

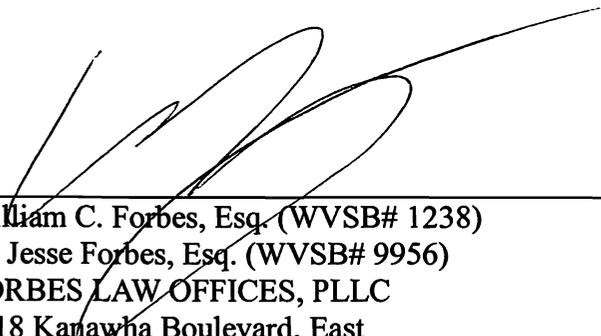
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA, Plaintiff below,
Respondent,**

Vs. Supreme Court Docket No. 12-0439

**JEREL ADDISON GARNER, Defendant below,
Petitioner.**

PETITIONER'S REPLY TO RESPONDENT'S BRIEF



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Now, comes the Petitioner, JEREL ADDISON GARNER, by counsel of record, William C. Forbes, Forbes Law Offices, PLLC, and in reply and objection 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.

III. ASSIGNMENTS OF ERROR

Petitioner has not restated his assignments of error in this reply; however, Petitioner incorporates all assignments of error and arguments made in his original brief as if the same were fully set forth herein.

IV. PETITIONER'S REPLY TO RESPONDENT'S INTRODUCTION

In Respondent's introduction, the Respondent misstates the date of the shooting as July 8, 2008, which is blatantly incorrect, as the date that Petitioner, in self-defense shot Donte Newsome, as said date is evidenced from all the trial testimony and the face of the indictment clearly indicates that the shooting actually occurred on July 5, 2008. (A.R. 1, Vol. I- VI, Vol. App. Vol. VI, Sec. 20) Contrary to Respondent's irrelevant assertions there was no evidence at trial that Newsome was about to marry the mother of his unborn child, nor whether or not it was a boy. Regardless, the Respondent's insertion of these emotional introductory statements, which were not of evidence at trial, is completely improper as the same are irrelevant to the legal

questions before this Court of whether Petitioner was denied a fair trial, and whether or not he acted in self-defense and defense of his girlfriend when he shot and killed Mr. Newsome on **July 5, 2008**. Thus, Respondent continues the State's tradition below of dealing unfairly with Petitioner by misstating the evidence and arguing facts not in evidence at trial. Furthermore, Petitioner was ACQUITTED of shooting Curtis Keyes in the foot as the evidence at trial showed that the bullet fragment taken from his boot could not be matched by ballistics testing to any gun. To quote Lt. Reed, the State ballistic expert's confirmation testimony on this issue, "Lead is Lead." (App. Vol. p. 908). Further, Respondent's assertion that Curtis Keyes had no criminal record is patently false, as the record clearly indicates that Curtis Keyes had a conviction for DUI which constitutes a criminal record.¹ Contrary to the Respondent's assertions that Curtis was unarmed, there was testimony at trial by Detective Sperry wherein Sperry admitted that he testified at the preliminary hearing that Robyn Christie had told him Curtis Keyes had a gun in his hand. (App. Vol. V. p. 1082, and Vol. VI, Sec.5, p.33)

There was absolutely no evidence introduced at trial to show that Ivan Clark's gun was the gun from which the bullets that grievously wounded Petitioner in three separate areas of his body came, as no ballistic comparisons were performed by the State on the bullet(s) that were recovered from Petitioner's body, no gunshot residue testing was performed on Petitioner's clothing to determine how far away the shots came from when he was shot, and Ivan Clark testified that he was uncertain whether or not he ever hit Petitioner with any of his multiple gunshots. (App. Vol. IV, 926, 952, 965-968, Vol. III) **Thus, there was absolutely no evidence at trial that indicated who actually shot and wounded Petitioner, therefore the State could not prove beyond a reasonable doubt that Petitioner did not act in self-defense as evidenced in his statement.** The State did not know nor care who shot Petitioner, and the State's inability

¹ At trial, the prosecutor even admits that Curtis Keyes had a DUI, but glosses over the FBI record of Ivan Clark.

to show who shot Petitioner; and what gun was used to shoot Petitioner and from what distance those injuries came from, created reasonable doubt as to whether or not Petitioner acted in self-defense from multiple assailants with guns, and but for the numerous reversible errors of the trial court and prejudicial misconduct of the prosecutor, the jury would have recognized such reasonable doubt and acquitted Petitioner of all charges. As to Respondent's characterization of Petitioner's three separate gunshot injuries as "slightly wounded," Petitioner submits the medical records admitted at trial speak for themselves as to the seriousness of Petitioner's wounds. Again, contrary to Respondent's opening assertions in its first footnote, Justin Ross and Keith Lee, two separate State witnesses, both testified to the effect that someone, other than Petitioner, was shooting simultaneously and/or prior to Petitioner firing his gun. Additionally, Petitioner admitted evidence at trial that tended to show Ivan Clark has some sort of criminal history with the FBI, which was never fully disclosed by the State. Thus, at the outset Respondent is misstating the evidence and testimony at trial, which is misleading to this Honorable Court.

