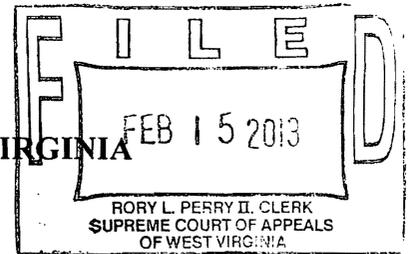


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0777



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

KENNETH E. CARTER,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

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v.

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Defendant Below, Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

On July 20, 2011, Kenneth Carter (“Petitioner”) murdered Ron Forton by beating him to death with a baseball bat. The facts and circumstances of this murder, and what led up to it, are as follows:

In 2007, prior to his murder, Ron Forton was living in a homeless shelter located in the downtown area of Charleston, West Virginia. App. vol. V, Day One Second Trial Tr., p. 183. During this same period, Bradie Dunlap, who was in a gay relationship with Ron, was also living at the shelter. App. vol. V, Day One Second Trial Tr., pp. 182-83. At some point, in 2007, Ron and Bradie moved out of the shelter and into an apartment on Charleston’s Westside. App. vol. V, Day One Second Trial Tr., p. 183.

Around spring of 2010, due to an argument with Ron, Bradie moved out of the apartment and into a center for mentally disabled persons on Charleston’s Westside. App. vol. V, Day One Second

Trial Tr., pp. 184-85. At this center, in 2010, Bradie first met Petitioner. It was also at the center that Petitioner met and subsequently married Kelly Tran. App. vol. V, Day One Second Trial Tr., pp. 182, 184, 256; App. vol. V, Day Two Second Trial Tr., pp. 275, 297. Bradie stayed at the center for 2 or 3 weeks, after which he returned to the apartment and resumed living with Ron. App. vol. V, Day One Second Trial Tr., pp. 185-86. In September 2010, Petitioner and Kelly likewise moved out of the center and into their own apartment on the Westside. App. vol. V, Day One Second Trial Tr., pp. 275-76.

Thereafter, in October/November 2010, Petitioner, along with his wife Kelly, who was pregnant with Petitioner's child at the time, moved into the apartment with Bradie and Ron. App. vol. V, Day One Second Trial Tr., pp. 186-87; App. vol. V, Day Two Second Trial Tr., pp. 277, 298. Petitioner and Kelly lived with Bradie and Ron for approximately 4 or 5 months before moving into another apartment. App. vol. V, Day One Second Trial Tr., pp. 188-89. During this period, disagreements arose between Petitioner and Ron and Bradie, which centered on Petitioner's accusations that Ron and Bradie were "sleeping" with Kelly. App. vol. V, Day One Second Trial Tr., p. 189. Ron and Bradie denied that any such relations were occurring, but Petitioner did not believe them. App. vol. V, Day One Second Trial Tr., pp. 189-90.

In fact, on one occasion (date uncertain), Petitioner chased Ron out of the apartment with a brick. App. vol. V, Day One Second Trial Tr., pp. 190, 192. On another occasion, in January 2011, Petitioner threatened to strike Ron with a hammer.¹ App. vol. V, Day One Second Trial Tr.,

¹ Petitioner never actually succeeded in hitting Ron with the brick or hammer. Ron escaped being hit by the brick when, after running out of the apartment, he went next door and called the police. App. vol. V, Day One Second Trial Tr., p. 192. Petitioner ended up not hitting Ron with the hammer due to Bradie pleading with him not to do so. App. vol. V, Day One Second Trial Tr., pp. (continued...)

pp. 190, 192-93; App. vol. V, Day Two Second Trial Tr., pp. 34-35, 198, 317-18, 319. Both of these incidents stemmed from Petitioner's belief that Ron was having sex with Kelly. App. vol. V, Day One Second Trial Tr., pp. 190-91; App. vol. V, Day Two Second Trial Tr., pp. 34-35, 318-19.

In the spring of 2011, Petitioner and Kelly moved out of Ron's and Bradie's apartment and into another apartment on the Westside, which was located close to Ron's and Bradie's apartment. App. vol. V, Day One Second Trial Tr., p. 195; App. vol. V, Day Two Second Trial Tr., pp. 291, 309, 312-13. During this period, workers from Adult Protection Services removed Kelly from her and Petitioner's apartment and placed her in a mental hospital. App. vol. V, Day One Second Trial Tr., pp. 196-97; App. vol. V, Day Two Second Trial Tr., p. 292. During this same period, Petitioner got into some disagreements with his landlord, who ended up evicting him. App. vol. V, Day One Second Trial Tr., p. 196.

In June/July 2011, after being evicted and with no other place to stay, Petitioner showed back up at Ron's and Bradie's "door" and asked if he could move back in with them. App. vol. V, Day One Second Trial Tr., pp. 196-97; App. vol. V, Day Two Second Trial Tr., pp. 313-15, 319. Although Ron was against this "idea" because he was afraid of Petitioner, Bradie allow Petitioner to move back into the apartment. App. vol. V, Day One Second Trial Tr., p. 197. As before when he lived with them, Petitioner continued accusing Ron and Bradie of having sex with his wife Kelly. App. vol. V, Day One Second Trial Tr., p. 198. Whenever Ron and Bradie denied any such

¹(...continued)

190, 193. Petitioner did, however, strike Ron in the mouth with his fist during this incident. App. vol. V, Day One Second Trial Tr., pp. 193-94; App. vol. V, Day Two Second Trial Tr., pp. 35, 198, 319. Again, the police were called on this incident and Petitioner was arrested for domestic assault and domestic battery. App. vol. V, Day One Second Trial Tr., p. 193; App. vol. V, Day Two Second Trial Tr., pp. 34-36.

relations, Petitioner became angry.

On the evening of July 19, 2011, Petitioner, Ron and Bradie were drinking at the apartment. App. vol. V, Day One Second Trial Tr., pp. 198-99; App. vol. VI, Day Three Second Trial Tr., p. 90. At some point, shortly after midnight on July 20, 2011, Ron left Petitioner and Bradie in the living room and went to the bedroom, where he went to sleep. App. vol. V, Day One Second Trial Tr., pp. 199-200; App. vol. VI, Day Three Second Trial Tr., pp. 90-91. After Ron went to bed, Petitioner continued to accuse Bradie and Ron of “sleeping” with his wife Kelly, which Bradie denied. App. vol. V, Day One Second Trial Tr., pp. 200-02, 257; App. vol. VI, Day Three Second Trial Tr., p. 90.

After repeatedly having to tell Petitioner that he and Ron did not “sleep” with Kelly, Bradie became angry and falsely told Petitioner that he did have sex with Kelly. App. vol. V, Day One Second Trial Tr., pp. 201-03, 257; App. vol. VI, Day Three Second Trial Tr., p. 90. Two or three minutes later, and enraged by Bradie’s comment, Petitioner grabbed a baseball bat and raised the bat in a position to strike Bradie,² after which Bradie went unconscious. When he woke up the next morning, Bradie’s head was “split open” and bleeding.³ App. vol. V, Day One Second Trial Tr., pp. 201-03, 254-55, 257; App. vol. VI, Day Three Second Trial Tr., p. 90.

The next morning, on July 20, 2011, as noted above, Bradie regained consciousness and found Petitioner asleep at his feet. App. vol. V, Day One Second Trial Tr., pp. 201, 203-04; App.

² This bat was located behind the front door and was kept in the apartment for protection. App. vol. V, Day One Second Trial Tr., p. 203.

³ In order to close this wound, Bradie received 16+ stitches. App. vol. V, Day One Second Trial Tr., pp. 201, 211. On top of this head wound, Bradie also suffered a broken collarbone, as well as a broken kneecap. App. vol. V, Day One Second Trial Tr., pp. 204-05, 210-11.

vol. VI, Day Three Second Trial Tr., p. 90. Awake, Bradie saw that he was bleeding from the head and called 911 for help. With Petitioner right by his side, Bradie falsely told the 911 operator that he did not know how he injured his head. Petitioner also spoke to the 911 operator—telling the operator that Bradie injured his head when he fell off of the porch. In response, the 911 operator sent an ambulance to the apartment.⁴ App. vol. V, Day One Second Trial Tr., pp. 204-06, 242-46; App. vol. V, Day Two Second Trial Tr., pp. 13-14; App. vol. VI, Day Three Second Trial Tr., pp. 92-94.

