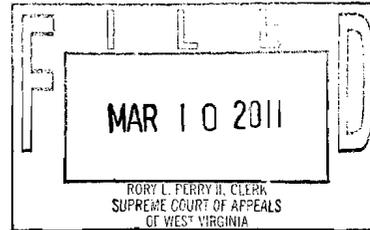

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 101367



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

JASON CLAY ANDERSON,

*Defendant Below,
Petitioner.*

THE STATE OF WEST VIRGINIA'S
RESPONSE TO PETITION FOR APPEAL

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

LAURA YOUNG
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
State Bar No. 4173
Telephone: 304-558-5830
E-mail: ljy@wvago.gov

Counsel for Respondent

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. SUMMARY OF THE ARGUMENT	13
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	15
IV. ARGUMENT	15
A. THE COURT DID NOT ERR IN REFUSING TO DISQUALIFY THE MARION COUNTY PROSECUTING ATTORNEY'S OFFICE FROM PROSECUTING THE PETITIONER	15
B. THE APPEARANCE OF THE PETITIONER, IN HANDCUFFS, BEFORE THE JURY IN THE MERCY PHASE OF THE TRIAL WAS NOT PREJUDICIAL ERROR REQUIRING A NEW HEARING AS TO MERCY. NO OBJECTION WAS RAISED AT TRIAL, AND THE ISSUE WAS NOT OTHERWISE PRESERVED FOR APPEAL	19
C. THE ADMISSION AND DISPLAY OF THE PHOTOGRAPHS OF THE INFANT VICTIM TO THE JURY AT TRIAL WAS NOT ERROR AND NOT AN ABUSE OF DISCRETION	22
D. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO CONCLUDE, BEYOND A REASONABLE DOUBT, THAT THE VICTIM'S DEATH WAS HOMICIDE CAUSED BY SEVERE CARETAKER MALTREATMENT. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO CONCLUDE, BEYOND A REASONABLE DOUBT, THAT THE PETITIONER COMMITTED THE OFFENSE OF MURDER BY A PARENT, GUARDIAN	25
V. CONCLUSION	38

TABLE OF AUTHORITIES

	Page
CASES:	
<i>State ex rel. Tyler v. MacQueen</i> , 191 W. Va. 597, 447 S.E.2d 289 (1994)	18
<i>State v. Derr</i> , 192 W. Va. 165, 451 S.E.2d 731 (1994)	24-25
<i>State v. England</i> , 180 W. Va. 342, 376 S.E.2d 548 (1988)	20-21
<i>State v. Finley</i> , 219 W. Va. 747, 639 S.E.2d 839 (2006)	19, 20
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	26-27, 32
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996)	21, 26-27, 32
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995)	20
<i>State v. Mongold</i> , 220 W. Va. 259, 647 S.E.2d 539 (2007)	14, 23, 24
<i>State v. Sharp</i> , 226 W. Va. 271, 700 S.E.2d 331 (2010)	26
OTHER:	
W. Va. R. App. P. 10(d)	1
W. Va. R. Evid. 401	24
W. Va. R. Evid. 403	24, 25

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 101367

STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

JASON CLAY ANDERSON,

*Defendant Below,
Petitioner.*

RESPONSE TO PETITION FOR APPEAL

Comes now the Respondent, the State of West Virginia, by Laura Young, Assistant Attorney General, pursuant to the West Virginia Revised Rules of Appellate Procedure 10(d) and according to an Order of this Honorable Court, dated February 7, 2011, and responds to the petition for appeal as follows.

I.

STATEMENT OF THE CASE

On October 1, 2007, Jason Clay Anderson, (hereinafter Petitioner), was indicted by the Marion County Grand Jury for the felony offense of murder of a child by a parent, guardian. Among the motions filed prior to trial was a motion to recuse the entire Marion County Prosecuting Attorney's Office from participation in the case because Brent Beveridge, who had been one of the Petitioner's attorneys, had been hired as an assistant prosecutor. (Motion to Recuse Marion County Prosecuting Attorney and For Appointment of Special Prosecutor, Dec. 1, 2009.) Both Mr.

Beveridge and Mr. Wilson, the Marion County Prosecutor, filed affidavits and amended affidavits in response to said motion. (Affidavits of Brent Beveridge and Patrick Wilson.) By order entered December 15, 2009, that motion was denied. On March 16, 2010, a hearing was held, in advance of trial to determine the admissibility of certain items of evidence, including photographs of the deceased, the Petitioner's infant son. By order entered March 31, 2010, the trial court determined that certain photographs of the victim were admissible as their probative value greatly exceeded the prejudicial nature of those photographs. Therefore, photographs identified as the infant at birth, after death at Fairmont General Hospital, and four post-mortem photographs admissible were admissible. (Order Resolving Admissibility, 6-7, March 31, 2010.)

Trial commenced on April 7, 2010. (Trial Tr. vol. 1, 5, Apr. 7, 2010.) On June 23, 2007, the Marion County Rescue Squad was toned, at approximately 11:55 a.m. for a possible cardiac arrest involving an infant. (*Id.* at 110.) Bernetta Beebe of the Rescue Squad testified that neither the mother nor the Petitioner exhibited any emotion about the death of the baby. (*Id.* at 111-12.) Ms. Beebe testified that when she first saw the dead baby, she was shocked. The baby was cold and stiff and had obviously been dead for a while. (*Id.* at 113.) The baby's left pinkie finger was black. (*Id.* at 114.) The baby's onesie was drenched in urine. (*Id.* at 114-15.) Ms. Beebe noted no urgency exhibited by either parent, and noted that the Petitioner "kind of laughed" when he mentioned Ms. Beebe's cell phone. (*Id.* at 116.) Earl Haught, also a member of the Rescue Squad, testified that when he arrived at the location, the Petitioner did not mention his son and the possibility of cardiac arrest. (*Id.* at 121.) Mr. Haught also noted the lack of emotion exhibited by the Petitioner in regards to his dead son, stating he stood in the doorway as if he "didn't care." (*Id.* at 123.) Mr. Haught observed the baby at Fairmont General Hospital and noted bruising on the baby's head and forehead

and around his eye, and noted, without objection, that the baby had passed away long before arriving at the hospital. (*Id.* at 126.)

Dr. Michelic was qualified, without objection, as an expert in the area of emergency room trauma medicine. (*Id.* at 130.) Dr. Michelic testified that the child had no cardiac activity and that rigor mortis had begun to set in when the baby arrived at the hospital. (*Id.* at 131.) Dr. Michelic opined that the child had been dead for hours. He also observed lesions on the child which could not be explained. He noted a “big band of raw skin across the child’s abdomen. The tip of his left fifth finger appeared to be necrotic . . .,” which he further described as if it hadn’t gotten blood for a while and was rotting off. The tip of the child’s penis was ulcerated. Dr. Michelic testified that he had taken care of between 5 and 10 very young cardiac arrests and they don’t have lesions associated with them. (*Id.* at 132-34.) Dr. Michelic opined that as to the injuries he observed on the baby after its death that they pre-existed the death by days to weeks. (*Id.* at 135.)

Martha Evans worked as a home health aide on the same street as the Petitioner’s home and testified she would not enter that home because of the filthy conditions. She further testified that she knew the Petitioner and had talked with him. (*Id.* at 142-44.) Ms. Evans had concerns about the care given the baby J. after his birth because of the conditions she observed with the Petitioner’s daughter, M. (*Id.* at 148-49.) Ms. Evans stated that during a conversation with the Petitioner she inquired as to what was more important, “you and all your dope and stuff like that or them babies.” The Petitioner’s response was that he was more important. (*Id.* at 156.) Amanda Oliverio had a friendly relationship with the Petitioner, and with the baby’s mother, Jennifer Meacham. She testified that the frequency of the visits the Petitioner made to her house increased after baby J. was born on Easter Sunday 2007, but he never brought the baby to her house absent a request from her.