All of the eyewitnesses were biased, and Ivan Clark especially had an interest in the outcome of the trial. One possible exception to the bias of State witnesses was Justin Ross, who testified that he did not see a gun in Newsome's hands due to his angle of sight, which is quite different than testifying that Newsome was unarmed.

Petitioner was precluded from presenting any evidence to contradict Newsome's allegedly peaceful character by the erroneous rulings of the trial court, and the trial court's substantial and unwarranted interference in Petitioner's cross-examination of all of the State's witnesses. However, all of the testimony indicated that immediately prior to the shooting Newsome was upset, agitated and impatient.

Respondent's insertion of matters that were presented at sentencing which were not

introduced as evidence at trial, clouds the issues and assignments of error before this Court, which involve whether or not Petitioner received a fair trial, and the trial transcript overwhelmingly indicates that he was denied this fundamental constitutional right. Petitioner had one prior gun conviction for which he paid a fine.² Thus, the trial court's assertion at sentencing that this was the third time Petitioner was involved with an illegal firearm, is simply untrue and constitutes yet another example of the trial court's unfamiliarity with the facts of this case, as Petitioner had only one prior conviction (or involvement) relating to a concealed firearm. Petitioner has never been convicted of any drug offenses in Georgia, and the Respondent overstates the charges from that jurisdiction. (*See footnote 2, herein*).

Petitioner's violation of post-conviction home incarceration has no bearing on whether he should receive credit for time served as an offender on post-conviction home incarceration. Likewise, the feelings of the home confinement office are irrelevant to this issue as well.³ Petitioner remains incarcerated under an unlawful conviction obtained without due process of law, nor the constitutional right to a fair trial.

V. PETITIONER'S STATEMENT OF FACTS

There was no dispute in the evidence that Curtis Keyes started the whole altercation without any provocation by Petitioner. Curtis was joined in threatening Petitioner by his friends Donte Newsome, and Ivan Clark, which unfortunately escalated into a shooting, as there was evidence at trial that one of them shot first before Petitioner fired, and due to the fear that Curtis placed in Petitioner's mind by Curtis' inexplicable and threatening behavior. The evidence at

² Petitioner's criminal history is of record, but was not submitted to this Court in the Appendix Record, as it has no bearing on whether or not Petitioner was denied a fair trial, nor whether he should receive credit for time served on post-conviction home incarceration. If the Court desires, Petitioner can supplement the record with his criminal history that was provided by the State in discovery, as well as information relating to the charges in Georgia.

³ Petitioner has not asked for credit for time served on pre-trial home confinement. However, Petitioner is entitled to credit for time served in jail prior to trial, and the original sentencing order fails to afford him the appropriate number of days of such credit, and as a result the records of the Division of Corrections indicate he has not received credit for the time he served in the regional jail system prior to trial.

trial clearly showed that Curtis Keyes⁴ attacked Petitioner without provocation by banging upon Petitioner's car and shouting at Petitioner, while Petitioner and Robyn Christie were simply just sitting in their car outside of Fluid Nightclub on July 5, 2008. After this startling and threatening behavior, Curtis then threw open the back door of Petitioner's car without permission, despite not knowing Petitioner or his girlfriend. The fact that this occurred was without dispute at trial, and Petitioner submits that Curtis Keyes' highly threatening and startling actions made Curtis the first aggressor to place Petitioner in fear for his life and the life of his girlfriend. Petitioner's statement introduced at trial indicated he thought he might be getting carjacked by Curtis, whom Petitioner believed had a gun and whom was unknown to Petitioner at the time. None of the State's witnesses indicated that Petitioner did anything to provoke Curtis Keyes into taking these startling and threatening actions. Petitioner believed that Curtis Keyes had a gun, and Detective Sperry admitted at trial that in his prior testimony at the preliminary hearing that he had testified that Robyn Christie had also told Sperry that Curtis (she did not know his name), the guy at the back window of car had a gun and banged on the window with it and scared us." Unfortunately, the trial court erroneously admitted the unreliable hearsay notes of Detective Sperry as an exhibit, and in said inadmissible hearsay notes Sperry fails to mention that Robyn told Sperry that the guy had a gun. (App. Vol. V. 1082-1084). The trial court's erroneous admission of this unreliable and inadmissible hearsay as substantive evidence constituted reversible error, which overwhelmingly prejudiced the jury against the evidence from Petitioner's statement that Curtis had a gun, and denied Petitioner his constitutional right to a fair trial.⁵

⁴ Curtis Keyes's employment does not detract from his admission at trial that he threw open the back door of Petitioner's vehicle without permission, despite not knowing Petitioner or his girlfriend.

⁵ Respondent's brief ignores the fact that the extra-judicial, highly prejudicial and thoroughly unreliable hearsay notes of Det. Sperry were inadmissible, therefore, the trial court's admission of this so-called evidence was reversible error, as it substantially prejudiced the jury against the evidence from Petitioner's statement that Curtis Keyes had a gun.

