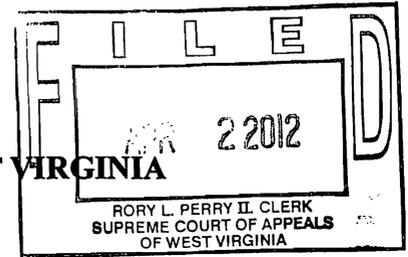


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO: 11-1336



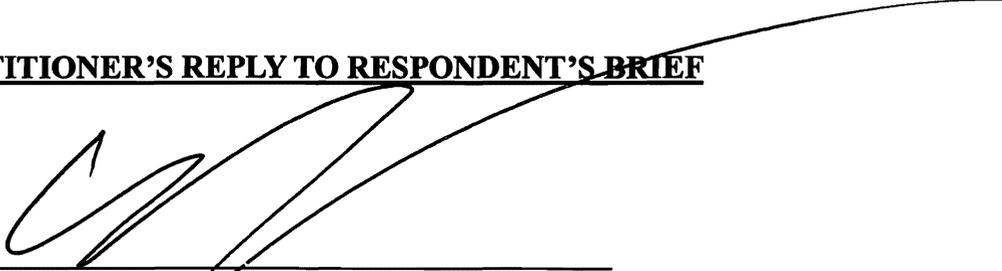
STATE OF WEST VIRGINIA, Plaintiff below, Respondent,

v.

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

RICHARD A. WHITE, PETITIONER, Defendant Below.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF



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TABLE OF CONTENTS
FOR
PETITIONER’S REPLY TO RESPONDENT’S BRIEF

	Pages
ASSIGNMENTS OF ERROR.....	1
STATEMENT OF THE CASE.....	1-5
STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	5
ARGUMENT.....	5-25
A. Plain Error in the Instructions to the Jury.....	8-10
B. There Was Insufficient Evidence As A Matter Of Law To Sustain The Jury’s Verdict.....	5-15
C. Juror Misconduct or Bias was Sufficiently Shown to warrant reversal of Petitioner’s conviction.....	15-16
D. Plain error in the admission of Robert White’s statement.....	16
E. Prosecutorial misconduct.....	16-25
CONCLUSION.....	25
Signature of Counsel of Record, William C. Forbes.....	25

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TABLE OF AUTHORITIES
for
PETITIONER’S REPLY TO RESPONDENT’S BRIEF

	Pages
<i>State v. Collins</i> , 186 W.Va. 1, 409 S.E.2d 181 (W.Va. 1990).....	5,
<i>Jackson v. Virginia</i> , 443 U.S. 307.....	6,14
<i>Mullaney v. Wilbur</i> , 421 U.S. at 697-698.....	14
<i>State v. Bowyer</i> , 143 W.Va. 302, 101 S.E.2d 243, (W.Va. 1957).....	14,15
<i>State v. Clifford</i> , 59 W.Va. 1 [52 S.E. 981].....	14
<i>State v. Baker</i> , 177 W.Va. 769, 356 S.E.2d 862 (W.Va. 1987).....	8
<i>State v. Harden</i> , 679 S.E.2d 628 (W.Va. 2009).....	9,10,14
<i>State v. Guthrie</i> , 194 W.Va. 657, 461 S.E.2d 163 (1995).....	13,
<i>State v. McMillion</i> ,104 W.Va. 1, 138 S.E. 732 (1927).....	7
<i>State v. Kirtley</i> , 162 W.Va. 249, 252 S.E.2d 374 (1978).....	7,8
<i>State v. Dinger</i> , 624 S.E.2d 572 (W.Va. 2005)	6,
<u><i>State v. Morris</i></u> , 142 W.Va. 303, 95 S.E.2d 401	14
<u><i>State v. Galford</i></u> , 87 W.Va. 358, 105 S.E. 237.....	13
<i>State v. Sugg</i> , 193 W.Va. 388, 456 S.E.2d 469 (W.Va. 1995).....	17,19

***State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (W.Va.1977).....20-23**

***State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (W.Va. 1981).....18,19,20**

***State v. Moose*, 110 W.Va. 476, 158 S.E. 715, (W.Va. 1931).....18**

***State v. Bragg*, 140 W.Va. 585, 87 S.E.2d 689 (1955).....21**

***State v. Moore*, 186 W.Va. 23, 409 S.E.2d 490 (W.Va. 1991).....16**

***State v. Poore*,226 W.Va. 727, 704 S.E.2d 727.....17,18, 20**

***State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).17.18**

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Now, comes the Petitioner, Richard A. White, by counsel of record, William C. Forbes, Forbes Law Offices, PLLC, and in reply to the State of West Virginia, Respondent's brief upon this appeal, hereby makes and files his response thereto for this Honorable Court's consideration.

I. ASSIGNMENTS OF ERROR

The Petitioner has not restated his assignments of error in this portion of his reply brief, and the argument section of this reply will loosely track the respondent's brief and headings therein.

II. STATEMENT OF THE CASE

Petitioner was involved in a life and death struggle for his life and the life of his son caused by the alleged victim shooting at them, and then going for another gun. (A.R. 14). Because Petitioner managed to be the lucky individual who only escaped with his life by shooting and killing the alleged victim with one of the alleged victims own guns at the time the alleged victim was reaching for another gun, the State placed him on trial for first degree murder, which Petitioner has submitted upon this appeal, was not proven beyond a reasonable doubt at trial, as the manifest weight of the evidence at trial overwhelmingly supported Petitioner's assertion of self-defense. The evidence at trial also indicated that the alleged victim had previously threatened to kill Petitioner and had shot at the Petitioner prior to the night in

