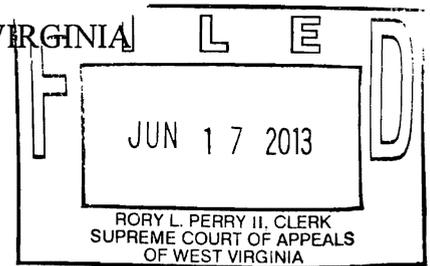


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

ANTONIO PROPHET,

Defendant Below, Petitioner.

DOCKET NO.: 12-1389
(Berkeley County Case No.: 11-F-67)

RESPONDENT STATE OF WEST VIRGINIA'S BRIEF

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TABLE OF CONTENTS

	Page
Petitioner’s Assignments of Error.....	1
Statement of the Case.....	1
Summary of Argument.....	2
Statement Regarding Oral Argument and Decision.....	3
Argument, Assignment I.....	3
Argument, Assignment II.....	12
Argument, Assignment III.....	16
Argument, Assignment IV.....	23
Argument, Assignment V.....	24
Argument, Assignment VI.....	29
Argument, Assignment VII.....	33
Conclusion.....	36
Certificate of Service.....	37

TABLE OF AUTHORITIES

Page

West Virginia Rules of Evidence

Rule 402.....14, 15

Rule 403.....14, 15

Rule 611.....12

Cases

Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).....19, 22

Brown v. United States, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958).....18

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).....17, 19

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....23

Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).....17, 18, 19

Matter of Investigation of W. Va. State Police Crime Lab., Serology Div., 190 W.Va. 321,
438 S.E.2d 501 (1993).....25

McDougal v. McCammon, 193 W.Va. 229, 455 S.E.2d 788 (1995).....16

State v. Blake, 197 W.Va. 700, 478 S.E.2d 550 (1996).....18

State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977).....16-17

State v. Bradshaw, 193 W.Va. 519, 457 S.E.2d 456, *cert. denied* 516 U.S. 872,
116 S.Ct. 196, 133 L.Ed.2d 131 (1995).....12-13, 15, 16

State v. Brown, 210 W.Va. 14, 552 S.E.2d 390 (2001).....28

State v. Calloway, 207 W.Va. 43, 528 S.E.2d 490 (1999).....13, 15

State v. Dobbs, 163 W.Va. 630, 259 S.E.2d 829 (1979).....23

State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995).....3, 12, 16, 23-24

State v. Harris, 216 W.Va. 237, 605 S.E.2d 809 (2004)(*per curiam*).....13, 15

<u>State v. Hughes</u> , 197 W. Va. 518, 476 S.E.2d 189 (1996).....	3, 12
<u>State v. Marple</u> , 197 W. Va. 47, 475 S.E.2d 47 (1996).....	16, 20, 22
<u>State v. Miller</u> , 204 W. Va. 374, 513 S.E.2d 147 (1998).....	3, 12
<u>State v. Oxier</u> , 175 W.Va. 760, 338 S.E.2d 360 (1985).....	17
<u>State v. Ramsey</u> , 209 W.Va. 248, 545 S.E.2d 853 (2000).....	17-18
<u>State v. Rivera</u> , 210 Ariz. 188, 109 P.3d 83, 89 (2005).....	28
<u>State v. Sugg</u> , 193 W. Va. 388, 456 S.E.2d 469 (1995).....	29, 32-33
<u>State v. Thompson</u> , 220 W. Va. 398, 647 S.E.2d 834 (2007).....	33, 36
<u>State v. Walker</u> , 207 W. Va. 415, 533 S.E.2d 48 (2000).....	18
<u>State v. Williams</u> , 198 W. Va. 274, 480 S.E.2d 162 (1996).....	3, 12
<u>State ex rel. Boso v. Hedrick</u> , 182 W.Va. 701, 391 S.E.2d 614 (1990).....	17
<u>State ex rel. Franklin v. McBride</u> , 226 W. Va. 375, 701 S.E.2d 97 (2009).....	24, 25, 28, 29
<u>United States v. Agurs</u> , 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).....	25
<u>United States v. Bagley</u> , 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).....	25
<u>United States v. Jackson</u> , 67 F.3d 1359, 1366 (8th Cir.1995).....	16
<u>United States v. Quintana</u> , 70 F.3d 1167, 1170 (10th Cir.1995).....	16

