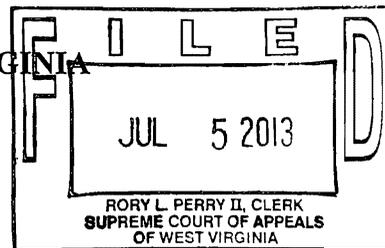


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA  
Respondent,

Vs.

No. 12-1389

ANTONIO PROPHEAT,  
Petitioner.

---

APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY  
HONORABLE CHRISTOPHER C. WILKES, JUDGE  
CASE NO. 11-F-67

---

REPLY BRIEF OF PETITIONER

---

**Christopher J. Prezioso, Esq. #9384**  
Luttrell & Prezioso, PLLC  
116 W. Washington Street, Ste. 2E  
Charles Town, West Virginia 25414  
(304) 738-3040

Counsel for Petitioner  
Antonio Propheet

**TABLE OF CONTENTS**

	Page
Assignments of Error.....	1
Statement Regarding Oral Argument.....	1
Reply Argument, Assignment I.....	2
Reply Argument, Assignment II.....	10
Reply Argument, Assignment III.....	12
Reply Argument, Assignment IV.....	13
Reply Argument, Assignment V.....	15
Reply Argument, Assignment VI.....	18
Reply Argument, Assignment VII.....	19
Conclusion.....	20
Certificate of Service	

**TABLE OF AUTHORITIES**

Page

**West Virginia Revised Rules of Appellate Procedure**

Rule 10(d).....13, 18

**West Virginia Rules of Evidence**

Rule 608(b).....12

**Cases**

State v. Dobbs, 163 W.Va. 630, 259 S.E.2d 829 (1979).....14

State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).....3, 4, 14

State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996).....14, 15

State v. Kerns, 47 W.Va. 266, 34 S.E. 734 (1899).....15

## ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT A JUDGEMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AGAIN AT THE CONCLUSION OF ALL THE EVIDENCE.
- II. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL AS THE USE OF PETITIONER'S PREVIOUSLY AUTHORED FICTIONAL NOVEL WAS IMPROPER AND UNDULY PREJUDICIAL.
- III. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL AS THE STATE IMPROPERLY USED PETITIONER'S POST ARREST/PRE-TRIAL SILENCE TO IMPEACH THE PETITIONER.
- IV. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL AFTER THE TRIAL COURT REFUSED TO GIVE A JURY INSTRUCTION AS PROFFERED BY THE PETITIONER PRIOR TO THE CASE BEING SUBMITTED TO THE JURY.
- V. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL AND MOTION FOR JUDGEMENT OF ACQUITTAL AS THE STATE KNOWINGLY ALLOWED JOSEPH MEDINA TO PRESENT FALSE AND PERJURED TESTIMONY.
- VI. PETITIONER'S CONVICTION SHOULD BE REVERSED AS HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN PROSECUTION MADE IMPROPER REMARKS AND ENGAGED IN PROSECUTORIAL MISCONDUCT.
- VII. PETITIONER'S CONVICTION SHOULD BE REVERSED AS HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT MADE IMPROPER REMARKS AND ENGAGED IN JUDICIAL MISCONDUCT.

## STATEMENT REGARDING ORAL ARGUMENT

The Petitioner affirmatively states that some issues raised in this case as assignments of errors are issues that may not have been previously authoritatively decided and oral argument

should be considered necessary. If the Court determines that oral argument is necessary, this case is appropriate for oral argument pursuant to Rule 19 and Rule 20 of the West Virginia Revised Rules of Appellate Procedure.

### REPLY ARGUMENT

#### **I. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT A JUDGEMENT OF ACQUITTAL AT THE CLOSE OF THE STATE’S CASE-IN-CHIEF AND AGAIN AT THE CONCLUSION OF ALL THE EVIDENCE.**

##### **A. Motion for Judgement of Acquittal at the Close of the State’s Case**

The Respondent, in its brief, asserts that there was more than enough evidence introduced during the State’s case-in-chief from which the jury could have found the Petitioner guilty of two counts of 1<sup>st</sup> Degree Murder and one count of 1<sup>st</sup> Degree Arson beyond a reasonable doubt. However, after careful review of all the evidence presented during the State’s case-in-chief, it is clear that none of the evidence presented, at its best, and if believed and given the benefit of every reasonable inference, could by any means prove beyond a reasonable doubt all of the elements needed to be proved in order to convict the Petitioner of the above crimes.