While the “Fab Five” may have gotten their name from the numbers on their football jerseys, on the night in question, they exhibited the behaviors of a violent gang, which threatened the Petitioner with grievous bodily harm and his life and the life of his girlfriend. Justin Ross testified that to his knowledge, the Fab Five, including Newsome, were previously involved in at least one other bar fight. Curtis Keyes attacked Petitioner in his car without provocation, by banging on the car, shouting, and throwing open the back passenger door. Justin Lee places Ivan Clark at the front of Petitioner’s car, in direct contradiction to Ivan’s testimony, and Donte Newsome was at or near the driver’s side door of Petitioner’s car. Other testimony placed Keith Lee as pacing around Petitioner’s car. Thus, Petitioner was surrounded by at least three large black males, if not four, who were all unknown to him at the time, all of whom Petitioner believed to have guns, which placed Petitioner in great fear of grievously bodily harm and great fear for his life and the life of his girlfriend. Petitioner’s statement introduced at trial was competent and compelling evidence that he acted in self-defense and defense of his girlfriend from multiple assailants armed with guns who attacked Petitioner without provocation, one or more of whom also shot and wounded Petitioner three separate times, as well as one of them punching Petitioner in the face, there was other evidence at trial that the assailants fired first, and the State failed to overcome this evidence beyond a reasonable doubt. However, the trial court made disparaging remarks about the weight and importance of Petitioner’s statement, and continually interrupted the playing of Petitioner’s statement by prejudicial remarks, and Petitioner’s statement was further interrupted by repeated failures of the State’s equipment, and thereby the weight and importance of Petitioner’s statement was substantially diminished by the trial court’s actions, which unduly and unfairly prejudiced the jury as to the weight to be afforded this evidence. (A.R. Vol. V, pp. 1047-1061).

Petitioner was shot three times by an unknown assailant, as the State never conducted any ballistic or other forensic testing to determine whether it was Ivan Clark, or one of the other assailants who shot Petitioner. The medical examiner's testimony corroborated the evidence from Petitioner's statement that the injuries to Petitioner's mouth area were consistent with being punched in the face. Petitioner's medical records admitted at trial constituted compelling evidence which also indicated that the through and through laceration injuries to Petitioner's mouth were consistent with being punched in the face. (A.R. Vol. VI, Sec. 18, p. 6, p. 47, pp. 51-54). **The evidence from Petitioner's medical records further established that bullet fragments were found inside all three of Petitioner's gunshot wounds.** (A.R. Vol. VI, Sec. 18, p. 53-54). **However, the State never bothered to collect these bullet fragments as evidence, therefore said bullet fragments were never subjected to ballistics or other forensic examination.** Detective Sperry did not even know how many gunshot wounds Petitioner had suffered. (A.R. Vol. V).⁶ Additionally, when Det. Sperry questioned Petitioner at the hospital, he had only talked to two witnesses, but he disbelieves Petitioner immediately, and the State never investigated the evidence from Petitioner's statement that Newsome had opened the driver's side door. (App. Vol. V, p. 1058-1061). Petitioner gave a second statement to Sperry in which he told the police where to find the gun he had used. (App. Vol.).

All of the eye-witnesses testified that the shooting was over very quickly, thus Ivan Clark's testimony that he retrieved his gun from the trunk of his car and shot at Petitioner from beside his car, when contrasted with Justin Ross' testimony that Ivan was at the front of Petitioner's car shooting at Petitioner, made Ivan's testimony inherently incredible. Keith Lee

⁶ Petitioner in a statement to the police told them where to find the gun he had used, and contrary to Respondent's assertions, he told them a friend had put it there when he borrowed the car and let him know it was there, but he did not want to tell the police who his friend was that put the gun in the car. (App. Vol. V, p.1052, p. 1054) In Petitioner's statement he also states he got out of the car when he pulled up to look for a friend. (*Id.* p. 1048).

testified that a lower sounding gun went off first and that the louder gun fired second, and that it was like a shoot-out, which further discredited Ivan's story. The State did not prove beyond a reasonable doubt that there were no bullets and/or bullet holes in Petitioner's car as the evidence at trial indicated the State never removed the floor mats of Petitioner's car, the blood was not cleaned from the black seats to check for bullet holes, nor did the State search Petitioner's car with a metal detector. Lt. Reed's testimony constituted compelling evidence that the alleged reconstruction conducted by Steve Compton was not based upon proper and adequate factual and forensic foundations, and therefore the trial court erred in admitting Compton's report. There was evidence at trial that Ivan Clark had already thrown one gun into the Ohio River, when he was caught by the Ohio police trying to throw his own gun into that same river. In contrast, Petitioner had informed the police where to find the gun he had used. The combination of all of this evidence constitutes reasonable doubt as to whether Petitioner acted in self-defense from multiple assailants armed with guns, and reasonable doubt as to where, when and how Petitioner was shot three times by one or more of these assailants. Thus, the State failed to overcome Petitioner's assertion of self-defense beyond a reasonable doubt. The trial court's and the prosecution's erroneous shifting of the burden of proof, admission of inadmissible and unreliable hearsay from Det. Sperry, and the other errors assigned upon this appeal, denied Petitioner the benefit of this reasonable doubt, and Petitioner was thereby denied a fair trial. Petitioner had the constitutional right to remain silent, and further was not under any burden to present witnesses, and the trial court's errors denied him these constitutional protections in the presence of the jury.