(*Id.* at 166-67.) Ms. Oliverio stated that the baby obviously wasn't being fed because he was getting skinnier. Further, the baby smelled because he wasn't being bathed or having his clothes changed. (*Id.* at 167.) Ms. Oliverio brought the baby home from the hospital and was informed by Jennifer Meacham that the baby was perfectly fine. (*Id.* at 171.) Ms. Oliverio described the home that this baby lived in as having "feces and pee all over the floor. It stunk. it was filthy" (*Id.* at 172.) Ms. Oliverio testified that the room where the baby slept had dirty clothes covered in human waste, and that his bed was always wet. She described that dirty diapers were left on the bed railing, and baby would be just lying in the filth. (*Id.* at 181.) Ms. Oliverio described the Petitioner as being the dominant partner in his relationship with Jennifer Meacham, and that he controlled whatever the two of them did. (*Id.* at 183.) Ms. Oliverio called CPS because of her concerns, but observed that CPS did not enter the house and had no contact with the baby. Further, both the Petitioner and Jennifer laughed about how dumb CPS was for not checking out the house. (*Id.* at 185.) Ms. Oliverio gave the Andersons a piece of blue foam which they inserted in the baby's bed. Ms. Oliverio testified that although the foam became urine soaked; it remained in the bed. (*Id.* at 186.) She also testified that the baby received no postnatal care. (*Id.* at 187-88.) She further observed that the Petitioner not only controlled Jennifer Meacham, he also controlled his grandfather, the other adult in the household and that neither of them did anything without the Petitioner's permission. (Trial Tr. vol. 1, 191-92, Apr. 8, 2010.) Ms. Oliverio concluded her testimony by noting that both the Petitioner and Jennifer Meacham knew how to take care of a child, but just weren't doing it. (*Id.* at 200-01.)

Dr. Sabet, the Chief Medical Examiner for the State of West Virginia testified as an expert witness. (*Id.* at 206.) Dr. Sabet testified that his office was notified because of the suspicious condition of the baby, including the lesions on his abdomen, head and extremities. (*Id.* at 207.)

When the baby arrived at the medical examiner's office, he had on a disposable diaper that smelled and was full of fecal material and urine. Dr. Sabet added that the condition of the diaper was unusual for an infant death. Dr. Sabet noted that upon external examination of the baby he found a lot of lesions on the abdomen, the infant genitalia, the anus, the inner aspects of both thighs, the back of both hands, injuries on his back, left buttock and right temple. (*Id.* at 209-10.) He also found flies and other "animals" around the diaper that are generally not seen even post-mortem. (*Id.* at 211.) Dr. Sabet identified the onesie and the aforementioned foam, and found them to be discolored with urine. (*Id.* at 213-14.) Dr. Sabet was able to rule out internal injury to the child. However, the situation of the clothing and external examination of the child indicated maltreatment. Dr. Sabet ruled out SIDS and SUID, (sudden unidentified infant death), and determined that the manner of death was homicide. The child's hands were covered in exfoliation dermatitis, which is an infection of the skin, caused by constant contact with urine. Dr. Sabet estimated 10 days to two weeks exposure. The baby would be unable to move his hands because of the thickening of the skin, and, as a result, would be in pain. The lesions on the abdomen were also irritated and thickened, with the skin falling off, which would also cause pain. The child had injuries on his back and forehead. He opined that the child's lesions were acutely infected. Baby J. had a thickened scrotum and penis, also a result of the "same situation" and lesions around his anus. Dr. Sabet specifically noted that this baby had skin conditions caused by irritation by urine, and also had injuries as a result of trauma, specifically a heavy object striking the skin one or two days before his death. Dr. Sabet noted traumatic injuries to the child's head and abdomen. He also saw indications on the baby's back of bedsores from lying in a crib. The child also had some traumatic injuries to his back. The child's head, buttocks, sacral region were discolored with lesions because those areas were in

constant contact with the ground, consistent with lying constantly in urine. Dr. Sabet testified that the lesions were at least 10 days old and would be obvious to anyone looking at the baby. Dr. Sabet noted that this child, who had been born perfectly healthy on Easter Sunday, was now in the lowest possible percentage for weight, which indicated very bad nutrition. The child had only one-half of the subcutaneous fat he should have had, consistent with the aforementioned malnutrition. Dr. Sabet testified that there was less than normal vitreous fluid in the baby's eye, also indicative of malnutrition and some degree of lack of hydration. His conclusion was that

[J.C.A.], a two- and a-half-month old, relatively small for age, who died suddenly and unexpectedly in the setting of severe care-taker maltreatment, including evidence of nonaccidental soft tissue injuries, poor hygiene with severe diaper rash, and investigative findings indicative of severe caretaker neglect. While a specific underlying mechanism of death has not been identified, the post-mortem and investigative findings point to severe caretaker maltreatment as the underlying cause of death. Infant's demise, death. So manner of death in this cause is classified as homicide.

(*Id.* at 228-29.) Dr. Sabet agreed that homicide was defined as caused by another human being.

(*Id.*) On cross-examination, while stating that there was some liquid in the baby's stomach, Dr. Sabet did not conclude that the mere presence of food in the baby's stomach precluded symptoms of starvation. (*Id.* at 233.) On re-direct, Dr. Sabet estimated that 40 to 50 percent of the child's body skin surface was involved with lesions. (*Id.* at 236.)

Dr. Verona was qualified as an expert in emergency room medicine. (*Id.* at 242.) Dr. Verona believed that the baby had been dead for hours before reaching the hospital. (*Id.* at 244.) He observed the baby to be thin, underweight, with very little fat. He had extensive skin breakdown that occurred before death. Dr. Verona opined that he had seen many SIDS deaths, and that a SIDS baby looks like an otherwise normal baby, without bruises. A SIDS baby, according to Dr. Verona, looks normal, usually still warm, not cold and stiff. There is no bruising, lividity or skin

discoloration. Dr. Verona opined definitely that baby J. was not a SIDS baby. (*Id.* at 246-49.)

Deputy Matt Love testified that he responded to the scene of the baby's death and observed the aforementioned foam. When picked up, urine actually ran out of the foam. (*Id.* at 260.) Deputy Love spoke both with the Petitioner and Jennifer Meacham, and noted them both to be matter of fact, without emotion, and not crying. He stated that the deputies were crying, but not the parents. (*Id.* at 262-63.) Further, Deputy Love spoke with Jason Anderson at the hospital, and noted that Mr. Anderson was not upset when talking to the county coroner. The only question the Petitioner had was about the laws involving four wheelers. (*Id.* at 262-66.)

Jennifer Meacham testified. Ms Meacham had entered a plea regarding the death of her child. (*Id.* at 270.) Ms. Meacham testified that both she and the Petitioner received government checks of around \$667.00 a month, and that Denzil Anderson received two different checks. (*Id.* at 278-79.) Ms. Meacham testified that the Petitioner would not let her go anywhere unless he accompanied her. (*Id.* at 280.) Ms. Meacham testified that for the first month and a half of their daughter's life the Petitioner was involved in all aspects of child care including feeding her. (*Id.* at 283.) She added that eventually Jason Anderson objected to her taking care of daughter M., and that child care was delegated to Denzil Anderson, a gentleman in his 80s. (*Id.* at 284.) Jennifer Meacham stated that Jason Anderson was with her constantly, and that she feared him because he was abusive. (*Id.* at 286.) She added that Denzil Anderson was almost blind, when charged with caring for M., and that Jason Anderson was in total control of their relationship. (*Id.* at 288-89.) Jennifer Meacham testified that she did not discover she was pregnant with baby J. for several months after conception and that the Petitioner was not happy about the pregnancy. She received next to no prenatal care. (*Id.* at 291-94.) According to Ms. Meacham, after the child's birth, the Petitioner decided that the