As asserted in the Petitioner’s original brief, throughout the entirety of the State’s case, the State was able to prove only opportunity and flight of the Petitioner. Absolutely no evidence whatsoever of premeditation and deliberation—which are necessary elements for a conviction of 1<sup>st</sup> Degree Murder—were presented by the State. No witness who testified on behalf of the State—whether Nabioa Haikal, the medical examiner who performed the autopsies on the victims; or Joseph Medina, who was the State’s primary witness against the Petitioner; or the numerous other witnesses who testified regarding the Petitioner’s flight—attested to anything that could reasonably be used to infer

the elements of premeditation and deliberation. In fact, in the State’s theory, which was alluded to in the prosecutor’s closing at trial—and was again alluded to in the State’s Respondent’s Brief—the jury was asked to infer that A D possibly instigated or started a fight with the Petitioner after having looked through his cell phone and became angered at certain text messages to other women saved therein. [A.R. 1106, A.R. 1341, and A.R. 1383-1384.] If the jury adopted this theory, which was essentially the only one proffered by the State, then it would have been impossible for the jury to have found the elements of premeditation and deliberation beyond a reasonable doubt; as speculation or inference regarding this scenario would naturally lead one to the reasonable conclusion that the victim, A D , was possibly the aggressor in any altercation that ultimately ensued and was possibly brandishing a weapon during said altercation. Furthermore, under this scenario proffered by the State, it is only further reasonable to infer that the child victim of this crime, whose cause of death was undetermined, could have easily fallen accidental victim to the fighting and flailing of two large adults engaged in a violent physical altercation, in which the child could have been knocked over and struck his head or otherwise could’ve been inadvertently fatally injured.

The Petitioner recognizes that the Respondent would no doubt argue that to come to this conclusion one would have to submit to fanciful speculation; but this is the same sort of fanciful speculation that the State asked that the jury entertain at trial, as there was no proof presented whatsoever that the State’s proffered scenario actually took place *at all*. And this is the very problem with asking that a jury merely speculate or infer things that are conceivably within the realm of possibility, but that have no basis in actual evidence.

The Respondent cites *State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)* in its argument

that the evidence was sufficient to convict the Petitioner at the close of the State's case of the crimes charged, however, the *Guthrie* court held that there must be some evidence that the Petitioner considered and weighed his decision to kill in order to establish premeditation. (See Syl. Pt. 5 and 6 State v. Guthrie, supra.)

By the reasoning of the *Guthrie* court, in order for the jury to have convicted the Petitioner of 1<sup>st</sup> Degree Murder under the State's proffered scenario in this case, the jury would've had to believe that: (1) the provocation of the victim possibly attacking the Petitioner with a weapon after finding text messages in his phone to other women was not sufficient to justify a deadly counter-attack; (2) the Petitioner was under no real fear of his own from being attacked; (3) the cutting of the victim's throat was intentional; and (4) the time it took the Petitioner to either disarm the victim or procure a weapon himself and to inflict a mortal wound was sufficient to establish premeditation. In direct contrast to the *Guthrie* case, however, the present case presented none of the evidentiary findings that the jury were able to entertain in the *Guthrie* case. In the *Guthrie* case, the jury was able to assess and weigh competent evidence of eye witnesses to the actual killing, and the incriminating confession of the defendant himself, in which he stated he "had the right to respond to the act of aggression perpetrated against him" by the victim, which was considered probative of premeditation and deliberation; yet, even after those things, the *Guthrie* court *still* expressed some doubt as to whether that was a 1<sup>st</sup> Degree Murder case. So imagine the *Guthrie* court's sentiment if they were to hear the present case. In the present case, the State asked the jury to *speculate* that the victim looked through the Petitioner's cell phone and became angered by texts to other women. The State asked the jury to *speculate* that this led to a violent confrontation between the Petitioner and the victim. The State asked the jury to *speculate* that the Petitioner was under no real fear of his own

from a possible attack during this violent confrontation and, thus, there was no sufficient provocation to justify a deadly counter-attack. And, lastly, the State asked the jury to *speculate* that the time it took the Petitioner to either disarm the victim or arm himself with a weapon and inflict a mortal wound was sufficient to establish premeditation. However, under the strict standard of proof beyond a reasonable doubt, piling inference upon inference, or more appropriately in this case, mere speculation upon mere speculation, to establish guilt is directly opposed to the principle of reasonable doubt. For these reasons, it is clear the Petitioner should have been acquitted of the crimes charged after the close of the State's case.

### **B. Motion for Judgement of Acquittal at the Close of All the Evidence**

The Respondent goes on to assert that there was more than enough evidence introduced by the close of all the evidence in the case from which the jury could have found the Petitioner guilty of the crimes charged beyond a reasonable doubt.