Judge Egnor's conduct throughout trial showed undue bias and partiality in favor of the State in the presence of the jury, which denied Petitioner his right to a fair, unbiased, and impartial tribunal, and the trial court's bias against Petitioner's counsel substantially prejudiced

the Petitioner's ability to defend himself as the trial court's hostility towards defense counsel in the jury's presence cast Petitioner and his defense in an extremely unfavorable light in the minds of the jury. The trial court's substantial and unwarranted interference in Petitioner's cross-examination of all State witnesses; erroneous rulings in the admission and exclusion of evidence; comments on the weight of the evidence; shifting the burden of proof to Petitioner; errors in instruction to the jury; refusal to give Petitioner's offered instructions to the jury; inability to pay attention to the evidence and the proceedings; unfamiliarity with criminal trial court procedure ; hostility and demeaning attitude towards Petitioner's counsel in the presence of the jury; extraneous, confusing and irrelevant questioning of Ivan Clark; and the court's inability to read the final charge to the jury in a coherent and cohesive manner; all of these substantially prejudicial errors of the trial court combined to deny the Petitioner his constitutional right to a fair trial, which requires reversal of his convictions and sentence and an award of a new trial.

VI. PETITIONER'S SUMMARY OF ARGUMENT

Petitioner's convictions and sentence should be reversed because he was denied due process of law and his constitutional right to a fair trial by the substantial and highly prejudicial errors that occurred at trial. Petitioner was denied his constitutional right to a fair trial by the trial court's actions and highly prejudicial comments towards Petitioner's counsel and upon the weight of the evidence throughout the trial, and further denied Petitioner's constitutional right to meaningful cross-examination, denied the presumption of innocence by the shifting the burden of proof, reversible error in the admission of unreliable hearsay evidence, and the trial court denied Petitioner the right to be present at all critical stages of his trial, which requires reversal of his convictions and sentence and the award of a new trial. At the time of Petitioner's arrest, the police had not even interviewed Ivan Clark, nor had he been mentioned by any witness at the

scene as being involved in the shooting. The testimony of Lt. Reed, the State's ballistic expert, and also an expert in crime scene reconstruction, constituted compelling evidence that State witness, Steve Compton's alleged reconstruction was not based on proper nor adequate factual foundations. Thus, Petitioner elicited compelling evidence at trial the police and by extension the State immediately jumped to unsubstantiated conclusions and failed to adequately investigate the shooting, and therefore, at trial the State failed to overcome beyond a reasonable doubt, Petitioner's evidence of self-defense and defense of his girlfriend. In the alternative, there was no evidence of a specific intent to kill Newsome, and therefore the jury's verdict of voluntary manslaughter is unsustainable due to the absence of evidence of this material and necessary element of said offense. Petitioner's convictions and sentence should be reversed and a new trial awarded.

VII. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that oral argument is necessary under the Revised Rules of Appellate Procedure. A memorandum decision is not appropriate in this matter given the constitutional nature of the substantial errors that occurred at trial.

VIII. PETITIONER'S ARGUMENT

Assignment of Error No. 1(a). Respondent's argument ignores the trial court's highly demeaning attitude and comments towards Petitioner's counsel during the cross-examination of Ivan Clark, and the substantial prejudice these comments had on the jury. Respondent's argument also ignores that the trial court's comments and rulings shifted the burden of proof to the Petitioner to produce a witness, which was unconstitutional and denied Petitioner the presumption of innocence in the presence of the jury. Petitioner's counsel had already informed the court that the State and counsel had agreed Petitioner could utilize the Ohio

police report to cross-examine Clark prior to Officer Werry taking the stand. (App. Vol. III, p. 670, p. 677). However, the trial court ignored this agreement between counsel, and then displayed confusion as to what report was at issue, despite having been informed of the report prior to Petitioner's cross-examination questions. (*Id.* p. 677) Thus, the trial court's comments which required Petitioner to produce this witness constituted a substantial and unwarranted abuse of discretion, which requires the award of a new trial, as it substantially prejudiced Petitioner's ability to present evidence that additional guns were in the hands of his assailants at the time of the shooting. The trial court made comments on the weight of the evidence, showed hostility towards Petitioner's counsel, and made Petitioner's counsel's promise to produce to produce Officer Anthony Werry, a State witness, and threatened to strike Petitioner's cross-examination of Clark unless Petitioner produced said witness. (*Id.* p. 678).

In a criminal prosecution, the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged, and it is error for the court to instruct the jury in such a manner as to require it to accept a presumption as proof beyond a reasonable doubt of any material element of the crime with which the defendant is charged **or as requiring the defendant either to introduce evidence to rebut the presumption or to carry the burden of proving the contrary.**