When they arrived, and afraid that Petitioner may attack them with the baseball bat, Bradie falsely told the paramedics that he had fallen off of the porch and busted his head open.⁵ App. vol. V, Day One Second Trial Tr., pp. 206, 248-49; App. vol. V, Day Two Second Trial Tr., p. 14. While being transported to the hospital, Bradie told the paramedics the truth—that Petitioner had attacked him with a baseball bat. App. vol. V, Day One Second Trial Tr., pp. 207-08, 249-50. At the hospital, Bradie informed hospital personnel, workers from Adult Protection Services (“APS”) and Child Protection Services (“CPS”),⁶ as well as the police,⁷ that Petitioner had attacked him with a baseball bat. App. vol. V, Day One Second Trial , pp. 208-10; App. vol. V, Day Two Second Trial Tr., pp. 19, 196, 201, 285, 324, 336.

⁴ Charleston Police Officer D.C. Goffreda was also dispatched to the scene. App. vol. V, Day Two Second Trial Tr., pp. 12-14.

⁵ Bradie told this same story to Officer Goffreda, as did Petitioner. App. vol. V, Day Two Second Trial Tr., pp. 14-16, 196.

⁶ These workers included APS worker Donna Thompson and CPS worker Ann Stacklin. App. vol. V, Day Two Second Trial Tr., pp. 285, 336.

⁷ Again, Bradie relayed this information to Officer Goffreda. App. vol. V, Day Two Second Trial Tr., pp. 17-19.

Later this same day, July 20, 2011, after speaking with Bradie and observing his injuries, the police went to Bradie's and Ron's apartment where they arrested Petitioner for malicious assault.⁸ App. vol. V, Day Two Second Trial Tr., pp. 24-25, 29, 71-72. At this point, however, the police did not search the apartment, as they did not realize that Ron was actually in the apartment. As such, the police did not feel they had probable cause/exigent circumstances for a warrantless search.⁹ App. vol. V, Day Two Second Trial Tr., pp. 31-32, 40-41, 51-52.

The next day, July 21, 2011, hospital personnel contacted the police and informed them that Bradie was concerned about Ron, as he had not come to see or even call Bradie. Acting on this, the police went to Bradie's and Ron's apartment. After having the landlord unlock the door, the police, as well as workers from APS and CPS, entered the apartment where they found Ron dead—he had been beaten to death with a baseball bat.¹⁰ App. vol. V, Day One Second Trial Tr., pp. 212-13; App. vol. V, Day Two Second Trial Tr., pp. 37-39, 73, 178, 324,326.¹¹ Thereafter, Petitioner was further

⁸ Officer Goffreda and his partner, Officer Anderson (first name uncertain), effected this arrest of Petitioner. App. vol. V, Day Two Second Trial Tr., pp. 24-25, 29.

⁹ Please note that the police later obtained a search warrant and made a full search of the apartment. App. vol. V, Day Two Second Trial Tr., pp. 96, 168, 197-98. This search was carried out by Charleston Police Detectives Louis Todd Taylor, Andrew Foster, Kinder (first name uncertain), and James Duncan. App. vol. V, Day Two Second Trial Tr., pp. 197-99.

¹⁰ The discovery of Ron's body was made by Officers Goffreda and Anderson (first name uncertain), as well as CPS worker Ann Stacklin and another APS worker (name uncertain). App. vol. V, Day Two Second Trial Tr., pp. 38-39, 288. Adult Protection Services worker Donna Thompson arrived at the apartment after Ron was discovered. App. vol. V, Day Two Second Trial Tr., p. 288. Following this discovery, on July 21, 2011, an autopsy was performed on Ron, which revealed that Ron died as a result of multiple blunt force trauma injuries to the head. App. vol. V, Day Two Second Trial Tr., pp. 239, 256.

¹¹ As discussed more fully below, after Ron was found, APS and CPS workers Donna Thompson and Ann Stacklin returned to the hospital and informed Bradie that Ron was dead. App. vol. V, Day One Second Trial Tr., pp. 213-14; App. vol. V, Day Two Second Trial Tr., pp. 90, 326-
(continued...)

charged with felony first-degree murder. App. vol. VI, Day Three Second Trial Tr., p. 89.

On July 29, 2011, a preliminary hearing was held in this case, during which the magistrate court found that there was probable cause to believe that Petitioner had committed the crimes, malicious assault and felony first-degree murder, with which he had been charged. App. vol. I, Prelim. Hr'g Tr., p. 56.

On September 16, 2011, the Kanawha County Grand Jury indicted Petitioner for felony first-degree murder (Count 1) and malicious assault (Count 2). App. vol. I, pp. 1-2.

In January 2012, while in jail and awaiting trial, Petitioner came into contact with Charles Jarrett ("Jarrett")—another inmate at the jail.¹² App. vol. VI, Day Three Second Trial Tr., pp. 84-85, 88. In fact, Petitioner and Jarrett were cellmates for 2½ days. App. vol. VI, Day Three Second Trial Tr., p. 89. During this 2½ day period, Petitioner informed Jarrett that he had malicious assault and murder charges pending against him. App. vol. VI, Day Three Second Trial Tr., p. 89. During this same period, Petitioner also confessed to Jarrett that he had beaten Bradie Dunlap with a baseball bat and then beat Ron Forton to death with the bat. App. vol. VI, Day Three Second Trial Tr., pp. 89-92.

In describing this incident to Jarrett, Petitioner stated that he walked over to the bed where Ron was sleeping and "put it on him." App. vol. VI, Day Three Second Trial Tr., p. 91. While

¹¹(...continued)

27. Upset and angered by this and wanting Petitioner to "pay" for killing Ron, Bradie thereafter gave statements to the police, during which he falsely stated that he had seen Petitioner hit Ron with the baseball bat. App. vol. V, Day One Second Trial Tr., pp. 214-15. During Petitioner's preliminary hearing, Bradie again falsely stated that he had seen Petitioner hit Ron with the bat. App. vol. V, Day One Second Trial Tr., pp. 215-16, 235-36.

¹² Jarrett was in jail on a robbery charge. App. vol. VI, Day Three Second Trial Tr., p. 82.

making this statement, Petitioner was walking around the cell demonstrating how he struck Ron with the bat. App. vol. VI, Day Three Second Trial Tr., pp. 91-92. After beating Bradie and killing Ron, as conveyed by himself to Jarrett, Petitioner said to himself—“Fuck it,” and then sat down and passed out. App. vol. VI, Day Three Second Trial Tr., p. 92. Again as conveyed by himself to Jarrett, this entire incident occurred due to Petitioner’s belief that Bradie and Ron were making sexual advances and comments towards his wife Kelly Tran, a “smart” remark by Bradie concerning the same, and that he was “tired of hearing that shit.” App. vol. VI, Day Three Second Trial Tr., p. 90. In talking with Jarrett, Petitioner also stated that he should have cut Bradie’s and Ron’s ears off, put them through a string, held them up, and hollered in them—“See what you made me do? I told you not to mess with my old lady.” App. vol. VI, Day Three Second Trial Tr., pp. 96-97.

Petitioner’s trial took place on May 9, 10, 11 and 14, 2012, and ended with the jury convicting him of felony first degree murder (Count 1) without a recommendation of mercy, as well as malicious assault (Count 2).¹³ App. vol. I, pp. 32, 33; App. vol. VI, Day Four Second Trial Tr., p. 98.

On June 11, 2012, the circuit court (“court”) sentenced Petitioner to life in the penitentiary without the possibility of parole for his conviction of felony first degree murder (Count 1). App. vol. I, p. 52. The court further sentenced Petitioner to a term of 2 to 10 years for his conviction of malicious assault (Count 2). App. vol I, p. 53. Finally, the court ordered that these sentences run consecutive to one another. *Id.* Thereafter, Petitioner brought the current appeal.

¹³ It should be noted that this was Petitioner’s second trial on these charges. Petitioner’s first trial took place on March 12, 13, 14, 15, 16 and 19, 2012, and ended in a hung jury. App. vol. IV, Day Six First Trial Tr., p. 3. It should also be noted that all of the pretrial orders, rulings, etc., issued by the circuit court in Petitioner’s first trial were carried over to his second trial. *See* App. vol. V, Day Two Second Trial Tr., p. 224.

II.

SUMMARY OF ARGUMENT

Apart from the Grand Jury hearing Brady Dunlap's false statement that he witnessed Petitioner strike Ron Forton with the baseball bat, there was sufficient other legal evidence presented to the Grand Jury from which they could have indicted Petitioner. Furthermore, Brady's false statement was corrected at Petitioner's trial—the statement was not repeated as true and the jury was fully informed of its falsity. Additionally, the prosecution did not intentionally, with knowledge of its falsity, present Brady's false statement to the Grand Jury. Thus, the court did not commit error in denying Petitioner's Motion to dismiss the Indictment.