PETITIONER'S ASSIGNMENT OF ERROR

- I. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY DENYING THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AGAIN AT THE CONCLUSION OF ALL EVIDENCE?
- II. WHETHER THE COURT COMMITTED REVERSIBLE ERROR BY DENYING THE PETITIONER'S MOTION FOR A NEW TRIAL BASED UPON THE MENTIONING OF THE PETITIONER'S NOVEL?
- III. WHETHER THE COURT COMMITTED REVERSIBLE ERROR BY DENYING THE PETITIONER'S MOTION FOR A NEW TRIAL BASED UPON THE MENTIONING OF THE PETITIONER'S PRE-ARREST SILENCE?
- IV. WHETHER THE COURT COMMITTED REVERSIBLE ERROR BY DENYING THE PETITIONER'S MOTION FOR A NEW TRIAL BASED UPON THE COURT'S REFUSAL TO GIVE A JURY INSTRUCTION PROPOSED BY THE PETITIONER?
- V. WHETHER THE COURT COMMITTED REVERSIBLE ERROR BY DENYING THE PETITIONER'S MOTION FOR A NEW TRIAL BASED UPON THE TESTIMONY OF WITNESS JOSEPH MEDINA?
- VI. WHETHER OR NOT THE PETITIONER'S CONVICTION SHOULD BE REVERSED BASED UPON ALLEGED PROSECUTORIAL MISCONDUCT?
- VII. WHETHER OR NOT THE PETITIONER'S CONVICTION SHOULD BE REVERSED BASED UPON ALLEGED JUDICIAL MISCONDUCT?

STATEMENT OF THE CASE

In the early morning hours of June 6, 2010, the Petitioner brutally murdered his girlfriend, A D , and her three-year old son, A . The Petitioner set the apartment on fire with the bodies of A and A still inside and carried his girlfriend's seven-week old son, D , to her parents' home, leaving him unattended on the porch of the residence. The Petitioner then fled the jurisdiction and, using a fake name, attempted to make his way to Georgia. The Petitioner was apprehended in North Carolina several days after the murders.

The Petitioner was indicted by a Berkeley County Grand Jury in February of 2011 for two (2) felony counts of murder in the first degree, and one (1) felony count of arson in the first degree. [Appendix Record Volume I, 1-2, hereinafter referred to as ARI.]

On July 16, 2012, following a trial by jury, the Petitioner was convicted of all charges: murder in the first degree for killing A , murder in the first degree for killing A , and arson in the first degree for setting fire to the apartment. [ARI - Appendix Record Volume II, hereinafter referred to as ARII, 177-1398; 1511-1512.] The jury did not recommend mercy. [Id.]

On September 10, 2012, following the preparation of a pre-sentence investigation report and upon consideration of all matters presented, the Petitioner was sentenced to the statutory sentences of life imprisonment without the possibility of parole for each of the two convictions of murder in the first degree. He was further sentenced to the statutory sentence of twenty (20) years of incarceration for the conviction of arson in the first degree. The court ordered the sentences to run consecutively. The Petitioner was also ordered to pay restitution in the amount of \$11,220.61. [ARI, 1399-1442; 1525-1528.]

SUMMARY OF ARGUMENT

The evidence presented at trial was wholly sufficient to convict the Petitioner of the murders of A and A as well as arson for setting fire to the apartment. Furthermore, the court properly used its discretion in allowing the State to cross-examine the Petitioner concerning his novel and concerning his pre-arrest silence considering it was clear that the Petitioner fled the scene of the crimes and interacted with numerous individuals in his life following the crimes but never told any of them that he, A and the children had all been victims of outside attackers who had taken the lives of A and A as he claimed on the stand. Additionally, the court properly refused to give the jury instruction proposed by the Petitioner under State v. Dobbs, as the law contained in this instruction was overruled by State v. Guthrie. Next, the State did not knowingly offer perjured testimony, and the court was correct

in allowing the jury to determine the credibility of all of the witnesses' testimony, including that of Joseph Medina. Lastly, there was no violation of the Petitioner's rights based upon alleged prosecutorial or judicial misconduct.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State avers that none of the issues presented are of first impression to the Court, there existing decided authority as precedent to the dispositive issues; that the facts and legal arguments are adequately presented in the briefs and record on appeal; and that the decisional process would not be significantly aided by oral argument. As such, oral argument would be unnecessary in this matter pursuant to Rule 18. If, however, this Court were to find oral argument necessary, the State believes argument pursuant to Rule 19 would be appropriate.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE-IN-CHIEF AND AGAIN AT THE CLOSE OF ALL EVIDENCE.

A. Standard of Review

“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. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.’ Syllabus Point 3, State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995).”

Syl. Pt. 1, State v. Miller, 204 W. Va. 374, 513 S.E.2d 147 (1998); Syl. Pt. 3, State v. Williams, 198 W. Va. 274, 480 S.E.2d 162 (1996); Syl. Pt. 2, State v. Hughes, 197 W. Va. 518, 476 S.E.2d

189 (1996).

B. Discussion

There was more than sufficient evidenced introduced from which the jury could have, and did, find the Petitioner guilty beyond a reasonable doubt.

Patrick Barker from the State Fire Marshall's Office testified that in his expert opinion the fire at A D 's apartment was an incendiary fire which originated in the middle of the living room area on the floor. He also testified that there was a fire extinguisher in good, working condition which had not been used or deployed during the fire. [ARI, 404-455.]

S D , II testified that on the evening before the fire, he had gone to pick up the Petitioner and brought the Petitioner to his home. He further testified that the Petitioner, A , and the two children left the house to go to the apartment at approximately 8:30pm, and that he watched to see them enter safely inside. He also testified that he looked out the window at approximately midnight that night and all was quiet on the property as far as he could see.