However, the only other competent evidence introduced after the State's case-in-chief and before the close of all evidence in the case was the Petitioner's case-in-chief. And after reviewing the entire case-in-chief of the Petitioner, it is clear that it was more than plausible that others could have, and, in fact, did commit this crime. The Petitioner's evidence and testimony established that in the days immediately prior to this crime the Petitioner had had a fatal falling out with Joseph Medina, in which threats were made between the two former friends; that Medina knew where A D lived and had averred that he intended to go there to confront the Petitioner; that on the night of the crime, Medina had members of his "crew" in or near his hotel room, and that these crew members had previously provided A with heroin; that these men arrived at A's residence on the night of the crime demanding payment for a debt, and that they had referenced a

stolen laptop computer that the Petitioner was believed to be in possession of; that these men then attacked the Petitioner and the other victims of this crime, killing A and her son A ; that after the Petitioner managed to escape and hide in some nearby woods, the assailants set fire to A 's home, stole her large flat screen television and fled, leaving infant D ' behind to be consumed by the flames. The Petitioner's evidence and testimony also proved that he had been cut during this altercation by a sharp instrument and that an expert in defensive injuries attributed the Petitioner's injuries as to being inflicted upon the Petitioner while in a defensive posture.

With these facts in mind it is clear that the Petitioner's evidence and testimony in no way establishes the necessary elements needed to be proved by the State in order to find the Petitioner guilty of murder beyond a reasonable doubt. At best, the Petitioner's evidence and testimony completely exonerates him; and, at worst, as the State contends, makes him a liar and his testimony unbelievable, leaving no clear answers to what happened on the night of the crime. But in no way does it establish that he unlawfully, willfully, maliciously, deliberately, and premeditatedly killed the victims of this crime.

The Petitioner acknowledges that there were numerous pieces of unduly prejudicial evidence and remarks presented and made by the State and permitted by the trial judge during the Petitioner's case that did in fact cause the jury to convict him. However, this evidence was by law irrelevant, inadmissible, and wholly incompetent in equipping the jury in their findings of guilt. Therefore, this evidence, too, though providing the jury with highly inflammatory evidence and rhetoric to consider, did nothing to reasonably allow for the elements of premeditation and deliberation to be found beyond a reasonable doubt.

Furthermore, the State asserts in its Respondent's Brief that there were many circumstances

attested to by the Petitioner that couldn't be explained. However, the Respondent is sadly mistaken in this regard. For example: The Respondent asserts that "after giving his version of events, the Petitioner was unable to explain why neither the D [redacted] 's, who actually shared a driveway with the apartment, nor any of the neighbors, heard the vehicles, commotion or gunshot that he alleged." The Petitioner asserts that the explanation provided for this at trial was that the D [redacted] 's and their neighbors—who didn't testify by the way—didn't hear the vehicles, commotion, or gunshot that the Petitioner attested to, for the same reason that they didn't hear the numerous emergency vehicles that sped by their home that morning, didn't see or hear the 40 or so foot fire that was blazing on their neighboring property, didn't hear the banging on their door by emergency personnel, or didn't see or hear the other commotion that took place on their property that morning before they arose, and that reason being—that they apparently were asleep.

The Respondent also asserts that the Petitioner was unable to explain why neither S [redacted] D [redacted] or E [redacted] D [redacted] saw anything out of the ordinary when they looked out the windows of their home during the course of the night. The Petitioner again asserts there was a very rational reason given for why this may have been the case: Firstly, the times that the D [redacted] 's looked out of the windows of their homes did not coincide with the times that the incidents described by the Petitioner took place; secondly, even if the times that the D [redacted] 's looked out of their windows were in relatively close proximity to the times when the assailants were on their property, there was unassailable proof provided by a video Lt. Harmison had recorded that showed that a very large and in full bloom "tree line" had fully obscured their view of the crime scene. [A.R. 1364-1368.]