The court correctly denied Petitioner's Motions for a judgment of acquittal. At trial, among much other testimony, the jury heard the testimony of Brady Dunlap and Charles Jarrett, during which they "fingered" Petitioner as Ron Forton's murderer. The jury was correct in believing Brady and Charles' testimony, as their testimony was very detailed, compelling and persuasive. This is so despite the fact that Charles was a jail inmate who agreed to testify for the prosecution, as well as the fact that Brady, before Petitioner's trial, gave false statements that he witnessed Petitioner strike Ron with the bat.

Whether in isolation or taken as a whole, the prosecutor's statements did not change the outcome of the jury's verdict in this case. Given the amount and strength of the evidence presented to them, the jury would have found Petitioner guilty without any such statements being made, and that is assuming that the statements were improper in the first instance. As such, the prosecutor's statements do not amount to reversible error.

Prior to murdering Ron Forton, Petitioner, on one occasion, chased after Ron with a brick.

On another prior occasion, Petitioner threatened Ron with a hammer. The court properly found that these two prior incidents occurred, that they were relevant, and that their probative value was not outweighed by their prejudicial effect. In finding such, the court did not abuse its discretion. This is so despite the fact that the evidence of these two prior acts was based on the “word” of Brady Dunlap, who, prior to Petitioner’s trial, falsely stated that he actually saw Petitioner strike Ron with the bat. Therefore, the court did not err in allowing the prosecution to introduce this 404(b) evidence.

Despite Petitioner’s contention to the contrary, the prosecutor did not have a conflict of interest with one of its witnesses—Charles Jarrett—simply because Jarrett had a pending criminal matter involving the same prosecutor. Petitioner has not cited any authority to support his theory that this amounts to a conflict of interest, and there is no such conflict under West Virginia law. Thus, the court did not commit error in ruling that the prosecutor did not have a conflict of interest with Charles Jarrett.

During *voir dire*, any comments that the corrections officer made, when he was excused and was exiting the court room, did not contaminate the jury. It is questionable whether the jury even heard these comments and whether they were directed at Petitioner. As such, the court did not err in not dismissing the jury for contamination based on the comments of the corrections officer.

Petitioner has not cited any authority to support his assertion that he was entitled to interrogate the jury foreman, after the jury had been dismissed, concerning Petitioner’s belief that several of the jury members had developed relationships with one another when they served as jurors in a previous trial. Furthermore, Petitioner was granted the opportunity to poll the jurors, all of whom confirmed their verdict. During this polling process, none of the jurors said anything that

brought into question the unanimity of their verdict or any misconduct on their part. Additionally, during *voir dire*, Petitioner was fully aware of the jurors' prior service and made no challenge for cause to have these jurors disqualified.

The untested DNA swabs are not newly discovered evidence. Furthermore, the identity of Ron Forton's murderer is not realistically at issue in this case. Thus, the court did not commit error in denying Petitioner's post-trial Motion for further DNA analysis of the untested swabs.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this is a first-degree murder case, which resulted in Petitioner being given a life without mercy sentence, the State believes that oral argument is necessary in this case. The State also believes that such argument should be of the Rule 19 "variety," as the issues presented by this case are governed by well-settled law. Again, because this is a first-degree murder case with a life without mercy sentence, the State believes that a Court opinion, rather than a memorandum decision, is appropriate. As always, the State respectfully defers to the discretion and wisdom of the Court on all these points.

IV.

ARGUMENT

A. THE CIRCUIT COURT DID NOT COMMIT ERROR BY NOT DISMISSING THE INDICTMENT.

1. Standard of Review.

This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*. However, in addition to the *de novo* standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's "clearly erroneous" standard of review is invoked concerning the circuit court's findings of fact.

Syl. Pt. 1, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009). “Generally speaking, the finding by the grand jury that the evidence is sufficient is not subject to judicial review.” *State v. David D. W.*, 214 W. Va. 167, 172, 588 S.E.2d 156, 161 (2003) (internal quotations omitted) *declined to follow on other grounds by State v. Slater*, 222 W. Va. 499, 665 S.E.2d 674 (2008). “This Court reviews indictments only for constitutional error and prosecutorial misconduct.” *Id.*

2. Law on Quashing an Indictment Because of Inadequate, Incompetent and/or Illegal Evidence.

The general rule is that the validity of an indictment is not affected by the character of the evidence introduced before the grand jury, and an indictment valid on its face is not subject to challenge by a motion to quash on the ground the grand jury considered inadequate or incompetent evidence in returning the indictment.

Syl. Pt. 2, *State v. Slie*, 158 W. Va. 672, 213 S.E.2d 109 (1975). “Cases are legion supporting the proposition that a defendant may not challenge a facially valid indictment returned by a legally constituted grand jury on the basis that the evidence presented to the grand jury was legally insufficient.” *David D. W.*, 214 W. Va. at 172, 588 S.E.2d at 161 (citing *United States v. Calandra*, 414 U.S. 338 (1974); *Costello v. United States*, 350 U.S. 359 (1956)). ““Except for willful, intentional fraud the law of this State does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency.””

Syl. Pt. 3, *State v. Grimes*, *supra* (quoting Syl., *Barker v. Fox*, 160 W. Va. 749, 238 S.E.2d 235 (1977)).

“[T]he fact that the grand jury considers improper matters cannot, standing alone, justify quashing of the grand jury’s acts so long as there is legal and competent evidence upon which an indictment is based.” *State v. Bonham*, 184 W. Va. 555, 561, 401 S.E.2d 901, 907 (1990). “It is generally conceded that the mere fact that some illegal or improper evidence has been received

before the grand jury or that certain witnesses examined were disqualified to testify will not invalidate an indictment where other legal evidence was received in its support.” *State v. Dotson*, 96 W. Va. 596, 600, 123 S.E. 463, 464 (1924). *See also State v. Clark*, 64 W. Va. 625, 630, 63 S.E. 402, 404 (1908) (internal quotations and citations omitted) (“The law is that, if there was any legal evidence before the grand jury, the court will not inquire into its sufficiency; nor will it quash the indictment in such a case because some illegal evidence was also received.”).

“The presumption is that every indictment is found upon proper evidence. If anything improper is given in evidence before a grand jury, it can be corrected in the trial before a petit jury.” *State v. Clements*, 175 W. Va. 463, 472, 334 S.E.2d 600, 609-10 (1985) (citing *Costello v. United States*, 350 U.S. 359, 363 (1956)). “Thus, any evidentiary errors in the prosecution’s case before the grand jury were not cause for reversal, where the errors were not repeated before the petit jury.” *Clements*, 175 W. Va. at 472, 334 S.E.2d at 610.

3. Despite the Grand Jury Hearing Bradie Dunlap’s False Statements That he Witnessed Petitioner Strike Ron Forton With the Baseball Bat, There was Sufficient Other Legal Evidence Presented to the Grand Jury From Which They Could Have Indicted Petitioner. Bradie Dunlap’s False Statements Were Corrected at Petitioner’s Trial—the Statements Were not Repeated as True and the Jury was Fully Informed of Their Falsity. The Prosecution did not Intentionally, With Knowledge of Their Falsity, Present Bradie Dunlap’s False Statements to the Grand Jury.

After Ron Forton was found beaten to death by a baseball bat, APS and CPS workers went to the hospital, where Bradie Dunlap was recovering from being attacked by Petitioner with the bat, and informed Bradie that Ron was dead. Upset, angry and wanting Petitioner to “pay” for killing Ron, Bradie falsely told Charleston Police Detective Andrew Foster that he actually saw Petitioner

strike Ron with the bat.¹⁴ App. vol. I, Grand Jury Tr., p. 11. Afterward, Bradie repeated this false statement during Petitioner’s preliminary hearing.¹⁵ App. vol. I, Prelim. Hr’g Tr., p. 8. Thereafter, Detective Foster appeared before the Grant Jury, during which Detective Foster testified that Bradie had indicated that he witnessed Petitioner hit Ron with the bat, which again was false.¹⁶ App. vol. I, Grand Jury Tr., p. 11. Based on these events, and prior to his trial, Petitioner moved the court to dismiss the Indictment,¹⁷ which the court denied. *See generally* App. vol. I, pp. 8, 38.

With this “backdrop” in place, Petitioner asserts on appeal that the court committed error in refusing to dismiss the Indictment against him. In support of this assertion, Petitioner essentially argues that but for them being presented with Bradie Dunlap’s false statements, the Grand Jury would not have indicted him for felony murder. *See generally* Pet’r’s Br., 8-15. For the reasons explained below, the State disagrees.