Syllabus point 4, *State v. Pendry*, W.Va., 227 S.E.2d 210 (1976), 227 S.E.2d 210 (W.Va. 1976), overruled on other grounds, *Jones v. Warden, West Virginia Penitentiary*, 161 W.Va. 168, 241 S.E.2d 914. (emphasis added). The trial court's wholly prejudicial exchange with counsel occurred in the presence of the jury, and unconstitutionally shifted the burden of proof to Petitioner and denied him the presumption of innocence and a fair trial. The trial court's disruption of Petitioner's crucial cross-examination of Ivan Clark on the critical issue of how many guns he threw into the Ohio river, constituted reversible error as it substantially prejudiced Petitioner's ability to conduct meaningful cross-examination on this critical issue as well as

shifted the burden of proof to Petitioner. Compounding the prejudice to Petitioner's ability to cross-examine Clark, Ivan Clark's statement(s) to the police were never recorded. (App. Vol. III,). When Clark was recalled later at trial, the State stayed away from the issue of how many guns Clark threw in the river, thus Petitioner was never afforded the opportunity to reopen his cross-examination on this crucial issue of how many guns Ivan Clark threw into the river. The trial court's demand that Petitioner produce a witness, any witness flies in the face of the presumption of innocence, and shifted the burden of proof to Petitioner, and requires the award of a new trial.

Once the trial court refused to allow the Petitioner to continue his cross-examination on this critical issue of how many guns Ivan threw into the river, the trial court then further disrupts Petitioner's cross-examination of Ivan Clark by making improper comments on Petitioner's counsel's competency and abilities to cross-examine the witness in the presence of the jury. These are two separate instances in which the trial court substantially interfered and prejudiced Petitioner's rights to meaningful cross-examination of Ivan Clark, a primary State witness who had been granted immunity by the State for his involvement in the shooting, and constituted manifest abuse of the trial court's discretion. Contrary to respondent's assertions, Petitioner's counsel was not rambling, the witness was being deliberately obtuse, and the trial court's directive that Petitioner's counsel go over his cross-examination questions with the witness and the State were highly prejudicial, improper, demeaned Petitioner's counsel in the presence of the jury, and denied Petitioner's right to meaningful cross-examination of Ivan Clark. (App. Vol. III, 684-686). The trial court's ordering Petitioner's counsel to go over his cross-examination questions with the State and Ivan Clark, was highly improper, extremely prejudicial, and evidenced the trial court's bias and hostility towards Petitioner's counsel, as well as the trial

court's unfamiliarity with the purpose of defense cross-examination of a State witness. "The fundamental right to confront one's accusers, which contemplates the opportunity of *meaningful cross-examination*, is guaranteed by Article III, Section 14 of the West Virginia Constitution." Syllabus Pt. 1, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330, (1975). The trial court even made a comment that it was "your" witness when in fact Ivan Clark was the State's witness not Petitioner's, and the trial court's comment that he was going to help Petitioner's counsel with cross-examination in front of the jury were highly improper and substantially prejudicial. (Vol. III, p. 684). The trial court's substantial interference in Petitioner's cross-examination of Ivan Clark constituted unwarranted and unsustainable abuses of discretion, which require reversal of Petitioner's convictions and sentence and the award of a new trial. Petitioner's counsel informed the court that he felt the trial court's interference in the cross-examination of Ivan Clark was interfering in his abilities to cross-examine this witness and that Petitioner's rights to a fair trial were being denied thereby. (Id. p. 685). Thus, the trial court's substantial and unwarranted interference in Petitioner's cross-examination of Ivan Clark constituted manifest abuse in the court's discretion which substantially prejudiced Petitioner, and requires reversal of his convictions and sentence and the award of a new trial.

The trial court's exclusion of cross-examination of Krystal Lee about Newsome's prior gun ownership was substantially prejudicial, as the State belabored Newsome's allegedly peaceful character throughout the trial, and Petitioner sought to introduce this evidence to contradict the State's evidence of Newsome's supposedly peaceful nature. (Vol. II, 345-346). Thus, it is immaterial whether or not Petitioner knew about the previously owned pistol-gripped shotgun, and the trial court's ruling substantially prejudiced Petitioner's ability to contradict the State's repeated introduction of Newsome's character.

An examination of the trial court's substantial interference in Petitioner's rights to cross-examination all of the State witnesses, reveals a manifest abuse of discretion by the trial court that is unsustainable as it denied Petitioner's constitutional rights to meaningful cross-examination and the right to a fair trial.

Assignment of Error 1(b) Respondent mischaracterizes the nature of the recess that was held in Petitioner's absence during the cross-examination of Justin Ross. (App. Vol. III, 749-751). While, it is true that a bathroom break occurred contemporaneously with this in-chambers proceeding, the transcript clearly shows that the purpose of the in-chambers proceeding was to get the court reporter's assistance in reading back a portion of Ivan Clark's testimony in response to the State's objection that Petitioner's counsel had misstated his testimony. (Id.). Thus, this proceeding was a critical stage of Petitioner's trial from which he was absent as it involved the review of previous trial testimony and involved a ruling on a State's objection in the middle of Petitioner's cross-examination of Justin Ross. (Id.). No record was made in the trial transcript of what testimony was read back in Petitioner's absence, and therefore the Respondent cannot show that Petitioner's absence was harmless beyond a reasonable doubt. Petitioner's counsel noted that Petitioner was absent to preserve the issue for appeal contrary to respondent's assertions to the contrary. In *State ex rel. Grob*, this Court held as follows:

Correlative with the constitutional right of confrontation is the right of presence which requires that an accused charged with a felony shall be present in person at every critical stage of a criminal trial where anything may be done which affects the accused; the right of presence, originating in the common law, is secured to an accused by W.Va. Code 1931 62-3-2.