elder Mr. Anderson could care for the baby, as well as caring for M. and that when she tried to change his diaper, the Petitioner would “grab me by my arm and throw me back on the bed and tell me, no, you’re not going.” (*Id.* at 297-98.) Ms. Meacham stated that the baby spent most of his time in his crib, and that the Petitioner would prop a bottle on a blanket so the baby could eat. (*Id.* at 299.) She added that the baby was not fed as he should have been, and that there were days when he wasn’t fed at all, even up to two or three days. (*Id.* at 300.) She stated that the baby always lay on his back and that he would have the same diaper on for days. Ms. Meacham testified that if she tried to change the baby, the Petitioner would physically stop her. (*Id.* at 302-03.) She stated that both she and the Petitioner knew baby J. was covered with urine and feces, and that the foam he was lying on was soaked through with urine. (*Id.* at 304-05.) She testified that when CPS came to visit that they either avoided the workers or covered the baby in a blanket. She stated no worker ever took the blanket off the baby to examine him. (*Id.* at 309-10.) She admitted that both she and the Petitioner saw the skin problems on the baby’s abdomen. (*Id.* at 310.) Jennifer Meacham stated that she told the Petitioner that she wanted to take the baby to a doctor, but that the Petitioner refused. (*Id.* at 311.) The Petitioner apparently believed that he was not the biological father of this child and stated that he was not going to care for the baby because it wasn’t his. (*Id.* at 314.) Ms. Meacham testified that on the day of the baby’s death, he had not been out of the crib. Denzil Anderson woke her and told her that the baby was cold. When she checked the baby, she knew he was gone. She stated that Jason Anderson wanted the house cleaned before 911 was called, so they cleaned for three or four hours. They tidied the baby’s room, and put toys around the crib. Jason Anderson told Ms. Meacham to inform the authorities that they fed the baby at night, and changed his diaper and that he was fine. Additionally, she stated that Jason Anderson wanted to bury the baby in the

backyard and claim he had been kidnapped. (*Id.* at 316-20.) Ms. Meacham testified that when the baby cried, the Petitioner became so angry that he shook the crib or hit the child with his fist or open hand. (*Id.* at 324.)

Roger Anderson, who is the Petitioner's stepbrother, testified that the house was in deplorable condition rife with odors, urine, feces, filth, cats and dogs. He further testified that "[Petitioner] ruled the house." (*Id.* at 392.)

Denzil Anderson testified that when he became aware that a second child was expected, he informed the Petitioner that he (Denzil) could not care for two children. (Trial Tr. vol. 2, 446, Apr. 9, 2010.) However, Mr. Anderson added that the child's crib was placed in his room. The baby would remain in his crib all day, and his parents would stay in another back bedroom. (*Id.* at 447-48.) He testified that the parents spent no time with the baby. (*Id.* at 449.)

Deputy Chris Gearde responded to the scene. He described the Petitioner as being matter of fact, and that Petitioner stated that he had called 911 immediately after he was informed that the child was not moving. (*Id.* at 481-82.) Deputy Gearde described the foam soaked in urine, so much so, that a towel had been lain below the crib to catch the excess urine. (*Id.* at 489.) Deputy Gearde described the Petitioner as disassociated from his son. (*Id.* at 494.) Deputy Gearde further testified that the Petitioner made no inquiry as to his son, but rather asked if he (the Petitioner) was going to be handcuffed, before he was informed that he was in any trouble. (*Id.* at 505.)

Dr. William Fremouw was qualified as an expert in the field of forensic evaluation. (*Id.* at 523.) Dr. Fremouw testified that the Petitioner was almost 19 at the time of the evaluation, and that the Petitioner was very rational and conversant. (*Id.* at 526.) Although the Petitioner knew his daughter's birth weight, he did not know his son's, and professed doubt that he was the biological

father of that child. (*Id.* at 528.) During the interview, the Petitioner readily admitted being addicted to drugs and having a problem with anger management. With specific regard to the baby, the Petitioner stated that he had noticed the lesions on the baby. He stated that it was the mother's fault the baby died, that he (Petitioner) had nothing to do with him. (*Id.* at 529-30.) The Petitioner stated that it wasn't right to let a baby die, but that it wasn't his job. Accordingly to Dr. Fremouw the Petitioner consistently and clearly throughout the interview didn't consider that it was his responsibility to make sure that the baby didn't die. (*Id.* at 532.) Dr. Fremouw noted that the Petitioner had an antisocial personality, which tends to affect an individual by making one indifferent to the law, reckless, exploitative, manipulative, and greedy. That individual is aware of the consequences of his choices, but just doesn't care about those consequences. (*Id.* at 535-37.) In regards to the antisocial personality, Dr. Fremouw stated, "There is no medication to give one a conscience." (*Id.* at 538.) Dr. Fremouw testified that the Petitioner had the ability to know if somebody was hungry or not, and had the ability to know that someone with lesions needed medical treatment, but just wouldn't care. (*Id.* at 540.) Over the Petitioner's objection a DNA test which proved his paternity of the child was admitted, and the parties stipulated as to the child's weight at death, nine pounds. (*Id.* at 543-44.)

Upon being recalled, Denzil Anderson stated that he never saw the parents feed the child, and that he didn't feed the child. (*Id.* at 549.) It must be pointed out, however, that a fair reading of that question and answer may have been the result of some confusion on the part of the witness.

Dr. Fowler was qualified as an expert in forensic pathology. (Trial Tr. vol. 2, 578, Apr. 12, 2010). As to the food found in the stomach, Dr. Fowler testified that the presence of food at autopsy does not preclude somebody being in a near starvation state. (*Id.* at 593.) He concluded that the

child's death was SIDS-like, or perhaps sudden unexplained death in infancy. (*Id.* at 594.) However, Dr. Fowler admitted that he had reviewed none of the witness statements nor the Petitioner's statements in regards to the care of the child. (*Id.* at 601-02.) He did not take into account in forming his opinion that the Petitioner admitted that the child was not being fed properly. Dr. Fowler did not take into account that the Petitioner knew the consequences of not feeding the child, although he blamed Jennifer Meacham. (*Id.* at 602-03.) Dr. Fowler did not review any statements regarding the care of the child. He did not know that the child went two to three days at a time without being fed. He was not aware that the baby was left in a crib with its hands tied, and admitted that the child was nutritionally behind. (*Id.* at 606.) Dr. Fowler agreed that the condition of the diaper in which the child died, that is soiled with fecal material and having bugs in it was indicative of severe neglect. Dr. Fowler admitted he had not reviewed the amended autopsy in which the amount of subcutaneous fat present at autopsy was corrected to reveal the proper decreased amount. (*Id.* at 610.) Dr. Fowler was unaware that the foam the baby was found in was dripping with urine. Dr. Fowler agreed that the condition of the diaper and the foam were indicative of severe neglect. (*Id.* at 611.) Dr. Fowler said that his opinion, was that this was a sudden unexplained death of an infant which by definition meant that something was going on about which one should be concerned. He agreed concerning factors would include the lesions. (*Id.* at 614.) Dr. Fowler agreed that the behavior of the parents delaying the 911 call after discovering the death of their child in order to clean house was "unusual." He further agreed that the father trying to convince the mother to bury the child in the back yard and state the baby was kidnapped was "unusual." (*Id.* at 616-17.) Dr. Fowler stated that without proper nutrition a child could starve, that untreated medical problems could kill a child, and inappropriate shelter, clothing and toxic

household can cause death. (*Id.* at 620-21.) Dr. Fowler noted that baby J. had no disease when he left the hospital after birth. (*Id.* at 622.) Dr. Fowler stated that the “poor nutrition and the hygiene issues, there is a risk to this child from those causing death.” (*Id.* at 637.) Dr. Fowler opined that the lesions on the skin were a way bacteria could get into the body and cause an infection in the blood stream which is fatal in a great majority of the cases. (*Id.* at 638.)

The jury returned a verdict of guilty of the offense of murder of a child by a parent, guardian or custodian. (*Id.* at 710.) The trial had been bifurcated on the issue of mercy, and the mercy phase commenced shortly after the verdict. The record is silent as to whether or not the Petitioner was shackled during that proceeding, and no contemporaneous objection to the Petitioner being shackled was made, if in fact, he was. Dr. Fremouw testified on the issue of mercy and testified, without objection, that he conducted his interview with the Petitioner prior to trial with the Petitioner in leg irons and belly chains. (*Id.* at 715.) The correctional officers refused to unchain the Petitioner because he was fighting, and had attacked two correctional officers. (*Id.* at 716.) When asked about future dangerousness, Dr. Fremouw related that the Petitioner had made specific threats of violence to public officials, including the governor, his wife, daughter, and family dog. (*Id.* at 717.) He found the Petitioner to be at a high risk to re-offend. (*Id.* at 720.) Further, Detective Phillips testified in the mercy phase about the effect this case had on him, personally, and his department, and opined that the Petitioner never had mercy upon baby J. during that child’s life. (*Id.* at 727-28.) Again, that testimony did not draw an objection. The jury unanimously did not recommend mercy. (*Id.* at 734.)