To begin with, apart from Bradie’s false statements that he witnessed Petitioner strike Ron with a baseball bat, there was more than adequate other legal evidence presented to the Grand Jury, as well as the reasonable inferences drawn from this evidence, from which the Grand Jury could have indicted Petitioner. This other evidence, as related by Bradie, other police officers and the

¹⁴ Bradie gave this statement to Detective Foster during a telephone interview on July 22, 2011. App. vol. I, Grand Jury Tr., p. 10. Notably, Bradie did not inform Detective Foster that he actually witnessed Ron’s murder. App. vol. I, Grand Jury Tr., p. 12.

¹⁵ This preliminary hearing took place on July 29, 2011. App. vol. I, Prelim. Hr’g Tr., p. 1. Again, Bradie made it clear at this hearing that he did not actually witness Ron’s murder. App. vol. I, Prelim. Hr’g Tr., p. 9.

¹⁶ This grand jury proceeding took place on September 15, 2011. App. vol. I, Grand Jury Tr., p. 1. Again, at no time during this proceeding was the grand jury told that Bradie actually witnessed Ron’s murder—only that Bradie saw Petitioner strike Ron with the bat.

¹⁷ Petitioner actually filed this Motion with the court on March 8, 2012. App. vol. I, pp. 8-9.

medical examiner to Detective Foster and, in turn, to the Grand Jury, is as follows:

1. On the night that he was murdered, July 20, 2011, Ron Forton was living in the same apartment with Petitioner and Bradie Dunlap. App. vol. I, Grand Jury Tr., pp. 6-7. Petitioner, Bradie and Ron were the only three persons in the apartment that night. App. vol. I, Grand Jury Tr., pp. 20-21.
2. On this same night, July 20, 2011, an argument “broke out” between these men, during which Petitioner accused Ron and Bradie of having an “affair” with his wife Kelly Tran. App. vol. I, Grand Jury Tr., p. 11. This was not the first time that Petitioner accused Ron and Bradie of having an “affair” with his wife. App. vol. I, Grand Jury Tr., p. 30. In fact, due to a similar disagreement on a prior occasion, Petitioner assaulted Ron with a hammer. App. vol. I, Grand Jury Tr., p. 28.
3. At some point, on the night of July 20, 2011, again due to his belief that Ron and Bradie were “sleeping” with his wife, Petitioner attacked Bradie with a baseball bat-striking him several times. App. vol. I, Grand Jury Tr., pp. 9, 11. During this attack, Bradie went unconscious and woke up next morning in the living room on the couch. App. vol. I, Grand Jury Tr., p. 12.
4. After awakening and realizing that he had a severe injury to his head—a “gash” that went all the way to his “skull”—Bradie called 911 for help. App. vol. I, Grand Jury Tr., pp. 12, 18-19. With Petitioner seated next to him, Bradie was unable to tell the 911 operator much during the call. At one point during the call, Petitioner spoke with the 911 operator, telling the operator that Bradie injured himself by falling off of the porch. App. vol. I, Grand Jury Tr., p. 29. When the police and paramedics

arrived, Petitioner again stated that Bradie injured himself when he fell off of the porch. App. vol. I, Grand Jury Tr., pp. 8-9, 31. However, the police did not find any evidence, such as blood, on or around the porch area supporting Petitioner's claim that Bradie was injured when he fell off the porch. App. vol. I, Grand Jury Tr., pp. 9, 31. The police did, however, find a large amount of blood in the living room by the couch where Petitioner actually attacked Bradie. App. vol. I, Grand Jury Tr., pp. 9, 15.

5. Once he had been transferred to the hospital, Bradie informed the police that Petitioner attacked him with a baseball bat.¹⁸ App. vol. I, Grand Jury Tr., pp. 9, 11. Thereafter, the police went to the apartment and arrested Petitioner for malicious assault. App. vol. I, Grand Jury Tr., pp. 13, 21. When they arrested him, Petitioner said nothing to the police about anyone else being in the apartment.¹⁹ App. vol. I, Grand Jury Tr., p. 22. Furthermore, between the time that Bradie was taken to the hospital and Petitioner was arrested—10:06 a.m. to 11:52 a.m.—Petitioner did not call 911 or the police to report that he found Ron dead in the apartment. App. vol. I, Grand Jury Tr., pp. 32-33.
6. Eventually, the police returned to the apartment where they found Ron dead in the bedroom. App. vol. I, Grand Jury Tr., p. 14. Ron was found lying face up on the bed

¹⁸ At the hospital, Bradie also expressed his concern about Ron to APS workers and asked whether someone could return to the apartment and check on Ron. App. vol. I, Grand Jury Tr., p. 13.

¹⁹ Also, when he was arrested, Petitioner did not have any injuries to his body, such as lacerations, cuts or bleeding. App. vol. I, Grand Jury Tr., p. 25.

with a large amount of blood on and around his body.²⁰ App. vol. I, Grand Jury Tr., pp. 14, 15. Ron had a large fracture to his skull, bruising to his forearms that were consistent with defensive wounds, as well as other large contusions all over his body. App. vol. I, Grand Jury Tr., p. 18. According to the medical examiner, Ron died of “blunt force trauma” to his head. This head injury was consistent with an injury that could be caused by being hit by a baseball bat. App. vol. I, Grand Jury Tr., p. 18. During their search of the apartment, the police recovered a baseball bat, which was later confirmed to have blood on it. App. vol. I, Grand Jury Tr., pp. 16, 24.

7. When he spoke to the police concerning what happened to Ron, Petitioner gave “several different theories,” including his “claim[] there was someone else in the apartment at some time during that night [July 20, 2011].” App. vol. I, Grand Jury Tr., p. 33. Petitioner indicated to the police, at that time, he was asleep and “didn’t hear or see anything.” App. vol. I, Grand Jury Tr., pp. 33-34. However, the apartment is “very small” and considering the “injuries that both victims [Ron and Bradie] received, [which were] very violent[,] . . . it would have been impossible for them to receive [these injuries] in silence.” App. vol. I, Grand Jury Tr., pp. 7, 34.

In short, this evidence alone would have given the Grand Jury all they needed to indict Petitioner on the charges for which he was tried—malicious assault and felony first degree murder. This is so even in the absence of Bradie Dunlap’s false statements that he actually saw Petitioner strike Ron Forton with the bat.

²⁰ A large amount of blood was also found smeared on the bedroom walls. App. vol. I, Grand Jury Tr., pp. 14, 15.

In arguing that the Grand Jury would not have indicted him without Bradie's false statements, Petitioner relies heavily on the following exchange between one of the grand jurors and Detective Foster:

FEMALE 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.

App. vol. I, Grand Jury Tr., p. 25. *See also* Pet'r's Br., 13. Importantly, this small exchange took place between Detective Foster and one of the grand jurors—there were 15 other grand jurors on the panel. App. vol. I, Grand Jury Tr., p. 5. More importantly, Detective Foster's response to the grand juror's question leaves out all of the evidence, circumstantial and otherwise, as set forth above, as well as the reasonable inferences that could be drawn from this evidence, which is substantial—"to say the least."

Furthermore, at Petitioner's trial, Bradie's false statements to the police, and at Petitioner's preliminary hearing, that he actually witnessed Petitioner strike Ron with the baseball bat were corrected. First, the statements were not repeated as true and the jury was fully informed of their falsity. Secondly, defense counsel fully cross-examined Bradie about these false statements.

Q Do you recall giving statements to police about what happened?

A Yeah. I done that because I was pissed off, and I wanted him to pay for it, and I thought maybe if I tell them I seen it and everything, that it would go over okay, but it didn't, because I didn't see it.

App. vol. V, Day One Second Trial Tr., p. 214.

Q Mr. Dunlap, you testified at a preliminary hearing in this matter, too, didn't you?

A Yes.

Q You testified in that preliminary hearing that you saw Mr. Carter strike Mr. Forton, didn't you?

A Yes.

Q Was that true?

A No.

App. vol. V, Day One Second Trial Tr., pp. 215-16.

Q Under oath. You took an oath [at the preliminary hearing] to tell the truth and only the truth so help you God.

A Yeah.

Q And you lied?

A I just lied on 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.

App. vol. V, Day One Second Trial Tr., p. 236.

Finally, at the time of the Grand Jury proceeding, neither the prosecutor or Detective Foster knew that Bradie Dunlap's statements to the police and at the preliminary hearing were false. Had they known otherwise, as insinuated by Petitioner,²¹ they would not have presented these statements

²¹ See Pet'r's Br., 4 ("The prosecutor knew of the false statements of Bradie Dunlap at the (continued...)

to the Grand Jury.

