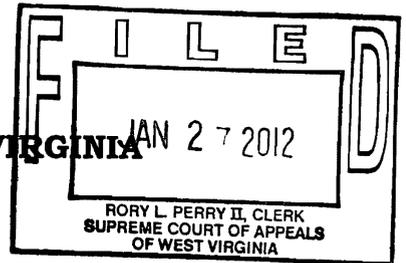


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO: 11-1336



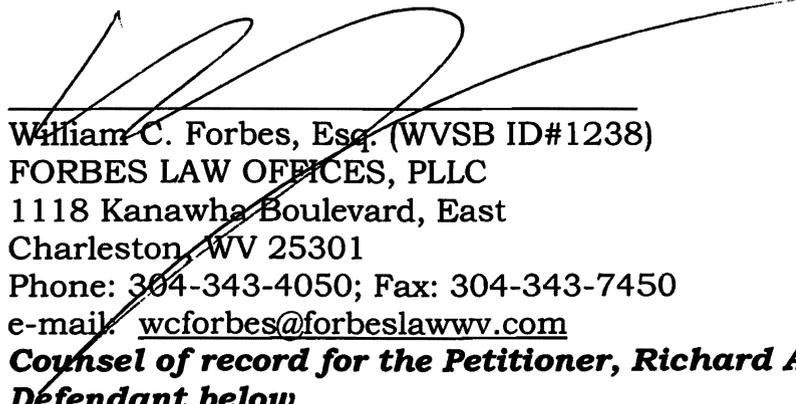
Nicholas Co. Circuit Court Case No. 10-F-79

STATE OF WEST VIRGINIA, Plaintiff Below, Respondent

V.

RICHARD A. WHITE, PETITIONER, DEFENDANT BELOW

"PETITIONER'S BRIEF TO PERFECT APPEAL"



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO: 11-1336

STATE OF WEST VIRGINIA, Plaintiff below, Respondent,

V.

(Appeal from a final order of the Circuit
Court of Nicholas County (10-F-79))

RICHARD A. WHITE, PETITIONER, Defendant Below.

PETITIONER'S BRIEF TO PERFECT APPEAL

ASSIGNMENTS OF ERROR

Assignment of Error No. I: Insufficient evidence to prove beyond a reasonable doubt that Petitioner did not act in self-defense. Insufficient evidence to sustain a verdict of first degree murder. Insufficient evidence to sustain sentence of life without mercy. Insufficient evidence to sustain a verdict of second degree murder. Error in trial court's denial of Petitioner's motion for judgment of acquittal. Error in trial court's denial of Petitioner's motion for directed verdict as to first degree murder and second degree murder. Jury's verdict was against the manifest weight of the evidence.

Assignment of Error No. II: Jury verdict based on passion or prejudice, and/or a misapprehension of law, as it was against the manifest weight of the evidence. Jury misunderstood court's instructions as to definitions of malice, premeditation, deliberation, self-defense, and misunderstood or ignored court's instructions that statements of counsel do not constitute evidence. Jury's verdict showed a clear misunderstanding of the law of self-defense, as well as a misunderstanding of proof beyond a reasonable doubt as to first degree murder, a misunderstanding of proof beyond a reasonable doubt of malice, premeditation, deliberation, and a misunderstanding of the law relating to heat of passion, provocation and voluntary manslaughter. Jury's verdict based upon inflamed passions and prejudices against Petitioner that were caused by extensive and highly prejudicial instances of prosecutorial misconduct that occurred throughout Petitioner's trial.

Assignment of Error No. III: Plain error in Circuit Court's charge to jury on self-defense, and plain error in the admission of Robert White's prior inconsistent statement to law enforcement absent a cautionary instruction, and over Petitioner's objection to the admission of said statement. *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (W.Va. 1990).

Assignment of Error No. IV: Petitioner denied his constitutional rights to a fair, objective, and impartial jury due to juror bias and prejudice and pre-determination of guilt.

Assignment of Error No. V: Prosecutorial misconduct in impeaching its own witness, Robert White, by utilizing a prior inconsistent statement, which was admitted as

substantive evidence over Petitioner's objection. *State v. Collins*, 409 S.E.2d 181, 186 W.Va. 1 (W.Va. 1990). Prosecutorial misconduct in introducing irrelevant evidence for purposes of confusing the issues, prejudicing Petitioner in the minds of the jury as to the alleged victim's house burning down. Prosecutorial misconduct in deliberately misleading the jury as to a certain piece of evidence (i.e. one blue pill crusher), and said comments by the prosecutor ignored judge's earlier admonishment not to mention the same in his attempts to impeach Kathy White; State's willful misleading of the jury in closing argument shows that prosecutor was acting as a partisan eager to convict and abandoning his quasi-judicial role; improper comments by the State in closing argument on the Petitioner's right to remain silent in closing argument, improper impeachment of Petitioner and other witnesses in closing argument and State's violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

STATEMENT OF THE CASE

This is a criminal appeal by Richard A. White, Petitioner herein, and Petitioner below, upon his conviction by jury of first degree murder to life without mercy, and the lower tribunal's imposition of said sentence. Petitioner maintains that he was entitled to a judgment of acquittal notwithstanding the verdict, as the State failed to prove beyond a reasonable doubt that Petitioner did Not act in self-defense, and the jury's verdict was against the manifest weight of the evidence. In the alternative, the Petitioner submits that the trial court erred by not directing a verdict in favor of the Petitioner against first and second degree murder, as the evidence at trial, when taken in the light most favorable to the State, was manifestly insufficient to sustain a verdict of first degree murder to life without mercy, nor was the evidence sufficient to sustain a verdict of second degree murder, as the manifest weight of the evidence, even when taken in the light most favorable to the State, at best supported an offense no higher than voluntary manslaughter. At trial Petitioner moved for judgment of acquittal and directed verdict against first and second degree murder, since the evidence was insufficient at law to support either offense, therefore, the trial court erred in not granting Petitioner's motions for a directed verdict in this regard, as the evidence was manifestly insufficient to support either offense. (A.R. 3, Vol.

III, p. 79).

The only people present when the victim was shot were the Petitioner and his son, Robert White, and the victim himself, as the evidence and testimony showed Kathy White had run out of the house when she saw the altercation in the living room, which occurred prior to the alleged victim firing the first shot. (A.R. 3, Vol. III, p.88, lines 19-24, p. 89, lines-1-6). Although, the Petitioner did not testify, his videotaped statement given to law enforcement prior to trial was introduced as evidence by the State as Exhibit 13, and said videotape was played for the jury. (A.R. 3, Vol. II, p. 150, 155).¹ Petitioner's statement, when taken as a whole, was supportive of and consistent with the Petitioner acting in self-defense and/or acting in the heat of passion in response to the gross provocation of Harvey Hersman shooting at him and his son. (A.R. 14, 1-41).²

Furthermore, Petitioner's son, Robert White's testimony was competent corroborating evidence that was also consistent with the Petitioner acting in self-defense, and/or the Petitioner acting in the heat of passion upon the gross provocation of the alleged victim shooting at them, and further constituted ample and competent evidence of Petitioner's inability to retreat without serious bodily harm or death. (A.R. 3, Vol. II, p. 138, lines 1-20). On cross-examination by Petitioner's counsel, Robert White testified as follows:

Q So, your dad takes the gun away from Harvey and before he can take the gun out of the holster, you tell him to not to and he stops. Is that right?

A Yes.

Q So, within five seconds of that time, Harvey Hersman fired a shot, Right?

A Yes.

¹ Petitioner's videotaped statement was not transcribed into the official trial transcript. Petitioner has included a transcript of Petitioner's statement that was utilized, but not admitted as an exhibit at trial as A.R. 14, and any references to Petitioner's statement may be found therein.

² A.R. 14, the transcript of Petitioner's statement, contains no line numbers, thus any references thereto will only refer to the page number from which the evidence appears therein.

Q It was dark in there?

A Yes.

Q Could you tell whether he was shooting at you or not?

A No.

Q **Did you think he was shooting at you?**

A **YES.**

Q **DID YOU THINK YOUR DAD COULD GET OUT OF THERE ALIVE WITHOUT SHOOTING HARVEY HERSMAN?**

A **NO.**

Q **DO YOU THINK THAT YOUR DAD'S LIFE WAS IN DANGER IF HE TRIED TO LEAVE?**

A **YES.**

(A.R. 3, Vol. II, p. 138, lines 1-20) emphasis supplied herein.

This testimony of Robert White was extremely compelling, persuasive, competent and corroborating evidence that Petitioner acted in self-defense, and was unable to retreat. The State offered no reliable testimony or evidence that refuted Robert White's testimony and this extremely competent and persuasive evidence of self-defense. This testimony alone was prima-facie evidence in support of the Petitioner acting in self-defense, and the State failed to disprove self-defense beyond a reasonable doubt. The State's "evidence" in this case amounted to craftily deceptive speculation designed by the prosecutor to mislead and inflame the jury against the Petitioner with the prosecutor's arguments and theories that were based upon facts not in evidence, or deliberate misstatements of the evidence, and other instances of highly prejudicial prosecutorial misconduct as discussed in detail below. Reasonable doubt abounded in Petitioner's trial, as the State failed to introduce any evidence other than conjecture as to what transpired between Petitioner and the alleged victim, and then improperly impeached the

credibility of all the witnesses that were actually present at or near the time of the shooting, i.e. Robert White, Kathy White and Petitioner. The competent evidence from Robert White, Kathy White, and Petitioner supported self-defense, or an offense no greater than voluntary manslaughter. Hence, the jury's verdict was against the manifest weight of the evidence, and must have been based upon a misapprehension of law, and/or inflamed passions and prejudices, and must be vacated by this Honorable Court. Additionally, the lower court erred by not granting Petitioner's motion for judgment notwithstanding the verdict (motion for judgment of acquittal), motion for directed verdict against first and second degree murder, and motion for new trial. The lower tribunal further erred in ruling that Petitioner was not prejudiced by the juror bias of Juror Pashke, and by failing to find prosecutorial misconduct.