question. (A.R. 3, Vol.III, p. 86, lines 7-23; and A.R. 14). The evidence at trial also indicated that the alleged victim was “kind of out of his mind a little bit” on drugs, methamphetamine. (A.R. 3, Vol. III, p. 84). The evidence at trial when taken in the light most favorable to the State, at best supported an offense no higher than voluntary manslaughter, as an impartial, rational and reasonable jury would have found Petitioner had acted in the heat of passion due to the gross provocation of the alleged victim having shot at Petitioner and his son, if not self-defense due to the alleged victim having been reaching for another gun at the time the Petitioner shot and killed him. (A.R. 14). Petitioner repeatedly and throughout his videotaped statement to the police, introduced at trial as evidence and played for the jury, stated that **the alleged victim was reaching for another gun** when the Petitioner shot him in the head and killed him. (A.R. 14,pp. 1-41; see p. 1, p. 5, p. 10, p. 11, p. 12, p. 13, p. 15, p. 25-26, 27), Indeed, the very gun for which the alleged victim was reaching was found by the police at the scene near the body. (A.R. 3, Vol. II, p.21). Cpl. Thomas, the lead investigator, admitted in his testimony that the crime scene had been contaminated by Judy Stewart’s actions there prior to his arrival, and Cpl. Thomas further testified that he could not say for certain what the original scene looked like prior to Ms. Stewart going in there. (A.R. 3, Vol. II, P. 50, lines 18-24, p. 51). Cpl. Thomas further testified that neither gun was brought to the scene by the Petitioner nor his son, as both guns belonged to the alleged victim. (A.R. 3, Vol. II, p.53, lines 24-24, p. 54, lines 1-2). Thus, contrary to respondent’s version of events, the manifest weight of the evidence at trial showed that the alleged victim was the one that was in possession of two guns, and that the alleged victim fired the first shot, making said alleged victim the aggressor, and the alleged victim was reaching for the gun which was found by his body, when Petitioner shot him making Petitioner’s actions self-defense. Since the fact that the alleged victim had been reaching for another gun was completely

uncontroverted at trial, and thus established and proved self-defense, the State utterly failed to meet its burden of proof beyond a reasonable doubt to disprove self-defense by failing to introduce any evidence and testimony to contradict this evidence at trial, and therefore the jury's verdict is unsustainable as well as inexplicable.

Contrary to the State's arguments that Petitioner's taking the gun utilized in the shooting of the alleged victim was evidence of his calm steps to hide his crime, Petitioner freely told law enforcement where the gun was and gave them specific instructions in order to be able to find it. (A.R. 14, p. 13). Petitioner's demeanor and attitude during the entire police interview indicated a man who was grateful and lucky to be alive and a man who was convinced that he would be going home rather than being arrested and incarcerated because he had acted in self-defense. (A.R. 14). While Petitioner voiced his dislike of the alleged victim in the interview, he repeatedly and adamantly states that he shot and killed him because the alleged victim was reaching for another gun. (A.R. 14). Throughout his statement to the police, Petitioner made no effort to hide anything he had done, including taking the gun and burying it. (A.R. 14).

Robert White testified that at the time, the Petitioner was not angry, hostile, or threatening when they left Kathy White's house to go to Harvey Hersman's house to find her. (A.R. 3, Vol. II, p. 135-136, lines 1-8). Robert's testimony corroborated that their reason for being there was to retrieve the Petitioner's personal belongings. (A.R. 3, Vol. II, p. 105, A.R.14). Therefore, there was a total absence of malice or malignant purpose on the part of Petitioner when he arrived at the alleged victim's house, despite the mutual dislike that existed between Petitioner and the alleged victim. It was manifestly clear that the alleged victim was the aggressor, since the alleged victim fired the first shot, and that Petitioner was not free to leave without getting shot in the back. (A.R. 14; A.R. 3, Vol. II, p. 127, lines 15-17, p. 132, lines 10-24; p. 131, lines

24 to p. 132, lines 1-7).

In Petitioner's videotaped statement, he more than once stated, that he had given his son the knife prior to entering the house.(A.R. 14, pp. 1, 17). Robert White testified that Petitioner did not have the knife out at all, nor was he waving it around (A.R.3, Vol. II, p. 136, lines 12-18). Thus, it was manifestly apparent that the alleged victim shot at them while they were unarmed with the ubiquitous knife. Kathy White testified she never saw a knife.(A.R. 3, Vol. III, p. 90). The State's medical examiner during his entire testimony never once attributed any of the alleged victim's injuries to being consistent with a knife wound. (A.R.3, Vol. III, pp.20-68). Furthermore, the medical examiner never attributed any of the alleged victim's wounds to being consistent with being severely beaten, as the prosecutor prejudicially argued to cast Petitioner as the aggressor, as the medical examiner repeatedly testified that the other injuries to the alleged victim were more consistent with the alleged victim's agonal falling on a fan. (A.R. 3, Vol. III, pp.42, 44, 48, 53, 25). Thus, the prosecutor's arguments in relation to this knife were based upon unreasonable inferences from the evidence in the record, and further mischaracterized the evidence of record, and unduly and unfairly served to mislead the jury as to the inferences it should have drawn from the evidence, which constituted prosecutorial misconduct.

Contrary to the respondent's characterization of the Petitioner having his wits about him during the police interview, Petitioner submits that the rambling and frequently off-topic nature of said statement speaks for itself as to his disorganized state of mind. (A.R. 14). The other gun which the alleged victim had in his possession was found at the scene by the body. (A.R.3, Vol. II, p. 21). The State introduced no evidence, nor testimony at any time during the trial to rebut the fact that the alleged victim was reaching for another gun when Petitioner shot him. (A.R. 3, Trial transcript, Vols. I-III), and indeed the police found said gun at the scene by the body. (AR 3,

p. 21). Robert White testified more than once that Petitioner would not have made it out of that house alive without shooting the alleged victim. (A.R. 3, Vol. II, pp. 131, line 24 to p. 132, lines 1-7; p. 138). Thus, the manifest weight of the evidence at trial supported Petitioner's assertion of self-defense in total justification for killing the alleged victim, and therefore the jury's verdict was irrational and manifestly against the weight of the evidence.

IV. STATEMENT REGARDING ORAL ARGUMENT

Petitioner submits that oral argument is necessary upon this appeal under Rule 19 of the Revised Rules of Appellate Procedure, within the Court's discretion. Petitioner prays that this matter be scheduled for Rule 19 oral argument upon this appeal.