Finally, the State asserts that the Petitioner was unable to explain why the infant child was

not covered in more of the Petitioner's blood if events happened as he attested to, and why the infant was spared while the older child, A , was killed. The Respondent added that only the State could explain why A was killed, then went on to assert that the only explanation offered as to why A was killed and D was spared was because "A had the ability to identify the Petitioner and tell people what the Petitioner had done to his Mommy," and Dε , being only seven weeks old, "could not". However, after careful consideration of the appendix record in this case, it is clear that the State could not explain how or why this crime was committed *at all*. The State simply offered vast amounts of pure speculation. The Petitioner, on the other hand, took the stand and attested to what he actually *witnessed*, including the fact that A and A were possibly killed as an apparent result of rage from the assailant named Boogie. And, in fact, if not for the actions of Petitioner in going into the burning home and getting him, D would not have been "spared" either, and would have been killed as well, as the assailants left the infant in a burning home and fled. In fact, the prosecutor said it best in her closing when she said to the jury, "If you killed one child, what would the difference be with the second child? Think about that." [A.R. 1328, lines 10-11.] Suggesting that these perpetrators that Petitioner had attested to would no doubt have killed infant D , too, if they truly existed, as they had already killed one child, so why not kill the second child as well. To this the Petitioner says: ***Indeed!*** And according to Petitioner's version of events, that's exactly what happened. The assailants left D in a home that they had just set fire to, showing absolutely no regard for his life or well-being; whereas the Petitioner took the child up to the neighboring family's home to safeguard him. Yet, according to the prosecutor's above-described argument, which must apply to the Petitioner as well, if Petitioner were the killer there would have been no reason for Petitioner to safeguard the infant, as, according to the State, he had

just killed one child, so “what would the difference be with the second child?”; especially considering that the second child was covered in Petitioner’s blood and Petitioner was supposedly in the midst of covering up a crime he had just committed. Indeed, this argument is one point where the State and Petitioner completely agree. In fact, the Petitioner contends that this is just one of the many facts that thoroughly supports his claim of innocence, as it is clear that the person who killed A and A , and the person who saved and safeguarded infant D are clearly not one in the same. And as to the Respondent’s assertion that there was not enough blood on D ’s clothing to support Petitioner’s version of events: The Petitioner testified that immediately after his hand was cut he wrapped it with a piece of laundry of some kind that was folded on the back of the couch. [A.R. 1028, lines 15-20.] This easily explains why there wasn’t vast amounts of the Petitioner’s blood on the infant.

And, lastly, the Respondent went to great efforts to list all of the “flight” evidence that was presented at trial, and went on to explain how this flight evidence—which was essentially the State’s entire case—supported the jury’s finding of guilt beyond a reasonable doubt. However, though flight evidence may be probative of consciousness of guilt, flight after a crime is in no way probative of premeditation and deliberation. In fact, the circumstances of Petitioner’s flight are directly opposed to premeditation and deliberation, as Petitioner had gotten a ride to the victim’s home from the father of the victims, S E , and as Petitioner had absolutely no reasonable means of escape from the scene of the crime that he had supposedly just premeditatedly committed. Furthermore, the Petitioner himself confirmed that he indeed *did* have some feelings of guilt after this crime, as he felt partially responsible for what had happened to this family. [A.R. 1057-1058.] He further confirmed that he fled out of shock, fear of the magnitude of the situation, and distrust of the authorities—as he

was the only remaining witness to a crime and he felt that he would not be treated fairly. [A.R. 1042, lines 17-22.] And though this fear of authorities may not be a reasonable sentiment in the opinion of officers of the court, or in the opinion of 70% of all other Americans who may completely trust their government and its agents, it is a perfectly understandable sentiment for a person of Petitioner's mentality and life experiences. And considering the actions alleged of the prosecutor and trial judge in **Assignments of Errors VI and VII**, the Petitioner's fear of not being treated fairly by the authorities was grounded firmly in reality.

**II. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT THE PETITIONER'S MOTION FOR A NEW TRIAL AS THE USE OF THE PETITIONER'S PREVIOUSLY AUTHORED FICTIONAL NOVEL WAS IMPROPER AND UNDULY PREJUDICIAL.**

The Respondent asserts that the trial court did not err by allowing the State to cross examine the Petitioner regarding a novel he had written and published well before this crime was committed. The Respondent also continues to perpetuate the misleading idea that similarities existed between the Petitioner's novel and the alleged facts of this case—specifically, that a character commits a murder and then sets the crime scene on fire in order to destroy the evidence of his crime.

The Petitioner contends that any similarities that exist between this case and his fictional novel exist only in a generalized sense that they both involve acts of violence and weapons inherently used during said acts. Any other similarities exist only in the Respondent's imagination and gross and intentional misinterpretations of the Petitioner's work. The Petitioner insists that this supposed scene in Petitioner's novel that the Respondent keeps referring to in which a character commits a murder and sets the crime scene on fire in order to destroy the evidence of his crime simply does not exist. The Petitioner contends that the passage alluded to by the State is nothing more than a simple