Petitioner further asserts error in the lower court's instructions to the jury regarding the duty to retreat, as said instruction was unsupported by the evidence adduced at trial. At trial, there was no evidence that the Petitioner was the aggressor, as the evidence of Petitioner's statement indicated the alleged victim grabbed a gun and shot at Petitioner and his son. (A.R. 14). Robert White's testimony corroborated Petitioner's statement that they had gone over to the alleged victim's house to find Kathy White and retrieve Petitioner's belongings from Kathy White. (A.R. 3, Vol. II, p. 105, lines 16-21). Robert's testimony further corroborated Petitioner's statement that the alleged victim fired a gun at Petitioner and him, and that they entered the residence without firearms or exposed weapons, (A.R. 3, Vol. II, p. 136, lines 12-18); that Petitioner was not mad, hostile, angry or threatening (A.R. 3, Vol. II, p. 135-136, lines 1-8); that his dad did not have the knife out at all, nor was he waving it around (A.R. 3, Vol. II, p. 136, lines 12-18) and that prior to the alleged victim's first shot of the gun Petitioner had just been holding the alleged victim down, and when the alleged victim got up, and started hitting

Petitioner, Petitioner did not strike the alleged victim back, and the alleged victim then got the gun and fired at them. (A.R. 3, Vol. II, p.105, lines 22-24, to p. 106, lines 1-5; also pp. 136-137). Petitioner asserted that he acted in self-defense, and the State of West Virginia failed to prove beyond a reasonable doubt that Petitioner did Not act in self-defense, and therefore the trial court erred by not granting Petitioner's motion for a judgment of acquittal at the close of the State's evidence. (A.R. 3, Vol. III, p. 79). At trial Petitioner also moved for a directed verdict against first and second degree murder, as the evidence introduced at trial by the State was insufficient to support either offense, and the trial court erred by not granting Petitioner's motion for directed verdict in this regard at the close of the State's evidence. (A.R. 3, Vol. III, p.79). Therefore, Petitioner prays that this Honorable Court will vacate his conviction and remand this case for entry of a judgment of acquittal, since the verdict was against the manifest weight of the evidence as the evidence at trial was insufficient as a matter of law to prove beyond a reasonable doubt that he did not act in self-defense. In the alternative, Petitioner prays that this Court will reverse his conviction, and grant him a new trial as the evidence was insufficient to support the verdict of first degree murder, and is further based upon other violations of the Petitioner's constitutional rights to a fair trial and due process of law, as discussed in the other errors assigned herein, and specifically prosecutorial misconduct.

SUMMARY OF ARGUMENT

The evidence adduced at trial was insufficient to support the jury's verdict of first degree murder without mercy, as the evidence at trial, even when taken in the light most favorable to the State, manifestly supported self-defense or an offense no greater than voluntary manslaughter. Reasonable doubt abounded at Petitioner's trial as to what actually transpired between Petitioner and the alleged victim, and therefore, the jury should have acquitted the Petitioner. From a fair

and impartial review of the entire trial transcript, one could write a definition of reasonable doubt, thus, it is clear that the jury was laboring under a misapprehension of law as to the meaning of reasonable doubt, and were further laboring under inflamed passions and prejudices stirred by pervasive prosecutorial misconduct throughout the trial. Petitioner was denied his constitutional right to a fair trial by the overzealous, partisan, and highly prejudicial prosecutorial misconduct of the State in willfully, deliberately and unfairly misleading the jury as to facts not in evidence; deliberate misstatements of facts in evidence; improper impeachment by the State of its own witness Robert White by erroneous and cumulative admission of his prior inconsistent statement to law enforcement, and other such additional and substantially prejudicial instances of prosecutorial misconduct as discussed herein. The prosecution inflamed the passions and prejudices of the jury by engaging in speculation and conjecture with respect to the knife at the scene that was unsupported by any of the evidence adduced at trial, and other theories of the prosecutor that were based upon facts not in evidence or deliberate misstatements of the evidence. Plain error in the trial court's instructions to the jury and plain error in the cumulative and erroneous admission of Robert White's prior inconsistent statement to law enforcement. Juror misapprehension of law, and jury verdict against the manifest weight of the evidence, jury verdict against the presumption of innocence and reasonable doubt, and based upon inflamed passions and prejudices due to prosecutorial misconduct. Denial of Petitioner constitutional right to a fair trial due to juror bias, prejudice, and pre-determination of guilt.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that oral argument is necessary upon this appeal under Rule 19 of the Revised Rules of Appellate Procedure, as this appeal involves claims of insufficient evidence and a verdict against the weight of the evidence, and further involves claims involving the

assignment of error in the application of settled law, and unsustainable exercise of discretion.

Thus, Petitioner prays that this matter be scheduled for Rule 19 oral argument upon this appeal.

ARGUMENT

Assignment of Error No. I: Insufficient evidence to prove beyond a reasonable doubt that Petitioner did not act in self-defense. Insufficient evidence to sustain a verdict of first degree murder. Insufficient evidence to sustain sentence of life without mercy. Insufficient evidence to sustain a verdict of second degree murder. Error in trial court's denial of Petitioner's motion for judgment of acquittal. Error in trial court's denial of Petitioner's motion for directed verdict as to first degree murder and second degree murder. Jury's verdict was against the manifest weight of the evidence.

The evidence adduced at trial was insufficient as a matter of law to support a conviction of first degree murder without mercy, as the State failed to overcome beyond a reasonable doubt, the Petitioner's assertion of self-defense, and as such the Petitioner was entitled to a judgment of acquittal, or a new trial based on the other constitutional violations of his rights that occurred during his trial, as further discussed herein. The evidence admitted at trial, even taken in the light most favorable to the prosecution was insufficient to convince a *rational* jury beyond a reasonable doubt that Petitioner was not acting in self-defense. The Petitioner's videotaped statement, introduced at trial by the State, when taken as a whole, was supportive of and consistent with Petitioner's assertion of self-defense, in that, therein, Petitioner repeatedly stated that the victim shot at him and his son first, and that the victim had another gun and/or was going for/reaching for another gun when the Petitioner shot him, (A.R. 14), and the State offered no testimony or reliable or competent evidence to refute this evidence at trial. Additionally, the Petitioner's statement made clear that his intention in going to the alleged victim's house was to retrieve some of Petitioner's personal property from his ex-wife, Kathy White. (A.R 14, p.7, 18-19,23, 25), and that he took his son along as a sort of peace-keeping measure due to his history with Harvey Hershman, the alleged victim (A.R. 14, p. 31).

Petitioner's statement is replete with competent evidence that supported his assertion of self-defense, and Petitioner's initial statement to law enforcement as played for the jury, as to what transpired between him and the alleged victim, were as follows:

BLM: Explain to me what all went down there and how everything happened. Go ahead and I'll let you talk now.

[Petitioner, R.A.W.] I, there's a couple kids, I hate to get involved and I did not want them to be there. I, I would have never pulled some kind of issue like that in front of them kids.

BLM: Right.

[Petitioner, R.A.W.] You know what I'm saying? I, I was, TG and you know Robert's always been good friends and then there's a young girl there I barely know her.

BLM: Okay.

[Petitioner, R.A.W.] This ain't something I would have done in front of them, **but Harvey Hershman pulled a gun out whenever I walked in there and asked him, I said what do we need to do to work this out man, to where I ain't standing out in my yard and you shooting at me just because you get pissed off and, and when he turned around he had a gun and he fired between me and my boy. I tackled his ass and when I tackled his ass he had another gun in his hand.** I pulled a gun from his hand, I shuck the shell in it, there was no shell in it, in, in the chamber, there was one in the clip and when I shucked it in there I shot, he had three shells in the clip and I shot him three times in the head. (A.R. 14, p. 7). [emphasis supplied herein].

The Petitioner's statement was conducted over a number of hours by law enforcement, and in that statement, Petitioner repeatedly states that the alleged victim fired a gun at him and his son first, that the alleged victim was in possession of two guns until Petitioner managed to take one of the guns, and that the alleged victim had another gun or was reaching for another gun when Petitioner fired the fatal shots. (A.R. 14, pp. 1, 5, 10, 11, 12, 13, 15, 25, 26, 27). Petitioner has a limited education, has had a traumatic head injury in the past, and is easily confused and misled, as evidenced by the rambling, tangential nature of his videotaped statement to the police. (A.R.

14, p. 1-41, and pp. 30-31). Petitioner also indicated in his statement that he used to work with chemicals, and sometimes has a hard time getting his words out. (A.R. 14, p.27-28).

Additionally, as a whole Petitioner's statement to the police indicates his willingness to cooperate with the authorities, and his belief that he was not going to be arrested as he acted in self-defense, and that he would be going home after he told the authorities what happened. (A.R. 14, p. 1-41). Petitioner in his videotaped statement stated on numerous occasions that the alleged victim was "bailing"/ going/ reaching for another gun when Petitioner shot him, and throughout his statement he never waives from this fact. (A.R. 14, pp. 1-41). One instance of Petitioner's reiteration of the fact that the alleged victim was "bailing for another gun, when Petitioner fatally shot him, occurs as follows:

But whenever he and when, when that gun snapped and he looked at me and laughed and he bailed for that gun you know the only thing I done was shucked it and when I shucked it they was one in the clip and when and it was three** inaudible 3 shells in that clip.

BLR How close were you when you shot him?

[A] I, I shot them right in his head.

BLR I mean where, did you move up toward him to shoot?

[A] Yeah, yeah, **WHEN, WHEN HE WHEN HE WENT AND BAILED FOR THAT [GUN].**³ I walked right up to him and shot him.

BLR And he was looking at your then or was he looking away?

[A] **HE, HE WAS, HE WAS, HE WAS TRYING TO FIND THAT GUN.**

BLR **HE WAS DIVING FOR THAT GUN?**

[A] **YEAH.**

BLR **He was going for that gun? (A.R. 14, p. 26).**

³ The word gun does not appear in the transcript of Petitioner's statement, (A.R. 14), therefore it is added herein in brackets, as it is clear from the context that Petitioner was saying that the alleged victim was going for the gun by his use of the word "that." Additionally, in the transcript (A.R. 14), no notations are utilized to indicate Petitioner's answers, thus "[A], a letter A in brackets, has been added herein to denote Petitioner's answers.

At trial, Kathy White, Petitioner's ex-wife, was called as the sole defense witness, and testified that Petitioner is easily confused and had a traumatic head injury which effects his memory, which Petitioner submits explained the rambling nature and tangential offshoots in his statement to law enforcement, and any minor discrepancies that may exist therein and between his statement and his son's testimony. (A.R. 3, Vol. III, p.102-103). Kathy White also testified that she didn't want Richard to come to her place because she feared that Harvey, the alleged victim herein, that Harvey would kill Richard, Petitioner herein. (A.R. 3, Vol. III, p. 87). Kathy White further testified that the alleged victim Harvey Hershman, had threatened to kill Petitioner several times, and that the alleged victim had previously shot at Petitioner while Petitioner was unarmed, prior to the night in question. (A.R. 3, Vol. III, p. 86, lines 7- 23). Kathy White also testified that the alleged victim, Harvey Hershman, on the night in question, was **"kind of out of his mind a little bit."** (A.R. 3, Vol. III, p. 84) **on drugs, methamphetamine** (A.R. 3, Vol. III, p. 84), and that there was a blue pill crusher beside him. (A.R. 3, Vol. III, p. 85). Her testimony regarding the blue pill crusher consisted of one single statement, on which Petitioner's counsel did not dwell. (A.R. 3, Vol. III, p. 85, lines 3-17). Kathy White further testified that all she saw as she was going out the door was Petitioner on top of Harvey, and that she did not see a knife in Petitioner's hand, nor anywhere else. (A.R. Vol. III, p. 90), she didn't know who started the altercation. (Id).

The State called Robert White, Petitioner's son as a witness in its case in chief, whose testimony corroborated Petitioner's reason of wanting to retrieve his personal belongings from Kathy White as the sole purpose in their being at the alleged victim's residence. (A.R. 3, Vol. II, p.105). Additionally, Robert White's testimony corroborated the fact that the alleged victim had a gun and shot at the Petitioner and Robert, and that the alleged victim shot first. (A.R. 3, Vol. II,

p. 106, lines 6-8). Robert White testimony further provided competent and corroborating evidence of self-defense, that Petitioner was not the aggressor, that Petitioner was not mad, or threatening the alleged victim; that Petitioner did not have his knife out; that Petitioner first tried non-lethal force by using a pot lid, and Petitioner's inability to retreat without getting shot in the back, Robert testified during cross-examination by Petitioner's counsel as follows: (A.R. 3, Vol. II, pp. 136-138).