V. ARGUMENT

A. PLAIN ERROR IN THE INSTRUCTIONS TO THE JURY

Petitioner did not waive any of his constitutional rights to object to the trial court's error in admitting the prior inconsistent statement made to law enforcement by Robert White without a cautionary instruction to the jury, because he objected to its admission, and the trial court's admission of the same without a cautionary instruction as substantive evidence clearly rises to the level of plain error, under the authority of *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (W.Va. 1990). Not only was the trial court's admission of Robert's statement against the well-settled law of *State v. Collins, Id.*, it constituted a substantial abuse of discretion, which clearly prejudiced the Petitioner by impugning the credibility of Robert White's favorable testimony in corroboration of Petitioner's assertion of self-defense.

In State v. Dinger, regarding that court's instructions on the duty to retreat and inability to retreat, this Court recognized that "[t]hose at fault must retreat **if able to do so; if from the fierceness of the attack or for other reasons they are unable to retreat, they will be excused**

by the law for not doing so.” *State v. Dinger*, 624 S.E.2d at 576) (citations omitted herein).

Thus, the trial court’s instruction to the jury in Petitioner’s case was an incorrect statement of the law on the duty to retreat, as the evidence at trial indicated that Petitioner was unable to retreat without getting shot in the back.

Moreover, in the case of *Jackson v. Virginia*, 443 U.S. 307, cited by the respondent, the United States Supreme Court, in considering insufficiency of the evidence claims, recognized that a properly instructed jury may still render a verdict that may be constitutionally infirm as to reasonable doubt, as follows:

A “reasonable doubt,” at a minimum, is one based upon “reason.” Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt...In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. (citations omitted herein)(emphasis supplied herein), *Id.* 443 U.S. 307 at 318.

Thus the United State Supreme Court has acknowledged that even properly instructed juries can get the verdict wrong. In Petitioner’s case the jury was definitely not rational, and definitely got the verdict wrong as the manifest weight of the evidence at trial overwhelmingly supported Petitioner having acted in self-defense. Thus, pursuant to this authority, even if this Court finds the jury was properly instructed, and/or that Petitioner may have waived error in the instructions, the jury’s verdict must still be vacated as it was manifestly against the weight of the evidence, as the State failed to carry its burden of proof beyond a reasonable doubt that Petitioner did not act in self-defense. No rational trier of fact utilizing reason could have found Petitioner guilty of first degree murder beyond a reasonable doubt, since the manifest weight of the evidence at trial supported self-defense or at least gross provocation so as to reduce the offense to one no higher than voluntary manslaughter.

B. THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO

SUSTAIN THE JURY'S VERDICT OF FIRST DEGREE MURDER.
SELF-DEFENSE

Petitioner's insufficiency of the evidence assignment of error should be meritorious upon this appeal, as said error is based upon the law of the State of West Virginia. The State failed to disprove Petitioner's assertion of self-defense beyond a reasonable doubt as there was absolutely no competent evidence nor reliable testimony introduced at trial to refute the evidence that the victim was reaching for another gun beyond a reasonable doubt when the Petitioner shot and killed him. This Honorable Court has held that:

"Once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove **beyond a reasonable doubt** that the defendant **did not act in self-defense.**" *Syl. Pt. 4, State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (W.Va. 1979). (*emphasis supplied herein*).

It is notable that the Respondent's brief fails to cite hardly any of the evidence that was introduced at Petitioner's trial, perhaps this is because the manifest weight of the evidence at trial was insufficient as a matter of law to sustain the jury's verdict. Instead, the State's brief cites an overabundance of authorities from numerous other jurisdictions, which do not represent the law in West Virginia. This Honorable Court has held that the law of West Virginia is 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.**' 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*).

Petitioner did not simply raise self-defense at trial, he proved it beyond a reasonable doubt as the fact that the alleged victim was reaching for another gun when Petitioner fatally shot him was

completely uncontroverted by the State, as the evidence indicated the Petitioner was unable to retreat without getting shot in the back; and therefore, the jury's verdict was not only manifestly against the weight of the evidence, it was based upon inflamed passions and prejudices stirred by the inflammatory theories of the prosecutor. In *State v. Baker*, 177 W.Va. 769, 356 S.E.2d 862 (W.Va. 1987), this Honorable Court found the State therein had failed to disprove self-defense beyond a reasonable doubt, and ordered a judgment of acquittal, even though the defendant therein shot an unarmed man five times, because, the State failed to controvert the evidence that the alleged victim therein was still a threat, as follows:

Here, there was **no evidence** suggesting that at any point the deceased was disabled such that the defendant could be said to have no reasonable expectation that she would not be subject to serious bodily harm. Her testimony indicated that after the shooting, the deceased was still coming toward her. She testified that when she fled the bar she thought he was still pursuing her...*Id.*, 177 W.Va. at 770, 356 S.E.2d at 863.

Similarly in Petitioner's trial, there was **no evidence** that the alleged victim had ceased to be a threat, since he was reaching for another gun at the time Petitioner shot and killed him, and Robert's testimony indicated that Petitioner was unable to retreat without getting shot in the back. Furthermore, there was **no evidence** introduced to contradict the fact that the alleged victim was the one who ran and got a gun and fired the first gunshot, making him a serious threat to the lives of Petitioner and his son, and being a continual threat to the serious bodily harm or death of Petitioner and his son by the victim's reaching for another gun. Thus, based on this uncontroverted evidence there is no way a *rational jury* could have found against Petitioner's assertion of self-defense at trial beyond a reasonable doubt.

The jury may have the sole province to believe or disbelieve any or all of the testimony or evidence, but their verdict still must be based upon the evidence and testimony at trial, **NOT** on the inflammatory speculation of the prosecutor, as was the jury's verdict herein.

