



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 12-0777

KENNETH EUGENE CARTER,

Petitioner,

Appeal from a final order

Of the Circuit Court of Kanawha

County (11F-692)

v.

STATE OF WEST VIRGINIA,

Respondent.

PETITIONER'S BRIEF

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III.

STATEMENT OF THE CASE

The Petitioner was indicted by the September Term 2011 Grand Jury for first degree murder and malicious wounding. (Appendix Record, Volume I, Indictment, Pages 1, 2) Petitioner was accused of causing the death of Ronald Forton and causing injury to Brady Dunlap by beating the two men with a baseball bat while residing, temporarily, at their Charleston apartment.

Petitioner has steadfastly maintained his innocence. (Appendix Record, Volume I, Arrest

Interrogation Transcript, Pages 1-45) (Appendix Record, Volume VI, Day Three of Second Trial Transcript, Pages 117-269)

Petitioner's first trial which took place in Kanawha County Circuit Court ended in a hung jury on March 19, 2012. His second trial was conducted in Kanawha County Circuit Court from May 9, 2012 to May 14, 2012. The jury returned a verdict of guilty on malicious wounding and guilty to first degree murder without mercy. Petitioner was sentenced on June 11, 2012 to a term of life imprisonment and a consecutive term of two to ten years.

On the morning of July 20, 2011, the Petitioner awoke in the apartment he had been sharing with Brady Dunlap and Ronald Forton. Petitioner had befriended Brady Dunlap a few years earlier and eventually ended up moving in with Brady Dunlap and his domestic partner of four years, Ronald Forton. (Appendix Record, Volume VI, Day Three of Second Trial Transcript, Page 127-130) As petitioner walked into the living room that morning, he discovered Brady Dunlap sitting on the floor, bleeding from his forehead. (Appendix Record, Volume VI, Day Three of Second Trial Transcript, Pages 134,135) When Petitioner asked Brady Dunlap what had happened, Brady replied that he had fallen off of the porch. To Petitioner, there was nothing particularly out of the ordinary about this explanation. Brady, who struggled with mental health issues and substance abuse problems, was prone to falling, particularly when he had been drinking. Indeed, the day before, Kenneth and Ron had helped Brady back inside the after he'd stumbled off the front porch. After finding Brady on the morning of July 20, Petitioner helped his injured roommate place a 911 call, at one point speaking to the dispatcher and receiving instructions on how to care for Brady's head injury. Petitioner then waited with Brady for the ambulance. (Appendix record, Volume VI, Day Three of Second Trial Transcript, Pages 135-138) When the emergency medical staff arrived, Brady repeated to them what he had told

Kenneth: that he had injured his head when he fell off the porch. (Appendix Record, Volume VI, Day Three of Second Trial Transcript, Pages 206-207) (Appendix Record, Volume V, Day Two of Second Trial Transcript, Page 16-18)

The relationship between Brady Dunlap and Ronald Forton, who had been living together as a couple for approximately four years, was marked by frequent episodes of violence and periods of estrangement. The two argued often and their arguments often turned physical. Ron routinely beat Brady, leaving his partner with a near-constant black eye. (Appendix Record, Volume V, Day One of Second Trial Transcript, Page 236) After one drunken argument between the two had escalated, Ron kicked Brady in the chest with his steeled toed boot. (Appendix Record, Volume V, Day One of Second Trial Transcript, Page 237) Brady testified that while being treated for the broken ribs, he never informed hospital staff about the real source of his injuries. Instead, he said that he had broken his ribs in a fall. On another occasion, Brady ended up at the Charleston Area Medical Wound Center, where he received treatment for burns he sustained after Ron poured lighter fluid over him and set him on fire. In addition to these frequent assaults, Brady was also dealing with schizophrenia and bipolar disorder. He had been institutionalized and diagnosed with these illnesses when he was a child. Brady attempted to manage his hallucinations with the help of various prescriptions, though he admitted to foregoing his medication while drinking, which was daily. While frequently the target of Ron's violence, Brady admitted to fighting back on at least on occasion, he testified at trial that he had cut Ron's chin with a closed knife, drawing blood. (Appendix Record, Volume V, Day One of Second Trial Transcript, Page 239) Ron's wedding ring, given to him by Brady, was found on the floor in the middle of the crime scene. The ring was gathered as evidence by the detectives. (Appendix Record, Volume V, Day Two of Second Trial Transcript, Page

56) (Appeal Record, Volume V, Day Two of Second Trial Transcript, Pages 163-167) Despite motive for Brady Dunlap to hurt Ron Forton, Brady Dunlap was never investigated as a suspect by the Charleston Police.(Appendix Record, Volume V, Day Two of Second Trial Transcript, Pages 153-155)