W.Va. Code 1931 62-3-2 requires that one accused of a felony shall be present at every stage of the trial during which his interest may be affected; and if anything is done at trial in the accused absence which may have affected him by possibly prejudicing him, reversible error occurs.

Syllabus Points 2-3, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

Therefore, Petitioner's absence during this critical portion of his trial requires reversal of his convictions and sentence and the award of a new trial, as it was a proceeding that affected Petitioner's substantial rights to cross-examination, involved review of prior testimony, and the trial court's deliberation on ruling on the State's objection, therefore, there was a substantial potential for prejudice to Petitioner. (Id.).

Assignment of Error 1(c). Respondent's ludicrous assertion that the trial court's obsession with how many bridges Ivan Clark crossed to get to Ohio to dump multiple guns in the river, somehow served to clarify any of Ivan's testimony is totally without merit and stretches the bounds of credulity. (App. Vol. IV, 931-934). Furthermore, respondent's argument ignores that the trial court's extensive questions about the route and bridges Ivan took to get there were totally extraneous, irrelevant and off-topic from the material and critical evidence upon which Ivan Clark was being examined by counsel, and were further totally extraneous to any material issue at trial.

Thus, in defining the role of a judge in interrogating a witness, Rule 614 permits the judge to ask questions to prevent misunderstanding, but extended examination of any witness has not been favored... 'a judge may ask questions for the purpose of clearing up points that seem obscure, and supplying omissions which the interest of justice demands, but it is not proper that he conduct an extended examination of any witness.' *State v. Thompson*, 220 W.Va. 398, 647 S.E.2d 834 (2007).

The trial court's extensive examination on the irrelevant bridges completely overshadowed the important evidence that Ivan Clark left the scene of the shooting to allegedly go to the hospital; failed to approach the police at the hospital; Ivan did not volunteer his participation to the police either at the scene or at the hospital; he incredibly claimed no police approached him at the hospital. (Id. 928-930). Thus, the focus of Ivan Clark's testimony on recall was regarding his actions in leaving the scene of the crime after the shooting and whether or not he went to the

hospital and his failure to give a statement to the police. (Id). During the trial court's irrelevant, confusing, and totally off-topic questions about the routes Ivan Clark took to dump the guns, the trial court not once asks how many guns Ivan threw into the river, nor the lack of Ivan making a statement to the police, and therefore, the trial court's questions failed to clarify any of Ivan's testimony nor any material issue at trial, and served to prejudice the Petitioner by overwhelming and misleading the jury with the trial court's inexplicable focus on these extraneous issues. Thus, the trial court's extensive examination of Ivan Clark was an unsustainable abuse of discretion that substantially prejudiced the Petitioner's rights to have the jury consider the important evidence that Ivan left the scene of the crime, did not approach the police, and threw more than one gun in the Ohio river. Thus, the authority of *State v. Thompson, supra*, indicates that the trial court's examination of Ivan Clark was wholly improper and requires reversal of Petitioner's convictions and sentence and the award of a new trial.

The trial court's failure to properly and sufficiently instruct the jury before recesses, constitutes plain error, and further shows the trial court's unfamiliarity with the judge's role at trial. Petitioner should not be required to inform the trial court of its duties to properly instruct the jury. Such omissions are: 1) plain; 2) error; 3) affecting substantial rights; and seriously affecting the fairness, integrity, or public reputation of the proceedings. See Syllabus Point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). Moreover:

The plain error doctrine contained in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, *including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court*. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result. Syllabus Point 2, *State v. Thompson, supra*. (emphasis added).

Assignment of Error No. 2. Petitioner requested credit for time served on post-conviction home incarceration from the trial court, and the trial court indicated that “it may be that the Court might give him credit for this. (App. Vol. VI, Sec.15, p. 9). However, the re-sentencing order fails to give the Petitioner credit for such time served on post-conviction home-confinement, and therefore, in effect it denied it, despite the trial court’s indication that it was inclined to do so. Petitioner recognizes that he is not entitled to credit for time served pre-trial on home confinement; however Petitioner is entitled to receive credit for time served in jail prior to trial, and both sentencing orders fail to grant him such credit for time served in jail prior to trial, and these error must be corrected upon this appeal. (Id. Sec. 2, Sec. 3). Petitioner is entitled to 421 days in pre-trial jail time. *State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991).*

Assignment of Error No. 3: The trial court’s failure to strike Juror Jenkins for cause was a substantial and unwarranted abuse of discretion which requires reversal of Petitioner’s convictions under West Virginia law. Juror Jenkins admitted bias towards Officer Coffey, and at the time the trial court refused to strike her for cause, the State had indicated Coffey would testify. “Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed.” Syllabus Points 2 and 4, *State v. Dellinger, 225 W.Va. 736, 696 S.E.2d 38 (2010).*