Respondent's arguments in its brief, like the jury's verdict at trial, are based upon a misapprehension of law as to what constitutes evidence, as opposed to unsupported inflammatory speculation by the prosecutor. Respondent's position regarding **uncontradicted or uncontroverted evidence** also does not represent the law of West Virginia, and is further without merit on the constitutional burden of reasonable doubt. This Honorable Court in awarding a judgment of acquittal to the defendant in *State v. Harden*, 679 S.E.2d 628 (W.Va. 2009), discussed these issues regarding evidence versus speculation and the burden of proof beyond a reasonable doubt as follows:

While we clearly must, according to our precedent, construe the evidence in the light most favorable to the State where a defendant challenges the sufficiency of the evidence, **this is not to say that we must abandon sound reasoning in so doing. Instead, we construe the evidence in the light most favorable to the State, and then apply it to the relevant legal standard. In this appeal, the relevant legal standard is proof beyond a reasonable doubt that the defendant did not kill the decedent in self-defense.** In *State v. Goff*, 166 W.Va. 47, 272 S.E.2d 457 (1980), we offered a standard jury instruction on the presumption of innocence and burden of proof. This instruction, in part, defined "proof beyond a reasonable doubt" to mean:

A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture. *State v. Goff*, 166 W.Va. at 54 n. 9, 272 S.E.2d at 463 n. 9.....

Having fully considered the record in this appeal, and construing the evidence in the light most favorable to the State, we find that the State's evidence failed to prove beyond a reasonable doubt that the defendant did not have a reasonable basis to believe, and did not believe, that she was in imminent danger of death or serious bodily injury at the time deadly force was used against the decedent. **The mere fact that the decedent was found on the couch after being shot creates only a "suspicion or conjecture,"** *State v. Goff*, supra, that the decedent **might possibly** have been "asleep" or **possibly** have been "passed out drunk," and that the brutal beatings, sexual assault, and threats to kill the defendant and the children had ended.

The fact that even the State cannot say with any certainty the decedent's disposition at the time of his death is compelling evidence of reasonable doubt on this issue. Evidence that the decedent had sexually assaulted the defendant, and thereafter lay sprawled naked from the waist down on the living room couch does not amount to proof beyond a reasonable doubt that the defendant was asleep or passed out drunk; instead, it is equally plausible that the decedent could have been doing exactly what the defendant testified he was doing, which was renewing his threats to kill her and the children and again becoming physically aggressive.

Reviewing the record, there is just no evidence, only conjecture, that the defendant's "night of terror" had ended or that the defendant and the children in her care were safe from death or serious bodily injury.....

Additionally, the overwhelming evidence demonstrates that any reasonable person similarly situated would have believed that death or serious bodily injury were imminent. Uncontested evidence from multiple witnesses and sources ... established that the decedent's death precipitously followed the decedent's having physically and sexually assaulted the defendant, as well as having threatened — on numerous occasions — the life of the defendant and the lives of the children. Uncontested evidence also established that the decedent was drinking heavily and had a blood alcohol level of 0.22% — nearly three times that where a person would be presumed intoxicated in West Virginia. In this intoxicated state of mind, the uncontested evidence is that the decedent's behavior immediately preceding his death was violent, unpredictable, criminal and placed the defendant at risk of death or serious bodily injury. Under such circumstances the defendant's use of deadly force to protect herself, without retreating, is objectively reasonable. The State's evidence failed to prove otherwise. Supposition and conjecture are not evidence.

**In State v. Cook, Justice Davis, writing for the Court, properly noted that while we must be "[m]indful of the jury's province over the evidence presented on the issue of [self-defense], this Court will not permit an injustice to occur because a jury failed to adequately understand the evidence presented at trial." We agree with that principle, and conclude that "[t]his is such a case." State v. Cook, 204 W.Va. at 602, 515 S.E.2d at 138. Accordingly, we hold that the State failed to prove beyond a reasonable doubt that the defendant's actions were not made in self-defense and, therefore, the defendant's conviction and sentence must be vacated and this matter remanded for immediate entry of a judgment of acquittal.¹³ *State v. Harden*, 679 S.E.2d at 646-647 (W.Va. 2009)
(footnotes omitted herein, emphasis supplied herein).**

Similarly, the jury's verdict at Petitioner's trial was based upon unduly prejudicial speculation and unreasonable conjecture of the prosecutor, unsupported by the evidence, which inflamed the passions and prejudices of the jury against the Petitioner. At Petitioner's trial there was no

evidence introduced at Petitioner's trial that contradicted Petitioner's statement that the alleged victim was reaching for another gun when Petitioner shot and killed him, there was no evidence to support the prosecution's prejudicial speculation about the knife; there was no evidence that the alleged victim had ceased to be a threat, there was **no evidence nor testimony, only speculation and conjecture** that the Petitioner was the aggressor, there was no evidence to refute Kathy White's testimony that the deceased was on drugs. Neither Kathy White, nor Robert White knew whether Petitioner or the alleged victim started the initial altercation; however, their testimony indicated that Petitioner was not striking the victim only holding him down, moreover, Robert White's testimony corroborated the Petitioner's statement that the alleged victim was the aggressor because the alleged victim was the one who ran and got a gun and fired at them. Petitioner's statement and Kathy White's corroborating testimony indicated that the alleged victim had threatened to kill Petitioner in the past and that the alleged victim had previously fired a gun at Petitioner in the past, thus Petitioner had a subjectively and objectively reasonable belief that the alleged victim would shoot him and kill him if he did not kill him first. If the presumption of innocence is still to have meaning, the Petitioner should have been given the benefit of the doubt as to who was the aggressor, as there was no evidence only speculation and conjecture to the contrary. For the jury at Petitioner's trial to totally discard all the testimony and evidence that supported self-defense, or at best voluntary manslaughter, creates serious doubt as to the jury's understanding of the very meanings of self-defense, presumption of innocence, and reasonable doubt. Is it reasonable to shoot and aim to kill someone who has already shot again at you and your son, and is at that moment reaching for another gun at the time you shoot to kill? Yes, a reasonable person, would take this action in self-defense, a reasonable and rational person would not turn to run so that the alleged victim could shoot him in

the back with the gun he was reaching for. Given the presumption of innocence and the meaning of reasonable doubt, and the State bearing the burden of proof, is it not more reasonable to believe that the alleged victim was reaching for another gun, when that very gun was found at the scene near the body, Judy Stewart had been on that scene prior to the arrival of Cpl. Thomas, Cpl. Thomas could not say for certain whether she had moved anything, and Ms. Stewart did not testify, and there was no evidence or testimony that contradicted Petitioner's claim that the alleged victim was reaching for another gun? Yes, it is much more reasonable to believe that the alleged victim was reaching for another gun, there is more than tremendous reasonable doubt on this issue, there is a total want of evidence to the contrary, and therefore, under a proper understanding of the presumption of innocence, and the burden of proof being on the State, a rational jury would have found that Petitioner's actions were taken in self-defense and he would have been acquitted in the way our justice system is designed and is supposed to work, and it was reversible error for the trial court to not to enter a judgment of acquittal at the close of the State's evidence due to the total want of evidence on this issue.