Brady Dunlap testified he had lied under oath at the preliminary hearing. He testified he was hallucinating at the time of the assault and did not see or know who had struck him. (Appendix Record, Volume V, Day One of Second Trial, Pages 245-253)

The prosecutor knew of the false statements of Brady Dunlap at the preliminary hearing and first trial. Despite this knowledge, the State used Brady Dunlap's false testimony in their opening statement at the second trial.(Appendix Record, Volume V, Day One of Second Trial Transcript, Pages160-162) (Appendix Record, Volume V, Day One of Second Trial Transcript, Page 223)

Testimony presented at the trial indicated that en route to the hospital, Brady changed his account of his injuries. He told the hospital staff that his friend Kenneth had struck him on the head with a baseball bat. (Appendix Record, Volume V, Day One of Second Trial Transcript, Pages 215-216) Petitioner was arrested later that day at the apartment. (Appendix Record Volume V, Day Two of First Trial Transcript, Pages 25-26) The arresting officers observed no traces of blood on petitioner's person, shoes or clothing. No blood was observed on Petitioner's person or clothing by the officers who responded to the 911 call and saw Petitioner with Brady earlier in the day. (Appeal Record, Volume V, Second Day of Second Trial Transcript, Pages 30-31)

Significantly, officers did not perform a search of the apartment at the time of Petitioner's arrest. (Appeal Record, Volume V, Second Day of Second Trial Transcript, Pages 32-34) They

did not return to the apartment until the following day when they searched the apartment and discovered the body of Ron Forton in the back bedroom. Soon afterwards, on the day after his arrest, Petitioner had a two hour interrogation by two Charleston police officers at the jail. He steadfastly maintained his innocence. (Appendix Volume I, Arrest Interrogation Transcript, Pages 1-45)

Petitioner was given the choice to proceed with his first trial or continue the trial to wait for DNA results. Kenneth decided to proceed with his first trial. On the night before the trial, the DNA results were provided and showed that petitioner's DNA was not on the murder weapon, bloody shirt nor on the toilet swab from the crime scene. Additionally, a possible unidentified person's DNA could have been on the six swabs tested. (Appendix Record, Volume I, Forensic and DNA Testing, Pages 56-64) The Court declared a hung jury at his first trial on March 19, 2012. The jury in the first trial, apparently, did not believe the perjured testimony of Brady Dunlap and the jailhouse snitch. At the second trial of this matter, the State could not change its theory of the case. Petitioner had no burden to prove his innocence, and didn't request his own testing of the DNA at the second trial. Additionally, Petitioner did not know at the time of the second trial that 20 of the swabs were not tested. (Appendix Record, Day Three of Second Trial Transcript, Pages 44-55) The DNA results at the second trial were exactly like the results in the first trial. Petitioner's DNA was not on the murder weapon, bloody shirt or blood drippings. Additionally, the DNA of an unidentified person was found on the bloody shirt and blood drippings at the crime scene, if not an artifact.

At the beginning of the second trial, the Circuit Court adopted all the pretrial rulings on motions and stipulations entered in the first trial. The Court denied Petitioner's renewed motion to dismiss the indictment although it was based on the false statements of Brady Dunlap. The

State used false, perjured testimony of Brady Dunlap in it's opening statement. (Appendix Record, Volume V, Day One of Second Trial Transcript, Pages 160-162) The State made numerous improper statements in opening statement, their case-in-chief, cross examination of the Petitioner and closing argument. The Court allowed two instances of prejudicial 404(b) evidence that was unreliable. Also, the Court allowed prejudicial 404(b) evidence from two DHHR workers and a Charleston Police Officer. (Appeal Record, Volume V, Day Two of Second Trial Transcript, Pages 276-315) (Appeal Record, Volume V, Day Two of Second Trial Transcript, Pages 11-41) The panel may have been contaminated when a South Charleston Regional Jail officer was dismissed from the panel and he greeted the Petitioner on his way out of the courtroom stating, "Sorry about that" or something to that affect. (Appendix Record, Volume V, Day One of Second Trial Transcript, Pages 51-53)

The jury consisted of seven members of a jury that had just heard a murder case several weeks earlier before the same prosecutor and judge. It was suspected that those jury members did not disclose the extent of their relationships developed in the earlier murder trial. Those jury members had found the defendant in that trial guilty of murder with a recommendation of mercy two weeks earlier with the same judge and prosecutor.(Appendix record, Volume V, Day One of Second Trial, Pages 104-117)

At the conclusion of the second trial, on the incredible testimony of Brady Dunlap, prejudicial 404(b) evidence, a jailhouse snitch and over-zealous, improper prosecutor conduct, the petitioner was found guilty on both counts, May 14, 2012. The Notice of Appeal of the second jury trial was timely filed on June 22, 2012.