[ARI, 462-518.] S D , III testified that he left the family's main house, where he resides with his parents, to take a bag to A that she had forgotten when she left to go to the apartment just a short time before. He testified that he walked the bag down to the apartment at approximately 9pm that evening, saw that everything was fine with the Petitioner, A , and the children, and then he drove his mother's car, which A had driven from the house to the apartment, back to the house. [ARI, 518-523.] E K D testified that the Petitioner had come to their home that evening and went to the apartment with A and the children to spend the night. She testified that she got up twice during the night and went down to the kitchen. She stated that both times, just out of habit, she looked out the door down to the apartment and neither time saw anything out of the ordinary. She testified that at approximately 1am and again at 3am that all was quiet, dark, and peaceful outside. [ARI, 523-548.]

Nabioa Haikal, the medical examiner who performed the autopsies on the bodies of A and A, testified that, as an expert in forensic pathology, both were deceased before the fire was started. Dr. Haikal stated that A died from exsanguination following her throat being slit, which was conclusively homicide. Dr. Haikal further testified that A's body was so damaged by the fire that no definitive cause of death could be determined. [ARI, 549-558.]

Lt. Gary Harmison testified as to the course of his investigation and the evidence that he was able to collect, such as the phone records of several of the witnesses, several pictures of the scene, the clothing worn by D W who was found on the porch of the D's residence, a video from the ROCS gas station and convenience store on the corner of Wilson St. and Winchester Ave. the morning after the crimes were committed, and partial medical records of the Petitioner from North Carolina under the fake name of James Carter. [ARI, 558-630.]

S C testified that she received a call from the Petitioner at around 4:30am the morning of the incident. When she spoke to him, the Petitioner asked her to come and get him from the southern part of the county. She said that she could hear that the Petitioner was walking, and when she asked he said that he had been at a party and the people he was there with weren't "acting right" so he left. She testified that she sent two of her friends, B

M and C R, to pick up the Petitioner. [ARI, 647-657.]

B M testified that he and C D went to pick up the Petitioner. He stated that the Petitioner had told them that he was near Vixens but they found him on Interstate 81 behind Wade's Auto Auctions near the State line. He further testified that when they arrived back at S's house in Martinsburg, the Petitioner got out of the car and walked away, stating that he would be right back. He said they never saw the Petitioner again after that. [ARI, 630-641.] C D testified that he went with B

M to pick up the Petitioner. He said that they finally located him on I-81, and as soon as they arrived back at S 's residence in Martinsburg, the Petitioner got out of the car and just walked away. [ARI, 642-647.]

Heather Aronhalt testified that she was working at the ROCS gas station and convenience store on the corner of Wilson Street and Winchester Avenue in Martinsburg on the morning following the murders. She stated that the Petitioner came into the store at approximately 7am "disturbed" and "sweating." She testified that there was a cut and blood on his neck. She stated that he seemed very paranoid with every passing car. She further testified that she noticed little spots of blood on his shirt. She said that the Petitioner attempted to purchase a beer, but he could not since it was Sunday. She testified that she called the Sheriff's Department as soon as she saw him in the newspaper and was sure it had been him in the store because he had come into the store on several occasions prior. The video surveillance footage from the ROCS store was introduced into evidence and the jury was able to view the same. [ARI, 657-667.]

John Willingham testified that a woman contacted him and arranged for him to drive an individual from Berkeley County, West Virginia into Virginia. He stated that he then picked up the individual, the Petitioner, in the area of Paynes Ford Road in Martinsburg, made a rest stop at a Sheetz on Route 50 in Virginia, and then dropped the Petitioner off in Manassas, Virginia. Mr. Willingham further testified that there was no conversation with the Petitioner, as the Petitioner just stated that he was tired and laid down in the back seat for the entirety of the trip. [ARI, 667-677.]

Katie Draughon testified that she had been in a 6 ½ - year relationship with the Petitioner and that the two share a son. She stated that the Petitioner called her on Sunday and said that he was stranded in West Virginia and needed a ride. She indicated that she told him that she could

not help him. She further testified that he called her again late Sunday into early Monday and again asked her for help, stating that he had exhausted all of his options. Ms. Draughon stated that she then started calling cab companies and was finally able to get in contact with a gentleman, John Willingham, who agreed to drive the Petitioner from Martinsburg to Winchester for \$200. She said that instead of Mr. Willingham taking the Petitioner to Winchester, Mr. Willingham drove the Petitioner to Manassas at the Petitioner's request. Ms. Draughon stated that the Petitioner called her upon being dropped off by Mr. Willingham and wanted to see his son and get some things of his that he had left at her house. She testified that she did not want the Petitioner at her home because of her new significant other, but that she agreed to see the Petitioner. She stated that she picked the Petitioner up at a bar in Manassas and brought him some clothes, an old cell phone, and other items that he had requested. She also ended up providing the Petitioner with some ointment and gauze for cuts that he had as well as approximately \$20 in pocket money. She testified that she dropped the Petitioner off at the train station and that she ended up sending Mr. Willingham \$250 for the cab ride since he brought the Petitioner all the way to Manassas. [ARI, 677-692.]

