "GROSSLY INTOXICATED" AT THE TIME OF THE CRIME.

1. Standard of Review

A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syl. pt. 4, *Guthrie, supra*.

"The basis of the objection determines the appropriate standard of review." *Guthrie*, 194 W. Va. 671, 461 S.E.2d 177. "In this light, if an objection to a jury instruction is a challenge to a trial court's statement of the legal standard, this Court will exercise *de novo* review." *Id.*

[W]hen an objection to a jury instruction involves the trial court's expression and formulation of the jury charge, this Court will review under an abuse of discretion standard. Therefore, we review jury instructions to determine whether, taken as a whole and in light of the evidence, they mislead the jury or state the law incorrectly to the prejudice of the objecting party. So long as they do not, we review the formulation of the instructions and the choice of language for an abuse of discretion. We will reverse only if the instructions are incorrect as a matter of law or capable of confusing and thereby misleading the jury.

Guthrie, 194 W. Va. 671-672, 461 S.E.2d 177-178 (footnote omitted).

2. **Based on the Evidence and Law, the Trial Court's use of the Terms "Grossly Intoxicated" and "Gross Intoxication" When Instructing the Jury was Proper. The Court's Use of These Terms Correctly Informed the Jury on the Degree of Intoxication Necessary to Show That Petitioner was Incapable of Premeditating and Deliberating the Murder of the Victim, Steve Yarborough.**

In their entirety, the court's instructions to the jury on intoxication are as follows:

The Court instructs the jury that although voluntary intoxication or drunkenness will never provide a legal excuse for the commission of a crime, the fact that a person may have been *grossly intoxicated* at the time of the commission of a crime, may negate the existence of premeditation and deliberation, which is an element of the offense of murder in the first degree. So, the evidence that a defendant acted while in a state of *gross intoxication* is to be considered in determining whether or not the defendant acted with premeditation and deliberation.

If the evidence in this case leaves you with a reasonable doubt that the accused was capable of forming premeditation and deliberation to commit the crime of murder in the first degree because of *gross intoxication*, then you should acquit the defendant of the offense of murder in the first degree and deliberate on the lesser included offense of murder in the second degree.

Trial Tr. 480, Mar. 18, 2010 (emphasis added).

On appeal, Petitioner essentially asserts that the court committed error in giving the jury this instruction, as the court's use of use of the terms "grossly intoxicated" and "gross intoxication" placed a greater burden of proof on him of showing that due to the amount of alcohol that he consumed prior to killing Steve Yarborough he did not have the requisite elements of premeditation and deliberation to be convicted of first-degree murder. *See generally* Pet. for Appeal, 11-18. Petitioner expands this argument by asserting that the court failed to provide the jury with more

guidance on the meaning of the term “gross intoxication.” Petitioner even goes so far as to point to a proposed jury instruction from the West Virginia Homicide Jury Instructions Project, and further asserts that this proposed instruction should have been given by the court. However, this instruction also uses the term “grossly intoxicated” to which Petitioner objects, but argues that it more fully explains or gives guidance to the jury on what is “gross intoxication.” *See generally* Pet. for Appeal, 16-18.

Below, Petitioner essentially made the same arguments to the court to which the court responded as follows:

With respect to the issue of intoxication and its effect on those elements of the crime of first-degree murder which require some specific intent. And, generally speaking, we would be talking about the elements of premeditation, deliberation. The Court found that there was sufficient evidence to present that defense to the jury. It was then the Court’s responsibility to charge the jury with regard to when intoxication would amount to a defense, or *when intoxication would negate those elements of the crime*. The Court went to the case law of the State of West Virginia and crafted the instruction and jury charge that was given to the jury on the issue of intoxication straight out of the language of the court in those cases. If that’s wrong, then, basically, the Court is going to have to overturn prior precedent. And that’s the Court’s prerogative. It’s not mine. It’s my job to try the case based upon the law as it stands in the State of West Virginia at the time the case is tried.

The Court believes that its instructions with regard to the issue of intoxication and its possible effect on the verdict was proper and appropriate and not error.

Post-Trial Motions Hrg, 14-15, May 20, 2010 (emphasis added).