B. THE CIRCUIT COURT COMMITTED NO ERROR IN DENYING PETITIONER’S MOTIONS FOR A JUDGMENT OF ACQUITTAL.

“The Court applies a *de novo* standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence.” *State v. Juntilla*, 227 W. Va. 492, 497, 711 S.E.2d 562, 567 (2011) (citing *State v. LaRock*, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996)).

Upon motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.

Syl. Pt. 1, *State v. Rogers*, 209 W. Va. 348, 547 S.E.2d 910 (2001) (internal quotations omitted).

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant’s guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

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

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court.

²¹(...continued)

preliminary hearing and first trial. Despite this knowledge, the State used Bradie Dunlap’s false testimony in their opening statement at the second trial.”). *See also* Pet’r’s Br., 10 (“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 Bradie Dunlap.”).

Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *Guthrie*, *supra*.

“When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor’s coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution’s favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution’s theory of guilt.”

Syl. Pt. 8, *State v. White*, 228 W. Va. 530, 722 S.E.2d 566 (2011) (quoting Syl. Pt. 2, *LaRock*, *supra*).

With these principles in place, Petitioner asserts on appeal that the court committed error in denying his Motions for a judgment of acquittal, made during and following his trial.²² In support of this assertion, Petitioner essentially argues that the prosecution’s evidence was insufficient to sustain the jury’s verdict. *See generally* Pet’r’s Br., 15-16. The State disagrees.

In making his “pitch” that the jury’s verdict is not backed up by sufficient evidence, Petitioner characterizes the prosecution’s evidence as follows:

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

Pet’r’s Br., 16.

“For starters,” Petitioner has no one to blame but himself for his stupidity of behaving

²² These Motions were actually made at the close of the prosecution’s case in chief, at the close of all the evidence, and following Petitioner’s trial on May 17, 2012. *See generally* App. vol. I, pp. 34- 36; App. vol. VI, Day Three Second Trial Tr., pp. 110-11, 271.

belligerently at trial. Additionally, it was not Petitioner's mere presence at the crime scene that convicted him—it was his actions and words before, during and after murdering Ron Forton that convicted him. Also, the alleged prior bad acts, as Petitioner terms them, were found by the court to be admissible, as they occurred, they were relevant, and their probative value was not outweighed by their prejudicial effect.

Furthermore, as this Court has found “time and time again,” the weight and credibility of the testimony of witnesses, such as Bradie Dunlap’s and Charles Jarrett’s testimony, is for the jury to decide. “The jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses.” Syl. Pt. 8, *State v. McGilton*, 229 W. Va. 554, 729 S.E.2d 876 (2012) (internal quotations and citations omitted). ““In the trial of a criminal prosecution, where guilt or innocence depends on conflicting evidence, the weight and credibility of the testimony of any witness is for jury determination.”” Syl. Pt. 2, *State v. Smith*, 225 W. Va. 706, 696 S.E.2d 8 (2010) (quoting Syl. Pt. 1, *State v. Harlow*, 137 W. Va. 251, 71 S.E.2d 330 (1952)). “[T]he jury, as the finders of fact, have the responsibility of weighing the evidence and the credibility of the witnesses and resolving . . . inconsistencies within the framework of the instructions given to them by the court.” *State v. Houston*, 197 W. Va. 215, 230, 475 S.E.2d 307, 322 (1996). *See State ex rel. Franklin v. McBride*, 226 W. Va. 375, 381, 701 S.E.2d 97, 103 (2009) (quoting *State v. Brown*, 210 W. Va. 14, 27, 552 S.E.2d 390, 403 (2001)) (“It was the role of the jury to weigh the evidence and make credibility assessments after it observed the witnesses and heard their testimony. The jury made its determination, and this Court will not second guess it simply because we may have assessed the credibility of the witnesses differently.”). *See also* Syl. Pt. 8, *State v. Smith*, 178 W. Va. 104, 358 S.E.2d 188 (1987) (“Only when testimony is so unbelievable

on its face that it defies physical laws should the court intervene and declare it incredible as a matter of law.”).

Here, the jury heard about Bradie Dunlap’s false statements that he witnessed Petitioner actually strike Ron, as well as Charles Jarrett’s status as a jail inmate awaiting trial on a robbery charge. The jury also heard Bradie and Charles, “more or less,” “lay the dead wood” on Petitioner as Ron’s murderer. The jury believed this testimony, and correctly so—Bradie’s and Charles’ testimony was very detailed, compelling and persuasive . In other words, they were telling the truth and the jury found as much by convicting Petitioner.

As a final note on this issue, in an attempt to discredit Bradie Dunlap’s testimony to the jury, Petitioner points out on appeal that Bradie is schizophrenic, bipolar, and an alcoholic. Petitioner goes on to state that Bradie was hallucinating at the time of Ron’s murder. Pet’r’s Br., 16. Absolutely not. There is absolutely nothing in the record to support Petitioner’s argument on this point. In fact, the evidence adduced at trial shows otherwise. Specifically, Bradie clearly testified at trial that, when he takes his medications, he does not hallucinate. App. vol. V, Day One Second Trial Tr., pp. 216, 224. Bradie also testified that he was taking his medications on the night of Ron’s murder—July 19/20, 2011. App. vol. V, Day One Second Trial Tr., pp. 216, 225. Bradie further testified that he was not hallucinating on the night of Ron’s murder. App. vol. V, Day One Second Trial Tr., p. 216. Finally, other than his own unsupported, self-serving allegation, Petitioner has given this Court nothing to refute this testimony.

C. ASSUMING, ARGUENDO, THAT THE PROSECUTOR MADE IMPROPER STATEMENTS DURING PETITIONER’S TRIAL, THESE STATEMENTS DO NOT AMOUNT TO REVERSIBLE ERROR, AS THE AMOUNT AND STRENGTH OF THE EVIDENCE AGAINST PETITIONER WAS SUCH THAT PETITIONER WOULD HAVE BEEN CONVICTED WITHOUT ANY SUCH STATEMENTS.

“A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice.” Syl. Pt. 6, *State v. Hamrick*, 216 W. Va. 477, 607 S.E.2d 806 (2004) (quoting Syl. Pt. 5, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995)).

“Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor’s remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.”

Syl. Pt. 8, *State ex rel. Kitchen v. Painter*, 226 W. Va. 278, 700 S.E.2d 489 (2010) (quoting Syl. Pt. 6, *Sugg, supra*).

In arguing that the prosecutor’s comments resulted in him not receiving a fair trial, Petitioner points out the following comments of the prosecutor:

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[.]

. . . On one occasion, he chased him with a hammer and threatened to beat his brains out. The presence of someone’s DNA at a residence where they live is of no value, whatsoever. Your Honor, I hate to keep objecting during his opening statement, but it absolutely arguing the case. And you have had prior interactions with Kenneth [C]arter, is that correct? Could that you had cocaine in your system? How about alcohol[?] You are not telling this jury that you were insane in 2011, are you? Well, you’re not telling this jury that you suffered some mental problem that prevented you— Kenneth Carter was insane and unreasonably jealous of his wife, the defendant, an insanely jealous person, Now, I may have been a little aggressive, but I do not have much sympathy for murderers, I couldn’t get a straight answer out of him under any circumstances[.]

Pet’r’s Br., 17-18 (internal quotations and citations omitted).

Bluntly stated, Petitioner’s complaints about these statements are nothing more than one big exercise of “nitpicking.” Furthermore, some of these statements consisted of the prosecutor telling

the jury what he thought the evidence would be, as well as his argument on what the evidence showed. Also, some of these statements occurred as a direct result of issues that arose while the prosecutor was cross-examining Petitioner. Finally, and most importantly, these statements, whether in isolation or as a whole, did not change the outcome of the jury's verdict from one of innocence to guilt. In other words, the jury would have found Petitioner guilty without any such statements being made, and that is assuming that the statements were improper to begin with. This is solely so because of the amount and strength of the evidence presented to the jury in this case. At its barest minimum, this evidence consisted of Bradie Dunlap's testimony that Petitioner attacked him with a baseball bat, as well as Charles Jarrett's testimony that Petitioner confessed to beating Ron Forton to death with the bat.

D. THE CIRCUIT COURT DID NOT COMMIT ERROR IN ALLOWING THE PROSECUTION TO INTRODUCE 404(b) EVIDENCE AT PETITIONER'S TRIAL.

The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

State v. Mongold, 220 W. Va. 259, 264, 647 S.E.2d 539, 544 (2007).