dialogue scene in which the words “murder”, “crime scene”, and “destroys evidence” are never used. In fact, Petitioner gives an accurate description of said passage during his testimony on this issue. [A.R. 1089, lines 5-12.] Furthermore, the prosecutor’s taking out of context and misinterpretations of this novel are clearly put on display in A.R. 1090, lines 11-24, in which the prosecutor claims that in a particular scene a character “takes the drugs and she swiftly runs away and waves to people; is that right?” [A.R. 1090, lines 11-12.] After disagreeing with the prosecutor, the prosecutor then hands the novel to the Petitioner—after walking it directly by the jury in a way so that its cover was clearly visible to the jury [A.R. 1090, lines 16-17.]—and Petitioner reads, “The woman happily snatches the narcotic from him and quickly disappears into the wave of people around.” Now, the Petitioner acknowledges and agrees that words can be interpreted in various different ways, however, how can any competent person take from the sentence above that the character in question had “waved to people”, as the prosecutor had suggested? The Petitioner asserts that this one example shows that the prosecutor’s interpretation of said novel was not reliable at all. Also, there was never any offer of proof made by the prosecutor to back up what she was claiming was in the novel. She was permitted by the trial court to simply stand before the jury and make all types of outrageous and unduly prejudicial claims regarding this novel. [A.R. 1088 line 19- 1090 line 1.] In addition, the Petitioner further states that regardless of the wording of certain passages contained in his novel, the State’s use of the novel was still: (1) outside the scope of direct, (2) irrelevant to the issues in dispute, and (3) improper impeachment evidence which centered on improperly attacking the Petitioner’s character.

The Respondent notes that the court did not classify this evidence as impeachment evidence. However, this fact simply shows that the trial court exercised bad-faith in making his ruling

regarding the admissibility of this evidence, because, though the court initially said that this evidence was not impeachment evidence (A.R. 1081, lines 19-24), just before this exchange, he said that the novel could be used to “go to” the credibility of the Petitioner. [A.R. 1081, lines 8-10.] And, according to *Black’s Law Dictionary: Ninth Edition (2009)*, the definition of *impeachment* is: the act of discrediting a witness; and the definition of *credibility* is: the quality that makes something (as a witness or some evidence) worthy of belief; therefore, to introduce something in order to attack or “go to” the credibility of a witness is the very legal definition of impeachment.

The Respondent goes on to assert in its brief that the court “conducted analysis related to relevancy and to prejudicial effect under Rules 402 and 403 of the WVRE”, however, the Respondent fails to provide appendix record references to support this claim of a supposed analysis performed. The Petitioner contends, in fact, that no analysis was done. [A.R. 1085, lines 13-18.]

Most notably, the Respondent never responds to the very important legal point and argument in the Petitioner’s original brief which cites Rule 608(b) of the WVRE; which provides that: specific instances of conduct of a witness—(in this case the writing of a work of fiction that contains acts of violence)—for the purpose of attacking or supporting the witnesses credibility...may not be proved by extrinsic evidence. Extrinsic evidence being, among other things, some documentary or recorded form of the evidence (i.e.: a novel). The use of the Petitioner’s novel was the clear use of extrinsic evidence for the purpose of attacking the credibility of the Petitioner (A.R. 1081, lines 8-9), which is expressly prohibited under Rule 608(b) of the WVRE.

**III. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER’S MOTION FOR A NEW TRIAL AS THE STATE IMPROPERLY USED PETITIONER’S POST ARREST/PRE-TRIAL SILENCE TO IMPEACH PETITIONER.**

The Respondent asserts that the State properly questioned and impeached the Petitioner's **pre-arrest** silence. In fact, in an effort to apparently mislead this Court, the Respondent, in listing the Petitioner's Assignments of Errors at the start of its brief, listed this assigned error as "WHETHER THE COURT COMMITTED REVERSIBLE ERROR...UPON THE MENTIONING OF THE PETITIONER'S **PRE-ARREST SILENCE**?" Being that the Petitioner's Assignment of Error III was specifically and emphatically in regards to the State's numerous and improper attacking of the Petitioner's **post-arrest/pre-trial** silence, and since the Petitioner never once references the State's apparently legitimate attack on his **pre-arrest** silence, the Petitioner will deem that the State failed to respond to this particular assignment of error regarding **post-arrest/pre-trial** silence, and, pursuant to WV Revised Rules of Appellate Procedure, Rule 10(d), will assume that the Respondent agrees with the Petitioner's view on this issue, and will respectfully request that this Court assume the same.