Motions to interrogate the foreman of the jury and obtain testing on the twenty remaining DNA swabs were denied.

IV.

SUMMARY OF THE ARGUMENT

We have an unsolved murder and malicious wounding of homosexual partners on Charleston's Westside. Petitioner did not receive a fair second trial. Petitioner's first trial on first degree murder and malicious wounding ended in a hung jury. The defendant was convicted of first degree murder without mercy and malicious wounding at his second trial.

Petitioner's DNA was not on the murder weapon nor a bloody shirt and blood drippings at the crime scene. The defendant had no blood stains on his clothing when arrested at the blood-soaked crime scene. The state's main witness, Brady Dunlap, admitted he had lied under oath, was diagnosed paranoid schizophrenic and bipolar, actively hallucinating at the time of the crime, and did not see who hit him. The prosecutor made improper statements thru out the second trial. The Circuit Court allowed prejudicial 404(b) evidence to be introduced. Petitioner's attempt to interrogate the foreman of the jury and obtain testing of newly discovered DNA evidence for newly discovered evidence were denied. The petitioner was unfairly convicted on the testimony of an admitted liar, prior bad acts, the testimony of a jailhouse snitch, improper prosecutorial statements and perhaps, his own belligerent behavior at trial.

V.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner contends that oral argument is necessary in this case. The petitioner contends that the oral argument in this case should be subject to Rule 19 of the Rules of Appellate Procedure. The Petitioner contends that the case is appropriate for a Rule 19 argument in that the Petitioner claims the Circuit Court engaged in an unsustainable exercise of discretion

and where the law governing discretion is settled, and that the Circuit Court's ruling dealt with a claim of insufficiency of evidence against the weight of evidence of the case. Also the Petitioner contends that the case involves assignments of error in the application of settled law. The petitioner contends that the case is not appropriate for a memorandum decision. Rule 21 of the Rules of Appellate Procedure states that a memorandum decision reversing the decision of the Circuit Court should be issued in limited circumstances and due to the complexity of this case it would be difficult for this Honorable Court to provide a concise statement of their reasoning for a reversal.

VI.

ARGUMENT

A. THE COURT ERRED FAILING TO DISMISS THE INDICTMENT

On March 8, 2012, prior to the commencement of his second trial, Kenneth Carter, by counsel, made a motion to dismiss the indictment. Kenneth based his motion on the false statements made by Brady Dunlap to law enforcement, statements that comprised a significant part of Detective Andrew Foster's testimony to the grand jury. (Appendix Record, Volume I, Preliminary Hearing Transcript, Pages 1-56)

Detective Foster, the only witness to testify before the grand jury in the first degree murder case, conducted a phone interview with Brady Dunlap while Brady Dunlap was in the hospital recuperating from his injuries. Detective Foster testified that Brady has described witnessing Kenneth Carter strike Ronald Forton repeatedly in the head with a baseball bat as Carter chased Forton down the hallway of their apartment on the night of July 19, 2011.

(Appendix Record, Volume I, Grand Jury Transcript, Page 11)

This eyewitness account was later revealed to be a total fabrication. Brady Dunlap, in

fact, never witnessed Kenny assaulting Forton with a bat. As the following excerpt, from counsel's cross examination of Brady Dunlap at the second trial, makes clear. Brady Dunlap not only lied to Detective Foster during their initial phone conversation. Brady Dunlap also lied again as a witness at Kenneth's preliminary hearing.

Q: Under oath. You took an oath to tell the truth and only the truth so help you God.

A: Yeah.

Q: And you lied?

A: I just lied that one little fib.

Q: And that was that you told them that you had seen Kenny hit Ron with the bat, didn't you?

A: Yeah.

Q: And that wasn't true, was it?

A: No.

Q: You didn't see Kenny go anywhere near Ron with a bat?

A: No.

(Appendix Record, Volume V, Day One of Second Trial, Pages 245-246)

Significantly, Brady Dunlap's admission at the second trial was not the first time that he admitted that he did not see Kenneth chase after, much less strike, Ron with a baseball bat. During Kenneth's first trial, which ended in a hung jury, Mr. Dunlap admitted that he lied at the preliminary hearing. (Appendix Record, Volume II, First Trial 404(b) Hearing and Day Two Transcript, Page 130) Moreover, Mr. Dunlap insisted that this fabrication was just a little white lie," a lie that-he thought- would help the law a little."