No one with a grain of sense is going to turn and run when someone is reaching for another gun to shoot you in the back on your way out and you have a football field long way to go to reach safety. Any person that would run in this situation can be found in the morgue or the ground, or apparently on Petitioner's jury simply because fortunately they have never found themselves in that situation. Thus, No rational or reasonable trier of fact could have found all the essential elements of first degree murder based on the manifest weight of the evidence at trial having supported self-defense, therefore, the jury's verdict should be vacated as the evidence was insufficient as a matter of law to support said verdict, even under the high standard of *State v. Guthrie, supra*.

Premeditation and deliberation. The evidence at trial, manifestly showed that Petitioner simply did not have time to deliberate or premeditate or even run since the alleged victim was reaching for another gun when Petitioner shot him, and thus the alleged would have shot Petitioner if Petitioner had stopped to think, or shot Petitioner in the back if he had run. If he had had time to either premeditate or deliberate, the Petitioner would be dead because the alleged victim would have shot and killed him.

Malice. “Malice, express or implied, is an essential element of murder in the [first] and second degree, and if absent the homicide is no greater than voluntary manslaughter.’ Syllabus Pt. 1, *State v. Galford*, 87 W.Va. 358, 105 S.E. 237 (1920). Once again, the State introduced no evidence of an essential element of first degree murder, i.e. malice. As the competent testimony of Kathy White, Robert White, and the statement of Petitioner, totally negated and refuted malice, and other than this competent evidence, there was only theory and speculation on the part of the prosecutor as to what happened in that trailer, which did not and does not constitute evidence, nor should it be allowed upon this appeal to overcome the presumption of innocence. Thus, despite the mutual dislike that admittedly existed between the alleged victim and Petitioner, there was no evidence that indicated Petitioner harbored any malignant purpose, and the testimony of Robert White totally refuted any reasonable inference of malice as Robert testified that Petitioner was not upset, threatening, angry or hostile towards the alleged victim when they arrived at that house. The evidence at trial, from Kathy White and Petitioner’s statement indicated that the alleged victim had previously threatened to kill Petitioner, had shot at Petitioner prior to the night in question, and the alleged victim was on drugs and had just shot at Petitioner and his son on the night in question, and this Honorable Court has held in *State v. Harden, supra*, that prior threats can tend to NEGATE malice or intent. On the issue of

insufficient evidence as to reasonable doubt, the United States Supreme Court, in a case cited by the respondent, has stated that:

The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. **The constitutional necessity of proof beyond a reasonable doubt is not confined to those who are morally blameless.** *E.g., Mullaney v. Wilbur*, 421 U.S., at 697-698, 95 S.Ct., at 1888-1889 (requirement of proof beyond a reasonable doubt is not “limit[ed] to those facts which, that if not proved, would wholly exonerate” the accused). *As cited in Jackson v. Virginia, supra at 443 U.S. at 323.*

In West Virginia malice has been described in many ways, but the Court’s description in *State v. Morris*, 142 W.Va. 303, 314-15, 95 S.E.2d 401, 408 (W.Va. 1956), is especially enlightening when examining the facts of Petitioner’s case, that Court stated as follows:

This term, it has been said, **implies a mind under the sway of reason.** It excludes the idea of sudden passion aroused by an unanticipated and unprovoked battery inflicted by the assailant without the fault of the person assailed. If in such case the death of the aggressor results, even if intentional, it cannot be terraced to a malignant heart but is imputable to human frailty.

Clearly, the alleged victim shooting at the Petitioner and his son would arouse sudden passion, which impairs reason, and there was tremendous reasonable doubt as to who was the aggressor prior to the alleged victim grabbing a gun and firing at Petitioner and his son, therefore, malice was not established beyond a reasonable doubt. Moreover, this Court has further held as follows:

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].

Interestingly, in *Bowyer, supra*, there was actual evidence that the defendant had malice towards the deceased therein, as that term is legally defined in West Virginia, as the State therein produced witnesses that indicated the defendant therein had made vague threats towards the victim; had taken to carrying around his own gun to protect himself from the alleged victim as

the deceased had previously shot at him before; and indeed the defendant therein shot the victim with his own gun, not the deceased's therein, immediately after the deceased had pulled a gun and shot at him, and the deceased still had possession of that gun. The Court in *Bowyer, supra*, based on those facts found that the evidence was insufficient to prove malice on the part of the defendant therein, and the Petitioner submits that the evidence of malice at his trial was much more insufficient as there was no evidence that Petitioner made any prior threats towards the alleged victim, he was there to get his stuff, and the gun used belonged to the alleged victim. In Syllabus Pt. 4 of *Bowyer*, the Court stated:

When a verdict of a jury finding the defendant guilty is wholly without evidence on a point essential to such a finding, or the evidence is plainly insufficient to warrant such a finding by the jury such verdict should be set aside and a new trial awarded. *Id.*, 143 W.Va. 302, 101 S.E.2d 243(W.Va. 1957).

Therefore, the State simply failed to prove malice beyond a reasonable doubt as that term is defined under West Virginia law, and therefore, its absence cannot support the jury's verdict of first degree murder without mercy herein.