Assignment of Error No. 4: The State failed to overcome the evidence from Petitioner’s statement that he acted in self-defense and defense of his girlfriend. The police conducted a slapdash investigation in which primary witness statements went unrecorded, i.e. Ivan Clark (Vol. III, p. 698-699); Robyn Christie (Vol. V. p. 1080); numerous critical witnesses that were at the scene were not interviewed, at the scene or the hospital or at all, Ivan Clark not at scene or hospital (Vol. IV 929-930), Larone Washington, Jermaine Keyes, Jamal Williams; no

copy of any written use immunity agreement between the State and Ivan Clark was provided to Petitioner (Vol. III 702-705); gunshot residue testing was not performed on numerous witnesses at the scene despite the police having no idea who all the participants involved in the shooting were at the time, as the stipulated evidence at trial showed that gunshot residue was only performed on Curtis Keyes, Newsome and Petitioner. (Vol IV, p. 836) the crime scene was unsecured, i.e, Larone Washington fled the scene with Newsome's car (Vol. II, 356, 480); Ivan Clark fled the scene in his own car (Vol. IV p. 929); the deceased's car was never processed for evidence nor was Ivan Clark's car even seized, much less processed, (Vol. IV, 944); the bullet fragments from Petitioner's body went uncollected and untested and were never sent to Lt. Reed for ballistics examination (Vol. IV p. 911-913); no forensic examination was conducted by the police of Petitioner's gunshot wounds for purposes of trajectory, entrance and exit wounds,, distance determination, or anything else, and the police never even photographed the Petitioner's three separate gunshot injuries (Vol. IV 965-968); Sperry admitted he did not even know how many times the Petitioner was shot (p. 1066); fingerprint evidence from Petitioner's driver's side door was never taken despite Petitioner's statement that Newsome had opened said door (Vol. IV 946-947); no metal detector was run inside Petitioner's car to check for the existence of bullets, nor was the blood cleaned off the black seats of the car to determine if bullet holes existed, (Vol. IV p. 975); the floor mats in Petitioner's car were not pulled up to search for bullet holes inside the car (Id. 975-976); no gunshot residue was performed inside Petitioner's car to determine if a gun had been fired therein (Vol IV 964); the Ohio river was not dragged for the other gun Ivan Clark threw into it (Vol. IV p. 879); the bullets from Petitioner's gun were never sent to the ballistics expert, Lt. Reed (Vol. IV p. 910-911). Additionally, Lt. Reed's testimony constituted compelling evidence that Steve Compton's alleged reconstruction was not based upon proper and

adequate factual and forensic foundations. (Vol. IV, pp. 903-927). Thus, there was evidence at trial that showed the alleged reconstruction of Compton and the forensic evidence conducted in this matter were totally insufficient to overcome Petitioner's assertion of self-defense beyond a reasonable doubt. Ivan Clark testified that he did not know if any of his multiple shots towards Petitioner actually hit Petitioner, and due to the lack of forensic testing of the bullets from Petitioner's body, the State never determined who shot the Petitioner. Nor did the State ever investigate who punched and caused the severe lacerations to Petitioner's face. Thus, Petitioner suffered severe injuries from multiple unknown assailants, which constituted the very definition of reasonable doubt as to whether he acted in self-defense.

Furthermore, both Keith Lee and Justin Ross testified that two guns were going off simultaneously at the start of the shooting, which corroborated Petitioner's evidence of self-defense. Keith Lee testified that the lower sounding gun went off first, which corroborated Petitioner's statement that one of his assailants shot first. Absolutely no evidence was admitted at trial which a rational trier of fact could have found beyond a reasonable doubt, to support Petitioner's *specific* intention to kill. The specific intention to kill is a necessary and material offense of voluntary manslaughter, and no evidence was introduced to support the same. Therefore, the verdict of voluntary manslaughter was irrational and based upon a misapprehension of law and/or inflamed passions and prejudices of the jury.

Assignment of Error No. 5: The trial court was denied meaningful voir dire by the trial court's failure to provide Petitioner with the juror panel prior to trial, and the State gained unfair advantage by the trial court's refusal to grant a continuance upon Petitioner's request on these grounds.⁷

⁷ Petitioner submits that a copy of the Jury Questionnaire he proffered below can be provided to the Court if the Court so desires.

Assignment of Error No. 6: Respondent's brief totally ignores the incoherent manner in which the trial court delivered the final charge to the jury, and that his utilization of intentionally instead of unintentionally gave the jury an incorrect statement of the law on involuntary manslaughter. This is plain error and requires reversal of Petitioner's convictions and sentence and the award of a new trial. *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114. A trial court commits reversible error in refusing to give proposed jury instructions when the following three criteria are met:

A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense.

State v. Wade, 200 W.Va. 637, 646, 490 S.E.2d 724, 733 (1997). Moreover, "it is reversible error for a trial court to refuse to instruct a jury on lesser offenses charged in the indictment if there is any evidence in the record to prove such lesser offenses." *State v. Wayne*, 162 W.Va. 41, 46, 245 S.E.2d 838,842 (1978), *overruled on other grounds*, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983); see also *State v. Davis*, 205 W.Va. 569, 585, 519 S.E.2d 852, 868 (1999).