To satisfy any possible curiosity of the Court, however, the Petitioner will cite the appendix record and the many instances where the State intentionally referenced the Petitioner's **post-arrest/pre-trial** silence. [(1) A.R. 1094, lines 17-23; (2) A.R. 1097, lines 13-15; (3) A.R. 1318, lines 12-17; (4) A.R. 1331, lines 9-11; (5) A.R. 1331, lines 22-24; (6) A.R. 1332, lines 6-7; (7) A.R. 1341, lines 23-24; (8) A.R. 1342, lines 1-2; (9) A.R. 1384, lines 5-8; and (10) A.R. 1385, lines 10-14.] The Petitioner asserts that every time the prosecutor said, "[the Petitioner] had two years to study the evidence", she was knowingly and unlawfully attacking the Petitioner's **post-arrest/pre-trial** silence. Every time the prosecutor said, "[the Petitioner] waited to get on the stand to concoct his story", she was knowingly and unlawfully attacking the Petitioner's **post-arrest/pre-trial** silence.

**IV. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL AFTER TRIAL COURT REFUSED TO GIVE A JURY INSTRUCTION AS PROFFERED**

**BY DEFENDANT PRIOR TO THE CASE BEING SUBMITTED TO THE JURY.**

“In the State of West Virginia a criminal Defendant is entitled to an instruction on theory of his defense if he has offered a basis in evidence for the instruction, and the instruction has support in law. Thus, an instruction offered by a Defendant should be given if the instruction: (1) is substantively correct, (2) is not covered substantially in the charge actually delivered to the jury, and (3) involves an important issue in the trial so that the trial court’s failure to give the instruction seriously impairs the Petitioner’s ability to effectively present a defense. State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996).

The Respondent asserts that the instruction proffered by the Petitioner was from a point of law later overruled by State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995). Therefore, the Petitioner’s proffered instruction was no longer a correct statement of law; thus, the trial court made the proper finding in refusing to give this instruction offered by the Petitioner. The point of law proffered by the Petitioner in whole was:

“Proof of opportunity of the accused to commit a crime is not sufficient to establish guilt; the evidence must exclude all reasonable opportunity by others to have committed it.”State v. Dobbs, 163 W.Va. 630, 259 S.E.2d 829 (1979).

The Petitioner contends that: **only** the *standard of review for the sufficiency of evidence in appealed cases* had changed with the ruling of the *Guthrie* court. The law stated in the *Dobbs* court, however, was not a *standard of review* law that fell under the *Guthrie* ruling. The law expressed in State v. Dobbs, supra. was simply the stating of a particular facet of the overriding principle of reasonable doubt and the burden that the State bears in laboring to present evidence that proves guilt *beyond* a reasonable doubt. To instruct a jury, pre-conviction, that it is the duty and burden of the State to prove that others *did not* commit a particular crime, when competent evidence has been presented at trial that could reasonably lead them to such a conclusion, in no way increases the burden of the State. It simply *clarifies* the burden of the State; which is the very reason for

instructions in the first place. On the other hand, to not give this instruction inherently and improperly shifts the burden onto the Defendant to prove that others *did* commit the crime rather than to leave the burden where it belongs, with the State, to prove that others *did not*. This very sentiment was addressed head on in State v. Kerns, 47 W.Va. 266, 34 S.E. 734 (1899). In that case, Defendant Kerns had been tried for the murder of his lover who was pregnant. The State contended that Kerns had murdered the woman. There was competent evidence presented throughout the trial, however, that the victim may have very well committed suicide. This case was a circumstantial evidence case in which the only surviving witness of the shooting was Defendant Kerns. But the *Kerns* Court ruling regarding a proffered jury instruction refused by the trial court didn't turn on the circumstantial nature of the case, but instead turned on the fact that under the standard of proof beyond a reasonable doubt and under the facts and circumstances alluded to during the trial, Defendant Kern's proffered instruction was necessary in order to keep the burden from unfairly shifting to the defendant, and to properly instruct the jury that the matter or possibility of suicide must be thoroughly considered and ruled out by them in order to lawfully find the defendant guilty under the standard of proof beyond a reasonable doubt.

So too in the present case. The matter or real possibility of others having committed this crime should've been placed prominently before the jury in order to have ensured that thorough consideration was given to that very real possibility. To instruct the jury of anything less than that unfairly shifted the burden onto the Petitioner, which is unconstitutional. As such, the court abused its discretion in refusing to give the Petitioner's proffered instruction. State v. Hinkle, supra.

V. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL AS THE STATE KNOWINGLY ALLOWED JOSEPH MEDINA TO PRESENT FALSE AND PERJURED TESTIMONY.