Johnny Tucker, a radio frequency engineer for Sprint Nextel, testified regarding the cell phone locations of both the Petitioner and Joseph Medina. He stated that during the hours immediately preceding the crimes that Joseph Medina was in the northern part of Berkeley County and the Petitioner was in the southern part of Berkeley County. He testified as to the location of the cell phone towers that each of their phones was in communication with around the time of the crimes. [ARI, 703-732.]

Jennifer Howard and Angela Gill testified as experts in the field of forensic analysis concerning their respective roles in the testing of the shirt that D W was found wearing

when he was discovered on the porch of the D home the morning after the murders.

Testing concluded that the small spots of blood located on the baby's shirt was that of the Petitioner. [ARI, 738-758.]

A S testified that she was with Joseph Medina at the Rodeway Inn in Martinsburg the entire night during the night of the murders. She stated that she read a text message that the Petitioner sent to Mr. Medina's phone in the early morning hours that stated he was "in a situation" and needed Mr. Medina's help. She further testified that she and Mr. Medina fled to Hagerstown, Maryland, after the police came looking to question them about the Petitioner, and they ultimately ended up in the Fredericksburg, Virginia area to stay with some of Mr. Medina's friends. [ARI, 767-793.] Joseph Medina testified that he has known the Petitioner since he was in third grade and that they were friends. Mr. Medina stated that he was with A S, P W, and C F at the Rodeway Inn on the evening leading into and then during the time when crimes that were committed. He stated that A woke him in the early morning hours to tell him that the Petitioner was texting him, but he ignored the messages. When he read the message A had told him about, it said that the Petitioner was "in a situation" and wanted Mr. Medina to call him. Mr. Medina stated that he did ultimately talk to the Petitioner on Sunday at which time during their conversation, Mr. Medina asked the Petitioner what happened. He said that the Petitioner replied that A had been going through his pockets and "stuff happened." [ARI, 797-879.]

C F testified that she was at the Rodeway Inn with A S, P W, and Joseph Medina for a while on the evening before the murders. [ARI, 693-702.] P W testified that he dropped off A S, C F, and Joseph Medina on the afternoon/evening before the murders, and he left the hotel room at around midnight. [ARI, 880-

896.] C D testified that Joseph Medina had asked her to come and hang out with him at the Rodeway Inn in Martinsburg on the evening before the murders but she didn't go. She also testified that she did not believe that her break-up with Joseph Medina had anything at all to do with this case. [ARI, 900-916.] Sgt. Dan Steerman testified that he had gone to the Rodeway Inn and confirmed that Joseph Medina was a registered guest at that hotel June 4- June 6. [ARI, 758-767.]

A W testified that A called him at approximately 1:10am the morning of the murders asking if he could get in contact with A W, his brother and the father of her children. A stated that he tried to call A, but his phone was not in service, so he called A back to tell her so. [ARI, 916-924.] A W testified that he had been in a 5-year relationship with A, and they had two children, A and D. He stated that they had just broken up in April, and the separation had been difficult for both of them, but they each had moved on to new relationships and maintained a good relationship for their children. He testified that he had spoken to A a bit off and on the afternoon of June 5th after he had gotten off work in Hagerstown, Maryland, as they were making arrangements for A to come and get A later that weekend. He said that since D had not been home from the hospital for very long, the plan was for him to stay with A. He stated that she spent the night at his girlfriend T D's house and that his phone went dead at some point during the night. [ARI, 932-943.] T D testified that she was the girlfriend of A W. She stated that she picked A up from work in Hagerstown and, after a visit his A's grandmother, they spent the night at her house. She stated that she received a call at approximately 7am the next morning from A's aunt who informed them that there was an emergency and the kids had been in a fire. She testified that they stopped to pick up A's aunt and drove to City

Hospital thinking that they would be there. When City Hospital had no record of them, they called A 's Father, S D , who told them to come to the house. [ARI, 925-932.]

When the Petitioner took the stand, he acknowledged that S De had picked him up and brought him to spend the night with A and the kids. He confirmed the interactions that he had that had been testified to by S D and E D that evening. The Petitioner admitted that he had anonymously reported that someone else made threats to harm A and her children days before the murder, and the only evidence of those threats was the word of the Petitioner himself. After giving his version of events, the Petitioner was unable to explain why the neither D , who actually shared a driveway with the apartment, nor any of the neighbors heard the vehicles, commotion or gunshot that he had alleged. The Petitioner acknowledged that he had been texting with S

C that evening, asking her if she wanted some company after she sent him a message about just having gotten out of the shower; furthermore, the Petitioner acknowledged that A used his phone later that evening and would have been able to view those messages. The Petitioner stated that, preceding the attack he alleged, he and A were sitting right outside the apartment door but also stated that they did not have enough time to get inside while the attackers were running up stairs, traversing a landing, and running up more stairs. The Petitioner stated he was in what he believed to be a fistfight with one attacker, who turned out to be holding a knife, but the Petitioner had no cuts or wounds on his face or torso. The Petitioner stated that, when the men came and threatened them wanting money for a debt that A owed, the Petitioner gave them the cash he had, but then the Petitioner went on to describe attempting to purchase beer, paying for cab rides, and buying a bus ticket to Georgia following the incident.