C. JUROR MISCONDUCT OR BIAS WAS SUFFICIENTLY SHOWN TO WARRANT REVERSAL OF PETITIONER'S CONVICTION

Petitioner's witnesses admittedly did a poor job in their testimony to the trial court about when Juror Pashke made these highly prejudicial and biased remarks about said juror not believing in the right to self-defense; however, Petitioner submits that she did make these statements, what she said "although it looked like self-defense I was taught if you pull trigger you're a killer" or words to that effect, is so overwhelmingly prejudicial that her very presence on the jury tainted the entire juror panel. Indeed, given the manifest weight of the evidence at trial supporting self-defense, and the jury's incomprehensible verdict of first degree murder without mercy, Petitioner submits that she did in fact make these statements to Petitioner's

family, despite her denial of ever having said them, and that the jury's verdict speaks for itself about her prejudicial influence on the entire jury. The trial court never listened to the interviews of these witnesses while they were in their own home, wherein they were much more at ease, and it is clear they had no reason to make up what Juror Pashke said, as they were not close to Petitioner, had not seen him in years, and it is very clear they did not make it up.(A.R. 6) Juror Pashke said it, she meant it, she believed it, and her presence on the jury prejudicially infected the entire panel, and her prejudicial influence can be plainly seen in the unreasonable, unsupported, and unsustainable verdict herein.

D. THERE IS PLAIN ERROR IN THE ADMISSION OF ROBERT WHITE'S STATEMENT AS SUBSTANTIVE EVIDENCE PURSUANT TO STATE V. COLLINS, 186 W.VA. 1, 409 S.E.2D 181 (W.VA. 1990), AND NO WAIVER OCCURRED BECAUSE PETITIONER OBJECTED TO ITS ADMISSION.

This Honorable Court's decision in *State v. Moore*, 186 W.Va. 23, 409 S.E.2d 490 (W.Va. 1991), further supports the application of plain error to the admission of Robert White's statement as substantive evidence.

E. PROSECUTORIAL MISCONDUCT HAS NOT BEEN WAIVED AND PLAIN ERROR EXISTS IN PROSECUTOR'S DELIBERATELY MISLEADING THE JURY AS TO THE EXISTENCE OF THE BLUE PILL CRUSHER, AND OTHER INSTANCES OF GROSS PROSECUTORIAL MISCONDUCT THAT OCCURRED THROUGHOUT THE TRIAL FURTHER CONSTITUTE REVERSIBLE ERROR.

Contrary to the respondent's assertion that Petitioner did not contemporaneously object to any of the instances of highly prejudicial prosecutorial misconduct, Petitioner did in fact object to several of the prosecutor's substantially prejudicial remarks, but was unfortunately overruled by the trial court and said objections are cited in Petitioner's original brief. The Petitioner's objections to the prosecutor utilizing the blue pill crusher during cross-examination of the sole defense witness, Kathy White, sufficiently preserved this error for purposes of appeal, despite his failure to timely object to the prosecutor's sneaky, underhanded and totally unprofessional and

surprise insertion of said blue pill crusher in final rebuttal. In any event, Petitioner submits that the prosecutor's outrageously prejudicial conduct throughout the trial constituted plain cumulative error based on the laws of West Virginia governing prosecutorial misconduct and plain error. *See State v. Poore, 226 W.Va. 727, 704 S.E.2d 727, citing State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).*

The Blue Pill Crusher: As the manifest weight of the evidence, that was introduced at trial, supported self-defense or an offense no greater than voluntary manslaughter, it is abundantly clear that the prosecutor made this last ditch nefarious utilization of facts not in evidence and misstatement of the evidence regarding the blue pill crusher to deviously bolster the investigation of the State Police and to unduly and unfairly destroy the credibility of the sole defense witness in his efforts to mislead and inflame the jury against Petitioner because the prosecution's case was so weak. Under *State v. Sugg, supra*, Syl. Pt. 6, in part, the degree to which the prosecutor's remarks have a tendency to mislead the jury and prejudice the accuse must be considered in a determination of prosecutorial misconduct, herein, the prosecutor's blatantly misleading the jury in final rebuttal as to the very existence of the blue pill crusher completely misled the jury into thinking the sole defense witness, and Petitioner's ex-wife, Kathy White had lied to them on Petitioner's behalf. Thus, the prosecutor's deliberate misstatement of the evidence and utilization of facts not in evidence surrounding the blue pill crusher constituted plain reversible error and further served to undermine the integrity, fairness, and public reputation of the judicial proceedings at Petitioner's trial, and should not be condoned. *See Syl. 7, State v. Miller, supra* It further casts serious doubt on the integrity of the jury's verdict, as said jury was deliberately misled by the prosecutor by utilizing disinformation as to facts not in evidence, and by misstating the facts in evidence into thinking that the sole

defense witness lied to them. For the respondent to suggest in its brief to this Court that these actions of the prosecutor below are somehow acceptable trial conduct and do not constitute plain error and did not deny the Petitioner his constitutional right to a fair trial is offensive and reprehensible.

This Honorable Court does not countenance such gross deliberate misstatements of the evidence and utilization of facts not in evidence as the prosecutor herein used to willfully mislead and prejudice the jury against Petitioner and his sole defense witness. *See Syllabus Pt. 2, State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288, *citing Syllabus State v. Moose*, 110 W.Va. 476, 158 S.E. 715 (W.Va. 1931). Just because Petitioner did not contemporaneously object to these comments in final rebuttal does not mean he waived his right to raise this issue on appeal, and the prosecutor's misstatements of the evidence regarding the blue pill crusher were so egregious as to rise to the level of plain error. *See analysis in State v. Poore, supra*. The respondent's brief, much like the prosecutor below, mischaracterizes the evidence regarding the blue pill crusher, and claims the prosecutor's remarks were true; however, the respondent misses the point, of what constitutes prosecutorial misconduct under the authority of this Court. The prosecutor's remarks regarding the blue pill crusher embodies the very definition of prosecutorial misconduct under the authority of this Court. The prosecutor knew the blue pill crusher existed, knew Kathy White could have seen it exactly where she said she saw it, because she ran out of the house prior to the shooting, and that Petitioner took the blue pill crusher along with the gun he used when he ran from that trailer after the shooting, therefore, for the prosecutor to deliberately imply that the blue pill crusher did not even exist in his efforts to impeach Kathy White's testimony in final rebuttal was gross, unfair, and unduly prejudicial to the defense's sole witness, and therefore, it constituted reversible error as prosecutorial misconduct. Such a

misstatement of the evidence and referencing facts not in evidence is not countenanced by this Honorable Court. **The jury did not know that the state police found this blue pill crusher at Petitioner's house, nor that Petitioner had taken it with him along with the gun when he left, as these were facts NOT in evidence, but the prosecutor knew.** This Honorable Court has held that:

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."** *Syl. Pt. 2, State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (W.Va. 1981).