Brady Dunlap's false account of having seen Kenneth strike Ron Forton in the head was

far more than the “little fib” or “white lie” he claimed. Rather, his statement was a critical piece of evidence communicated to the Grand Jury by the lone testifying witness, Detective Foster. Moreover, it concerned the observations of an individual purporting to be an eyewitness to a violent assault resulting in the Ron Forton’s death. Long before Kenneth’s second trial, it was evident that the statements made by Brady Dunlap to Detective Foster, and later repeated by Brady Dunlap at the preliminary hearing, were not truthful. The State never attempted to obtain a new indictment, electing to proceed on the original indictment which the State knew to be reliant on the false statements of Brady Dunlap.

The Fifth Amendment to the United States Constitution guarantees that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” This guarantee is echoed in Article III, § 4 of the United States Constitution which mandates grand jury indictments in all felony cases. The role of the grand jury has long been acknowledged to be twofold: not only does it determine whether probable cause exists to believe a crime has been committed, it also protects citizens from unfounded criminal prosecutions. *United States v. Calandra*, 414 U.S. 338, 343 (1974), citing *Bransburg v. Hayes*, 408 U.S. 665, 686-687 (1972). From its historical origins in Anglo-American jurisprudence to the present day, the grand jury has “serve[d] the invaluable function in our society of standing between the accuser and accused, whether the latter be an individual, minority group, or other [...]” *Wood v. Georgia*, 370 U.S. 375, 390 (1962). “Historically, the grand jury has been the sword of the government as well as the shield of the people, and this court has on many occasions emphasized the importance of preserving this duality. *State v. Barnhart*, 211 W. Va. 155, 563 S.E. 2d 820, 823 (W. Va. 2002), quoting *State ex rel. Pinson v. Maynard*, 181 W. Va. 662, 383 S.E. 2d 844 (W. Va. 1989).

Courts have long acknowledged that in order to perform their unique function, grand juries need greater freedom and flexibility than petit juries. Because they are charged with determining only probable cause-and not ultimate guilt- grand juries are not subject to the same rules that govern criminal trials. See *United States v. Williams*, 504 U.S. 36, 50 (1992) (holding that prosecutors have no duty to present exculpatory evidence to the grand jury); *Costello v. United States*, 350 U.S. 359 (1956) (Holding that the hearsay evidence is admissible in grand jury proceedings); *United States v. Calandra*, 414 U.S. 338 (1974) (holding that the Fourth Amendment exclusionary rule does not apply in the grand jury setting). Central to the court's reasoning in these cases is the need to balance the prospect of indicting innocent people against the need for judicial efficiency. As this Court observed: " While we recognize the many burdens of trial which an accused would want to avoid, we also recognize that a full pretrial review of the sufficiency of the evidence considered by the grand jury is not a significantly less burdensome procedure." *Barker v. Fox*, 160 W.Va. 749, 752, 238 S.E. 2d 235,237 (W.Va. 1977)

While it is well established that courts will not dismiss an indictment on the grounds of incompetent or insufficient evidence, courts are not without power to dismiss an indictment where independence or integrity of the grand jury has been seriously compromised. Courts have the authority to "prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules(imposed by the Constitution or laws) governing matters apart from the trial itself. " *U.S. v. Williams*, 504 U.S. 36, 50 (1992) West Virginia has similarly recognized that its courts possess the authority to dismiss where "fundamental fairness requires looking behind [an] indictment to achieve the purposes of the West Virginia Constitution's due process clause" *State v. Barnhart*, 211 W.Va. 155, 563 S.E. 2d 820, 823 (W.Va. 2002)

It is also well settled that there are certain errors at the grand jury stage are so

fundamental that prejudice is presumed. *State v. ex rel. Starr v. Halbritter*, 183 W.Va. 350, 395 S.E. 2d 773 (W. Va. 1990). In that case, the Court found that the failure of the grand jurors to approve prosecutor –amended indictment forms constituted “a basic violation striking at the heart of the grand jury proceedings.” *Id.* At 354. In *Halbritter*, the prosecutor’s additions to the indictment slips usurped the role that was supposed to be carried out by the grand jury. Similarly, the fabricated eyewitness account given by Brady Dunlap to Detective Foster, and subsequently to the grand jury, completely deprived the grand jurors of the opportunity to make fair and accurate finding of probable cause. It is difficult to conceive of a fabrication more damaging to the integrity of grand jury proceedings than Brady Dunlap’s. Few things are more material, especially to grand jurors deciding whether to charge a man with first degree murder, than an eyewitness’s testimony that he watched the accused beat the victim in the head with a baseball bat.