In accordance with the jury verdict and the failure to recommend mercy, the Petitioner was sentenced to life in prison. (*Id.* at 738.) This petition for appeal ensued.

II.

SUMMARY OF THE ARGUMENT

The State presented sufficient evidence, at trial, for the jury to conclude that baby J.'s death resulted from the acts and omissions of his caretakers, including the Petitioner on trial. The trial testimony was replete with descriptions of the conditions of the household, the baby's living conditions, his decline in percentile of weight, the filth in which he lay, and the open lesions caused by skin irritation because he was lying in urine. The amount of food present in his stomach, does not, according to the testimony of the Petitioner's expert, Dr. Fowler, necessarily belie near-starvation, and the lack of hydration is shown by the lack of vitreous fluid at autopsy. Dr. Sabet testified clearly that severe caretaker maltreatment was the underlying cause of death, and that the manner of death was homicide. The evidence further was sufficient for the jury to conclude, beyond a reasonable doubt, that the Petitioner's actions in consistently refusing to himself care for his infant son, and in not ensuring that someone else was caring for the baby were wilful and deliberate. Failure to feed an infant on a consistent basis, failure to change his diaper so that his skin is so irritated it develops open lesions which are portals to blood poisoning, and leaving an infant in a urine soaked crib so that he develops bed sores certainly demonstrates malice, which is defined, in part, as a human heart fatally bent on wickedness. In terms of proving intent, the jury was correctly instructed that it could infer that a person intended the consequences of his actions. The consequences of leaving a baby on his back, going days at a time without any food, tying a bottle to his hands and propping it up so that a 10-week-old, who cannot even roll over yet would "feed" himself, noticing the lesions and not getting the child to the doctor are actions which consequently can be foreseen to result in the death of a helpless baby. Additionally, the jury may infer the

Petitioner's mental state and intent from his reaction to the baby's death which was to clean the house and try to think of a plausible lie before calling 911. Therefore, the evidence in this case, viewed in the light most favorable to the State certainly supports the finding that the baby died as a result of the actions and inactions of the Petitioner, and that those actions and inactions were done willfully, deliberately and maliciously.

The admission of the contested photographs and their display to the jury was not error. The court reviewed all of the proposed photographs and did not permit the introduction into evidence of pictures it deemed cumulative. The trial court engaged in the analysis required by *State v. Mongold*, 220 W. Va. 259, 647 S.E.2d 539 (2007), as it specifically noted in the Order Resolving the State's Motion to Determine the Admissibility of Evidence. (Order, March 31, 2010.) The court concluded that the probative value of the photographs greatly exceeded the prejudicial nature of those photographs.

The record does not reflect that the Petitioner was shackled during the mercy phase of the trial. Assuming that he was in fact shackled, the Respondent asserts that the error, if any, was waived by the failure of counsel to object to the shackles so that the trial court could correct that situation. Further, the error could not have been prejudicial under the facts and circumstances of this case. The Petitioner had just been convicted by the same jurors of the offense of murder. During the mercy phase the jurors heard testimony of the Petitioner's violent behavior while in custody, his extensive juvenile placement record, and his threats against public officials. To state that the sight of the Petitioner in handcuffs influenced the jury in its recommendation is clearly unwarranted.

The trial court did not err in permitting the Marion County Prosecutor's Office to participate in the case. The record reflects that Brent Beveridge had at one time represented the Petitioner, but

before trial, was hired as a Marion County Assistant Prosecutor. The affidavits submitted by Mr. Beveridge and Mr. Wilson demonstrate that Mr. Beveridge was effectively screened from any participation in this matter, and that no improper communications about this matter ensued. In short, the required “Chinese Wall” was erected. Therefore, disqualification of the Marion County Prosecuting Attorney’s Office was not required.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent acknowledges the grave nature of the offense which resulted in the Petitioner’s conviction, and that he consequently received the most severe sentence which can, by law, be imposed. However, in reviewing the nature of the alleged errors, the applicable case law and statutes, and the briefs, it does not appear as if the decisional process would be aided by oral argument. The law is well settled and has been definitively ruled upon by this Honorable Court, and was correctly decided by the lower tribunal. However, should this Court determine oral argument to be appropriate, the Respondent wishes to participate in such argument.

IV.

ARGUMENT

A. THE COURT DID NOT ERR IN REFUSING TO DISQUALIFY THE MARION COUNTY PROSECUTING ATTORNEY’S OFFICE FROM PROSECUTING THE PETITIONER.

The Petitioner had several attorneys represent him in this matter, including, at one time Brent Beveridge. Prior to trial, Mr. Beveridge accepted employment with the Marion County Prosecuting Attorney’s Office, and ceased representation of the Petitioner. A motion to recuse the Marion County Prosecutor was filed. That motion noted the successive employment of Mr. Beveridge as

defense counsel and then assistant prosecutor. The motion requested recusal unless the Prosecutor's Office could demonstrate that Mr. Beveridge had been effectively screened from any contact with the criminal prosecution whatsoever and that Mr. Beveridge had not divulged any information about the Petitioner to the Prosecutor's Office. (Motion to Recuse Marion Co. Pros. Att'y and for Appointment of Special Prosecutor.)

In response to that motion, affidavits were filed by both Mr. Wilson, the elected Prosecutor, and Brent Beveridge. Those affidavits stated affirmatively that Mr. Beveridge had divulged no information relating to the defendant's case to any person at the prosecutor's office. Further, Mr. Beveridge had not been asked to communicate about the case, or to participate directly or indirectly in the matter. Mr. Beveridge opined that he had been and would remain completely screened from all involvement in the case. Mr. Wilson noted that he had communicated about the case, but only in Mr. Beveridge's capacity as defense counsel, and that since his employment with the Prosecutor's Office, Mr. Beveridge had not divulged any information about the case, and that Mr. Beveridge was completely and effectively screened from all involvement, including any discussion or participation in the case in any way. An amended affidavit noted that Mr. Beveridge was informed in July 2009 that in the future there might be a grant funded assistant prosecutor's position in Marion County, and would Mr. Beveridge be interested. Mr. Beveridge did not regard this as a job offer, as no job existed at that time. Mr. Beveridge inquired about the grant status, which was undecided until Mr. Beveridge was hired, effective October 1, 2009. During the period from July to October, Mr. Beveridge had conversations about the matter, which revealed that Mr. Wilson was unsure of whether an additional plea offer would be made, since the Petitioner had backed out of a plea

scheduled in August 2009. (Affidavits of Mr. Beveridge, Mr. Wilson, and Amended Affidavit of Mr. Beveridge, Dec. 15, 2009.)

A preliminary hearing was held on the motion to recuse 14 minutes after its filing. (Pretrial Motion Hr'g, 4, Dec. 1, 2009.) The court requested the aforementioned affidavits, which demonstrated that Mr. Beveridge did not have a standing job offer, or a job offer at all until September 2009, and that during the interim, he continued to diligently represent his client, including by inference, trying to get a renewed plea, after the Petitioner had already backed out of a plea. (Beveridge, Amended Affidavit, Dec. 15, 2009.) At the hearing, the Marion County Prosecutor's Office represented that the grant wasn't approved until September, therefore, by inference, Mr. Beveridge could not have had a job offer until September. (Pretrial Motion H'rg., 5, Dec. 1, 2009.) The court noted that the question of successive employment was not a novel question in the Marion County Prosecutor's Office and that that office regularly constructed a Chinese Wall to effectively screen any of those prosecutors from further involvement, of any sort, or communication, of any sort, with those cases. (*Id.* at 8.) By order dated December 15, 2009, the court denied the motion to recuse finding that Mr. Beveridge had been and would remain screened from all involvement, nor had he divulged any confidential information. (Order Denying Motion to Recuse Marion County Office of the Pros. Att'y and for Appointment of a Special Prosecutor.)