Thus, the prosecutor's blatantly misleading utilization of facts not in evidence in relation to the blue pill crusher, clearly constituted gross prosecutorial misconduct that requires reversal of the Petitioner's conviction.

The Knife: Under *State v. Sugg, supra*, Syl. Pt. 6, in part, the degree to which the prosecutor's remarks have a tendency to mislead the jury and prejudice the accuse must be considered in a determination of prosecutorial misconduct, herein, the prosecutor's heavy reliance on the knife when the evidence of record failed to fairly support his remarks, and in several cases refuted his speculations, constituted prosecutorial misconduct. Thus, the prosecutor's highly prejudicial and improper arguments about the knife were mere speculations and suggestions designed to mislead and inflame the jury against Petitioner that were **UNsupported** by any of the competent and reliable evidence at trial.

Great latitude is allowed counsel in argument of cases, but **counsel MUST KEEP WITHIN the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury."** *Syl. Pt. 4, (in part) of State v. Poore, supra, citing Syl. Pt. 2, State v. Kennedy*, 162 W.Va. 244, 249 S.E.2d 188 (1978).

The Petitioner will not bother to discuss the overabundance of non-binding authority cited by respondent in its brief as to how prosecutors treat witnesses in other jurisdictions, as it is quite apparent from the citations therein that this Honorable Court justifiably holds prosecutors in the State of West Virginia to a very high standard of conduct, much higher than said jurisdictions. In this State, this Honorable Court has held as follows as to the position of the prosecutor in a criminal trial:

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). (emphasis supplied herein).**

Furthermore, this Honorable Court has held that:

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).

Moreover, the State's evidence at Petitioner's trial was so manifestly insufficient that the prosecutor made highly prejudicial and improper speculation throughout the trial, including the knife and other unsupported theories, which amounted to the prosecutor's insertion of his own personal opinion about how the events of the night unfolded, which constituted reversible error. In *State v. Critzer, 167 W.Va. 655, 280 S.E.2d 288 (W.Va. 1981)*, in discussing similar reversible prosecutorial misconduct, stated as follows:

Similarly, in *State v. Bragg, 140 W.Va. 585, 87 S.E.2d 689 (1955)*, this Court recognized its duty to caution prosecuting attorneys of this State against the use of their positions in the trial of criminal cases, **where the prosecutor in argument to the jury had given his opinion as to how the killing occurred**

without evidence of record on the issue justifying the remarks. The Court concluded the prosecutor's actions, even if no other error had occurred in the case, would have constituted reversible error. See also, Syl. pt. 2, State v. Kennedy, W.Va., 249 S.E.2d 188 (1978); T.C.R. VI (1963)

Petitioner's crime involved the most serious crime known to man, a charge of first degree murder, which further involved the revolting and gruesome actions that Petitioner had to take by shooting the victim three times in the head to ensure that he and his son would not be shot in the back on their way out of the alleged victim's house when the alleged victim was reaching for another gun. Thus, the respondent's brief completely ignores the higher standards cited above as set forth by this Honorable Court to which prosecutors in the State of West Virginia must be held, and the Petitioner submits that the prosecutor's conduct at Petitioner's trial completely abandoned these standards of fair and impartial presentation and the prosecution's quasi-judicial role, thereby denying Petitioner his constitutional right to a fair trial, and requiring and warranting reversal of his conviction by this Honorable Court.

In *Boyd*, this Court condemned the prosecutor's actions therein as prosecutorial misconduct in part for:

“... [2] dealing sarcastically with defense counsel's objections; [3]for making derisive comments at witnesses; [4] for belittling the defense attorney that he was misquoting the evidence....and in one instance asking a witness if he had gone over his testimony with defense counsel and after the witness testified he had not demanding that defense counsel be put under oath; [5] accusations categorizing a defense witness' testimony as a “cock and bull” story; attacking defendant's testimony by remarks such as, “[T]his is a dead man he is talking about who can't come in and deny; [and other accusations of lying]; [and] [6] injecting collateral and inflammatory issues.... *(loosely quoted herein from State v. Boyd, at 160 W.Va. 241-242, 233 S.E.2d at 716-717. (emphasis supplied herein).*

Therefore, from the Court's condemnation of these remarks in *Boyd*, it is clear that this Honorable Court does not condone the prosecution's unfair and undue utilization of sarcasm and derisiveness as exhibited at Petitioner's trial that the respondent advances in its brief as somehow

acceptable for the treatment of criminal defendants, witnesses, and defense counsel as appropriate decorum in this State during a murder trial. In this State, prosecutors must maintain a high degree of decorum and deal fairly and justly with all participants in the trial, and the prosecutor at Petitioner's trial did not do so. *Unnecessary sarcasm and derisiveness towards witness*: The prosecutor in Petitioner's trial employed the use of sarcasm and derisiveness in dealing with the State's witness, Robert White, when, in response to Robert's testimony that he did not hear Petitioner and the alleged victim saying anything, wherein the prosecutor made the unnecessary and unduly and unfairly prejudicial, sarcastic remark: "What was it sign language." Such unnecessary insertion of the prosecutor's own disbelief and derisive opinion of Robert's testimony in this regard falls well below the standards of fair and impartial presentation required of a prosecutor in a first degree murder trial as set forth in *State v. Boyd, supra*. The prosecutor's insertion of this unnecessary and sarcastic remark at Petitioner's trial showed contempt and unfairness towards the witness, who was Petitioner's son, and it showed a total disregard for the quasi-judicial role in which the prosecutor is cloaked. All of the instances of highly prejudicial prosecutorial misconduct cited in Petitioner's original brief to perfect this appeal include examples of sarcastic comments, derisiveness towards witnesses, defense counsel, and Petitioner, insertion of collateral and extraneous matters to inflame passions and prejudices of the jury, and accusations that Robert White, Kathy White, and Petitioner were lying.