The West Virginia Supreme Court of Appeals has not dealt with a case precisely like the one at issue here—the presentation of material evidence, later discovered to be false, by the sole grand jury witness. However, it has long been held that the proper approach is a two-pronged one:

“[...] [I]n reviewing a case where improper evidence has been submitted to the grand jury, a court must ascertain whether there was a significant and material evidence presented to the grand jury to support all the evidence of the criminal offense. Then the court must determine whether the improper evidence substantially influenced the decision to indict.” *State v. Bonham*, 184 W.Va. 555, 401 S.E. 2d 901 (W. Va. 1990), citing *State ex rel. Pinson v. Maynard*, *supra*.

The grand jury cannot be relied on to perform its critical screening function on

fraudulent, inaccurate or misleading evidence. In the instant case, it is undisputed that the grand jury received improper-that is to say, false-evidence. Detective Foster testified what Brady Dunlap had told him on the phone and what Brady Dunlap had told him turned out to be false. Brady Dunlap admitted to making up the story of seeing Petitioner beating Ron Forton in the head as he chased Ron down the hallway of the apartment. (Appendix Record, Volume V, Day One of Second Trial Transcript, Pages 245-247)

The second step, determining whether the false evidence substantially influenced the decision to indict,” is similarly straight forward here. The extent of the influence of Brady Dunlap’s statements is made plain by the following exchange between a grand juror and the witness, Detective Foster:

FEMALE GRAND JUROR: So really we don’t right now have any evidence other than Mr. Dunlap’s word that Mr. Carter did anything to Mr. Forton.

THE WITNESS: Aside from the baseball bat and the conflicting stories, no. You would be correct in that statement until we receive the results from the DNA.

(Appendix Record, Volume I, Grand Jury Transcript, Page 25)

In contrast to what seems implied by the witness’s response (DNA testing would only corroborate Brady Dunlap’s version of events) (The DNA tests performed in this case did not detect Kenneth’s DNA on the bat, the t-shirt, or the toilet seat.)

The foregoing illustrates what is perhaps the most salient point for the purposes of a cause and prejudice type of analysis: Dunlap’s word was not only false; it was also the only bit of evidence on which grand jurors could have based their findings. Absent Brady Dunlap’s fraudulent account of events, there is no probable cause to believe that Kenneth murdered Ron Forton. In this way, Kenneth’s case stands in stark contrast to another case involving the

presentation of false evidence to a grand jury. In the Bonham case, *supra*, this Court found that there existed sufficient evidence other evidence to support a homicide and conspiracy indictment. Specifically, the false statements given by the investigator in that case were out-weighted by the testimony of other witnesses, including the “hit man” solicited and paid by the defendant to assault the victim. In the instant case, there is an utter lack of other evidence on which the grand jury could have based the indictment. It is therefore unreasonable to believe that but for Brady Dunlap’s testimony, a grand jury would have voted to indict on a charge of first degree murder.

Other courts have quashed indictments where the government knew or should have known the evidence it was presenting to the grand jury was misleading or false. See *United States v. Asdrubal-Herrera*, 470 F. Supp. 939 (N.D. ILL. 1979) (Dismissal of indictment warranted where the government agent gave misleading information without which the grand jury would not have indicted); *United States v. Provenzano*, 440 F. Supp. 561 (S.D. N.Y. 1977) (dismissal of indictment required where the government knew of or should have known the key witness subsequently recanted his identification of the accused); *Commonwealth v. Baker*, 11 S.W. 3d 585 (Ky. App 2000) (dismissal of indictment warranted where detective with no personal knowledge of the facts gave misleading testimony before the grand jury). In *Baker*, the trial court had dismissed an indictment charging a woman with second degree assault based on the testimony of the investigating detective’s supervisor who informed the grand jury that the accused had beaten her children with an “aluminum baseball bat.” In a recorded interview with the investigating detective, the accused admitted to striking her children, but admitted to using only as “wooden stick” in order to discipline them. Underpinning the court’s rationale in that case were its concerns for the independence and integrity of the grand jury.

In summary, Petitioner made a pretrial motion to dismiss the indictment at the beginning of his second trial. Brady Dunlap, the State's main witness, had lied during the petitioner's preliminary hearing. "A little white lie to help the prosecutor", he testified. The investigating detective had used Brady Dunlap's false statements before the grand jury. Brady Dunlap admitted he had lied, at the first trial, and did not see who attacked him or Ron. It was clear at the time of the second trial that Brady Dunlap's statements used by the investigating officer before the grand jury were false. However, the State made no attempt to seek another indictment. The State decided to proceed with the indictment based on false evidence. It is just as clear that a finding can be made that Brady Dunlap's direct testimony of seeing Plaintiff strike Ron Forton with the bat had a significant effect on the Grand Jury and the indictment might not have been found true without it. (Appendix Record, Volume I, Preliminary Hearing Transcript, Pages 117-208)