The Petitioner said he used mace on one of the attackers but states inexplicably that he didn't do so until after A and A had been killed and that he didn't get any mace on himself when he did deploy it. The Petitioner stated that a stolen laptop computer was the cause of the crime, and yet he had the opportunity to recover it, but he inexplicably did not. The Petitioner was unable to explain why neither S D or El D saw anything out of the ordinary—not so much as the motion sensor porch light outside the door of the apartment on—when they looked out the windows of the house during the course of the night. The Petitioner's testimony about where the fire was coming from was partially inconsistent with that of the Fire Marshall's testimony, and the Petitioner's testimony about what was on fire when he went back into the apartment was inconsistent throughout the testimony of the Petitioner. The Petitioner's testimony about the location of D is inconsistent in that he describes D being in the bassinette throughout his testimony up until he says he came back into the apartment after the fire was started but did not explain how D could have then ended up on the mattress if A and A were already deceased. When asked if there were any fences, stones or rocks he came upon when he was walking through fields to get to the Interstate where he was picked up by Mr. M and Mr. R, the Petitioner answered "I don't know." The Petitioner could not explain why, if he had been injured so badly when he carried Da from the apartment to the D home, there was not more blood on D's clothing. And, lastly, the Petitioner could not explain why, if he and A and the children were attacked by two unknown individuals and the Petitioner was injured by them so severely, he left D on the porch of the D home and immediately fled instead of calling emergency services, waking the Ds, and reporting to law enforcement what had happened. He could not explain why he told no one he came into contact with—not even the mother of his child—about

the deaths of A and A . He further could not explain why he took such great pains as to use a fake name when he finally did seek medical treatment in North Carolina. [ARII, 955-1218.]

The thing that no one could explain, except perhaps for the State, was why A was killed. The Petitioner testified that A did not appear to know either of the men who allegedly came to the house and attacked them. [ARII, 1156.] The Petitioner stated that A was not crying or yelling. [Id.] The Petitioner did testify, however, that A knew the Petitioner. He had spent time with him and had always called him “A .” [ARII, 1112-1113.] 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. D , being only seven weeks old, could not talk and could not identify the Petitioner.

In sum, there was an over abundance of evidence, drawing all inferences and making all credibility assessments in favor of the State, upon which the jury could have found and did find the Petitioner guilty of the crimes alleged beyond a reasonable doubt. State v. Guthrie, *supra*.

II. THE COURT PROPERLY ALLOWED THE PETITIONER TO BE CROSS EXAMINED CONCERNING THE CONTENTS OF HIS CRIME NOVEL AND ITS SIMILARITIES TO THE CASE AT HAND.

A. Standard of Review

Rule 611(b) of the West Virginia Rules of Evidence states in pertinent part, “a party may be cross-examined on any matter relevant to any issue in the case, including credibility...”

“In applying Rule 611(b) of the West Virginia Rules of Evidence, the circuit court has considerable discretion to determine the proper scope of cross-examination, after weighing such factors as the importance of the evidence to the prosecution's case, the relevance of the conduct to the witness's truthfulness, and the danger of prejudice, confusion, or delay raised by the evidence sought to be adduced.”

State v. Bradshaw, 193 W.Va. 519, 541, 457 S.E.2d 456, 478, *cert. denied* 516 U.S. 872, 116 S.Ct. 196, 133 L.Ed.2d 131 (1995).

“The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syl. Pt. 1, State v. Harris, 216 W.Va. 237, 605 S.E.2d 809 (2004)(per curiam), Syl. Pt. 1, State v. Calloway, 207 W.Va. 43, 528 S.E.2d 490 (1999).

B. Discussion

The Petitioner alleges that the court erred by allowing the State to cross examine the Petitioner regarding a crime novel he had written and published before the murders, which shares some similarities to the murders of A D and her son.

As noted above,

“it is a well settled rule that a defendant who voluntarily offers himself as a witness and testifies in his own behalf subjects himself to legitimate and pertinent cross-examination to test his veracity and credibility. Thus, by deciding to testify in a West Virginia criminal trial, a defendant brings into play the rules designed to implement the truth-finding process, i.e., cross-examination.”

State v. Bradshaw, 193 W.Va. at 541, 457 S.E.2d at 478.

“The common notion that trial courts have almost unlimited discretion to regulate the scope of cross-examination does not apply to a criminal defendant in West Virginia. Rule 611(b)(1) by its very terms encourages wide-open cross-examination when a party is a witness unless the defendant can demonstrate that literal application of the rule would create an unjust situation.”