Q WHEN HE GOT TO KATHY'S HOUSE AND FOUND HER GONE, DID HE GET UPSET, ANGRY, MAD, OR THREATENING AT ANY TIME BETWEEN THERE AND HARVEY'S HOUSE?

A NO.

Q You weren't inside the room when the flashlight?

A No.

Q UP TO THE POINT IN TIME WHEN YOU DAD WALKED IN, WHEN HE WALKED IN THAT TRAILER AND THE LAST TIME YOU SAW HIM, DID HE HAVE HIS KNIFE OUT AND WAVING IT AROUND?

A NO.

Q DID HE HAVE HIS KNIFE OUT AT ALL?

A NO.....(A.R. 3, Vol. II, p. 136, lines 1-18)....

Continued at lines 22-24:

Q But he was holding Harvey down when you went in there?

A YES.

Continued on p. 137

Q And you got him up off Harvey, Harvey the dead guy, started punching you dad; and that started the fight over again?

A Yes.

Q YOU[R] DAD DIDN'T START PUNCHING HARVEY?

A NO.

Q AND WHEN YOU GOT BETWEEN THEM, THEN HARVEY TAKES OFF RUNNING AND YOUR DAD SEES HIM GETTING A GUN AND ENDS UP GETTING IT. IS THAT CORRECT?

A YES.

Q HOW FAR IS IT FROM THE TRAILER DOOR OVER TO WHERE YOUR CAR IS AT TO GET OUT?

A ALL THE WAY ACROSS THE YARD. IT'S PROBABLY—IT'S A GOOD WAYS. PROBABLY ABOUT A FOOTBALL FIELD.

Q ABOUT A HUNDRED YARDS. AND SO, YOU HAVE TO TAKE THE RISK IN ORDER TO LEAVE, THAT HARVEY'S GOING TO BE SHOOTING AT YOU IN THE BACK ALL THE WAY OUT OF THERE. ISN'T THAT CORRECT?

A YES.

(A.R. 3, Vol. II, p. 137, lines 1-24).

Robert White further testified during cross-examination as follows:

Q Did you think your dad could get out of there alive without shooting Harvey Hersman?

A NO.

Q Do you think that your dad's life was in danger if he tried to leave?

A YES.

(A.R. 3, Vol. II, p. 138, lines 15-20) [emphasis supplied herein].

The Petitioner submits that the above-cited testimony of Robert White, in and of itself, was prima facie evidence of self-defense, and that the State failed to disprove self-defense beyond a reasonable doubt, and obtained the jury verdict by the prosecutor's improper impeachment, and inflaming the passions and prejudices of the jury. During direct examination by the State, Robert's testimony further proved to be extremely persuasive, compelling and competent

evidence that supported Petitioner acting in self-defense, Petitioner not being the aggressor, Petitioner's inability to retreat, and/ or the Petitioner acting in the heat of passion upon gross provocation by the alleged victim shooting at them so as to reduce the offense to that of voluntary manslaughter. Furthermore, Robert's testimony regarding the knife was competent evidence adduced at trial that Petitioner was not in possession of the knife, that the prosecutor so unfairly, deliberately, and extensively utilized to inflame the jury, despite there being no competent evidence of record for his arguments. Robert's testimony would have been given substantial weight by the jury without the prosecutor's misconduct as to Robert White's testimony and admission of Exhibit 11.

Q Is that when you picked your dad's knife up off the floor?

A Yes, I mean, I'm not sure it was his. I just know that he—he asked me to pick it up, you know.

Q He asked you to pick it up?

A Yes. He may not want Harvey to stab him in the back or something when he was going out.

Q Where was this knife located?

A It was just in the middle of the living room floor.

Q It was open?

A Yes.

Q What did you do with it?

A I just put it in my goodie pocket.

(A.R. 3, Vol. II, p. 109-110). emphasis supplied herein.

The prosecutor in his improper opening and closing arguments to the jury, and throughout the

trial figuratively waves this knife around extensively as being in Petitioner's hands, when no competent evidence was introduced to support such an inference, and (indeed the above-testimony totally refutes such an inference), in the prosecutor's blatant efforts to inflame the passions and prejudices of the jury, when none of the evidence from Robert, Kathy, and Petitioner, nor from the medical examiner Dr. Ham, nor the physical crime scene evidence introduced, none of this evidence places that knife in Petitioner's hand, only the prosecutor did that. On direct examination by the State, when questioned by the prosecutor as to what transpired between Petitioner and alleged victim, Robert White testified as follows:

Q Why don't you tell us what happened?

A We went over there to get some of the stuff of my dad's and see his daughter; and my step-mom wasn't there. So, we went next door to see if she was there. He knocked on the door, and Harvey let him inside.

I was outside hanging around and went inside, and **he was holding Harvey there but he wasn't doing nothing.** And then I talked to him, I was like, "Dad, let's go."

He stood up. And as he stood up, Harvey started hitting him again; and they got in a fight again. So I got between them. Then Harvey went for a gun, and I was in between him and my dad.

Well, Dad grabbed the gun from him; and you know, I got between them and I was like, "Dad let's go," and he fired a -Harvey fired a shot. Well, I didn't see him but I heard it.

(A.R. 3, Vol. II, pp. 105-106).[emphasis supplied herein].

Thus, Petitioner submits that the evidence adduced at trial was totally non-existent as to him being the aggressor in this incident, as the alleged victim fired a gun at him and his son, and further was non-existent as to Petitioner being mutually at fault for initiating it, and therefore the

verdict was irrational and based on a misapprehension of the law, passion and prejudice, and was manifestly against the weight of the evidence. Moreover, Dr. Ham, the medical examiner herein, repeatedly testified that the bruised and bloody condition of the alleged victim's face, other than the gunshots, was more consistent with his agonal falling and falling on a fan, or could have been caused in numerous ways. (A.R. Vol. III, pp.42, lines 5-21, p.44, lines 10-13, p. 48, lines 17-22, p. 53, lines 19-24 and to p. 25, lines 1-54). Thus, there was **no** competent evidence from this expert to support the prosecutor's arguments and speculation as to Petitioner beating the alleged victim to a bloody pulp, and these said arguments of the State served to inflame the passion and prejudice of the jury against the Petitioner. The competent evidence adduced at trial, clearly showed that the victim was the aggressor; that the victim shot towards the Petitioner and his son without provocation by the Petitioner or his son; that the Petitioner acted in self-defense in disarming the victim, and only shot the victim when the victim reached for another gun. Furthermore, the evidence introduced at trial through the State's lead investigator, Cpl. Ron Thomas, revealed a shoddy investigation in which measurements were not performed, forensic and ballistic testing was not performed, fingerprints were not taken from the guns, location of physical evidence was unexplained. (A.R. 3, Vol. II, pp.10 -102) Cpl. Thomas' testimony further showed that neither gun was brought to the scene by the Petitioner nor his son, and that both guns belonged to the alleged victim Harvey Hershman, but were both stolen. (A.R. 3, Vol. II, pp. 53, lines 21-24, to p. 54, lines 1-2). Thus according to this State's evidence at trial, that Petitioner and his son did not bring the guns to the alleged victim's house, the other evidence at trial showed that neither Petitioner nor his son possessed a firearm at the time the victim shot towards them, and that the Petitioner was in no way at fault for starting the shooting since the victim was the only person in possession of a gun when the shooting started. The Petitioner

submits that it is more than reasonable to believe that you and your son are in imminent danger of serious bodily harm or death when someone, such as the victim herein, is shooting towards or at you, and is further in possession of another gun, and that the Petitioner was entirely justified in using deadly force in order to defend himself and his son in this situation. Petitioner submits that at most he may have been guilty of voluntary manslaughter upon a fair and impartial consideration of the evidence at trial.

A sudden intentional killing with a deadly weapon, by one who is not in any way at fault, in immediate resentment of a gross provocation, is prima facie a killing in heat of blood, and therefore, an offense no higher degree than voluntary manslaughter. Syllabus Point 3, *State v. Bowyer*, 143 W.Va. 302, 101 S.E.2d 243, (W.Va. 1957), citing Point 10, syllabus, *State v. Clifford*, 59 W.Va. 1 [52 S.E. 981].

The Petitioner submits that he was in fear for his life and the life of his son due to the victim shooting at them, the victim's previous acts of violence towards Petitioner, including previously shooting at Petitioner, prior to the night in question, and further that being shot at by the victim constitutes gross provocation, and therefore, the evidence at trial clearly supported self-defense, or an offense no higher than voluntary manslaughter, and that the jury's verdict of guilty of first degree murder without mercy was irrational and based upon a misapprehension of the law of self-defense and a misapprehension of the law of voluntary manslaughter and/or was based upon inflamed passions and prejudices. The State offered no testimony or reliable evidence that contradicted the Petitioner's version of events, nor that contradicted the persuasive and compelling testimony of Robert White that Petitioner would not have made it out of that house alive without shooting Harvey Hersman. (A.R. 3, Vol. II, p. 138). Moreover, upon direct examination by the State, Robert White testified that Petitioner was unable to leave without harm and without getting shot in the back. (A.R. 3, Vol. II, pp.131, line 24 to p. 132, lines 1-7).

Furthermore, Robert once again testified that Petitioner was not the aggressor, and that he wasn't free to leave unless he got Harvey off him. (A.R. 3, Vol. II, p. 132, lines 10-24). Moreover, Robert's testimony during direct examination corroborated Petitioner's statement that Harvey went for a gun and Harvey fired the first shot. (A.R. 3, Vol. II, p. 127). Robert White testified as follows on direct examination by the State:

Q When you heard the first shot, who fired it?

A "HARVEY."

(A.R. 3, Vol. II, p. 127, lines 15-17) emphasis supplied herein.

Thus, the evidence adduced at trial from the witnesses who were actually there, showed that neither the Petitioner nor his son were armed with a firearm or any other visible weapon at the time the victim shot his gun at them, nor did the evidence indicate that the Petitioner or his son were threatening the victim in any way when the victim fired at them with one of his guns. The only competent evidence as to where the knife was at the time of the altercation between Petitioner and the alleged victim, was introduced from Petitioner's statement, that he did not have it (A.R. 14), and his son, Robert White, that Petitioner did not have it out, that the knife was on the floor. (A.R. 3, Vol. II, p.109-110, and p. 136). Additionally, the Petitioner repeatedly stated in his videotaped statement that he shot the victim because the victim was reaching for another gun, and there was no reliable evidence at trial which contradicted this. (A.R. 14). Therefore, the State failed to meet its evidentiary burden of beyond a reasonable doubt on the issue of self-defense.