B. THE COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL

The Court denied the petitioner's motion for judgment of acquittal at the close of the State's case and after the trial. (Appendix Record, Volume VI, Day Three of Second Trial Transcript, Pages 110-111) (Appendix Record, Volume VI, Day Four of Second Trial Transcript, Page 271) Whether the circuit court properly ruled on the petitioner's motion for judgment of acquittal is reviewed de novo, based upon the sufficiency of the evidence. *State v. LaRock*, 196 W.Va. 294, 304, 470 S.E. 2d 613, 623 (1996) As this Court further explained:

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry

is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

The state's main witness was Brady Dunlap. Mr. Dunlap testified that he had been in mental hospitals since age 5. He was diagnosed paranoid schizophrenic, bi-polar, and alcoholic. He testified to drinking one half case of beer a day and some vodka. He testified he was actively hallucinating at the time of the incident. He testified he lied at the preliminary hearing to help the prosecutor. "Just a little white lie", he said. He testified that he did not see who struck him. His testimony was not credible.

Additionally, both the 404(b) incidents evidence admitted was based only on Brady Dunlap's testimony. The first incident was dismissed in court and the second incident allowed by the trial court was never charged or investigated by the police. (Appendix Record, Volume II, First Trial 404(b) Hearing and Day One Transcript, Pages 1-247)

The DNA analysis revealed that Petitioner's DNA was not on the murder weapon, a baseball bat; nor on the bloody white shirt or the toilet blood drippings at the crime scene. Mary Heaton, the State Police DNA expert, opined that the DNA of another, unidentified person could have been on the bloody shirt and toilet at the crime scene. Dr. Kia Sabet, Deputy Medical Examiner testified an unfound, other weapon, could possibly have been used in the assault. Significantly, petitioner did not have any bloodstains on his person or clothing at the time of arrest. (Appendix Record, Volume V, Day Two of Second Trial Transcript, Page 60)

The petitioner's mere presence at the crime scene, an admitted liar's incredible testimony, alleged prior bad acts, a jailhouse snitch's testimony, and his own belligerent behavior at trial seem to be the only evidence against him.

C. THE PROSECUTOR MADE IMPROPER STATEMENTS

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

After the first trial ended in a hung jury, the prosecutors became over-zealous in their attempt to convict the defendant and denied the Petitioner a fair trial. The prosecutor used perjured testimony in their opening that they knew was perjured. "Mr. Dunlap will tell you that he was seated on the couch in the living room, as was his habit, and that out of his eye, he saw defendant, Kenneth Carter"(Appendix Record, Volume V, Day One of Second Trial, Page 160-162)

The prosecutor made numerous improper comments throughout his opening statement, case-in-chief, cross examination of Plaintiff and closing argument. "On one occasion, he chased him with a hammer and threatened to beat his brains out." Appendix Record, Volume V, First Day of Second Trial, Page 156) "The presence of someone's DNA at a residence where they live is of no value, whatsoever." Appendix Record, Volume V, First Day of Second Trial Transcript, Page 170) " Your Honor, I hate to keep objecting during his opening statement, but it absolutely arguing the case." (Appendix Record, Volume V, Day One of Second Trial Transcript, Page 175) "And you have had prior interactions with Kenneth carter; is that correct? (Appendix Record, Volume V, Day Two of Second Trial Transcript, Page 33-35) "Could that you had cocaine in your system?" "How about alcohol" Appendix Record, Volume VI, Day Three of Second Trial,

Page 186) “You are not telling this jury that you were insane in 2011, are you? Appendix Record, Volume VI, Day Three of Second Trial Transcript, Page 197) ‘Well, you’re not telling this jury that you suffered some mental problem that prevented you--“ (Appendix Record, Volume VI, Day Three of Second Trial Transcript, Page 200) “Kenneth Carter was insane and unreasonably jealous of his wife” (Appendix Record Volume VI, Day Four of Second Trial Transcript, Page 72), “the defendant, an insanely jealous person” (Appendix Record Volume VI, Day Four of Second Trial), “Now, I may have been a little aggressive, but I do not have much sympathy for murderers” (Appendix Record, Volume VI, Day Four of Second Trial, Page 82), “I couldn’t get a straight answer out of him under any circumstances” (Appendix Record, Volume VI, Day Four of Second Trial Transcript, Page 82)

These remarks are prejudicial to Kenneth, extensive, and designed to put extraneous matters before the jury. There is an absence of probative evidence in this second trial as highlighted by the first trial resulting in a hung jury.