The Petitioner's assignment of error attributes subconscious bias to Mr. Beveridge regarding a "standing offer of employment." Both Mr. Wilson and Mr. Beveridge deny that an offer of employment was made, and, indeed, note that no offer of employment could be made until the position was funded by a grant, which did not occur until September 2009. The attribution of subconscious bias and conflict of interest on the part of Mr. Beveridge is mere speculation, and

speculation with *no* grounding in fact. No position was available and no job offer was extended until September 2009, at which time, Mr. Beveridge ceased his representation of his client. After becoming employed by the Prosecutor's Office, Mr. Beveridge was effectively screened (the "Chinese Wall" erected) and there is absolutely not a shred of evidence in the record to contradict the finding that no conflict of interest existed to disqualify the Marion County Prosecutor's Office.

The Petitioner, while engaging in speculation about subconscious biases and motivation, fails to examine the case law regarding successive private and government employment. *State ex rel. Tyler v. MacQueen*, 191 W. Va. 597, 447 S.E.2d. 289 (1994), dealt with the identical factual situation. David Greene, an attorney in private practice, represented Mr. Tyler on an aggravated robbery charge. Mr. Tyler was indicted in 1992, and Mr. Greene represented Mr. Tyler until sometime in 1993. In 1993, Mr. Greene was hired as a Kanawha County assistant prosecutor. The *Tyler* Court noted that the West Virginia Rules of Professional Conduct do not require the disqualification of other lawyers in the agency with which former defense counsel becomes associated. Mr. Greene and the elected prosecutor both filed affidavits demonstrating that Mr. Greene was screened from involvement in Mr. Tyler's prosecution. Therefore, the Court found in its opinion,

the fact that an assistant prosecuting attorney previously represented a criminal defendant while in private practice does not preclude the prosecutor's office as a whole from participation in further prosecution of criminal charges against the defendant, provided that the circuit court has held a hearing on any motion to disqualify filed on this basis and determined that the assistant prosecutor has effectively and completely been screened from involvement, active or indirect, in this case.

Id., 191 W. Va. at 601, 447 S.E.2d at 293 (footnote omitted).

That is precisely the procedure followed by the trial court in this matter. The record conclusively demonstrates that Mr. Beveridge did not have a “standing job offer” which somehow subconsciously affected his representation of Mr. Anderson, and that further, upon becoming employed by the Marion County Prosecuting Attorney’s Office, Mr. Beveridge was completely and effectively screened from involvement in the matter. Therefore, the refusal to recuse the entire Marion County Prosecuting Attorney’s Office, and appoint a special prosecutor was correct under the law and the facts.

B. THE APPEARANCE OF THE PETITIONER, IN HANDCUFFS, BEFORE THE JURY IN THE MERCY PHASE OF THE TRIAL WAS NOT PREJUDICIAL ERROR REQUIRING A NEW HEARING AS TO MERCY. NO OBJECTION WAS RAISED AT TRIAL, AND THE ISSUE WAS NOT OTHERWISE PRESERVED FOR APPEAL.

The jury returned its verdict of guilty of murder by a parent, guardian or custodian at approximately 3:10 p.m. on April 12, 2010. (Trial Tr. vol. 2, 709, Apr. 12, 2010.) The presentation of evidence in the mercy phase began after the polling of the jury, and a short break, at approximately 3:22 p.m. on that same day. (*Id.* at 714.) The State called two witnesses and short statements were made by the attorneys for both sides. The jury deliberated and did not recommend mercy. (*Id.* at 734.) Nowhere in the record does it indicate that the Petitioner appeared handcuffed, and the Petitioner concedes in his brief that no contemporaneous objection was made and the issue was not otherwise preserved for appeal.

State v. Finley, 219 W. Va. 747, 639 S.E.2d 839 (2006), addressed the issue of whether or not requiring a defendant to wear prison garb during the penalty phase was error. As noted in Syllabus Point 3, due process demands that a criminal defendant may not routinely be compelled to appear in jail clothing at the penalty phase. However, the decision regarding whether or not the

defendant may be required to wear such clothing is within the sound discretion of the trial court, subject to an evidentiary hearing demonstrating the necessity for such apparel. Syl. Pt. 4, *Finley*. The *Finley* Court found no discernible difference in appearing in identifiable prison clothes and in handcuffs and noted that routinely a defendant should not be forced to appear at the penalty phase in either. However, the Court noted that the decision to require prison garb rested “within the sound discretion of the trial court subject to an evidentiary hearing” regarding the necessity of such apparel. *Finley*, 219 W. Va. at 752, 639 S.E.2d at 844.

This Honorable Court cogently noted in *State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995), that “the failure of a litigant to assert a right in the trial court likely will result in a procedural bar to an appeal of that issue.” The *Miller* Court, in accord with the United States Supreme Court, distinguished “waiver” and “forfeiture.” Waiver is the intentional relinquishment of a known right, and when there is a knowing waiver, there is no error. However, forfeiture of a right--the failure to assert such right in a timely fashion--does not extinguish the error. Plain error may be corrected in circumstances where a miscarriage of justice would otherwise result. The error must indeed be plain, which means obvious. If there is “plain” error, to which no timely objection was raised, a determination must be made as to whether that error actually affected substantial rights of the defendant. That means that the error must have been prejudicial and affected the outcome of the proceedings. Further, the defendant bears the burden of persuasion with respect to prejudice. *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129.

The Court noted in Syl. Pt. 4 of *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988), that the plain error doctrine

enables this Court to take notice of error . . . occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the

doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.

Additionally, this Court stated in Syl. Pt. 7 of *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996):

In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

In the instant case, the Petitioner had been convicted of the offense of murder by a parent of his ten-week-old infant son. The jury heard an abundance of testimony regarding the conditions of the home in which this child existed, the urine soaked bed in which he lay almost continuously, his plunge down the percentile charts for acceptable weight, the lack of feeding, the lack of hydration, the lack of changing his diapers to the point where the diaper in which he died had insects in it—which were not post-mortem changes. The jury heard an abundance of testimony about the Petitioner's severe neglect of this child, and further testimony about his preventing the child's mother from caring for the child. The jury heard that the Petitioner had an antisocial personality and that the consequences of his actions did not matter to him. The jury heard that the Petitioner had the ability to care for this baby, but chose not to. The jury heard that the child died from severe caretaker maltreatment and that the cause of death was homicide. After being properly instructed, the jury returned a verdict of murder.

In the penalty phase, the jury was informed, as referred to in the Statement of the Case, that while in custody the Petitioner was interviewed in chains because he had been fighting with another inmate and also attacked correctional officers. The jury was informed that the Petitioner had

threatened the governor, his wife, his daughter, and the family dog with violence. The jury heard the effect this case had on the investigating officers, while also being informed that the Petitioner never showed an ounce of remorse or grief over the death of his child.

Under all the facts and circumstances of this matter, including the totality of the evidence heard by the jury in both phases of the trial, the appearance of the Petitioner in handcuffs during the penalty phase was not error resulting in a miscarriage of justice. It was not such error that affected the fairness or integrity of the judicial proceedings. Assuming, *arguendo*, that the jury even noticed that the Petitioner was in handcuffs, and there is no evidence that jurors did, the error was harmless beyond a reasonable doubt.

C. THE ADMISSION AND DISPLAY OF THE PHOTOGRAPHS OF THE INFANT VICTIM TO THE JURY AT TRIAL WAS NOT ERROR AND NOT AN ABUSE OF DISCRETION.

Prior to trial, a hearing was held, on March 16, 2010, on the State's motion to determine the admissibility of certain evidence, including photographs of the infant victim. At that hearing, the Petitioner objected to the admission of the photographs as gruesome and on the grounds that they would enrage and inflame the jury. (Pretrial Motion Hr'g, 38, March 16, 2010.) The court indicated that it would examine the photographs to determine which, if any, would be admitted at trial. (*Id.*) Further, at that hearing, the prosecutor noted that "given the alleged failure of medical and proper feeding, medical and those kinds of things that are contained within the specifics of the indictment, the specifics of what's contained in those photographs become much more - probably never more relevant." (*Id.* at 45.) Following that hearing, the court issued a written order regarding the admissibility of several items of evidence, including the contested photographs. That order was entered on March 31, 2010. The court noted that in order to evaluate the relevance of the

photographs of the victim, it had, with the consent of counsel, reviewed the autopsy report and the child's records from Fairmont General Hospital. The court found that after reviewing the photographs, the hospital records, and the autopsy report, the probative value of the photographs determined to be admissible greatly exceeded the prejudicial nature of those photographs. The court admitted some photographs, and excluded others of the victim on the basis that those excluded were either cumulative or unduly gruesome. The court did not characterize any of the pictures which it ruled admissible as gruesome, although the Petitioner's brief states that the trial court concluded that "although the photographs could be characterized as gruesome, they were not unduly prejudicial in comparison to their probative value." In reference to the case at bar, a careful reading of the court's March 31 order reflects that the quotation regarding the characterization of the photographs as gruesome actually is in reference to this Court's decision in *State v. Mongold, supra*.