This Honorable Court has held that when the State fails to carry its burden of proof on the issue of self-defense that the Petitioner is entitled to a judgment of acquittal. *See State v. Cook*, 204 W.Va. 591, 515 S.E.2d 127 (W.Va. 1999); *State v. Baker*, 177 W.Va. 769, 356 S.E.2d 862 (W.Va. 1987); *State v. Headley*, 210 W.Va. 524, 558 S.E.2d 324. Furthermore, the Petitioner

submits that the State failed to prove all the elements of first degree murder beyond a reasonable doubt, and therefore as a matter of law, the jury's verdict must have been based upon a misapprehension of law or passion and prejudice; and said verdict is thus unreliable and must be vacated by this Honorable Court. Specifically, the evidence adduced at trial failed to prove beyond a reasonable doubt, the elements of malice, premeditation, and deliberation. From Petitioner's statement to law enforcement and the testimony of Robert White, Petitioner's son, as cited herein, the evidence at trial indicated that the Petitioner's intentions in going to the victim's residence were for the purpose of retrieving his personal belongings from his ex-wife, and that the Petitioner had taken his son with him as a peace keeping effort due to the victim's previous history of violence towards Petitioner. Thus, the Petitioner did not go to the victim's house with any unlawful, malignant or malicious intention. Additionally the evidence adduced at trial indicated that the victim was reaching for another gun when the Petitioner shot him, and therefore, the Petitioner did not have time to deliberate or premeditate prior to shooting him.(A.R. 14). As previously quoted herein, the Petitioner's son, Robert White testified to the effect that if Petitioner had not shot the victim and had tried to retreat, that the Petitioner would not have made it out of that house alive. (A.R. 3, Vol. II, p. 138). Thus, Robert White's testimony corroborated Petitioner's assertion of self-defense, as well as Petitioner's inability to retreat. Therefore, the Petitioner is entitled to a judgment of acquittal herein, as the jury's verdict was manifestly against the weight of the evidence, and the State's circumstantial evidence failed to overcome the presumption of innocence and failed to disprove beyond a reasonable doubt the Petitioner's assertion of self-defense, therefore, under the following authority of this Court, Petitioner's conviction should be set aside, and an order entered granting a judgment of acquittal, as follows:

While we recognize that ordinarily the use of self defense is a jury question, nevertheless, as we explained in Syllabus Point 5 of *State v. McMillion*, 104 W.Va. 1, 138 S.E. 732 (1927), **if the jury's verdict is manifestly against the weight of the evidence, then it must be set aside:** 'It is peculiarly within the province of the jury to weigh the evidence upon the question of self-defense, and the verdict of a jury adverse to that defense will not be set aside unless it is manifestly against the weight of the evidence.' See also *State v. Clark*, supra. This is particularly true where the State bears the burden of proving the lack of self-defense beyond a reasonable doubt, as we pointed out in Syllabus Point 4 of *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978):...*State v. Baker*, 177 W.Va. 769, 771, 356 S.E.2d 862, 864 (W.Va. 1987). (*emphasis supplied herein*).

Furthermore, the Petitioner submits that the State failed to prove all the elements of first degree murder beyond a reasonable doubt, and therefore as a matter of law, the jury's verdict must have been based upon a misapprehension of law or inflamed passions and prejudices against Petitioner; and said verdict is thus unreliable and must be vacated by this Honorable Court. Specifically, the evidence adduced at trial failed to prove beyond a reasonable doubt, the elements of malice, premeditation, and deliberation. Further as the Petitioner was acting in self-defense as discussed herein, his actions were justified and not unlawful. From Petitioner's statement to law enforcement corroborated by Robert White's testimony at trial, the competent evidence indicated that the Petitioner's intentions in going to the victim's residence were for the purpose of retrieving his personal belongings from his ex-wife, and that the Petitioner had taken his son with him as a peace keeping effort due to the victim's previous history of violence towards Petitioner. Thus, the Petitioner did not go to the victim's house with any unlawful, malignant or malicious intention. Additionally, the evidence at trial showed that the victim had already shot at the Petitioner and his son, and was reaching for another gun and/or already had one when the Petitioner shot him, and therefore, the Petitioner did not have time to deliberate or premeditate prior to shooting him.

The State's failed to prove all of the essential elements of first degree murder beyond a reasonable doubt as the evidence at trial as discussed herein was insufficient at law to sustain the jury's verdict. A rational, fair and impartial jury, upon considering the evidence at trial could not possibly have found malice in Petitioner's intention to retrieve his personal belongings. A fair, impartial and rational jury, considering the evidence at trial in a fair and impartial manner could not possibly have found malice from the evidence adduced at trial, when said evidence showed that the Petitioner had gone there to retrieve his personal belongings, the victim shot at the Petitioner and his son, the guns were originally in the possession of the victim, the victim had also threatened and shot at the Petitioner prior to the night in question making the Petitioner's fear for the life of his son and his own life even more reasonable, and when the Petitioner shot and killed the victim, the victim was reaching for or already had another gun. The Petitioner submits that all of this evidence is competent to prove self-defense, and further supports reasonable and just provocation for employing deadly force, mitigating circumstances and justification upon gross provocation by the alleged victim, and thus the absence of malice.

A reasonable person, such as the Petitioner, who had already been shot at by the victim on previous occasions, who had been shot at by the victim on the night in question, and who was struggling with the victim who was reaching for another gun, has clearly been reasonably provoked into using deadly force, and the jury's failure to so find must have been based upon a misapprehension of law or passion and prejudice. Additionally, as this Honorable Court has held in *State v. Harden*, 679 S.E.2d 628 (W.Va. 2009), prior threats can tend to negate malice or intent, and the trial court herein gave an instruction loosely based on that authority, which the jury also must have ignored or misunderstood based on their verdict. Thus, the State failed to prove malice beyond a reasonable doubt, and since malice is an essential element of first and

second degree murder, the jury's verdict is manifestly unreliable as it was based upon a misapprehension of law and/or inflamed passions and prejudice as discussed herein caused in large part from the pervasive prosecutorial misconduct during trial. Therefore, due to the lack of evidence of malice, the trial court erred by not directing a verdict in favor of Petitioner against first and second degree murder.

Premeditation and Deliberation. The evidence at trial indicated that the Petitioner had gun at home that were seized by the police during the execution of the search warrant on Petitioner's home; however, the evidence at trial showed that Petitioner, nor his son, brought any firearm to the victim's house, and the Petitioner submits that this shows lack of premeditation or a plan to shoot the victim. Additionally, although premeditation or deliberation, can come into existence for any length of time, the Petitioner submits that the manifest weight of the evidence introduced at trial does not support either premeditation or deliberation, as the manifest weight of the evidence showed that the alleged victim and the Petitioner had engaged in some form of altercation, that they were struggling with each other and the alleged victim was reaching for another gun at the time the Petitioner shot him and therefore, Petitioner did not have time to reflect or choose or else the victim would have shot him. The Petitioner therefore submits that a fair, impartial, and rational jury could not have found the existence of all these essential elements of first degree murder without mercy based upon a fair and impartial consideration of the evidence, and that therefore, their verdict must have been based upon a misapprehension of law and/or inflamed passions and prejudices against the Petitioner. The manifest weight of the evidence did not support deliberation as discussed in *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Simply put, the manifest weight of the evidence admitted at trial, even when taken in the light most favorable to the State, does not support the jury's verdict of first degree

murder to life without mercy. At best, the manifest weight of the evidence supported an offense no greater than voluntary manslaughter.

The Petitioner submits that he is entitled to a judgment of acquittal or a new trial, since the evidence adduced at trial was insufficient as a matter of law to prove beyond a reasonable doubt that he did not act in self-defense, nor was it sufficient to sustain a verdict of first degree murder, as the manifest weight of the evidence supported self-defense and/or the Petitioner acting in the heat of passion upon gross provocation by the alleged victim. Petitioner submits that he has met the burden required to reverse his conviction on the ground of insufficiency of the evidence herein, as contemplated in Syl. Pt. 3, of *State v. Guthrie*.

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled. *State v. Guthrie*, Syl. Pt. 3, 194 W.Va. 657, 461 S.E.2d 163, (W.Va. 1995),

As the State's evidence was largely circumstantial, and the manifest weight of the evidence as discussed herein supported self-defense, or an offense no greater than voluntary manslaughter, the trial court erred by not granting Petitioner's motion for judgment of acquittal, and/or Petitioner's motion for directed verdict against first and second degree murder. The State offered no testimony or reliable evidence that contradicted the Petitioner's version of events. The wild speculation by Trooper R.M. Thomas and the prosecution that the victim fired a warning shot is simply ridiculous considering that the evidence adduced at trial showed that neither the

Petitioner nor his son were armed with a firearm or any other visible weapon at the time the victim shot his gun at them, nor did the evidence indicate that the Petitioner or his son were threatening the victim in any way when he fired at them with his gun. Additionally, the Petitioner repeatedly stated in his videotaped statement, played for the jury, that he shot the victim because the victim was reaching for another gun, and there was no reliable evidence at trial which contradicted this. The State herein failed to meet its evidentiary burden of beyond a reasonable doubt on the issue of self-defense. Thus, the Petitioner submits that the evidence at trial was insufficient, as a matter of law, to convince a rational, impartial and fair trier of fact beyond a reasonable doubt that the Petitioner was not acting in self-defense, and that the jury's verdict of guilt must have arisen from a misapprehension of law and/or inflamed passions and prejudices that arose from the prejudicial misconduct of the State throughout the trial. This Honorable Court has held that when the State fails to carry its burden of proof on the issue of self-defense that the Petitioner is entitled to a judgment of acquittal. *See State v. Cook*, 204 W.Va. 591, 515 S.E.2d 127 (W.Va. 1999); *State v. Baker*, 177 W.Va. 769, 356 S.E.2d 862 (W.Va. 1987); *State v. Headley*, 210 W.Va. 524, 558 S.E.2d 324.

The Petitioner submits that he is entitled to a judgment of acquittal herein, or in the alternative a new trial as the manifest weight of the evidence was insufficient at law to support the jury's verdict of first degree murder.

Assignment of Error No. II: Jury verdict based on passion or prejudice, and/or a misapprehension of law, as it was against the manifest weight of the evidence. Jury misunderstood court's instructions as to definitions of malice, premeditation, deliberation, self-defense, and misunderstood or ignored court's instructions that statements of counsel do not constitute evidence. Jury's verdict showed a clear misunderstanding of the law of self-defense, as well as a misunderstanding of proof beyond a reasonable doubt as to first degree murder, a misunderstanding of proof beyond a reasonable doubt of malice, premeditation, deliberation, and a misunderstanding of the law relating to heat of passion, provocation and voluntary manslaughter. Jury's verdict based upon inflamed passions and

prejudices against Petitioner that were caused by extensive and highly prejudicial instances of prosecutorial misconduct that occurred throughout Petitioner's trial.