State v. Boyd, supra, is once again instructive as to the damage and substantial prejudice that the prosecutor's unprofessional conduct throughout Petitioner's trial rose to the level of reversible error:

Defendant Boyd was charged with the most serious crime that can be brought under our criminal law, that of murder. Therefore, it was incumbent upon the prosecuting attorney to exercise the highest degree of decorum in the conduct of the trial, and this he did not do. By not so doing, the

cumulative effect constitutes reversible error. *Id. (emphasis supplied herein).*

Petitioner submits that the numerous instances of highly prejudicial misconduct raised in this appeal show that the prosecutor in his trial also failed to exercise the highest degree of decorum in the conduct of Petitioner's trial, and that the cumulative effect of all the instances of highly prejudicial prosecutorial misconduct during Petitioner's trial mandate the reversal of his conviction. Additionally, it is clear from the jury's verdict that the jury completely ignored the trial court's instruction not to consider the lawyers statements as evidence, as the prosecutor had no competent evidence to discredit the extremely competent and compelling evidence that Petitioner acted in self-defense or in the heat of passion, other than the prosecutor's own belief and highly prejudicial theories of what happened in that trailer, which he touted before the jury at length, with no competent evidence to support the prosecutor's arguments. Thus, there is no other reasonable conclusion to draw from the verdict, other than that the jury must have relied on the prosecutor's highly inflammable and substantially prejudicial theories of what happened, as there was no one else there other than the Petitioner, Kathy White, and Robert White, therefore, the jury must have relied on the prosecutor's highly prejudicial remarks and unsupported theories, otherwise the Petitioner would have been acquitted, or the verdict would have been an offense no higher than voluntary manslaughter. Thus, the respondent's assertion in its brief that the prosecutor's conduct at Petitioner's trial was somehow acceptable or is rendered acceptable because the trial court instructed the jury not to use the prosecutor's statements as evidence is without merit under the authority of this Court. An analysis of the prosecutor's conduct at Petitioner's trial under the authority cited herein clearly shows that the prosecutor at Petitioner's trial failed to exercise the highest degree of decorum required at a murder trial; further unduly and unfairly employed sarcasm and derisiveness towards witnesses, defense counsel and

Petitioner; made blatant and deliberate misstatements of the evidence and utilized disinformation about facts not in evidence in a willful and obviously successful effort to mislead the jury regarding the very existence of the blue pill crusher to destroy the credibility of Kathy White and bolster the credibility of Cpl. Thomas; repeatedly accused witnesses, who were Petitioner's family members of lying, the prosecutor inserted and encouraged willful insertion of collateral and extraneous matters that had no bearing on the guilt or innocence of Petitioner on the charge of murder (i.e. the mysterious burning house, hollow point ammunition); unfairly and prejudicially commented on defense counsel's ethics in final rebuttal by making remarks about how to treat a dead man; questions to Cpl. Thomas about taking a statement from the deceased; derisive and sarcastic insertion of his own personal disbelief of Robert White (i.e. "What was it sign language").

Wherefore, Petitioner submits that the pervasive and unprofessional prosecutorial misconduct throughout his trial, requires reversal of his conviction on this assignment of error, as manifest injustice resulted from the prosecutor's highly prejudicial, completely improper remarks, and unsupported substantially prejudicial speculations, insofar as their cumulative effect, denied Petitioner his constitutional and fundamental right to a fair trial, and constituted plain error, and furthermore, it is apparent that the prosecutor's inflammatory conduct substantially inflamed the passions and prejudices of the jury against the Petitioner thereby completely denying Petitioner his constitutional rights to due process of law and a fair trial. The substantial prejudice and inflammatory effect of the prosecutor's conduct on the jury is self-evidence from the jury's verdict against self-defense.

CONCLUSION

WHEREFORE, for all the foregoing reasons stated herein and the reasons stated in the

“Petitioner’s Brief to Perfect Appeal,” the Petitioner prays that this Honorable Court will vacate his conviction as the State failed to disprove self-defense beyond a reasonable doubt, and the jury’s verdict was against the manifest weight of the evidence, and remand this matter for entry of a judgment of acquittal. In the alternative, the Petitioner prays that this Honorable Court will reverse his conviction due to the deplorable prosecutorial misconduct that occurred throughout Petitioner’s trial, and other errors assigned, and remand this matter for the award of a new trial.

Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO: 11-1336

STATE OF WEST VIRGINIA, Plaintiff Below, Respondent

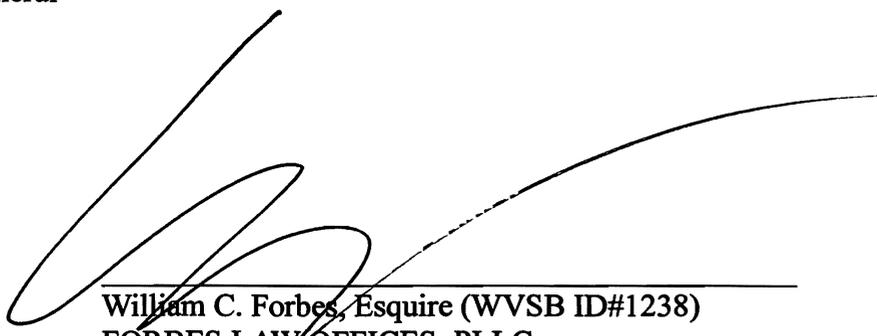
vs.

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 Reply to Respondent's Brief*" was duly served upon counsel of record for the State of West Virginia by depositing the same in the first class U.S. mail, postage pre-paid on this the 2nd day of April, 2012, addressed as follows:

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