The Respondent asserts that the Petitioner has presented no conclusive proof to back up his assertion that Medina presented false and perjured testimony during his trial. The Respondent then goes on to list and argue against the Petitioner's various points made on this issue, one by one, in order to show that, standing alone, no sufficient standard of proof can be presented to demonstrate perjured/false testimony. However, when dealing with perjury it is almost impossible to fully and conclusively prove perjury beyond all possible doubt—with the obvious exception of when one admits to his perjury. As with any claim whose crux rests on circumstantial evidence, it is not the individual and separate facts and circumstances, standing alone, that conclusively proves the matter asserted, but the collective piling on of those circumstances which, at a given point, unerringly proves a given conclusion beyond a reasonable doubt. With that sentiment in mind, take into account the facts and circumstances, collectively, that prove *beyond a reasonable doubt* that Medina did in fact present false and perjured testimony at the Petitioner's trial.

(1) Medina initially spoke to the authorities about this crime two years before the Petitioner's trial, and though he clearly and repeatedly attempts to implicate the Petitioner in this crime, he never once mentions or alludes to an alleged confession made by the Petitioner.

(2) Two months before the start of the Petitioner's trial, Medina's plea deal for a separate offense was rejected by a judge, thus placing Medina in jeopardy of going to prison for upwards of 20 years. Immediately afterward, Medina contacts the State to now assert that the Petitioner had confessed to him. The timing and circumstances of this is new claim is powerful circumstantial evidence that shows that Medina concocted this claim for self-serving reasons.

(3) Medina was absolutely adamant in his statement to authorities on 5/9/2012 that he had heard the Petitioner's supposed confession over the phone of his girlfriend, Anica Small. Therefore,

proving that Ms. Small's phone was inoperable at the time in question is powerful circumstantial evidence that not only was this particular claim by Medina—that he'd heard this supposed confession over *Ms. Small's phone*—wholly impossible, but that the supposed confession, itself, was a lie, too.

(4) The Petitioner had called the authorities on Medina 3 days before the commission of this crime, as Medina had threatened violence against the Petitioner and the other victims of this crime. There is absolutely no conceivable argument that can be made to then make sense of the claim that the Petitioner would then confess to Medina the murders of the very people Petitioner had reported Medina as having threatened. This is probably the strongest piece of circumstantial evidence added to the tower of proof elevating to heights beyond a reasonable doubt that this supposed confession was indeed false testimony invented by Medina to ensnare the Petitioner for this crime.

(5) Medina's testimony that "they" killed this child and could kill his child as well (A.R. 852), especially considering that the Petitioner had been in jail for the two years since the crime, was a glaring inadvertent admission that shows that Medina, at the very least, has other info he is not revealing regarding this crime.

(6) And lastly, from the very moment Medina took the stand he was contradicting himself and fumbling over his story—one minute claiming to have never spoken to the police, the next minute claiming to have probably spoken to the police, the very next minute recalling that he indeed did talk to the police, and suddenly recalling vividly that he hadn't told the officers about a confession at that time because of some odd reason or another. [A.R. 798-830.] Medina was then cross-examined and impeached on every primary type of impeachment evidence imaginable. [A.R. 830-872.]

With all of the above-described circumstantial evidence in mind, it gets to a point where the evidence of Medina's false testimony becomes absolutely overwhelming and more and more

undeniable, and the claims that the State didn't know he was lying become less and less believable. Furthermore, the Respondent conveniently fails to even acknowledge or argue against the claim of perjured testimony that Petitioner demonstrated beyond *all possible* doubt—as Medina had claimed on the witness stand that he didn't speak to the police about the alleged crimes of the Petitioner at his first interview with them because he didn't have a lawyer at the time. [A.R. 825, lines 22-24.] Which, after examining his transcribed initial interview is proven to be wholly untrue, as he repeatedly attempted to implicate the Petitioner in this crime, and did so without a lawyer present. And since the Respondent refused to address this particular argument, Petitioner, pursuant to Rule 10(d) of the WV Revised Rules of Appellate Procedure, will respectfully request that this Court assume that the Respondent agrees with the Petitioner regarding this particular argument.

**VI. PETITIONER'S CONVICTION SHOULD BE REVERSED AS HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN PROSECUTION MADE IMPROPER REMARKS AND ENGAGED IN PROSECUTORIAL MISCONDUCT.**

Prior to addressing this allegation, the Respondent objected to its appearance in the Petitioner's brief, as Petitioner himself drafted this particular allegation.

The Petitioner asserts that he has every legal right to fully, actively, and enthusiastically participate in the appellate process questioning the legality of his conviction. The Petitioner further asserts that each allegation made against the prosecutor is thoroughly supported by his reading of the appendix record and his interpretation of WV law. It is now the duty of the Appellate Court to determine if his allegations have any merit. The Petitioner respectfully requests that this Court overrule the Respondent's bad-faith objection.