The prosecution mostly focused on the knife by figuratively waving it around, but also focused on the fact that the Petitioner was so much larger than the Petitioner and the prosecutor's unsupported speculation that Petitioner was armed with the knife to inflame the passions and prejudices of the jury against the Petitioner; however, the Petitioner submits that size does not matter, when the smaller individual, such as the victim herein is in possession of two guns, and Petitioner was originally unarmed according to the manifest weight of competent and reliable evidence at trial.(A.R. 14, and A.R. 3, Vol. II, p. 136). Further doubt in the jury's understanding of the law of self-defense, and the concept of heat of passion and gross provocation such as to reduce the offense to voluntary manslaughter, is raised by the evidence introduced at trial, and cited above, that the alleged victim had animosity towards the Petitioner, that the alleged victim had previously threatened to kill the Petitioner and previously shot at the Petitioner, prior to and in addition to shooting at Petitioner on the night in question, as these facts and competent evidence, should have reinforced the Petitioner's reasonable belief of serious bodily harm or death, and resulted in a not guilty verdict or a verdict of the lesser offense of voluntary manslaughter. This Honorable Court has addressed the issue of a jury ruling against self-defense as follows:

While we recognize that ordinarily the use of self defense is a jury question, nevertheless, as we explained in Syllabus Point 5 of *State v. McMillion*, 104 W.Va. 1, 138 S.E. 732 (1927), **if the jury's verdict is manifestly against the weight of the evidence, then it must be set aside:** 'It is peculiarly within the province of the jury to weigh the evidence upon the question of self-defense, and the verdict of a jury adverse to that defense will not be set aside unless it is manifestly against the weight of the evidence.' See also *State v. Clark*, supra. This is particularly true where the State bears the burden of proving the lack of self-defense beyond a reasonable doubt, as we pointed out in Syllabus Point 4 of *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978):...*State v. Baker*, 177 W.Va. 769, 771, 356 S.E.2d 862, 864 (W.Va. 1987). (*emphasis supplied herein*).

In the Petitioner's trial, the jury's verdict was manifestly against the weight of the evidence and should be vacated, with an order to enter a judgment of acquittal. From the jury's verdict of first degree murder without mercy, it is clear that they were either misled or inflamed by the pervasive prosecutorial misconduct which inflamed their passions and prejudices against the Petitioner, or that the jury misunderstood the meaning of reasonable doubt, and disregarded the lower court's instructions relating to reasonable doubt and the presumption of innocence. Thereby denying Petitioner his rights to a fair trial, and a fair, impartial and objective consideration of the manifest weight of the evidence that competently showed self-defense or an offense no greater than voluntary manslaughter. The jury's verdict also shows a misunderstanding, bias or prejudice on the law of self-defense and voluntary manslaughter, and clearly was based upon inflamed passions and prejudices against Petitioner as said verdict was against the manifest weight of the evidence at trial. Furthermore, the integrity of the jury's verdict is seriously in question due to the pervasive prosecutorial misconduct that inflamed the jury against the Petitioner. Therefore, the jury's verdict should be vacated and the Petitioner granted a judgment of acquittal or awarded a new trial due to the constitutional violation of his rights to a fair trial due to the gross prosecutorial misconduct discussed in Assignment of Error V, and discussed within Petitioner's discussion of the insufficiency of the evidence assignment of error above, and the other constitutional grounds of error discussed herein.

Assignment of Error No. III: Plain error in Circuit Court's charge to jury on self-defense, and plain error in the admission of Robert White's prior inconsistent statement to law enforcement absent a cautionary instruction. *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (W.Va. 1990).

This Honorable Court has held that "[i]nstructions must be based upon the evidence and an instruction which is not supported by evidence should not be given." *Syl. pt. 3, State v.*

Dinger, 624 S.E.2d 572 (W.Va. 2005), citing *State v. Collins*, 154 W.Va. 771, 180 S.E.2d 54 (1971); Syl. Pt. 3, *State v. Leonard*, 217 W.Va. 603, 619 S.E.2d 116 (2005). In pertinent part, the lower court improperly and erroneously instructed the jury on self-defense as follows:

“When there is a quarrel between two or more persons and both are at fault, and a combat ensues as a result, in order to reduce the offense to killing in self-defense, two things must appear from the evidence and circumstances in the case: (1) First, before the mortal shot was fired, the person firing the shot declined further combat,” (A.R. 3, Vol. III, p. 132, lines 20-24, p. 133, lines 1-3).

There was absolutely no evidence adduced at trial that indicated Petitioner was at fault in starting any quarrel, nor was there any evidence that Petitioner was the aggressor, and therefore, the Judge’s charge in this regard was unsupported by the evidence, was a misstatement of law, as the Petitioner had no duty to retreat, and indeed the testimony of Petitioner’s son, Robert White, indicated that Petitioner was unable to retreat without risking death or serious bodily harm. With respect to Petitioner’s inability to retreat Robert White testified as follows:

Robert White testified that the car was about a football field away, (A.R. 3, Vol. II, p. 137, and to the effect that his dad would have risked getting shot in the back if he tried to leave, and would never have made it out alive. (A.R. 3, Vol. II, pp. 137-138). Therefore, the above instruction constituted plain error as the same was unsupported by the evidence, and serious doubt as to the reliability of the verdict exists due to the trial courts charge on the duty to retreat. In contrast to the actual charge given by the trial court, the Petitioner’s proposed instruction was more in line with the evidence, as the Petitioner was not at fault, the victim had shot at him and his son, while neither Petitioner nor his son had a firearm, the victim was reaching for another gun when Petitioner fatally shot him, their car with two other people in it was parked about a football field away, and therefore, Petitioner had no duty to retreat, and indeed was entirely unable to do so. The pertinent part of the Petitioner’s proposed instruction, reads as follows:

Under the laws of this state, when one without fault himself is attacked by another in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or that of another person, or to do him or another person some great bodily harm, and there is reasonable grounds for believing the danger imminent, that such design will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, **he may act upon such appearances and without retreating, use deadly force against his assailant**, if he has reasonable grounds to believe, and does believe, that use of such force is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out, that the appearances were false, and that there was in fact neither design to do him some serious injury nor danger, that it would be done. But all of this the jury must judge from all the evidence and circumstances of the case.

A Petitioner who is not the aggressor and has reasonable grounds to believe, and actually does believe, that he is in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant has the right to employ deadly force in order to defend himself. *State v. Dinger*, 624 S.E.2d 572 (W.Va. 2005) citing to Syl. Pt. 7, *State v. Cain*, 20 W.Va. 679 (1882), Syl. Pt. 6, *Feliciano v. 7-Eleven, Inc.* 210 W.Va. 740, 559 S.E.2d 713 (2001).

It was entirely reasonable that the Petitioner believed the victim would kill him and/or his son, since the victim had previously shot at Petitioner not only on the night in question but previously, and that neither Petitioner or his son possessed a firearm prior to Petitioner disarming the victim, who was in possession of two guns. Thus, it was an abuse of discretion for the lower tribunal to refuse to give the Petitioner's proposed instruction on the inability to retreat and self-defense, and it was clear error for that court to give its own instruction which was unsupported by the evidence.

It was an abuse of discretion for the lower court to refuse to give the Petitioner's instruction relating to provocation, as the same was supported by the evidence, was a correct statement of law, and was highly relevant and necessary to provide the jury a fair and correct statement of the law related to the facts of Petitioner's case, and to provide the Petitioner a fair trial. Petitioner's proposed instruction, not given by the lower court, read as follows:

The Court instructs the jury that reasonable provocation means those certain acts committed against the Petitioner, which would cause a reasonable man or woman to use deadly force. Inherent in this concept is the further requirement that the provocation be such that it would cause a reasonable person to lose control of himself and act out of the heat of passion, and that he did in fact do so. *State v. Morris*, 142 W.Va. 303, 95 S.E.2d 401; *State v. Galford*, 87 W.Va. 358, 105 S.E. 237; *State v. Clifford*, Syl. Pts. 10-11, 59 W.Va. 1, 52 S.E. 981.

Petitioner submits that the absence of this instruction in the judge's charge to the jury, essentially deprived him of his right to a fair trial, since the jury was precluded from fairly considering whether Petitioner acted in self-defense, and the evidence and testimony of Robert White relating to Petitioner's inability to retreat, as well as from fairly considering the lesser included offenses such as voluntary manslaughter, by the absence thereof.

The lower court abused its discretion in refusing to give Petitioner's proposed instructions relating to malice, premeditation and deliberation, as the same were supported by the evidence and were correct statements of the law. The trial court committed plain error in the admission of Robert White's prior inconsistent statement to law enforcement without a cautionary instruction in violation of the mandates of this Honorable Court as pursuant to the authority of *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (W.Va. 1990), as further discussed in the context of prosecutorial misconduct under Assignment of Error No. V herein.

Assignment of Error No. IV: Petitioner denied his constitutional rights to a fair, objective, and impartial jury due to juror bias and prejudice and pre-determination of guilt.

The Petitioner was denied his constitutional right to a fair, objective, and impartial jury in this matter. At least one juror, Juror Pashke, and perhaps the entire jury panel, had already pre-determined the Petitioner's guilt prior to the close of evidence, and Juror Pashke further possessed an unassailable bias and prejudice, undisclosed during voir dire or at any point during

the trial, that prevented her from impartially considering the Petitioner's assertion of self-defense as a valid justification and complete defense for shooting the victim. Juror Pashke made statements to the Petitioner's family that create serious doubt as to her objectivity and impartiality, and which raise substantial issues of pre-determination of guilt and prejudice against him, and therefore, the Petitioner was denied his constitutional right to a fair trial by a fair, objective, and impartial jury.

The right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14, of the West Virginia Constitution. A meaningful and effective *voir dire* of the jury panel is necessary to effectuate that fundamental right. Syllabus Pt. 2, *State v. Dellinger*, 225 W.Va. 736, 696 S.E.2d 38 (W.Va. 2010), *citing State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981).

Petitioner presented evidence at post-trial hearings, that Juror Pashke was completely biased against the Petitioner's right to act in self-defense, and that this bias and prejudice contaminated the entire jury panel, and the lower court committed clear error in ruling otherwise. Juror Pashke made statements to a member of Petitioner's family, which statements indicated indicated that the jury had been improperly discussing the Petitioner's case among themselves prior to the close of evidence at trial contrary to the lower court's instructions; said statements further indicated that the jury had made up its mind about the Petitioner's guilt on the first day of trial, and said juror also made statements to the effect that it did not matter what anyone said at trial, we convicted him on the first day, he (i.e. the Petitioner) is a stone cold killer. Juror Pashke, also indicated that although it looked like self-defense, she was taught that if you pull the trigger you're a cold-blooded killer. The Petitioner submits that the term applies to Juror Pashke's statements as her statements indicate juror misconduct, bias and prejudice during trial prior to the close of evidence and the start of deliberations. In discussing the impeachment of a

jury's verdict due to extrinsic juror misconduct, this Honorable Court has stated as follows:

Included in this exception is **the impeachment of the verdict if one or more of the jurors who sat in the case was initially biased or prejudiced against a party.** Ordinarily, before this type of impeachment is permitted, it must be shown that due diligence was exercised by the parties during voir dire examination to develop possible bias, prejudice or disqualification on the part of the jury panel. *(citations omitted herein, emphasis supplied herein)*. *State v. Scotchel, Syllabus Pt. 2*, 168 W.Va. 545, 285 S.E.2d 384 (W.Va. 1981). *168 W.Va. at 549, 285 S.E.2d at 387-388. (emphasis supplied herein)*.