This Court reviews a lower court's determination regarding the introduction of Rule 404(b) other crimes evidence under an abuse of discretion standard. We have emphasized that a circuit court abuses its discretion in admitting Rule 404(b) evidence only where the court acts in an "arbitrary and irrational" manner.

State v. Hager, 204 W. Va. 28, 36, 511 S.E.2d 139, 147 (1998) (citation omitted). "In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence . . . maximizing its probative value and minimizing its prejudicial effect." *State v. Willett*,

223 W. Va. 394, 397, 674 S.E.2d 602, 605 (2009).

With these standard of review principles in place, at trial, the court allowed the prosecution to introduce two previous acts of violence perpetrated by Petitioner on Ron Forton. On one of these prior occasions, Petitioner chased Ron out of the apartment with a brick. On the other prior occasion, Petitioner threatened to strike Ron with a hammer and did actually strike Ron with his fist. Both of these prior incidents stemmed from Petitioner's belief that Ron was having sex with his wife Kelly Tran. On appeal, Petitioner argues that the court committed error in admitting this 404(b) evidence. In alleging this error, Petitioner does not argue that these prior acts are irrelevant.²³ Petitioner does state that these prior acts are extremely prejudicial, but he does not, or so it seems, assert that the probative value of these prior acts are outweighed by their prejudicial effect, which is what he must show in order to have this evidence excluded.²⁴ Rather, Petitioner essentially asserts

²³ To do so would be silly, given the law coming out of this Court on such issues. “As to the relevancy of other violent acts between a defendant and a deceased, courts have generally permitted such evidence to show ill will or hostility as bearing upon intent, malice and motive for the homicide.” *Hager*, 204 W. Va. at 36, 511 S.E.2d at 147 (quoting *State v. Smith*, 178 W. Va. 104, 108 n.2, 358 S.E.2d 188, 192 n.2 (1987)). “[E]vidence of prior bad acts, threats, against the victim [is admissible] to prove intent[.]” *LaRock*, 196 W. Va. at 311, 470 S.E.2d at 630 (citing *State v. Berry*, 176 W. Va. 291, 342 S.E.2d 259 (1986)). “[E]vidence of other crimes [is admissible] in order to complete the story or to show the context of the crime.” *Hager*, 204 W. Va. at 37, 511 S.E.2d at 148 (internal quotations omitted).

²⁴ Again, given the rulings by this Court on this issue, Petitioner would have a real “uphill battle” on this point. “The balancing of probative value against unfair prejudice is weighed in favor of admissibility and rulings thereon are reviewed only for an abuse of discretion.” *LaRock*, 196 W. Va. at 312, 470 S.E.2d at 631. “[A]n appellate court should find an abuse of discretion [in Rule 403 rulings] only when the trial court acted ‘arbitrary or irrationally.’” *State v. Knuckles*, 196 W. Va. 416, 424, 473 S.E.2d 131, 139 (1996) (citing *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994)). “Unfair prejudice does not mean damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggests decision on an improper basis.” *LaRock*, 196 W. Va. at 312, 470 S.E.2d at 631. Stated in a different manner, evidence causing unfair prejudice relates to evidence tending “to lead the jury, often for (continued...) ”

that the court should have found the evidence of these prior incidents unreliable, as it was based on the testimony of Bradie Dunlap. *See generally* Pet'r's Br., 18-20. For the reasons explained below, the State disagrees.

To begin with, prior to admitting this evidence, the court conducted a full blown Rule 404(b) hearing. *See generally* App. vol. II, Day Two First Trial Tr., pp. 1-50. During this hearing, Bradie Dunlap gave detailed testimony of the two prior incidents where Petitioner chased after Ron Forton with a brick on one occasion, threatened to strike Ron with a hammer on another occasion, and that both of these incidents occurred because Petitioner believed that Ron was having sex with his wife Kelly Tran. App. vol. II, Day Two First Trial Tr., pp. 7-9. During this same hearing, Petitioner denied these incidents. App. vol. II, Day Two First Trial Tr., pp. 30-33. Thereafter, the court found that Petitioner did indeed threaten Ron with a hammer and chase Ron with a brick and that these two prior incidents were admissible at Petitioner's trial. App. vol. II, Day Two First Trial Tr., pp. 47-48.

To counter this finding, Petitioner argues that these two prior incidents should have been found unreliable by the court, as they were based on the testimony of Bradie Dunlap, who is bipolar, a paranoid schizophrenic who was hallucinating at the time of the prior incidents, and lied at Petitioner's preliminary hearing. Pet'r's Br., 19. First, there is nothing in the record, and certainly not in the 404(b) hearing, to support Petitioner's assertion that Bradie was hallucinating at the time of these prior incidents. Furthermore, the Judge, for lack of a better phrase, was the "man on the scene" during the 404(b) hearing. Who, better than he, was in a position to determine that these prior acts did occur and that Petitioner committed them. In finding such, the Judge did not abuse

²⁴(...continued)
emotional reasons, to desire to convict a defendant for reasons other than the defendant's guilt." *Guthrie*, 194 W. Va. at 683, 461 S.E.2d at 189.

his discretion, and this is so despite the fact that Bradie lied at Petitioner's preliminary hearing, during which he testified that he actually saw Petitioner strike Ron Forton with a bat on the night of the murder.

On appeal, Petitioner also argues that, while he was being cross-examined, the court impermissibly allowed the prosecution, against the prosecution's pretrial stipulation, to introduce incidents of domestic abuse by himself on his wife Kelly Tran. Pet'r's Br., 19. Certainly, there was a pretrial stipulation forbidding such evidence. However, the stipulation also provided that "all bets were off" should Petitioner "open the door" on such matters. App. vol. II, Day Two First Trial Tr., p. 48. This is exactly what occurred during Petitioner's cross-examination. Petitioner stated that, during the time that he was in jail for maliciously assaulting Bradie Dunlap, he thought he had been jailed for violating a protective order against him, which prohibited him from calling his wife Kelly. App. vol. V, Day Three Second Trial Tr., pp. 243-48. At any rate, all that was asked of him by the prosecution was whether the protective order had been issued because of him calling Kelly. Petitioner did not testify, nor was he asked, about any specific incidents of abuse, which brought about the protective order in the first place. App. vol. V, Day Three Second Trial Tr., pp. 248-50.

On appeal, Petitioner also argues that the prosecution violated its pretrial stipulation by having APS worker Donna Thompson, CPS worker Ann Stacklin, as well as Charleston Police Officer Goffreda, give testimony about Petitioner's wife Kelly Tran and, as termed by Petitioner, "other prior bad acts," including Petitioner's anger and his eviction from his apartment. To begin with, the prosecution did not, "in any way, shape or form," stipulate away these matters. The stipulation only covered incidents of domestic abuse by Petitioner on Kelly. *See* App. vol. II, Day Two First Trial Tr., p. 48. Furthermore, in the context of which they were brought up, Petitioner's

eviction, as well as his anger, were not prior bad acts and were certainly relevant. The eviction related to how Petitioner ended back up at Bradie Dunlap's and Ron Forton's apartment prior to Ron being murdered. Petitioner's anger was directly connected to his belief that Ron and Bradie were "sleeping" with Kelly, which goes "hand-in-hand" with the prosecution's case as to why Petitioner beat Bradie and then killed Ron with a baseball bat. App. vol. V, Day Two Second Trial Tr., pp. 318-19, 327-29.

E. THE CIRCUIT COURT DID NOT ERR IN RULING THAT THE PROSECUTOR DID NOT HAVE A CONFLICT WITH CHARLES JARRETT.

"This Court has . . . indicated that whether a trial court should disqualify a prosecutor, or his office, from prosecuting a criminal defendant is reviewed under an abuse of discretion standard." *State v. Jessica Jane M.*, 226 W. Va. 242, 256, 700 S.E.2d 302, 316 (2010).

With this "backdrop" in place, while he was in jail awaiting trial, Petitioner was cellmates, for a 2½ day period, with Charles Jarrett ("Jarrett"). Sometime during this 2½ days, Petitioner confessed to Jarrett that he assaulted Bradie Dunlap with a baseball bat, and then "turned" the bat on Ron Forton killing him. At trial, the prosecution put on Jarrett as one of its witnesses who, in turn, testified that Petitioner confessed to him that he beat Bradie and killed Ron with the bat.²⁵

On appeal, Petitioner asserts that the court committed error by not finding that the prosecutor had a conflict of interest with Jarrett. In support of this assertion, Petitioner argues that, in exchange for his testimony, the prosecutor agreed to inform the Judge in Jarrett's case of Jarrett's testimony. Petitioner goes on to argue that Jarrett had a trial pending two weeks after his trial in

²⁵ Prior to this testimony, Petitioner moved the court to disqualify the prosecutor, which the court denied. App. vol. VI, Day Three Second Trial Tr., pp. 86-87.

front of the same Judge and prosecutor. Finally, Petitioner argues that, in trying Jarrett's case, the prosecutor dismissed one of Jarrett's charges, which gave an appearance of impropriety and prejudiced Petitioner. Pet'r's Br., 20-21. The State disagrees.