That is, the court excluded some of the proffered photographs as unduly gruesome. It admitted some of the photographs over the defense objection, but did not specifically find those photographs to be gruesome in its order. The language that Petitioner recites from the Order is not a characterization of the proffered photographs as gruesome, but a recitation of the finding in *Mongold*, where autopsy photographs of a two-year-old were admitted at trial.

The prosecuting attorney proffered the relevance of the photographs when he noted that as this case consisted of medical and physical neglect, the photographs were absolutely relevant. The court then reviewed the photographs in conjunction with the medical reports and autopsy report to determine their relevancy. As recited in the March 31, 2010, order such review was with counsel's consent. After the review, the court determined that the probative value of the photographs, in terms of the autopsy report and the medical reports, greatly exceeded any prejudicial impact. Therefore,

the court did carefully consider the relevance of the photographs in order to illustrate the testimony relating to the autopsy report and medical records. The court also did not make an express finding that the photographs to be admitted were gruesome, but did exclude other photographs on the ground that those photographs were cumulative and unduly gruesome. (Order, March 31, 2010.)

State v. Mongold, supra, dealt, in pertinent part, with the admission at trial of autopsy photographs of the two-year-old victim. Syllabus Point 6 of that opinion notes, in paraphrase, that the admissibility of a photograph depends upon whether the probative value is outweighed by counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. The balancing test is a matter of trial conduct, and the court's discretion will be not be overturned absent abuse of that discretion.

The *Mongold* Court points out that generally, photographs that are relevant to any issue are admissible. If an objection is made that the photographs in question are gruesome, then admissibility is determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence. Further as to the pictures actually admitted at Mr. Mongold's trial, the Court held that "[a]lthough we find that the autopsy photographs may be characterized as gruesome, we do not believe that those photographs were unduly prejudicial." 220 W. Va. at 279, 647 S.E.2d at 273. (Of note, this is the sentence that Petitioner claims the court used in finding the photographs in the case at bar gruesome. Clearly, that is an incorrect reading of the order.) *Mongold* also reiterates, on the same page of the opinion, that gruesome photographs simply do not have the prejudicial impact as courts once believed. Gruesome or inflammatory pictures exist more in the imagination of judges and lawyers than in reality. *Mongold* also repeated the process for determining admissibility as determined by the Court previously in *State v. Derr*, 192 W. Va. 165,

451 S.E.2d 731 (1994), by noting that Syllabus Point 10 of *Derr* states that the court must determine the relevancy of the exhibit, and then consider whether the probative value of the exhibit is outweighed by those factors listed in Rule 403.

In the case on appeal, there was no explicit finding by the trial court that the photographs which were admitted were in fact gruesome. As reflected in the hearing on the admissibility of evidence and in the court's order, the court carefully reviewed all the proffered photographs to determine their relevance with respect to the autopsy report and medical reports. That is the first part of the balancing test required by case law and by the West Virginia Rules of Evidence. The court excluded some photographs as unduly gruesome and cumulative. The court admitted other photographs of the victim, including one of him alive, some autopsy photographs, and a photograph of him at the hospital. Those photographs were relevant to illustrate that a baby who was born healthy deteriorated to a baby who suffered from lesions, lack of feeding, and infection to illustrate the testimony of the medical examiner that the baby died as a result of severe caretaker maltreatment. The court determined that the pictures, which were not explicitly stated to be gruesome, were such that their probative value greatly exceeded any prejudice. Under an abuse of discretion standard, the lower court did not abuse its discretion in the admission of a limited number of photographs of the victim.

D. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO CONCLUDE, BEYOND A REASONABLE DOUBT, THAT THE VICTIM'S DEATH WAS HOMICIDE CAUSED BY SEVERE CARETAKER MALTREATMENT. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO CONCLUDE, BEYOND A REASONABLE DOUBT, THAT THE PETITIONER COMMITTED THE OFFENSE OF MURDER BY A PARENT, GUARDIAN.

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a

reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

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

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

Syl. Pt. 3, *Guthrie*. Further, the *Guthrie* court states on page 668 of its opinion, that a jury verdict will not be overturned lightly. The Court notes on that same page that "It is possible that we, as an appellate court, may have reached a different result if we had sat as jurors. However, . . . it does not matter how we might have interpreted or weighed the evidence." 194 W. Va. at 668, 461 S.E.2d at 668. The *Guthrie* Court adds that "appellate review is not a device for this Court to replace a jury's finding with our own conclusion. On review, we will not weigh evidence or determine credibility. Credibility determinations are for a jury and not an appellate court." *Id.* at 669, 461 S.E.2d. at 669. The Court in *State v. Sharp*, 226 W. Va. 271, 275, 700 S.E.2d 331, 335 (2010), repeated that a reviewing court should not reverse a case on the facts as found by the jury, unless there is reasonable doubt of guilt.

When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's vantage of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover,

as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecutions's theory of guilty.

Syl. Pt 2, *State v. LaRock, supra*.

Further, the Court notes that the reviewing court "must scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict's favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt." *Id.* at 304, 470 S.E.2d at 623. In noting the issues with determining the mental processes of any defendant, the *LaRock* Court noted that those processes are wholly subjective, not susceptible to direct proof. Therefore, "if one voluntarily does an act, the direct and natural tendency of which is to destroy another's life, it fairly may be inferred, in the absence of evidence to the contrary, that the destruction of that other's life was intended." *Id.* at 305, 470 S.E.2d at 624.

The trial court gave extensive instructions to the jury dealing with the elements of the offenses for which possible jury verdicts could be returned. Those instructions, included, in pertinent part, that the offense charged is murder of a child by a parent, guardian, or custodian. The court instructed the jury that "murder of a child by a parent, guardian, or custodian is committed when any parent, guardian or custodian maliciously and intentionally causes the death of a child under his or her care, custody or control by his or her failure or refusal to supply such child with necessary food, clothing, shelter or medical care." Additionally, the court instructed that murder of a child by a parent is also committed when that parent knowingly permits another to maliciously and intentionally cause the death of a child by the failure or refusal to supply such child with necessary food, clothing, shelter or medical care. (Trial Tr. vol. 2, 651, Apr. 12, 2010.) The court defined the terms child, parent, custodian and guardian for the jury. Further, the court instructed the jury on the lesser-included offense of child neglect resulting in death. The court distinguished between the

greater and lesser offenses by noting that the murder charge required the State to prove that the Petitioner intentionally and maliciously refused to supply the infant victim with food, clothing, shelter, and/or medical care, and therefore caused the death of the baby or that Petitioner knowingly allowed Jennifer Meacham to maliciously and intentionally refuse to supply the child with the necessary food, clothing, shelter, and/or medical care, and that her refusal caused the death of the baby. The lesser-included offense of child neglect causing the death of the child did not require the State to prove that the Petitioner's actions or lack thereof were committed knowingly and with malice. (*Id.* at 654-56.)

The court further instructed the jury that "knowingly" was defined as follows:

[A] person acts knowingly with respect to a material element of an offense: (a) if the element involves the nature of his conduct or the attendant circumstances, and that he is aware that his conduct is of that nature or that such circumstances exist; or (b) if the element involves a result of his conduct, he is aware that it is practically certain that this conduct will cause such a result.

(*Id.* at 656-57.)

Malice was defined for the jury as well.