Respondent ignores the fact that the State below had argued that Newsome was an innocent bystander. Additionally, respondent's argument completely ignores that the lack of the Petitioner's proposed instructions in the final charge substantially prejudiced the jury's ability to apply the law to the evidence in the Petitioner's trial. Petitioner's instructions were a correct statement of law; were not substantially covered in the actual charge given to the jury; and concerned important points in the trial so that the failure to give Petitioner's instructions seriously impaired Petitioner's ability to have the self-defense evidence fairly considered by the jury. **Thus, all three criteria for reversible error are met herein, and Petitioner's convictions should be reversed and a new trial awarded.** Therefore, the trial court's refusal to

give Petitioner's offered instructions constituted reversible prejudicial error, as did the reading of incorrect law to the jury pertaining to involuntary manslaughter instead of the correct statement of law offered by the Petitioner. Had these instructions properly been given the outcome would likely have been different.

Assignment of Error 7: The State also withheld Wilbur Hargrove's pre-trial diagram that he made of the scene. Respondent also ignores that the admission of Hargrove's testimony as to Newsome's alleged dying words was done for an improper purpose, to-wit: to inflame the passions and prejudices of the jury. Respondent also ignores the State's blatant failure to disclose Hargrove's pre-trial statement about Newsome's dying words as a violation of Rule 16 of the West Virginia Rules of Criminal Procedure. Syllabus Point 2, *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994).

Assignment of Error 8: The State's remark that Petitioner should have called Sgt. Williams himself was totally improper, and served to shift the burden of proof to call this witness onto Petitioner. The prosecutor also intimated that Petitioner should have called Robyn Christie during closing argument. The prosecutor also inserted his own personal opinion into closing argument and told the jury he was the only one in the room sworn to do justice. (Vol. VI p. 1371) In West Virginia, the prosecutor is held to a higher standard of presentation in argument, and herein, the prosecutor's highly prejudicial comments fell well short of this standard and abandoned his quasi-judicial role and shifted the burden of proof to Petitioner. The trial court compounded the prosecutorial misconduct by failing to give a curative instruction and by failing to rule on Petitioner's objections to the prosecutor's remarks. The authority of *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981) and *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977), require reversal of Petitioner's convictions and sentence due to prosecutorial misconduct.

Assignment of Error 9: As previously stated for the trial court to exclude the evidence during Krystal Lee's cross-examination about Newsome's gun ownership constituted an unwarranted abuse of discretion, which substantially impaired and/or completely denied Petitioner's ability to present rebuttal evidence of Newsome's alleged peaceful character.

Assignment of Error 10: The trial court's urging the State to admit the thoroughly unreliable hearsay notes of Detective Sperry was wholly improper, and the admission of the same constituted reversible error as the State introduced this inadmissible hearsay to prove the truth of the matter asserted in violation of Rule 801, et. seq. of the Rules of Evidence. Whether Curtis Keyes had a gun on the night in question was crucial to Petitioner's assertion of self-defense, and thus the admission of this unreliable hearsay substantially prejudiced Petitioner's ability to present evidence in his defense. Sperry testified at the preliminary hearing that Robyn Christie did tell Sperry that the guy at the window banged on the window with a gun, and scared us, thus his extra-judicial notes, which omit any mention of her statement about the gun, were thoroughly unreliable, and it was reversible error for the trial court to urge their admission and admit them over petitioner's vehement objections. Sperry also admitted at trial that his prior testimony indicated Ms. Christie had told him Curtis had a gun. (Vol. V. 1066). The admission of this inadmissible hearsay had a devastatingly prejudicial effect on the jury's consideration of the evidence from Petitioner's statement that he acted in self-defense from multiple assailants with guns.

Assignment of Error 11: Any one of the numerous errors assigned upon this appeal require reversal of Petitioner's convictions and sentence; however, should this Honorable Court find any of said errors to be harmless, Petitioner submits that the cumulative effect of all the substantial constitutional error that occurred at trial combined to deny him a fair trial.

“Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.”
Syllabus Point 9, *State v. Lively*, 226 W.Va. 81, 697 S.E.2d 117 (2010).

IX. CONCLUSION

WHEREFORE, for all the foregoing reasons, and pursuant to the arguments made and authorities cited herein and within Petitioner’s original brief to this Honorable Court, Petitioner prays that this Honorable Court will reverse his convictions and sentence, and remand this matter for an award of a new trial.

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

STATE OF WEST VIRGINIA, Plaintiff
Below, Respondent,

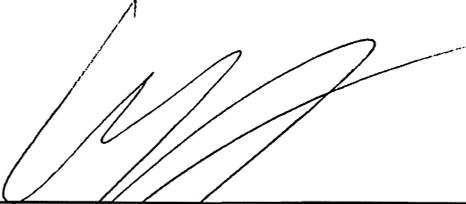
Vs. Supreme Court Docket No. 12-0439

JEREL ADDISON GARNER, Defendant Below,
Petitioner.

X. CERTIFICATE OF SERVICE

I, W. Jesse Forbes, Esq., Forbes Law Offices, PLLC, co-counsel for the Defendant, Jerel Addison Garner, hereby certify that a true and exact copy of the foregoing "*Petitioner's Reply to Respondent's Brief*" was duly served upon counsel of record for respondent upon appeal by depositing the same in the first-class, United States mail, postage pre-paid on this the 5th day of November, 2012, addressed as follows:

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