The defendant claims that the Court erred in giving an intoxication instruction that allowed the jury to find that premeditation and deliberation could be negated by their finding that the defendant had been “grossly intoxicated” at the time of the commission of the crime. At trial, the Court found from the evidence

presented by the defendant and by the State, that the defendant and others had been drinking alcohol on the day of the murder, was sufficient to support an instruction regarding intoxication as a defense to first degree murder. However, having determined that an intoxication instruction was justified, the Court was obligated to correctly charge the jury regarding the *degree of intoxication that could eliminate the elements of premeditation and deliberation*. The Court's instruction was derived from the W. Va. Supreme Court's caselaw.

Post-Trial Mot. Order Denying Mot. to Set Aside Verdict or Grant New Trial, 2, May 24, 2010 (emphasis added).

The State agrees that Petitioner drank a considerable amount of beer, as did Steve Yarborough, Mullenax and Stafford, on the day before as well as the day of Steve's murder. However, despite his drinking, Petitioner knew exactly what he was doing before, during and after murdering Steve – more about this later. “Simple intoxication” is not sufficient to prevent a criminal defendant, including Petitioner, from forming the necessary elements for first degree murder – premeditation and deliberation. Hence, the court's inclusion of the terms “grossly intoxicated” and “gross intoxication” in its instructions. Simply put, the court's instructions on this point are in keeping with the law as well as the evidence in this case.

Voluntary intoxication, as the Court is well aware, is no excuse or justification for committing any crime, including murder. However, voluntary intoxication can reduce first degree murder to second degree murder. In reducing murder from first to second-degree, this Court, in its various decisions, has found that simple intoxication, for lack of a better phrase, “just doesn't cut the mustard.” The common thread running through these cases seems to be that the intoxication must be so great or “gross” as to render the defendant incapable of forming the necessary elements of first-degree murder, that being premeditation and deliberation. The following cases illustrate this

point:

Voluntary drunkenness is generally never an excuse for a crime, but where a defendant is charged with murder, and it appears that the defendant was *too drunk* to be capable of deliberating and premeditating, in that instance intoxication may reduce murder in the first degree to murder in the second degree, as long as the specific intent did not antedate the intoxication.

Syl. pt. 2, *State v. Keeton*, 166 W. Va. 77, 272 S.E.2d 817 (1980) (emphasis added).

A person guilty of homicide may reduce his crime from murder in the first degree to murder in the second by showing that he was *so intoxicated* at the time the offense was committed as to render him incapable of doing a willful, deliberate, and premeditated act, and that he did not voluntarily become intoxicated for the purpose of committing the offense. All this may be shown by his own and the state's evidence, and the facts and circumstances surrounding the case.

Syl. pt. 1, *State v. Davis*, 52 W. Va. 224, 43 S.E. 99 (1902) (emphasis added).

Voluntary drunkenness is generally never an excuse for a crime, but where a defendant is charged with murder, and it appears that the defendant was *too drunk* to be capable of deliberating and premeditating, in that instance intoxication may reduce murder in the first degree to murder in the second degree, as long as the specific intent did not antedate the intoxication.

Syl. pt. 2, *State v. Bush*, 191 W. Va. 8, 442 S.E.2d 437 (1994) (internal quotations and citations omitted) (emphasis added).

Again, it is clear from these cases that merely being intoxicated or drunk will not do – rather, in order to have his charge reduced from first to second-degree murder, a criminal defendant must be “so intoxicated” or “too drunk” so as to be incapable of deliberating and premeditating the killing. These terms, “so intoxicated” and/or “too drunk,” are synonymous with the terms “grossly intoxicated” and/or “gross intoxication,” which this Court has also found to be necessary in reducing

murder 1 to murder 2:

[I]f a sane man, not having voluntarily made himself drunk for the purpose of committing crime, does, while in a state of such *gross intoxication* as to render him incapable of deliberation, commit a homicide, he is guilty of no higher offense than murder in the second degree.

State v. Kidwell, 62 W. Va. 466, ___, 59 S.E. 494, 496 (1907) (citations omitted) (emphasis added).