Id., fn. 30.

In the case at hand, the parties were able to agree that it would be improper for the State to reference or in any way introduce the Petitioner’s crime novel during its opening statement or its case-in-chief. [ARII, 1580.] However, the stipulation included the ability of the State to use

the novel, subject, of course, to the rules of evidence. [Id.] When the Petitioner made the decision to testify and was called to the witness stand, the State sought to question the Petitioner with regard to the similarities existing between his crime novel and the facts of this case, specifically that a character therein commits a murder and sets the crime scene on fire in order to destroy the evidence of his crime.

When the State began to lead the Petitioner in that direction during cross examination, Petitioner's counsel promptly objected and the parties convened a sidebar discussion with the court. [ARII, 1077.] During the sidebar, the court correctly analyzes the evidence as proper cross examination material relating to the Petitioner's credibility as a witness. The court did not allow the book to be admitted into evidence in total, the court did not permit the cover art to be viewed by the jury, nor did the court classify it as impeachment evidence. Based upon the State's proffer of the contents of the novel, the court allowed the State to make inquiries of the Petitioner regarding relevant portions thereof, and found the evidence to be quite relevant and probative if the State could in fact make the parallel it claimed in its proffer. [ARII, 1077-1087.] The court conducted analysis related to relevancy and to prejudicial effect under Rules 402 and 403 of the West Virginia Rules of Evidence. The court allowed the State to inquire but gave the Petitioner opportunity to fully answer and explain any similarities and differences or any mischaracterizations that the Petitioner believed the State made of his novel. The Petitioner in fact stated that he did not interpret or intend certain passages of his novel in the same manner that the prosecutor interpreted them. [ARII, 1088-1089, 1091.] Even the State during closing arguments noted the novel had been written several years prior and absolutely did not mean that the Petitioner had done anything; otherwise, all crime novelists would be arrested for murder. [ARII, 1317.]

In considering the matter again at post-trial motions, the court again asked if there were any legal grounds that the Petitioner could cite to preclude the State's use of the novel during cross examination other than relevancy under Rule 402 and prejudice under Rule 403. Petitioner's counsel continued to argue relevancy and prejudice considering the novel of the Petitioner was entirely a work of fiction and was written years before these crimes. [ARII, 1407-1410.] The court again properly found that, considering the similarities in theme, especially the fact that the Petitioner had written about a murder scene where the evidence of the crime had been destroyed by a fire, the novel was proper material for use in cross-examination. [Id.] The court specifically found that "if someone said this before and then it happens, it's fairly probative for the jury to put in their mind, I think, over the prejudicial value of it." [ARII, 1409.] The court also discussed that the novel being a work of fiction and being written several years ago went simply to the weight that the jury would give that information. [ARII, 1408-1409.] The court fully instructed the jury about the competency of the Petitioner to testify on his own behalf and that the jury should give his testimony the same careful and thorough consideration as given to the evidence of the other witnesses and to weigh his testimony by the same rules as they weigh the evidence of other witnesses. [ARII, 1303.]

As such, the court properly exercised its discretion in allowing the State to cross examine the Petitioner concerning the similarities contained in his book to the crimes at hand, and there was no error or abuse of discretion. State v. Bradshaw, supra.; State v. Harris, supra.; State v. Calloway, supra. Furthermore, the Petitioner has not demonstrated that the State's questioning of him concerning the similarities contained in his novel created an "unjust situation" considering he was given the opportunity to explain and distinguish scenarios contained in his book, he was allowed to argue to the jury concerning the weight that evidence should be given,

and there was ample evidence introduced by the State, even without mention of the novel, to establish his guilt. State v. Bradshaw, *supra*.

III. THE COURT PROPERLY ALLOWED THE STATE TO ASK IF THE PETITIONER TOLD ANYONE THAT HE HAD BEEN THE VICTIM OF A CRIME DURING HIS FLIGHT WHERE HE ADMITTEDLY HAD INTERACTED WITH A NUMBER OF OTHER INDIVIDUALS.

A. Standard of Review

“The evidentiary rulings of a circuit court, including those affecting constitutional rights, are reviewed under an abuse of discretion standard. *See McDougal v. McCammon*, 193 W.Va. 229, 235, 455 S.E.2d 788, 794 (1995) (deference is required given how quickly evidentiary rulings must be made, and trial courts must be able to make these decisions without fear of reversal); United States v. Jackson, 67 F.3d 1359, 1366 (8th Cir.1995); United States v. Quintana, 70 F.3d 1167, 1170 (10th Cir.1995). Even if we find the circuit court abused its discretion, the error is not reversible unless the defendant was prejudiced. *See State v. Guthrie*, 194 W.Va. 657, 684, 461 S.E.2d 163, 190 (1995).”

State v. Marple, 197 W. Va. 47, 51, 475 S.E.2d 47, 51 (1996).