The Petitioner submits that he exercised due diligence during voir dire to develop possible bias, prejudice, or disqualification, and that Juror Pashke, failed to disclose her unassailable belief that "although it looked like self-defense," "I was taught that if you pull the trigger and shot another person, then the person pulling the trigger is a cold blooded killer." (not a direct quote, quotations added herein for emphasis). At the post-trial hearings, it is clear that Shannon Adkins was nervous and afraid and confused about the timing of Juror Pashke's statements, as to when said statements were made by said juror; however, the content of those statements raise serious questions about the objectivity and bias of Juror Pashke, and the substantial prejudicial effects that her unassailable beliefs against self-defense had on the entire juror panel. Petitioner's witnesses on this issue made out of court consistent statements under oath that were not reviewed by the trial court. (A.R.) The Petitioner submits that these comments made by Juror Pashke expose a complete lack of objectivity and impartiality to the right of a person, and specifically the Petitioner, to act in self-defense to prevent his own death and possibly the death of his son. The lower court erred by finding that Juror Pashke's presence on the jury did not deny Petitioner his constitutional right to a fair, impartial, and objective jury.

Assignment of Error No. V: Prosecutorial misconduct in impeaching its own witness, Robert White, by utilizing a prior inconsistent statement, which was erroneously admitted as substantive evidence over Petitioner's objection. State v. Collins, 409 S.E.2d 181, 186 W.Va. 1 (W.Va. 1990). Prosecutorial misconduct in introducing irrelevant evidence

for purposes of confusing the issues, prejudicing Petitioner in the minds of the jury as to the alleged victim's house burning down. Prosecutorial misconduct in deliberately misleading the jury as to a certain piece of evidence (i.e. one blue pill crusher), and said comments by the prosecutor ignored judge's earlier admonishment not to mention the same in his attempts to impeach Kathy White; State's willful misleading of the jury in closing argument shows that prosecutor was acting as a partisan eager to convict and abandoning his quasi-judicial role; improper comments by the State in closing argument on the Petitioner's right to remain silent in closing argument, improper impeachment of Petitioner and other witnesses in closing argument and State's violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The Defendant, asserted self-defense as a complete justification and defense for shooting the victim and killing him, and the State was required to prove beyond a reasonable doubt that the defendant did not act in self-defense, and the Defendant has submitted that the State failed to meet this burden at trial, and that the jury's verdict must have been based on passion, prejudice, or a misapprehension of law caused, in large part, by widespread prosecutorial misconduct throughout the trial. The prosecutor called the Petitioner's son, Robert White, as a witness in the State's case in chief, with full knowledge that Robert's testimony would most likely not be in favor of the State, and then proceeded to improperly impeach and attack the State's own witnesses' credibility, by extensively utilizing Robert White's prior statement to law enforcement, and then improperly moved for that statement's admission and the trial court abused its discretion and committed plain error in the application of well-settled law of West Virginia by allowing Robert's prior statement to law enforcement to be admitted as substantive evidence, Exhibit 11, over Petitioner's objections that the State was improperly impeaching its own witness and Petitioner's objection that Robert's prior statement should not be admitted. (A.R. 3, Vol. II, pp. 104, 146). Although,

Rule 607 of the West Virginia Rules of Evidence allows a party, including the one who called the witness to impeach a witness with his prior inconsistent statement... The right to impeach a witness under Rule 607 is not without limitations... As we recognized in *State v. Kopa*, 173 W.Va. 43, 54, 311 S.E.2d 412, 423 (1983), Rule 607 broadened our prior rule, which was: "[O]ne may not

impeach his own witness absent entrapment, hostility, or surprise.’ *State v. Wayne*, [162 W.Va. 41, 44], 245 S.E.2d 838, 841 (1978).” (Citations omitted). However, we cautioned in *Kopa* “that the adoption of Rule 607 does not free either party to introduce otherwise inadmissible evidence into trial under the guise of impeachment.” 173 W.Va. at 54, 311 S.E.2d at 423 (Citations omitted). See F. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 4.3(A)(1985).

The admonition in *Kopa* is echoed throughout federal cases, typical of which is *United States v. Johnson*, 802 F.2d 1459, 1466 (D.C.Cir. 1986), where the Court of Appeals stated:

“Impeachment evidence is to be used solely for the purpose of impeachment, and it may not be ‘employed as a mere subterfuge to get before the jury evidence not otherwise admissible.’ (Citations omitted herein).

This type of bootstrapping is impermissible, and it is ‘an abuse of the rule, in a criminal case, for the prosecution to call a witness that it [knows will] not give it useful evidence, just so it [can] introduce hearsay evidence against the defendant....’ *United States v. Webster*, supra 734 F.2d [1191] at 1192 [7th Cir. 1984].” *as cited in State v. Collins*, supra, 186 W.Va. at 8, 409 S.E.2d at 188 (W.Va. 1990). (*emphasis supplied herein*).

This Honorable Court has consistently followed West Virginia Rule of Evidence 801(d)(1)(A) to determine whether prior inconsistent statements of a witness may be admitted as substantive evidence, and this Court has long held that prior statements of witnesses made to law enforcement should not be admitted as substantive evidence, and that admission of such statements can constitute reversible and plain error. In *State v. Collins*, Syl. Pt. 1, 186 W.Va. 1, 409 S.E.2d 181 (W.Va. 1990), this Honorable Court held as follows:

Under Rule 801(d)(1)(A) of the West Virginia Rules of Evidence, a witness’s prior inconsistent statement is not hearsay and may be used as substantive evidence if it meets certain prerequisites. First, the statement must have been given under oath subject to the penalty of perjury at trial, hearing, or other proceeding, or in a deposition. Second, the statement must be inconsistent with the witness’s testimony at trial, and the witness must be subject to cross-examination. *Id.*

“A prior statement of a witness, even if given under oath, during the course of a police interrogation is not a statement made subject to the penalty

of perjury during a trial, hearing, or other proceeding as required by Rule 801(d)(1)(A) of the West Virginia Rules of Evidence.” *Id. at Syl. 2.(emphasis supplied herein).*

Thus, under this authority, Robert White’s statement to law enforcement should not have been admitted at trial as Exhibit 11, and said admission constitutes reversible error, as the inconsistencies between his prior statement and his testimony at trial substantially prejudiced the Petitioner’s assertion of self-defense, and his constitutional right to a fair trial. There was no foundation laid by the prosecutor that Robert White’s statement to law enforcement was made under oath, and even if it had been made under oath, the authority of this Court cited above holds that the same should not be admitted as substantive evidence. The trial court failed to perform any balancing test under Rule 403 of the West Virginia Rules of Evidence, prior to the admission of Robert’s prior statement to weigh its substantial prejudicial effects to the defense and the Petitioner against any limited probative value said admission may have. (A.R. Vol. II, p.146). Robert White had already read the entire statement into evidence during direct examination by the State (A.R. 3, Vol. II, pp. 125-126), therefore, the admission of said statement as exhibit 11 further was cumulative and highly prejudicial evidence. Therefore, under the authority of this Honorable Court, the Petitioner submits that it was prosecutorial misconduct to seek admission of this statement, and that it was reversible error for the trial court to allow the admission of this statement over the Petitioner’s objections, and that given Robert White’s relationship of being Petitioner’s son that it was prosecutorial misconduct for the State to call Robert White in its case in chief and then impeach him by the introduction of his statement to law enforcement as an exhibit at trial, as the prosecutor’s actions in this regard were done for the improper and sole purpose of introducing this otherwise inadmissible prejudicial hearsay evidence against the Petitioner into trial under the guise of impeachment to the substantial prejudice to Petitioner’s

constitutional rights to a fair trial. Once again, this Court's discussion in *State v. Collins, supra*, is constructive in illustrating the prosecution's misconduct herein, with respect to Robert White's prior statement, harkening to the above-cited cautions of this Court in *Kopa, supra*, this Court recognized as follows:

The admonition in *Kopa* is echoed throughout federal cases, typical of which is *United States v. Johnson*, 802 F.2d 1459, 1466 (D.C.Cir. 1986), where the Court of Appeals stated:

“Impeachment evidence is to be used solely for the purpose of impeachment, and it may not be ‘employed as a mere subterfuge to get before the jury evidence not otherwise admissible’ (citations omitted herein). This type of bootstrapping is impermissible, and it is ‘an abuse of the rule, in a criminal case, for the prosecution to call a witness that it [knows will] not give it useful evidence, just so it [can] introduce hearsay evidence against the defendant...’ *United States v. Webster, supra*, 734 F.2d [1191] at 1192 [7th Cir. 1984]”

There is also general agreement that because impeachment by a prior inconsistent statement may not be employed as a mere subterfuge to get inadmissible evidence in front of the jury, a trial court has a duty to analyze the reason why a party wants to impeach its own witness. [citations omitted herein], as cited by this Court in *State v. Collins, supra*, 186 W.Va. at 8, 409 S.E.2d at 188.

The trial court performed no such analysis at Petitioner's trial, as to why the prosecutor wanted to impeach his own witness, nor was the balancing test of Rule 403 performed by the trial court prior to the admission of Robert's prior statement as an exhibit. (A.R. 3, Vol. II, p.146) Neither did the trial court give a cautionary or limiting instruction as to the use of this evidence by the jury for impeachment purposes only. (A.R. 3, Vol. II, p.146)

Adding insult to injury in Petitioner's trial, and compounding the substantial prejudice done to Petitioner by the admission of Robert White's prior statement as an exhibit, the prosecutor, in his closing argument, inserted his own personal opinion regarding Robert White's credibility and the prosecutor's personal opinion as to Robert's partisan interest as Petitioner's son in protecting Petitioner's interest. (A.R. 3, Vol. III, pp. 176-178, cited below) Robert

White, Kathy White, and Petitioner himself were the only witnesses present at or near the time and place of the shooting, and Kathy White testified that she ran out of the house prior to any shots being fired. (A.R. 3, Vol. III, p 88, lines 19-24, p. 89, lines 1-6) In the State's final rebuttal closing argument, the prosecutor, improperly inserts his own personal opinion to the jury by attacking the testimony of both Robert White and Kathy White, misstating the evidence, deliberately misleading the jury as to the evidence regarding Kathy White's credibility in relation the blue pill crusher, when the prosecutor had been admonished not to utilize this evidence on cross-examination, and further the prosecutor knew exactly why said blue pill crusher was not at the scene and exactly where it was found (A.R. 2, p. A.R. 3, Vol. III, p.93), as further discussed below, and unfairly commenting on Petitioner's counsel's ethics in closing as follows:

Now Bill gave me a job when I got out of law school working in the prosecutor's office down there, and there's something he taught me is that you don't talk about a dead guy like that, that he's a snake or a dog or a drug dealer, without having any proof.

The only proof we have of that is Robert and Kathy saying these things. Robert's in a pinch. I feel for him okay. He's in a bad situation. This is his dad that's on trial. I'd hate to be in that position myself, but you've got to tell the truth.

Kathy wants you to believe that there was a blue pill crusher, a blue pill crusher back there by the—they was snorting met. The state police investigated that. They didn't collect a blue pill crusher from that house.(A.R. 3, Vol. III, p. 177).

Now, Dr. Ham, he testified that Harvey did have meth in his system, --if any of you had science or chemistry or math back in high school—0.33 milligrams per liter of blood in his body.

A milligram is one thousandth of a gram, 0.33 is a third of that thousandth of a gram in each liter of blood in his body.

I don't know. Say there's fifty grams of blood in the body. I don't know if that's way high or not. Do you know how much meth that would be in his system? Not that of a crazed psychopath. I think he called him a lunatic, high on meth, on a three-day bender. No evidence as to that was introduced in this trial.