D. THE COURT ERRED ALLOWING PREJUDICIAL 404(B) EVIDENCE

“It is presumed that a defendant is protected from undue influence if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction.” Syl. Pt. 3, State v. LaRock, 196 W.Va. 294, 470 S.E. 2d 613 (1996) The critical issue in this case is whether petitioner was properly convicted “on an improper basis, commonly...an emotional one,” due to the introduction of what is referred to as “bad acts” evidence. See Fed. R. Evid. 403 advisory committee’s note (emphasis added).\

The trial court allowed two prior incidents between the deceased victim and the petitioner. (Appendix Record, Volume II, First Trial 404(b) Hearing and Day Two Transcript) (Appendix Record, Volume V, Day One of Second Trial Transcript, Pages 198-203) Both of these incidents were based on the statements of Brady Dunlap, the deceased victim's domestic partner for four years. One was a domestic assault charge that had been dismissed in State court. In that charge, Brady Dunlap was allowed to testify that approximately five months before the incident in question, the petitioner held up a hammer to the deceased victim. In the other incident, that was not charged by authorities, Brady Dunlap was allowed to testify that he saw the petitioner chase the deceased victim, Ron Forton, with a brick. Brady Dunlap was the only witness to both these incidents. (Appendix Record, Volume V, Day One of Second Trial Transcript, Pages 198-203) (The trial court, in the second trial, adopted and incorporated all rulings on motions and stipulations that were made at the first trial) (Appeal Record, Volume II, First Trial 404(b) Hearing and Day Two Transcript, Pages 4-50)

These two 404(b) incidents were extremely prejudicial. The two incidents should have been found unreliable as they were based solely on the testimony of a bipolar, paranoid schizophrenic who was actively hallucinating at the time of the incidents. (Rule 403 of the West Virginia Rules of Evidence) Brady Dunlap admitted he lied under oath at the preliminary hearing and at the first trial. (Appendix Record, Volume V, Day One of Second Trial, Pages 245-246)

Additionally, the state introduced improper 404(b) evidence into the trial. During cross examination of Kenneth, the court allowed evidence of domestic abuse of his wife came into evidence that the State had stipulated they would not introduce as it was prejudicial. (Appendix Record, Volumes VI, Day Three of Second Trial, Pages 244-250) This evidence was prejudiced Petitioner and should not have come into evidence. The state continued to violate its

stipulation by having Donna Thompson and Ann Slacken, DHHR workers, and Charleston Police Officer Goffreda testify regarding Petitioner's wife and other prior bad acts including Petitioner's anger and an eviction. (Appendix Record, Volume V, Day Two of Second Trial Transcript, Page 284-291) (Appendix Record, Day Two of Second Trial Transcript, Pages 317-319, 327-330)

The 404(b) evidence admitted by the Court was unreliable and based only upon Brady Dunlap's incredible testimony. The other bad act evidence elicited by the prosecutor and stated in opening argument and their case-in-chief was prejudicial and unfair to the Petitioner. (Appendix Record, Volume V, Day One of Second Trial Transcript, Pages 152-156) (Appendix Record, Volume V, Day Two of Second trial Transcript, Pages 33-38) (Appendix Record, Volume V, Day Two of Second Trial Transcript, Page 72-75)

E. THE COURT ERRED RULING THE PROSECUTOR HAD NO CONFLICT WITH A JAILHOUSE SNITCH

According to the United States Department of Justice, many cooperating witnesses are "outright conscienceless sociopaths" who will do anything to benefit themselves, including "lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies, and double crossing anyone with whom they come into contact. The Perjury Trilema, in UNDERSTANDING LAWYERS ETHICS 329 (3D. 2004)

The Circuit Court abused its discretion ruling that the prosecutor had no conflict of interest with Charles Jarrett, their jailhouse snitch. Charles Jarrett had agreed to testify that Kenneth Eugene Carter had confessed the crimes to him at South Central Regional Jail. In exchange for his testimony, the prosecutor agreed to inform the Judge of his testimony.

(Appendix Record, Volume VI, Day Three of Second Trial Transcript, Pages 81-107)

Charles Jarrett had been in the penitentiary for 15 years. He had a felony trial pending two weeks after this trial for escape and burglary, before the same Judge and Prosecutor trying this case. The prosecutor, trying the jailhouse snitch the following week and dismissing one of his escape charge, gave the appearance of impropriety and prejudiced the defendant.

F. THE COURT ERRED NOT DISMISSING THE JURY DURING VOIR DIRE FOR CONTAMINATION

During voir dire, a correctional officer from South Central Regional Jail was excused from jury duty for being prejudiced at he knew Kenneth Eugene Carter from the jail. (Appendix Volume V, Day One of Second Trial Transcript, Pages 50-53) He greeted and spoke to Kenneth on his way out of the courtroom before the entire jury panel. This action prejudiced Kenneth.