B. Discussion

The Petitioner asserts that the State improperly questioned and attempted to impeach the testimony of the Petitioner with his post-arrest silence. However, that is not the case. The State properly questioned and impeached the Petitioner using his **pre-arrest** silence. In his brief, the Petitioner examines his due process rights related to his Constitutional right against self incrimination or his right to remain silent. The State, obviously, does not dispute that right; however, there is a litany of caselaw distinguishing between pre-arrest and post-arrest silence.

In State v. Boyd, the West Virginia Supreme Court held:

“Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury.”

Syl. Pt. 1, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977). This Court's holding in Boyd was based on the United States Supreme Court case of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). The rationale behind those decisions was twofold: first, the giving of Miranda warnings by law enforcement informing the Defendant of his right to remain silent may actually serve to cause his silence; and, secondly, the Defendant is lead to believe by being informed of his right to remain silent that if he chooses to do so, there will be no unfavorable inference drawn from his assertion of that right. The Court found that it did not comport with due process to permit the prosecution during the trial to call attention to a Defendant's silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. See Doyle v. Ohio, 426 U.S. at 619, 96 S.Ct. at 2245.

Both the United States Supreme Court and this Honorable Court have gone on to hold, however, that this rule does not apply when the silence of the Defendant referenced occurs prior to his arrest and Miranda warnings. In Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), the United States Supreme Court found that since no governmental action induced the Defendant to remain silent before his arrest, the fundamental unfairness present in Doyle does not apply to impeachment by use of a Defendant's pre-arrest, pre-Mirandized silence. This Court followed suit, recognizing the rule articulated by the Jenkins Court in State v. Oxier, 175 W.Va. 760, 338 S.E.2d 360 (1985) and applying that rule in State ex rel. Boso v. Hedrick, 182 W.Va. 701, 391 S.E.2d 614 (1990)(where the Court found that the Doyle-Boyd rule did not apply where the Defendant had not been given his Miranda warnings) and again in State v. Ramsey, 209 W.Va. 248, 545 S.E.2d 853 (2000)(where the Court found that the Doyle-Boyd rule did not apply since the silence admitted at trial was the Defendant's pre-arrest silence).

As the United States Supreme Court discussed at length in Jenkins,

“Attempted impeachment on cross-examination of a defendant, the practice at issue here, may enhance the reliability of the criminal process. Use of such impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts. A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, ‘[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.’ Brown v. United States, 356 U.S. 148, 156, 78 S.Ct. 622, 627, 2 L.Ed.2d 589 (1958).

“Thus, impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility.”

Jenkins v. Anderson, 447 U.S. 231, 238, 100 S. Ct. 2124, 2129, 65 L. Ed. 2d 86 (1980). The Jenkins Court further considered that “common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted.” Id. at 239, 2129. Stated conversely,

“Generally, a witness who testifies to certain matters cannot be impeached by showing his or her failure on a prior occasion to disclose a material fact unless the disclosure was omitted under circumstances rendering it incumbent or natural for the witness to state it.’ Syllabus point 2, State v. Blake, 197 W.Va. 700, 478 S.E.2d 550 (1996).”

Syl. Pt. 2, State v. Walker, 207 W. Va. 415, 533 S.E.2d 48 (2000). Specifically applicable to the case at hand, why he would not call emergency services, why he would flee and why he would not report to the police or tell any of the numerous persons that he spoke to following the murders that he, A and the children had been attacked by two unknown male intruders are perfectly reasonable questions to be asked of the Petitioner.

The United States Supreme Court revisited this issue in the case of Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). In that case, Petitioner Brecht had been convicted of first degree murder in Wisconsin state court. When he took the stand, Brecht admitted to shooting the victim but claimed that it was an accident. In order to impeach his testimony, the prosecution made several references to the fact that Brecht did not call for help following the shooting, fled and, in the course of his flight, came into contact with several individuals, none of whom he told about the shooting or that it was an accident. The Court found all of that questioning to be entirely proper, as it was highly probative and did not implicate any of the due process concerns present in Doyle. Id. The Court stated that the facts in Brecht illustrated very well the reasoning behind the Jenkins decision:

“This case illustrates the point well. The first time petitioner claimed that the shooting was an accident was when he took the stand at trial. It was entirely proper—and probative—for the State to impeach his testimony by pointing out that petitioner had failed to tell anyone before the time he received his *Miranda* warnings at his arraignment about the shooting being an accident. Indeed, if the shooting was an accident, petitioner had every reason—including to clear his name and preserve evidence supporting his version of the events—to offer his account immediately following the shooting.”

Brecht v. Abrahamson, 507 U.S. at 628, 113 S. Ct. at 1716-17. Such is the case here, only even moreso considering the Petitioner’s claims that he too was a victim, severely injured by the same assailants who had just murdered his girlfriend and her child in cold blood. If the murders were committed by two unknown attackers, the Petitioner herein had every reason—including to get medical treatment for his injuries, prevent the fire from completely destroying the bodies of his loved ones, preserve evidence in order that the assailants may be apprehended, insure the safety of the baby and the rest of the D family, and even to take suspicion off of himself as a

survivor of the attack, among others—to offer his account immediately following the murders and arson.