Kathy says he was acting a little bit funny. She has an interest in this case. You can discredit or credit witnesses as you please in this case, and the Judge has instructed you on that. You can weigh their testimony how you want to weigh it. Okay?

Who has an interest in the outcome of this case? Ron Thomas was called to the scene. He's working his regular job. He goes out and he does his job. Besides that, he doesn't have a personal interest in this case.

None of the witnesses that I have called have a personal interest in this case other than Robert—Kathleen and Robert have a personal interest; in that that's their husband and father, and I understand it. That's putting you in a tough spot. You're going to say sometimes what you're going to say.

Her testimony wasn't supported by the evidence in this case, and that's what you have to make your decision on.
(A.R. 3, Vol. III, pp. 176-178).

Robert White testified that he believed the Petitioner would not have made it out of the house alive had he not shot the alleged victim (A.R. 3, Vol. II, p 138); however, the weight of this testimony, was thoroughly decimated by the prosecutor's improper argument above as to the State's own witness, Robert White, and the admission of Robert White's prior inconsistent statement to law enforcement as Exhibit 11, which the jury had available during its deliberations.

After thoroughly inserting his own personal beliefs as to the unreliability of any testimony by Kathy and Robert White as evidence, as cited above, and deliberately misleading and outright lying to the jury as to the evidence regarding the blue pill crusher and its very existence, the prosecutor then proceeds to read extensively from various portions of Petitioner's statement to law enforcement, (A.R. 14), and improperly emphasizes and comments on the Petitioner's decision not to testify in his own behalf. (A.R. 3, Vol. III, pp.178-179, 179-184). Immediately after deliberately lying to the jury by saying Kathy White's testimony as to the blue pill crusher was not supported by the evidence, the prosecutor segues into improper and unconstitutional comment on the Petitioner's right to remain silent by addressing the jury as

follows:

I want to talk to you about what Richard White said. Okay? You'll get to take the video, if you want to watch the video again, you can during your deliberations.

There's some things I want to point out. NOW, THIS IS A GUY HERE TODAY, THROUGH HIS ATTORNEY, SAYS THIS WAS IN SELF-DEFENSE. NOW, THIS IS WHAT HE TOLD THE POLICE THAT NIGHT:....., and from that point on in final rebuttal argument, the prosecutor reads from various portions of the transcript of Petitioner's statement (A.R. 14), until the end of his final rebuttal (A.R. 3, Vol. III, 178-184). Petitioner submits that this constituted an unconstitutionally improper comment on Petitioner's decision not to testify, and his constitutional right to remain silent, and that by extensively reading from Petitioner's statement in final rebuttal the prosecutor unconstitutionally emphasized to the jury the fact that Petitioner chose to remain silent at trial and not testify in his own behalf.

Additionally, the prosecution utilized Kathy and Robert's testimony to point out inconsistencies in Petitioner's statement during closing argument. Moreover, both Kathy and Robert testified that Harvey, the alleged victim, was not saying anything at all during the altercation between Petitioner and Harvey. (A.R. 3, Vol. III, p. 88, lines 14-21), (A.R. 3, Vol. II, p. 107, lines 18-21, p.) But when Robert testifies on direct that the alleged victim was not saying anything like get out of his house or anything at all, the prosecution makes an improper and snide comment, to the effect of what was it "sign language." (A.R. 3, Vol. II, sign language at line 24 of p. 115, questioning on all of p. 115, p. 116, lines 1-5). This sarcastic comment by the prosecutor was uncalled for, unnecessary, and unfairly prejudicial to the witness' credibility. Thus, Petitioner submits that the State's improper admission of Robert White's testimony and prior statement was a mere subterfuge at impeachment to place said prior inconsistent statement

before the jury in substantial prejudice to the rights of the Petitioner to a fair trial as the jury had the exhibit before them during deliberations which was extremely detrimental to Robert's testimony that corroborated Petitioner's being there to retrieve his stuff (A.R.3, Vol. II, p. 104-105, 135-136), Petitioner's inability to retreat, Petitioner not free to leave unless he wanted to get shot in the back,(A.R.3, Vol. II, p. 131-132); Petitioner being unarmed, the knife being on the floor (A.R.3, Vol. II, p.109-110, and Petitioner not being the aggressor, was just holding Harvey down when Robert entered, and Harvey started hitting Petitioner. (A.R. 3, Vol. II, p. 105, also 132-133). (A.R. 3, Vol. II, p. 105, 107, 109-110, 111); and that Harvey went for a gun and fired it at them. (A.R. 3, Vol. II, p. 111, 134).

Thus, the inconsistencies between Robert's statement to law enforcement, Exhibit 11, and the above-referenced favorable testimony in favor of Petitioner that Robert White gave which supported Petitioner's assertion of self-defense, substantially prejudiced any favorable weight the jury may have given Robert White's testimony that Petitioner acted in self-defense as the prosecution's impermissible and the trial court's erroneous and cumulative admission of Exhibit 11 prevented the jury from fairly weighing Robert's testimony and credibility with said inadmissible exhibit before them. Additionally, the trial court's and the prosecution's admission of Exhibit 11, was doubly prejudicial to the Petitioner's right to a fair trial, as during Robert White's testimony, the prosecutor had Robert read the entire prior statement to law enforcement into evidence. (A.R. 3, Vol. II, pp. 121-126). Then the prosecutor extensively questions Robert White about the contents of that statement. (A.R. 3, Vol. II, pp. 126-135); therefore, the admission of the actual handwritten statement as Exhibit 11, was duplicative, cumulative, substantially prejudicial to the rights of Petitioner to a fair trial, and was done for an improper purpose by the prosecutor, and therefore, the admission of said statement constitutes reversible

error.

The rest of the State's evidence at trial consisted of speculation, conjecture, and arguments that were unsupported by the evidence and deliberate misstatements of the evidence and utilization of facts not in evidence by the prosecution as to what transpired between the Petitioner and the alleged victim, thus his improper impeachment by introduction of the prior statement of Robert White during the State's case in chief, his insertion of his personal opinion of Robert and Kathy during closing argument, all paint a picture of a partisan prosecutor bent on conviction that has abandoned his quasi-judicial role, and further abandoned any effort at fairness towards the Petitioner, his counsel, or even his own witness, Robert White.

As quoted above, in final closing argument the prosecutor called Kathy White's motives and credibility into question by outright lying and deliberately misleading the jury as to her testimony regarding a blue pill crusher. (A.R. 3, Vol. III, p.177, See also, A.R. 2, pp. 44-46).

Kathy wants you to believe that there was a blue pill crusher, a blue pill crusher back there by the—they was snorting meth. The state police investigated that. They didn't collect a blue pill crusher from that house.(A.R. 3, Vol. III, p. 177).

Thus in final rebuttal the prosecutor was deliberately misleading and an outright lying to the jury as to the very existence of this blue pill crusher, based on facts not in evidence, and the prosecutor made these statements that the prosecutor knew were untrue in a slanderous and apparently successful attempt to impeach the testimony of Petitioner's sole defense witness, Kathy White, when all along the prosecutor knew that there had been a blue pill crusher at that crime scene prior to the Petitioner taking it along with the gun to his house, where the state police seized it upon Petitioner telling the state police where it was, and further the prosecutor engaged in this willful and deliberate deception of the jury after being instructed during Kathy

White's testimony not to refer to the blue pill crusher again in a sidebar during Kathy's testimony. (A.R. 3, Vol. III, p. 92, 93-94.) On direct examination by Petitioner, the blue pill crusher is barely mentioned and Petitioner's counsel, does not dwell on this evidence in Kathy's testimony, therefore, the trial court from its instruction basically ruled that Petitioner did not open the door, and that due to the circumstances surrounding said blue pill crusher that both parties should stay away from this evidence. (A.R. 3, Vol. III, p. 93 and-94, lines 1-19) The Petitioner never mentions the blue pill crusher in front of the jury again; but the prosecutor resurrects the blue pill crusher in final rebuttal and misstates the facts, uses facts not in evidence, and outright lies to the jury, all to attack the credibility of Petitioner's sole defense witness, Kathy White. These improper, untrue, and deliberately misleading comments of the prosecutor further had the effect of unfairly bolstering the incompetent investigation of Cpl. Thomas, and inserting the prosecutor's belief in the justness of said investigation to the substantial prejudice of Petitioner. This is blatant prosecutorial misconduct, rising to a constitutional level, which should not be condoned by this Honorable Court. Prior to trial, there was an admissibility hearing regarding the blue pill crusher, and the State did not move to admit this evidence (A.R. 2), and as evidenced by the prosecution's statements at trial to the court during the sidebar regarding Kathy White's testimony in this regard. (A.R.3, Vol. III, p. 93, lines 1-8, pp. 93-94). There is a rather lengthy sidebar regarding the State being able to utilize evidence of this blue pill crusher, wherein the prosecutor recognizes that said pill crusher had been taken by the Petitioner and found and seized by law enforcement at Petitioner's home, and the prosecutor knew it and wanted to use it during cross; however the trial court properly instructed that it is safer to stay away from it. (A.R.3, Vol. III, pp. 93-94). However, in blatant disregard of the truth and the prosecutor's knowledge thereof that surrounded this evidence, and in willful disregard of

the trial court's instruction to stay away from it, in final rebuttal, the prosecutor deliberately and willfully utilized this blue pill crusher to deliberately mislead the jury and destroy the credibility of Kathy White, Petitioner's sole defense witness. (see quote above from final rebuttal. (A.R. 3, Vol. III,p. 77, lines 6-10) . The prosecution's willful, deliberate and outright lies to the jury relating to the blue pill crusher constituted egregious and outrageous prosecutorial misconduct that rose to the constitutional level of denying the Petitioner a fair trial, substantially prejudiced the testimony of Petitioner's sole defense witness at trial, and which require this Court to reverse Petitioner's conviction, and grant him a new trial.

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters. (*emphasis supplied herein*). *Syllabus point 6, State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (W.Va. 1995).

The Petitioner submits that the prosecutor's outright lies to the jury regarding the blue pill crusher were so damaging to the credibility of the sole defense witness called at trial, as to require reversal, as the prosecutor's misconduct in this regard denied Petitioner his constitutional right to a fair trial.

The prosecution mainly focused on his unsupported theory regarding the knife, and also focused on the fact that the Petitioner was so much larger than the Petitioner to inflame the passions and prejudices of the jury and made extensive and wildly speculative arguments relating to the Petitioner's possession of a knife that were unsupported by any competent evidence at trial, the prosecutor's wild speculation that Petitioner was threatening the alleged victim with a knife was unsupported and not reasonably inferred by the testimony of Kathy White(A.R.3, Vol.