First of all, Petitioner cites no authority to support his assertion that the prosecutor has a conflict of interest in this case, which is understandable, because there is none. In fact, there are two basic scenarios in which disqualification of a prosecutor is appropriate, neither of which occurred here.

“Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question.”

Syl. Pt. 5, *Jessica Jane M.*, *supra* (quoting Syl. Pt. 1, *Nicholas v. Salmons*, 178 W. Va. 631, 363 S.E.2d 516 (1987)).

Furthermore, neither the prosecutor, nor the Judge, promised Jarrett anything in exchange for his testimony. Similarly, other than the hope that his testimony would benefit him in some way, Jarrett did not expect anything in exchange for his testimony. App. vol. VI, Day Three Second Trial Tr., pp. 97-99. As for Petitioner's comment that the prosecutor dismissed one of Jarrett's charges—an escape charge to be exact—this charge was dismissed prior to Petitioner's trial. App. vol. VI, Day Three Second Trial Tr., p. 83. The reason for this dismissal is simple—it was a “crappy” charge to begin with, which arose out of Jarrett being accidentally released from jail and not turning himself back in to jail authorities. App. vol. VI, Day Three Second Trial Tr., pp. 82-83. In short, Petitioner's claim that the court should have disqualified the prosecutor due to a conflict of interest

on the prosecutor's part is absolutely meritless.

F. THE CIRCUIT COURT DID NOT COMMIT ERROR BY NOT DISMISSING THE JURY DURING *VOIR DIRE* FOR CONTAMINATION.

“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.”

Syl. Pt. 1, *State v. Daniel*, 182 W. Va. 643, 391 S.E.2d 90 (1990) (quoting Syl. Pt. 7, *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932)). “A trial court’s order denying a defendant’s motion for a new trial is entitled to substantial deference on appeal. The trial court’s findings of fact supporting this decision may be reversed only when the defendant proves that they are clearly wrong.” *State v. Cooper*, 217 W. Va. 613, 616, 619 S.E.2d 126, 129 (2005).

On appeal, Petitioner asserts that the court committed error when it denied his Motion for a mistrial, based on his assertion that the jury was contaminated during *voir dire*. *See generally* Pet’r’s Br., 21. In support of this assertion, Petitioner argues the following:

During voir dire, a correctional officer from South Central Regional Jail was excused from jury duty for being prejudiced [as] he knew Kenneth Eugene Carter from the jail. He greeted and spoke to Kenneth on his way out of the courtroom before the entire jury panel. This action prejudiced Kenneth.

....

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.

Pet’r’s Br., 21 (citations omitted).

The State believes this argument to be absolutely meritless. To begin with, there is a

discrepancy between the parties', as well as the court's, versions as to what the corrections officer indicated and said in the first place.²⁶ At any rate, as correctly pointed out by the prosecutor during and following Petitioner's trial, it would have become apparent to the jury that Petitioner "was incarcerated for some period of time," and that "any comments ... [that the officer] might have made when excused were out of the hearing of the jury and not directed toward the defendant." App. vol. V, Day One Second Trial Tr., p. 50; App. vol. I, p. 38.

G. THE CIRCUIT COURT DID NOT ERR IN DENYING PETITIONER'S POST-TRIAL MOTION TO INTERROGATE THE JURY FOREMAN.

"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."

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²⁶ At trial, Petitioner, through counsel, claimed that "the officer indicated that he knew" Petitioner. App. vol. V, Day One Second Trial Tr., p. 49. The court and the prosecution disagreed with this claim. Specifically, the prosecutor responded to this claim by stating the officer "didn't indicate that." *Id.* In response to Petitioner's claim, the court stated that the officer "didn't indicate that he knew anybody," "[h]e just said that he worked at the jail." *Id.* Thereafter, Petitioner claimed that, as the officer was walking out of the courtroom, he came towards Petitioner and acknowledged him and stated "[s]orry about that." App. vol. V, Day One Second Trial Tr., pp. 49-50. In response to this claim, the prosecutor stated that the officer only said "[n]o problem" as he passed Petitioner. App. vol. V, Day One Second Trial Tr., p. 50.

On May 14, 2012, the jury found Petitioner guilty on both of the charges of which he was tried—felony first degree murder and malicious assault. Immediately upon returning this verdict, Petitioner requested that the jurors be polled. The court granted this request and, thereafter, all of the jurors confirmed their guilty verdicts. App. vol. VI, Day Four Second Trial Tr., pp. 98-101. Following his conviction, on May 22, 2012, Petitioner moved the court to interrogate the jury's foreman. *See generally* App. vol. I, pp. 43-44. The court denied this Motion.

On appeal, Petitioner asserts that the court committed error in denying his Motion to interrogate the jury foreman. In support of this assertion, Petitioner argues that seven members of the jury that convicted him had served together on a murder trial two weeks before his trial, in which the defendant was found guilty, with the same Judge and prosecutor. Petitioner goes on to argue that it had been suspected that the seven jurors had formed relationships with one another during this previous murder trial, which were not disclosed during *voir dire* in Petitioner's trial. These factors, argues Petitioner, entitled him to interrogate the jury foreman and the court's denial of this request constituted reversible error. *See generally* Pet'r's Br., 22. The State disagrees.

Again, Petitioner cites no authority to support his assertion that he is entitled to interrogate the jury foreman, or any of the other jurors for that matter, after he was convicted and the jury was dismissed. Furthermore, Petitioner asked and was granted the opportunity to poll the jurors—each and every one of these jurors confirmed their verdict. At no time during the polling of the jury did any of the jurors say anything, remotely, that brought into question the unanimity of their verdict or any misconduct on their part, either individually or collectively. If such had occurred, which it did not, Petitioner would have had every right to question the jurors.

Furthermore, as best said by the prosecutor, "Defendant's assertion that the jury panel

members had 'established relationships' with each other is somehow the basis for a new trial is patently without merit. [During *voir dire*,] [j]urors were questioned by both counsel for the state, the defendant and the court regarding their qualifications to set as jurors in this case. Defendant was fully aware of their prior jury service and made no challenge for cause not granted by the court." App. vol. I, pp. 38-39. Finally, the prosecutor's comments on this point, as far as the law is concerned, are "on the money."

Where there is a recognized statutory or common law basis for disqualification of a juror, a party must during *voir dire* avail himself of the opportunity to ask such disqualifying questions. Otherwise the party may be deemed not to have exercised reasonable diligence to ascertain the disqualification.

Syl. Pt. 8, *State v. Bongalis*, 180 W. Va. 584, 378 S.E.2d 449 (1989).

H. THE CIRCUIT COURT DID NOT ERR IN DENYING PETITIONER'S POST-TRIAL MOTION FOR DNA ANALYSIS.

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 a 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 or impeach a witness on the opposite side.

Syl. Pt. 4, *State v. Bonham, supra* (internal quotations and citations omitted).²⁷

Pursuant to W. Va. Code §15-2B-14(a), "[a] person convicted of a felony currently serving

²⁷ See also *State v. Crouch*, 191 W. Va. 272, 276, 445 S.E.2d 213, 217 (1994) ("In reviewing the lower court's findings relating to this allegedly newly-discovered evidence, we will not disturb the lower court's conclusions when there is factual support for such findings unless the lower court's conclusions are plainly wrong or against the weight of the evidence.").

a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction for performance (DNA) testing.” Under W. Va. Code §15-2B-14(f),

[t]he court shall grant the motion for DNA testing if it determines all of the following have been established:

(1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect;

(3) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case;

(4) The convicted person has made a prima facie showing that the evidence sought for testing is material to the issue of the convicted person’s identity as the perpetrator of or accomplice to, the crime, special circumstance, or enhancement allegation resulting in the conviction or sentence;

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person’s verdict or sentence would have been more favorable if DNA testing results had been available at the time of conviction. The court in its discretion may consider any evidence regardless of whether it was introduced at trial;

(6) The evidence sought for testing meets either of the following conditions:

(A) The evidence was not previously tested;

(B) The evidence was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results;

(7) The testing requested employs a method generally accepted within the relevant scientific community;

(8) The evidence or the presently desired method of testing DNA were not available to the defendant at the time of trial or a court has found ineffective assistance of counsel at the trial court level;

(9) The motion is not made solely for the purpose of delay.