It may be either express or implied and it includes not only anger, hatred, and revenge, but other unjustifiable motives. It may be inferred or implied by you from all of the evidence in this case if you find such inference is reasonable from facts and circumstances in this case which have been proven to your satisfaction beyond all reasonable doubt. It may be inferred from any deliberate and cruel act done by the defendant without any reasonable provocation or excuse, however sudden. Malice is not confined to ill-will toward any one or more particular persons, but malice is every evil design in general; and by it is meant that the fact has been attended by such circumstances as are ordinarily symptoms of a wicked, depraved and malignant spirit, and carry with them the plain indications of a heart, regardless of social duty, fatally bent upon mischief. It is not necessary that malice must have existed for any particular length of time and it may first come into existence at the time of the act or at any previous time.

The Court instructs the jury that there is a permissible inference of fact that a person intends that which he or she does or which is the immediate and necessary consequence of his or her act.

(Id. at 657.)

Although the statements of counsel in closing argument are not evidence, it is worth noting that at trial, defense counsel cast aspersion upon the credibility of Jennifer Meacham for her failure to care for her child. *(Id. at 691-93.)* However, the jury determined the credibility of witnesses in reaching its verdict. Counsel conceded that the baby lived in awful conditions. Further, counsel stated “the state’s case is pretty strong,” and focused on trying to convince the jury that the Petitioner did not act intentionally and maliciously, essentially conceding that the Petitioner was guilty of the lesser-included offense. “Did he neglect that child? I’m not going to lie to you. Probably. I mean, the facts are pretty strong. I can’t say that there’s a clean bill of health here” *(Id. at 698.)*

The defense relied at trial upon the testimony of Dr. Fowler, the Medical Examiner for the State of Maryland. Dr. Fowler quibbled a bit with some steps that Dr. Sabet might or might not have taken, but a fair reading of his direct and cross-examination testimony reveals that the best opinion Dr. Fowler put forward was an “I don’t know.” Dr. Fowler also admitted that there were an overwhelming number of documents and statements that he did not have in issuing his opinion, including, but not limited to the amended autopsy report of Dr. Sabet, which corrected the amount of subcutaneous fat existent in the child at the time of his death to less than one-half what the child should have had. *(Id. at 610.)* Dr. Fowler originally opined that the child’s death was SIDS like, or perhaps sudden unexplained death in infancy. *(Id. at 596.)* Dr. Fowler did agree that in the ten weeks of this child’s existence his weight had dropped to below the fifth percentile. *(Id. at 581.)* Dr.

Fowler stated that having one amount of food in the stomach does not preclude somebody being in starvation-type state or near starvation-type state. (*Id.* at 593.) Dr. Fowler noted that in determining the cause of death that all relevant information was important. That included not only the autopsy, but also, case history, credible facts of the observations of the witnesses, and all other information is important in making a final determination in any case as to the cause of death. Dr. Fowler agreed that the more information, the more accurate one's conclusion. (*Id.* at 597-600.) Dr. Fowler, however, did not recall specifically reviewing any of the witness statements in the matter, although he believed he had some statements in his file. Dr. Fowler did not review the report prepared by Dr. Fremouw, in which the Petitioner noted that he knew how to care for a child, but it was not his responsibility, and in which the Petitioner admitted the child was not being fed properly. (*Id.* at 601-02.) Dr. Fowler did not take into account that the baby went days at a time without being fed, and that it was left in a crib with its hands tied. Dr. Fowler did agree that the child was nutritionally behind. (*Id.* at 606.) Dr. Fowler agreed that the fact that the child dies in a diaper soiled with fecal material and "bugs," and that it slept on a mattress dripping with urine was severe neglect. (*Id.* at 608-09.) Dr. Fowler said that the sudden unexplained death of an infant meant, by definition, that there was something going on in the child's life about which one should be concerned, and that the lesions on this child were "concerning." (*Id.* at 613.) Dr. Fowler stated that without proper nutrition a child could starve, that untreated medical problems could kill a child. Further, he stated that the inappropriate shelter, inappropriate clothing and a "toxic" household could cause death. The baby had no disease when he left the hospital. (*Id.* at 620-22.) Further, Dr. Fowler stated that the "poor nutrition and the hygiene issues, there is a risk to this child from those causing death." The lesions

on the skin were a way bacteria could get into the body and cause an infection in the bloodstream which is fatal in the majority of cases. (*Id.* at 637-38.)

Dr. Sabet performed the autopsy on this child. Dr. Sabet did not find any internal injury to the baby. However, on external examination, Dr. Sabet noted a lot of lesions on the abdomen, genitalia, anus, thighs, both hands, back, buttock and temple. (Trial Tr. vol. 1, 209-10, Apr. 8, 2010.) The child's diaper had flies and "animals" that are generally not seen even post-mortem. (*Id.* at 211.) Dr. Sabet stated specifically that this was neither SIDS nor an unexplained death. Dr. Sabet determined the manner of death to be homicide, or death at the hands of another. In examining the baby, he noted that the child's skin was infected because of the constant contact with urine, and that such constant contact had been in existence for ten days to two weeks. The infection caused thickening of the skin, leaving the child unable to move his hands. The child had open lesions on his abdomen. The infant's scrotum and penis were thickened as a result of the exfoliation dermatitis and lesions around his anus. The lesions were acutely infected. Not only had this child suffered from neglect, he also had traumatic injuries inflicted shortly before death; specifically, being stricken with a heavy object on his head and abdomen. The child's weight had plunged to the lowest possible percentile for weight, indicating very bad nutrition. The malnutrition was also demonstrated by the lack of subcutaneous fat. The lack of vitreous fluid indicated malnutrition and some degree of lack of hydration. Dr. Sabet concluded that the baby died as a result of severe caretaker maltreatment, including "evidence of non-accidental soft tissue injuries, poor hygiene with severe diaper rash, and investigative findings indicative of severe caretaker neglect . . . the post-mortem and investigative findings point to severe caretaker maltreatment as the underlying cause of death. Infant's demise, death. So manner of death in this cause is classified as homicide." (*Id.* at 216-29.)

Therefore, the jurors had evidence before them indicating that a perfectly healthy, even chubby baby went home from the hospital after having been born on Easter Sunday, and a mere ten weeks later died. The gist of the defense's testimony was that the cause and manner of death of the baby was unexplained but "concerning." That opinion was rendered, as demonstrated both by the above synopsis and the Statement of the Case, without Dr. Fowler having access to, or apparently not bothering to consult any of the investigative findings.

Dr. Sabet opined clearly that the manner of death was homicide and that the cause of the child's death was severe caretaker maltreatment. The child was malnourished, and to some extent, not hydrated. The child lived in a toxic home, filled with animal feces and animal urine. The child went without food for days at a time, and whenever anyone bothered to pay the slightest attention to the child's nutritional needs, a bottle was propped on a blanket, and his hands were tied. The child lay on a filthy piece of foam, soaked with urine. His clothes were soaked with urine. He had severe diaper rash, and lesions over 40 to 50 percent of his body. Dr. Fowler agreed that the poor nutrition and hygiene were a risk to cause death, and that the lesions were a way bacteria could cause an infection in the bloodstream, which is generally fatal.

In reviewing the sufficiency of the evidence in this case as to whether the State proved beyond a reasonable doubt that the child died as a result of the acts and omissions of another person, under the standards articulated in *Guthrie, supra*, and *LaRock, supra*, it is clear that the evidence was more than sufficient. Viewing the evidence in the light most favorable to the prosecution, and crediting all inferences and credibility assessments in favor of the prosecution, it is clear that the jury had sufficient evidence from which it could determine that a healthy baby went home and lay in a cesspool, being fed sporadically at best, seldom being changed, developing acute skin infections

because of constant contact to urine, and declined in weight until the combination of malnourishment, infection, and maltreatment caused his heart to stop beating.

The second prong of the Petitioner's argument is that his conduct toward the infant was not done intentionally nor maliciously, so that he is guilty of child neglect resulting in death, at most.

The trial court correctly instructed the jury on the elements of murder and of child neglect resulting in death, and as noted previously, defense counsel's closing argument virtually conceded that the Petitioner was guilty of child neglect resulting in death, but not guilty of murder, and blamed Jennifer Meacham for the child's death, essentially terming her testimony about the Petitioner's controlling behavior not credible. The credibility determination has been made by the jurors, and that determination was against the Petitioner. The aforementioned closing attacked Ms. Meacham's credibility because she had entered a plea. While not necessarily germane to any argument raised in this appeal, a review of the entire record indicates that the Petitioner had apparently twice agreed to enter a plea, and twice backed out.