III, p. 90, lines 12-18), Robert White (A.R. 3, Vol. II, p. 136), and were unsupported by Petitioner's statement(A.R. 14); and were further unsupported and not reasonably inferred from the State's medical examiner's testimony as to the alleged victim's wounds. (A.R. 3, Vol. II, 20-68). Petitioner submits that size does not matter, when the smaller individual, such as the alleged victim herein is in possession of two guns, while Petitioner was unarmed with a firearm or any other weapon prior to disarming the victim. (A.R. 14, pp.33). Petitioner also maintained in his videotaped statement that he had given his knife to his son, and therefore Petitioner did not have the knife on his person, or out or open when the alleged victim grabbed a gun and shot at him and his son, and that he was unarmed when this occurred. (A.R. 14, p. 33). Kathy White testified that she did not see a knife in Petitioner's hand or anywhere else. (A.R. 3, Vol. III, pp. 90, lines 12-18). Petitioner's son testified that the knife was in the middle of the living room floor, (A.R. 3, Vol. II, 109-110, lines) as it was found by law enforcement at the crime scene (A.R. 3, Vol II, p.29), the medical examiner never once mentioned any knife wounds to the alleged victim during his entire testimony (A.R. 3, Vol. III, pp. 20-68), therefore, there was no competent evidence at trial that placed that knife in Petitioner's hand, only the prosecution's overactive, improper and overzealous arguments did that, despite the prosecutor having no competent evidence from which to make such highly prejudicial and unsupported arguments against the Petitioner.

The standard of fair and impartial presentation required of the prosecutor may become more elevated when the offense charged is of a serious or revolting nature, as it is recognized that a jury in this type of case may be more easily inflamed against the defendant by the very nature of the crime charged. *State v. Boyd*, Syllabus point 4, 160 W.Va. 234, 233 S.E.2d 710 (W.Va. 1977).

The Petitioner was charged with the most serious of criminal offenses, first degree murder, and therefore, the prosecution's misconduct at trial, cannot meet the elevated standard required in relation to his presentation to the jury in this regard. This is blatant prosecutorial misconduct

which should not be condoned by this Honorable Court, and which further constitutes reversible error as said extensive prosecutorial misconduct denied the Petitioner his right to a fair trial.

The lower court also erred by failing to find that the State had violated the mandates of *Brady v. Maryland, supra*. As the prosecution failed to disclose to Petitioner, prior to the close of evidence, favorable exculpatory and favorable impeachment evidence with respect to one of the State's witnesses, who had "moved" the body of the victim, prior to the arrival of law enforcement, and which evidence would have further supported Petitioner's claims of self-defense, and his claims that the crime scene was contaminated. This issue was discussed at length in the Petitioner's motion for new trial (A.R.5), and further addressed by the trial court in post-trial hearings and orders included in the appendix record (A.R. 7, 8, 10, 11, 12).

Throughout the trial, and during opening and closing arguments, the prosecutor figuratively waved the knife found at the scene in front of the jury, and extensively and highly prejudicially argued that Petitioner was in possession of that knife, and threatening the alleged victim without any competent evidence to support this argument.. The State's medical examiner, Dr. Ham did not testify that any of the alleged victim's wounds were consistent with a knife, (A.R. 3, Vol.III, 20-68) ;and therefore, the prosecution's extensive arguments regarding said knife were not reasonable inferences from the State's evidence.

An attorney for the state may prosecute vigorously as long as he deals fairly with the accused; but he should not become a partisan, intent only on conviction. And it is a flagrant abuse of his position to refer, in his argument to the jury, to material facts outside the record, or not fairly deducible therefrom. Syllabus point 2, *State v. Critzer, supra*, citing Syllabus, *State v. Moose*, 110 W.Va. 476, 158 S.E. 715 (W.Va. 1931). (emphasis supplied herein).

Moreover, Robert testified that when he saw the knife it was on the living room floor, and he picked it up and put it in his pocket. (A.R. 3, Vol. II, p.109-110). Petitioner's statement

indicated that he did not have the knife in his hand, and Kathy White never saw the knife at all (A.R. 3, Vol. III, p. 90). Thus, the prosecutor's heavy reliance on this knife throughout trial was outrageously prejudicial to Petitioner and was not a reasonable inference based on any evidence introduced at trial, and further was a deliberate and willful misstatement of the evidence admitted at trial, and constituted prosecutorial misconduct which denied the Petitioner his right to a fair trial.

Further instances of the pervasive and highly prejudicial prosecutorial misconduct, were committed at trial by the prosecutor's deliberate insertion of totally extraneous, irrelevant and highly prejudicial testimony regarding the alleged victim's house burning down. After Petitioner's cross-examination of the lead investigator, Cpl. Thomas, which highlighted the incompetence of the state police investigation, in retaliation on re-direct examination, the prosecutor elicited this highly inflammable and improper testimony from Cpl. Thomas:

By Mr. Milam:

Q Corporal Thomas, can you go back out and collect this evidence from Harvey Hersman's house?

A No, sir.

Q **Why is that?**

A **That house mysteriously caught on fire and burnt to the ground.**

(A.R. 3, Vol. II, p. 92, lines 14-20).

The conduct of the prosecutor in eliciting this testimony constituted prosecutorial misconduct aimed at inflaming the passions and prejudices of the jury against the Petitioner by slyly implying and inserting the prosecutor's own belief that Petitioner was somehow responsible for this mysterious burning, and further aimed at distracting, misleading and confusing the jury by

the insertion of irrelevant, extraneous and highly prejudicial matters that had no bearing on the charges for which Petitioner was on trial. After eliciting this improper and highly prejudicial testimony, the prosecutor segues into further unfair, improper and extremely extraneous and prejudicial questioning of Cpl. Thomas on re-direct as follows:

[By Mr. Milam]:

Q And what type of ammunition do you carry in your weapon?

A .45 hollow points.

Q Why hollow points?

A Because it does the most damage on contact with flesh.

(A.R. 3, Vol. II, p. 94, lines 18-23).

The prosecution then continues this extraneous and improper line of questioning regarding the damage that can be inflicted by mushrooming hollow-points, despite the fact that there was no evidence introduced to support Petitioner supplying the ammunition as the evidence of record was that the guns belonged to and were loaded by the alleged victim. Immediately, after this prejudicial line of questioning, the prosecutor further inflames the jury by questioning Cpl Thomas, over the overruled objection of Petitioner, as follows:

[By Mr. Milam]:

Q Did Harvey Hersman give you a statement as to who started the fight?

MR. FORBES: Objection.

THE COURT: What was the question?

MR. MILAM: Did Harvey Hersman give him a statement as to how the fight started?

MR. FORBES: He's trying to play the jury with the fact that Mr. Hersman died in this fight.

THE COURT: Well, you asked him his opinion...
(A.R. 3, Vol. II, p. 95, lines 16-24).

Continued on A.R. 3, Vol. II, p. 96, lines 1-5 as follows:

[The Court] and what it was based upon. If he's based an opinion upon that, he can state what it is.

BY MR. MILAM: Q Did Harvey give you a statement?

A No, sir.

The Petitioner submits that the prosecutor's questions about taking a statement from the deceased in this regard were highly inflammable, extremely prejudicial, unnecessary and unfairly designed to inflame the passion and prejudice of the jury, and therefore, evidenced a total lack of regard for the prosecutor's quasi-judicial role that required him to deal fairly with the accused at trial, and that Petitioner's rights to a fair trial were substantially prejudiced thereby. Further, Petitioner submits that it was reversible error for the trial court to allow such improper and prejudicial questions by the prosecutor over the Petitioner's objections thereto. Throughout the trial the prosecutor completely abandoned his quasi-judicial role, acted as a partisan eager to convict, and dealt unfairly and prejudicially with the Petitioner, Petitioner's sole defense witness, Petitioner's counsel, and the State's own witness, Robert White-- in violation of the Petitioner's constitutional rights to a fair trial. This Court has held that:

The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law. *Syllabus Pt. 3, State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

The Petitioner submits that the numerous instances of unfairness cited herein, constituted

reversible error due to prosecutorial misconduct, as the same violated the prosecution's quasi-judicial role as set forth above.

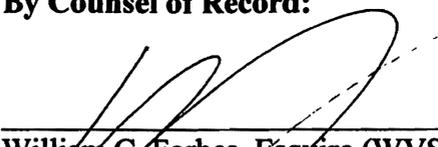
Later in the trial, in the State's cross-examination of the sole defense witness at trial, the prosecutor deliberately resurrected and returns to the mysterious burning house of the alleged victim that the prosecutor first referenced in Cpl. Thomas' testimony cited above, and focused on this highly inflammable extraneous, irrelevant and inadmissible "evidence" of the alleged burning house in his cross-examination of Kathy White, creating the highly prejudicial impression on the jury that maybe she or Robert were responsible for burning Harvey's house at the direction of Petitioner. (A.R. 3, Vol. III, p. 96, lines 8-24, p. 97, lines 1-14). The prosecution's reiterated introduction of this extraneous, irrelevant and inadmissible information substantially prejudiced the Petitioner, by misleading, confusing, and inflaming the jury against the Petitioner, and the deliberate actions of the prosecutor in this regard constituted prosecutorial misconduct at a constitutional level as it denied Petitioner his constitutional right to a fair trial as Kathy White was the sole defense witness called at trial, whom the prosecutor further improperly impeached by outright lies to the jury in his final rebuttal closing argument as discussed earlier herein.

CONCLUSION

Wherefore, for all the foregoing reasons, the Petitioner prays that this Honorable Court will vacate his conviction and remand this matter to the Circuit Court of Nicholas County for an entry of a judgment of acquittal, or in the alternative, that this Honorable Court will reverse his conviction based upon the constitutional errors at trial discussed herein, and gross prosecutorial misconduct, which denied Petitioner his constitutional right to a fair trial, and remand this matter for the award of a new trial.

**Respectfully submitted,
RICHARD A. WHITE, Petitioner,
Defendant below,**

By Counsel of Record:



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO: 11-1336

STATE OF WEST VIRGINIA, Plaintiff Below, Respondent

vs.

(Appeal from final order of the Nicholas County Circuit Court 10-F-79)

RICHARD A. WHITE, Defendant Below, Petitioner.

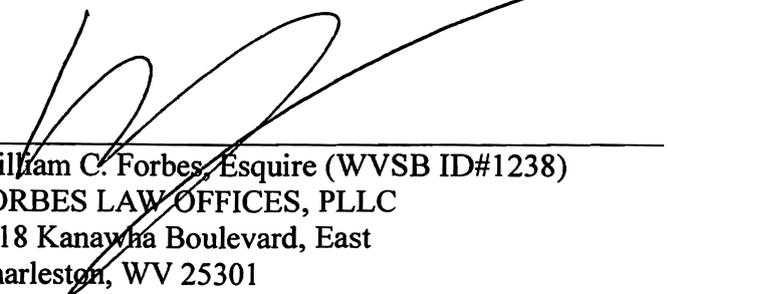
CERTIFICATE OF SERVICE

I, William C. Forbes, counsel of record for the Petitioner, RICHARD A. WHITE, hereby certify that a true and exact copy of the "*Petitioner's Brief to Perfect Appeal*" together with the "*Appendix Record*" was duly served upon counsel of record for the State of West Virginia via hand delivery on this the 27th day of January, 2012, addressed as follows:

Robert D. Goldberg, Esquire
Assistant Attorney General
West Virginia State Capitol Complex
Building 1, Room E-26
1900 Kanawha Boulevard, East
Charleston, WV 25305

I further certify that a courtesy copy of the "*Petitioner's Brief To Perfect Appeal*" was served upon counsel for the State below, due to the assignment of prosecutorial misconduct as a ground of error, said courtesy copy served via facsimile this same date without the appendix record, addressed as follows:

James "PK" Milam
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