The State would argue that the degree of intoxication necessary to reduce murder 1 to murder 2 must be such that the defendant is literally in a state of “blackout.” This may seem extreme, but there is authority from the Court requiring as much:

[I]ntoxication can never be used as a defense where it is alleged that there was Diminished capacity except where previous exceptions apply, but can only be used when there is demonstrated a *Total lack of capacity such that the bodily machine completely fails*. Furthermore, where a weapon is involved it must affirmatively appear that the defendant had no predisposition to commit the crime or to engage in aggressive anti-social conduct which the voluntary intoxication brought to the forefront.

State v. Brant, 162 W. Va. 762, 767, 252 S.E.2d 901, 904 (1979) (emphasis added).

As noted above, Petitioner, along with Steve Yarborough, Mullenax and Stafford, drank a considerable amount of beer on the day before (Saturday, April 25, 2009) as well as the day that Petitioner murdered Steve (Sunday, April 26, 2009). However, the alcohol consumed by Petitioner did not “cloud” his mind in the least in planning and carrying out this murder. In other words, despite his drinking, Petitioner knew exactly what he was doing before, during and after picking up a hammer and viciously beating Steve to death with the same.

Petitioner and Steve were not, to put it mildly, fond of one another. On the day before as well as the day of his death, Steve and Petitioner had several heated arguments due to Petitioner not

“pulling his weight” as far as helping out with the household expenses and chores. Because of this, Steve informed Petitioner that he would have to find another place to live. This angered Petitioner and, in fact, on the day of or day before killing Steve, Petitioner commented that he was going to “fuck” him up.

On the day of his murder, Steve, along with his two friends Mullenax and Stafford, sat around in the living room watching television and drinking beer while Petitioner stayed out on the porch drinking beer and talking on the telephone. While talking on the phone, Petitioner sounded calm rather than as if he were “talking out of his head.” At one point, Petitioner was overheard on the phone saying that “I got a place to stay now” and that he would now have “three hots and a cot.” Again, in making these statements, Petitioner sounded calm and rational. In fact, throughout the entire afternoon and evening of April 26, 2009, Petitioner spoke in a clear and understandable tone.

After killing Steve, Petitioner threatened Mullenax and Stafford, telling them “don’t come no farther,” “you’ll be next” and “I love you guys to death, but I’ll kill you too.” When Mullenax and Stafford attempted to help Steve, Petitioner angrily told them, “don’t bother him, he’s dead,” “don’t touch him, he’s dead.” Petitioner then commented “I hope the motherfucker’s dead.”

When he was arrested, Petitioner told the police “over and over” that he would now have “three hots and a cot.” Petitioner even asked the police whether West Virginia had the death penalty and, when he was informed that it did not, he commented that was good and he would just have to spend the rest of his life in jail. When he was asked what he meant by this comment, Petitioner responded “well, I did what I did, so I gotta get caught for it.” Throughout the entire time that he was in police custody, Petitioner’s demeanor was calm, he spoke with a clear and understandable voice, he understood and answered appropriately to the officers’ questions, and he did not have any

trouble standing or controlling his movements.

It is obvious on these facts that Petitioner intentionally, deliberately and premeditatedly murdered Steve Yarborough and, at the risk of sounding too blunt, his actions were cold, callous and cowardly. It is also obvious on these facts that, despite his alcohol consumption, Petitioner knew exactly what he was doing before, during and after murdering Steve. Finally, the jury, and correctly so, did not “buy” Petitioner’s so-called alcohol induced “blackout” story.

V.

CONCLUSION

Petitioner’s conviction should be affirmed.

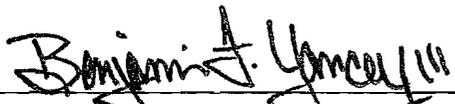
Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 101581

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

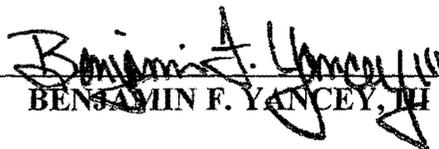
BEN SKIDMORE,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent hereby certifies that a true and correct copy of the foregoing **BRIEF ON BEHALF OF RESPONDENT STATE OF WEST VIRGINIA** was mailed to counsel for the Petitioner by depositing it in the United States mail, first-class postage prepaid, on this 28th day of April, 2011, addressed as follows:

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