The jury had to determine whether the actions of the Petitioner toward this helpless infant were knowing and malicious. The instructions defined knowingly as acting, in paraphrase, with awareness of his conduct and circumstances, or awareness that his conduct would cause a result.

Malice was defined and express or implied and included anger, hatred, revenge and other unjustifiable motives. The jury was correctly informed that it could infer malice from the facts and circumstances of the case. The inference could be drawn from any deliberate and cruel act. Malice is every evil design in general, and shows a wicked depraved and malignant spirit, with a heart, regardless of social duty, fatally bent on mischief. The jury was also correctly instructed that a

person intends that which is the immediate and necessary consequence of his act. (Trial Tr. vol.2, 657-58, Apr. 12, 2010.)

The circumstances of the “toxic” household were described both by neighbors and friends of the Petitioner and by the deputies and the first responders. Martha Evans would not enter the home because of the filth. (Trial Tr. vol 1, 144, Apr. 7, 2010.) Amanda Oliverio described the home as having feces and pee all over the floor, and that the house was filthy. The baby would sleep lying in filth, with dirty diapers on his bed railing. (*Id.* at 172, 181.)

Regardless of the responsibility of his other caretakers, including Denzil Anderson and Jennifer Meacham, the Petitioner had the responsibility to ensure that this infant was provided with the necessary shelter, food, clothing, and or medical treatment.

The elements of the offense of murder in that the actions of the Petitioner must be knowing and filled with malice, are the mental elements which are not subject to direct proof. One seldom hears of a criminal defendant who says “I am not going to feed this baby, and I know that it will die, and I am acting with malice, to boot.” We lack the ability to unscrew the Petitioner’s head and peer inside his brain to see what his mental state was. The best indicator of one’s mental state, in the criminal context, is to examine what the Petitioner did, or did not do, and what the consequences of those actions necessarily were.

The testimony, from each witness who commented upon the Petitioner’s behavior on the day his son was found dead was that the Petitioner exhibited no concern, no worry, no remorse and no grief. The Petitioner’s reaction, upon being notified that the baby was dead, in fact, cold, was not to call 911 in the hope of a miracle to revive the baby, but rather to clean up the house, get some cigarettes, and attempt to concoct a story in which the child would be kidnapped. Those reactions

demonstrate a heart absent any indicia of social duty, fatally bent on mischief and showing ill-will and hatred.

This baby had traumatic injuries, as well as the injuries caused by the severe neglect. According to Jennifer Meacham, the Petitioner slapped the child and hit him with a fist to keep him from crying. The child had bruises to his forehead, head and around his eye. An individual who strikes a starving, caged, baby to stop him from crying is one who has malice in his heart, who is acting from hatred and ill-will, and who is fatally bent on mischief.

The record is rife with testimony about this infant's physical condition. He went home, and his weight percentile dropped to the lowest possible, and he had only one-half of the necessary subcutaneous fat. He lacked vitreous fluid. Those are indicators that this baby was not being fed adequately, and that he was consuming himself in an attempt to stay alive.

His pinkie finger was necrotic and he had acutely infected lesions over half his body. Those lesions were caused by constant contact with urine. The lesions were portals to infection, which, in the bloodstream are generally fatal.

The Petitioner knowingly made a choice not to provide this child with the necessities of life, and knowingly prevented Jennifer Meacham from providing them. He stated explicitly to Martha Evans that he and his dope were more important than the baby. (*Id.* at 156.) The Petitioner, according to Amanda Oliverio, controlled the household and that neither Ms. Meacham nor Denzil Anderson did anything without the Petitioner's permission. Further, based upon her observation of the Petitioner with his daughter Maria, and with her own son, Ms. Oliverio stated that the Petitioner knew how to care for a child, but was not doing it. (*Id.* at 200-201.)

Dr. Sabet testified that the lesions would have been obvious to anyone who looked, that they were at least ten days old, and that the baby would be in pain. The Petitioner chose to leave the baby lying in urine, chose not to take the child to the doctor when the lesions erupted, and chose not to comfort the child while in pain. The jury could fairly infer that an individual who had managed to raise a daughter without neglecting her to death, and who had a pack of dogs and cats healthy and well fed enough to leave feces on the floor, knew the result of not feeding a child and not treating his infection, and maliciously and knowingly chose not to care for the child.

Jennifer Meacham testified that the Petitioner would not let her change the baby's diaper, that the baby spent most of his time in his crib, that the baby was not fed as he should been, including going days without feeding. He had the same diaper on for days, and the Petitioner would physically stop her from caring for the baby. The Petitioner knew the baby was covered with urine and feces. The Petitioner saw the skin problems, and refused to take the child to the doctor. (*Id.* at 298; 300; 302-03, 304-11.)

The jury could fairly infer that the Petitioner intended the natural consequences of his acts and omissions. The failure to feed a child, the failure to seek medical care for infection, the failure to change a baby out of the urine and feces filled crib, all can be foreseen to lead to the gradual decline and death of a child. The deliberate choice to leave a baby to suffer, with infected skin exposed to the ammonia in urine, slapping the infant when he cried, not feeding the baby and not letting his mother feed him demonstrates malice.

Further, Dr. Fremouw gave insight into the Petitioner's mental state. The Petitioner was rational and conversant. The Petitioner noticed the lesions on the baby, but stated that it was the mother's fault the baby dies, that he (Petitioner) had nothing to do with him. (Trial Tr. vol 2, 526,

530, Apr. 9, 2010.) The Petitioner knew that it was not right to let a baby die, but that it was not his job, and according to Dr. Fremouw, consistently and clearly indicated that it was not his—the Petitioner’s responsibility to make sure that his son didn’t die. (*Id.* at 530, 532.) The Petitioner had the ability to know if somebody was hungry or not, and had the ability to know that someone with lesions needed medical treatment but just wouldn’t care. (*Id.* at 540.) Indeed, as noted by Dr. Fremouw, “There is no medication to give one a conscience.” (*Id.* at 538.)

The evidence at trial, when viewed in the light most favorable to the prosecution, and when all credibility determinations and inferences are resolved in favor of the verdict demonstrates that the jury had more than sufficient evidence to determine that baby J. died as a direct result of the omissions in care of the Petitioner, and that those omissions were knowing and malicious. The baby died as a result of severe caretaker maltreatment, and the manner of death was homicide. The Petitioner chose not to feed his infant son. The Petitioner chose to leave him lying in a urine soaked bed. The Petitioner chose not to change him out of his urine and feces filled diaper. The Petitioner refused to let Jennifer Meacham care for the child. As a foreseeable consequence of those actions, this baby stopped living. The Petitioner’s choices were voluntary, and according to his own statement to Dr. Fremouw, made with an awareness of what would happen, but that it just was not his responsibility to care for the child. To choose to leave a baby unfed, lying in filth, with his finger rotting off, with open infected lesions exposed to urine, to hit the baby when he cries, and then to clean house rather than call 911 when the baby’s death is discovered demonstrates, beyond any doubt, knowing choices made by a heart filled with anger and hatred. Those are deliberate and cruel acts performed without provocation. The acts and omissions of the Petitioner, done voluntarily, and

with an awareness of the consequences, show his wicked depraved and malignant spirit and show that his heart was absent social duty, fatally bent on mischief.

Baby J. died as a result of the failure of the Petitioner to provide the necessities of life. Those omissions were a result of deliberate and knowing choices of the Petitioner. Those acts and omissions were voluntary and malicious. The evidence was sufficient to convict the Petitioner, and his conviction should not be overturned.

V.

CONCLUSION

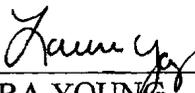
Therefore, based upon the foregoing arguments of law, and recitations of fact, the State of West Virginia, by counsel, respectfully requests that this petition for appeal be denied.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



LAURA YOUNG
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
State Bar No. 4173
Telephone: (304) 558-5830
E-mail: laura.young@wvago.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of "The State of West Virginia's Response to the Petition for Appeal" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 10th day of March, 2011, addressed as follows:

To: Harry P. Montoro, Esq.
235 High Street, Suite 725
Morgantown, West Virginia 26505



LAURA YOUNG