As this Court has found, “[i]n accordance with West Virginia Code § 15-2B-14 (2004), the West Virginia Legislature provides a defendant the absolute right to ask for DNA testing; however, it does not provide a defendant the absolute right to have DNA testing conducted.” Syl. Pt. 7, *State ex rel. Burdette v. Zakaib*, 224 W. Va. 325, 685 S.E.2d 903 (2009). The Court has also found that

[b]efore a petitioner is entitled to post-conviction DNA testing the petitioner must file a motion for post-conviction DNA testing in the circuit court that entered the judgment of conviction that the petitioner challenges. In the motion the petitioner must allege, and subsequently prove by a preponderance of the evidence, that: 1) the petitioner is incarcerated; 2) the material upon which the petitioner seeks testing exists and is available; 3) the material to be tested is in a condition that would permit DNA; 4) a sufficient chain of custody of the material to be tested exists to establish such material has not been substituted, tampered with, replaced, or altered in any material respect; 5) identity was a significant issue at trial; and, 6) a DNA test result excluding the petitioner as being the genetic donator of the tested material would be outcome determinative in proving the petitioner not guilty of the offense(s) for which the petitioner was convicted. Finally, the petitioner’s theory supporting the request for post-conviction DNA testing may not be inconsistent with the trial defenses.

Syl. Pt. 6, *State ex rel. Richey v. Hill*, 216 W. Va. 155, 603 S.E.2d 177 (2004).²⁸

With this “backdrop” in place, following Ron Forton’s murder on July 20, 2011, the police found and collected many items of evidence from the apartment, including a bloody baseball bat, a bloody T-shirt and blood off of the toilet seat.²⁹ Thereafter, the police sent 26 total DNA swabs (“swabs”) from the bat, T-shirt and toilet seat to the West Virginia State Police Forensic Laboratory

²⁸ See also *Richey*, 260 W. Va. at 165, 603 S.E.2d at 187 (“DNA testing is warranted where the defendant claims he is ‘actually innocent’ of the crime, and demonstrates that such testing shows that . . . [he] did not commit the crime. DNA testing will not be permitted where such a test would only muddy the waters and be used by the defendant to fuel a new and frivolous series of appeals.”).

²⁹ This evidence was found and collected by Charleston Police Detective Louis Todd Taylor. See generally App. vol. V, Day Two Second Trial Tr., pp. 89, 91-92, 96-97, 99.

(“Lab”) for testing—the swabs were received by the Lab on September 7, 2011.³⁰ App. vol. I, p. 58. Of these 26 total swabs, pursuant to protocol, six were tested by the Lab, including one swab from the handle of the bat, one swab from the head of the bat, three swabs from the T-shirt, and one swab from the toilet seat.³¹ App. vol. I, pp. 58-59. *See also generally* App. vol. VI, Day Three Second Trial Tr., pp. 31-34, 37, 42, 61, 68, 69, 70-71, 76-77.

Petitioner trial began on May 9, 2012 and ended on May 14, 2012, with the jury convicting him of felony first degree murder and malicious assault. Following his trial, on May 22 and June 6, 2012, Petitioner moved the court to issue an order directing that a DNA analysis of the remaining 20 swabs be conducted. *See generally* App. vol. I, pp. 41-42, 49-50. The court denied these Motions. On appeal, Petitioner asserts that the court committed error in refusing his request for further DNA testing. In support of this assertion, Petitioner argues that the test results from the

³⁰ Also sent and received by the Lab were specimens of Petitioner’s saliva, Bradie Dunlap’s saliva, and Ron Forton’s blood. *See generally* App. vol. I, pp. 56, 58; App. vol. V, Day Two Second Trial Tr., pp. 97, 101.

³¹ The swab of the bat handle (swab no. SC-LT-01-a) did not contain any of Petitioner’s, Bradie Dunlap’s or Ron Forton’s DNA. App. vol. I, p. 60. The swab of the bat head (swab no. SC-LT-01-g) contained a mixture of Brady’s and Ron’s DNA, with Bradie being the primary source of the DNA; Petitioner’s DNA was not present on this swab. App. vol. I, p. 59. The swab of the toilet seat (swab no. SC-LT-04) was positive for Ron’s DNA; no conclusions were made concerning Bradie as a contributor to the DNA on this swab; Petitioner could not be excluded as a contributor of the DNA found on this swab. App. vol. I, p. 60. One of the swabs from the T-shirt (swab no. SC-LT-02-a) contained a mixture of DNA from three or more individuals; Ron and Bradie could not be excluded as contributors to the mixture of DNA found on this swab; no conclusions were made concerning Petitioner as a contributor to the DNA on this swab. App. vol. I, p. 60. A second swab from the T-shirt (swab no. SC-LT-02-c) contained a mixture of DNA from at least two individuals; Bradie could not be excluded as the primary source of the DNA found on this particular swab; no conclusions were made regarding Petitioner and Ron as contributors to the DNA on this particular swab. App. vol. I, p. 60. A third swab from the T-shirt (swab no. SC-LT-02-e) contained the DNA of Brady. App. vol. I, p. 59.

remaining 20 swabs would be newly discovered evidence, which evidence could be exculpatory for himself, as such evidence could have established the identity of the unidentified person indicated on some of the six swabs that were tested. *See generally* Pet'r's Br., 22-24. The State disagrees.

To begin with, the untested 20 swabs are not newly discovered evidence. Well before his second trial, and even before his first trial for that matter, on February 1, 2012, to be exact, the Lab's expert, Mary Heaton, issued a report, which report clearly indicates that 26 swabs were received by the Lab, but that only six of these swabs were tested. App. vol. I, pp. 58-60. As pointed out by the prosecutor, during Petitioner's second trial, a copy of Ms. Heaton's report was provided to the defense during discovery. App. vol. VI, Day Three Second Trial Tr., p. 45. As further pointed out by the prosecutor, Ms. Heaton's report was not only admitted into evidence during Petitioner's second trial, the report was introduced as evidence during Petitioner's first trial. App. vol. VI, Day Three Second Trial Tr., p. 45. The prosecutor also points out, and correctly so, that the defense "had this report since prior to the first trial" and that "[i]f they wanted additional work done, they could have asked for it." App. vol. VI, Day Three Second Trial Tr., p. 52. Given this, and begging the Court's pardon for the repetitiveness, the untested 20 swabs are not newly discovered evidence. It is anticipated that Petitioner will respond to the State's position on this point by arguing that they missed the fact from Ms. Heaton's report that 20 of the 26 swabs were not tested—he sure argued this at his second trial. *See generally* App. vol. VI, Day Three Second Trial Tr., pp. 44-55. With no offense intended, the State believes any such counter argument to be disingenuous and that it should not be countenanced by this Court.

Furthermore, despite Petitioner's contention to the contrary, the identity of Ron Forton's murderer is not realistically at issue in this case. Bradie Dunlap clearly identified Petitioner as the

person who attacked him with the baseball bat. Likewise, while he was in jail and awaiting trial, Petitioner confessed to Charles Jarrett that he attacked Bradie with the baseball bat and then killed Ron with the bat. Also, Petitioner's insistence on further DNA testing in this case, if it had been permitted by the court, might have "backfired." Such testing may have "turned up" Petitioner's DNA on the untested swabs, whereas the swabs that were actually tested did not. Such positive results would have further solidified the prosecution's case, which was not necessary, as the prosecution's case is "as solid as it gets" without someone having directly witnessed Petitioner murder Ron. Finally, and again contrary to Petitioner's contention, additional DNA testing would not have positively identified any other individual. This is so, of course, because you would have to have a DNA sample—i.e., saliva, blood, etc.—from this "so-called" other perpetrator to test against any unidentified DNA on the 20 untested swabs.

As an afterthought, this case can be summed up in one sentence. There were three men in an apartment one night—one was maliciously assaulted with a baseball bat, one was brutally beaten to death with the bat, and one wielded the bat and is now in prison where he belongs!

V.

CONCLUSION

Petitioner's conviction should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0777

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

KENNETH E. CARTER,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent hereby certifies that a true and correct copy of the foregoing **BRIEF OF RESPONDENT STATE OF WEST VIRGINIA** was mailed to counsel for the Petitioner by depositing it in the United States mail, first-class postage prepaid, on this 15th day of February, 2013, addressed as follows:

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