Due to page limitations, the Petitioner will allow his argument made in his original brief to stand *as is* in support of his allegations of prosecutorial misconduct.

**VII. THE PETITIONER'S CONVICTION SHOULD BE REVERSED AS HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN TRIAL COURT MADE IMPROPER REMARKS AND ENGAGED IN JUDICIAL MISCONDUCT.**

Prior to addressing this allegation, the Respondent objected to its appearance in the Petitioner's brief, as the Petitioner himself drafted this particular allegation. As to the Petitioner's response, he respectfully requests that this Court cite section VI above and apply the same argument to overrule this objection as well.

After objecting, the Respondent then went on to assert that there is no evidence that the judge abandoned his role of impartiality and neutrality in the handling of this case. The Respondent further suggests that it was the Petitioner's fault that the trial court interrupted his testimony and attacked him for not answering the prosecutor's questions specifically enough. [A.R. 1173-1174.] However, after careful consideration of the record it is clear that the judge was all too eager to look for any reason to insert his opinion of the Petitioner's veracity into the trial and to do so before the jury. It is clear that prior to the exchange of the Petitioner and the court that the Petitioner had not clearly understood the question asked by the prosecutor. [A.R. 1173, lines 20-21.] So, in an attempt to understand the question, the Petitioner said, "What? Did I run through fire is what you're asking?" [A.R. 1173, lines 22-23.] Which was a very reasonable interpretation of such a badly worded question. At which, the court very brusquely said, "No. She asked you the floor underneath was not on fire. Answer the question." [A.R. 1174.] Which was—never mind the fact that he'd changed the wording of the question entirely—an attempt, in effect, to force the Petitioner to answer a question that he didn't understand. Putting the Petitioner in an untenable position, the Petitioner was then forced to enter into a discourse with the judge. [A.R. 1174.] Which led to the judge further berating him in front of the jury in a very physically and tonally hostile manner. It is clear that the Petitioner

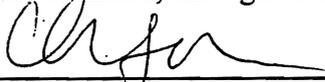
had done nothing to deserve this scolding, and even if he had done something to deserve it, it was totally improper for the court to do so in front of the jury. The Petitioner's testimony was much too critical for an indiscretion of this nature on the part of the court.

Due to page limitations, the Petitioner will allow the remainder of his arguments made in his original brief to stand *as is* in support of his allegations of judicial misconduct. The only other addition that the Petitioner would add is: there seems to be some confusion as to the appendix record cited by Petitioner in his first allegation against the judge in which the judge expressed "He's just as guilty," while referring to the Petitioner in open court. This extremely biased statement, amongst others, was made during a motions hearing which was held on July 9, 2012, and is in T.T. Vol. III, page 17, lines 17-24. Further examples of the judge's bias during that hearing can be observed by examining pages 11-42 in their entirety.

### CONCLUSION

For the foregoing reasons, and as stated in the Petitioner's original brief, the Petitioner respectfully requests that this Petition be granted; that the judgement of the Circuit Court of Berkeley County be reversed and that the Petitioner be immediately released from incarceration. And because of the facts and circumstances of this case and the intentional efforts of both the trial court and prosecutor to willfully and deliberately prejudice the Petitioner in order to avoid his lawful acquittal they feared imminent absent their misconduct, the Petitioner contends that to retry him would thoroughly violate each and every principle espoused in the Fifth Amendment's Double Jeopardy clause. Therefore, the Petitioner respectfully requests that this Court order that the State be precluded from further trying.

Respectfully Drafted by Antonio Prophet  
And submitted, through counsel,



Christopher J. Prezioso, Esq. #9384

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
STATE OF WEST VIRGINIA,  
Petitioner below/Petitioner,**

**Vs.**

**No. 12-1389**

**ANTONIO PROPHET, Warden,  
Respondent below/Respondent**

**CERTIFICATE OF SERVICE**

I, Christopher J. Prezioso, counsel for the Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing Reply of Petitioner upon the following persons, by U.S. Mail on this 3rd day of July, 2013:

Cheryl K. Saville  
Assistant Prosecuting Attorney for Berkeley County, West Virginia  
380 West South Street, Suite 1100  
Martinsburg, West Virginia, 25401



Christopher J. Prezioso, Esq. #9384  
Luttrell & Prezioso, PLLC  
116 W. Washington Street, Ste. 2E  
Charles Town, West Virginia 25414  
**prezioso@luttrellprezioso.com**  
(304) 728-3040