Counsel made a motion for mistrial on the ground of jury panel contamination. In *State v. Daniel*, 182 W. Va. 643, 391 S.E. 2d 90 91990), this Court gave its general rule, which is:

“A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of. The question as to whether or not a juror was not injured by the misconduct or influence complained of. The question as to whether or not a juror has been subjected to improper influences affecting the verdict is a fact primarily to be determined by the trial judge from the circumstances, which must be clear and convincing to require a new trial; proof of mere opportunity to influence the jury being insufficient.” Syllabus Point 7, *State v. Johnson*, 111 W.Va. 653, 164 S.E. 31 (1932).

When the South Central Jail Officer greeted Petitioner and wished him luck in front of the jury panel, petitioner’s right not to be identified as incarcerated was violated.

G. THE COURT ERRED DENYING THE PETITIONER’S MOTION TO INTERROGATE THE JURY FOREMAN

After the guilty verdict, petitioner had moved to interrogate the jury foreman. (Appendix Record, Volume I, Motion to Interrogate Foreman, Pages 43-44) This motion was denied. It had been testified on voir dire that seven members of the jury selected, jurors Newhouse, Riddle, R. Halstead, Finney, Clendenin, and Alternatives, Oxley and S. Halstead had served on a murder trial before the same Judge and Prosecutor approximately two weeks before this trial. The defendant in that trial had been found guilty of murder. (Appendix Record, Volume V, Day One of First Trial Transcript, Pages 104-118, 140-141) It had been suspected that the seven jury members had formed relationships during the first trial that weren’t disclosed on voir dire.

“ ‘A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of. The question as to whether or not a juror has been subjected to improper influence affecting the verdict is a fact primarily to be determined by the trial judge from the circumstances, which must be clear and convincing to require a new trial; proof of mere opportunity to influence the jury being insufficient. State v. Johnson, 111 W. Va. 653, 164 S. E. 31 (1932). “ Syllabus Point 1, State v. Daniel, 182 W.Va. 643, 391 S. E. 90 (1990).

The petitioner was not allowed to question the jurors after the trial and the court stopped any inquiry into the jury misconduct. The petitioner should have been granted his motion.

H. THE COURT ERRED DENYING THE PETITIONER’S MOTION FOR DNA ANALYSIS

It became clear doing the second trial that twenty swabs of DNA evidence, gathered at the crime scene, were not tested. (Appendix Record, Volume VI, Day Three of Second Trial Transcript, Pages 46-55) After the trial, the petitioner filed a motion for DNA testing to establish new evidence. (Appendix Record, Volume I, Motion for Extraction and Analysis, Pages 41,42) The motion for DNA testing to discover new evidence was denied.

The evidence would clearly be newly discovered evidence. Counsel stated at trial that they did not know the remaining 20 swabs were in condition to be tested. (Appendix Record, Volume VI, Day Three of Second Trial Transcript, Pages 44-55) This court reviews the rulings of a circuit court concerning a new trial under an abuse of discretion standard. Syl. Pt., in part, State v. Vance, 207 W. Va. 640, 535 S.E. 2d 484 (200). The factors which a defendant must prove when asserting a motion for a new trial based upon newly discovered evidence are well settled:

A new trial will not be granted on the ground of newly discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict, (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at the second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit a witness on the opposite side.

Syl. Pt. 1, Halstaed v. Horton, 38 W.Va. 727, 18 S.E. 953 (1894); Syl., State v. Frasier, 162 W.Va. 935, 253 S.E. 2d 534 (1979); Syl. Pt. 1, State v. William M., 225 W.Va. 256, 692 S.E. 2d 299 (2010).

The DNA testing used in the second trial only analyzed six of the 26 swabs taken from the crime scene. (Appendix Record, Volume V, Second Day of Second Trial Transcript, Pages

142-150)The analysis of the 20 remaining swabs would be newly discovered evidence as this evidence was not available at trial. The evidence could be exculpatory for Kenneth. The evidence could have established the identity of the unidentified person possibility identified by the previous testing. (Appendix Record, Volume VI, Day Three of Second Trial Transcript, Pages 58-63)

VII.

CONCLUSION

The petitioner asks that judgment be reversed and that an order be entered vacating the guilty verdict and granting a judgment of acquittal, and that, in the alternative, this case be remanded to Kanawha County Circuit Court and a new trial be ordered and that Kenneth Eugene Carter be placed on a personal recognizant bond with the condition of home incarceration while awaiting trial and other relief deemed proper by this Court.

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VIII.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief and Appendix Record, Volumes I, II, III, IV, V and VI were hand delivered this 11th day of December, 2012, to: Benjamin F. Yancey, III, Assistant Attorney General, Office of the Attorney General, State Capitol, Building 1, Room W-435, Charleston, West Virginia 25305.


Charles R. Hamilton