The Petitioner herein also specifically contends, however, that the State’s question, “you never told anyone the story you told us yesterday prior to taking the stand?” [ARII, 1097] was absolutely a comment on the Petitioner’s post-arrest silence. While the State concedes that this was a more generalized question than the many others asked of the Petitioner, it is not a question explicitly concerning the Petitioner’s post-arrest silence. As such, the State asks this Court to find no abuse of discretion. State v. Marple, *supra*.

However, even if the Court does find that the State’s more generalized question amounted to an abuse of discretion, the State asserts that there was no prejudice to the Petitioner. The United States Supreme Court in Brecht found that the prosecutor’s more generalized questions, such as “the first time you have ever told this story is when you testified here today, was it not?” and “Did you tell anyone about what had happened in Alma?”, although they may have been interpreted to be a comment on the Petitioner’s post-arrest silence as well as the Petitioner’s pre-arrest silence, were harmless error after being “quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].” Brecht v. Abrahamson, *supra*. This Court has applied similar analysis by requiring any abuse of discretion to have actually prejudiced the Defendant before it will consider reversal. State v. Marple, *supra*.

A review of the record reveals that the State’s questioning of the Petitioner in reference to his silence was undoubtedly appropriate commentary on his pre-arrest silence. The State asked the Petitioner if he ever contacted the D _____ s in the days following the murder to tell them what happened to their loved ones. [ARII, 1097-1098, 1167.] The State asked the Petitioner if

he called 911 following the attack. [ARII, 1179.] The State asked the Petitioner if he told S C , who the Petitioner had called for a ride, or the two friends of S 's, who came to give him a ride, immediately following the murders. [ARII, 1182.] The State asked the Petitioner if he told the mother of his child, whom he called to ask for her help in arranging a ride to Virginia and whom he saw before leaving Manassas to head farther south. {ARII, 1188.] The State asked the Petitioner if he told John Willingham, the cab driver who took him from Berkeley County down to Manassas, Virginia. [ARII, 1188.] The State asked the Petitioner if he reported what happened to anyone in North Carolina when he was seeking medical attention for his hand. {ARII, 1194.]

Another interesting point in this case was that the Petitioner testified that he had anonymously called law enforcement a couple days prior to the murders to report that Joseph Medina had threatened to kill a husband and wife, their four year old child and their nine month old child and that he had stated that he was going to steal all of the drugs in the house. The Petitioner testified that he had heard Medina threaten him and wanted to call in to law enforcement so that they would arrest Medina before any harm could come to the Petitioner, A , or A 's children. The Petitioner had no explanation for not reporting the anticipated victims by name nor for so obviously misreporting the descriptions of the victims from his personal knowledge other than to say that in his culture it was frowned upon to ever call the police, and he did not want authorities to know that it was him calling nor did he want to be involved with the police investigation. It was also his own testimony that there were no drugs in the D home and that he had "exaggerated" that part. [ARII, 955-1218.] That revelation lead the State to ask several questions of the Petitioner concerning why he would call

law enforcement in order to report a threat but not report the actual event if things had happened the way he described in his testimony. [ARII, 1094, 1123, 1127, 1137, 1179.]

During closing, the State references all of the opportunities the Petitioner had to tell all of these individuals he was interacting with during his flight about the deaths of A and her child. [ARII, 1328-1332.] Following a recounting, the State summarizes with “he never tells a living soul his story until he takes that stand.” [ARII, 1331.] From there, the State goes back to recounting the movements of the Petitioner during his flight and the opportunities he had to tell individuals he came in contact with during that flight about what had happened. [ARII, 1332.] While the State again concedes that one quoted, isolated statement is a more generalized statement, **in context**, the State was clearly summarizing the numerous times the Petitioner could have reported what happened that night to someone during his flight, but he did not.

Considering that in the voluminous index of this case, comprising 1588 pages, there are only two more generalized statements made concerning the Petitioner’s silence that could even arguably be interpreted to be a comment on the Petitioner’s post-arrest silence, in view of the State’s extensive and permissible references to the Petitioner’s pre-arrest and pre-Miranda silence, these more generalized references are, in effect, cumulative. *See Brecht v. Abrahamson*, 507 U.S. at 639, 113 S.Ct. at 1722. Moreover, the evidence of the Petitioner’s guilt presented by the State, as discussed under allegation I. above, was significant. Considering these two brief generalized statements in the context of the extensive appropriate examination of the Petitioner’s pre-arrest silence and the other weighty evidence introduced, there was no prejudice to the Petitioner. *State v. Marple, supra*.

IV. THE COURT PROPERLY REFUSED TO GIVE THE INSTRUCTION OFFERED BY THE PETITIONER, AS THE POINT OF LAW THEREIN HAS BEEN EXPRESSLY OVERRULED.

A. Standard of Review

“A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.”

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

B. Discussion

The Petitioner cites error in the court's refusal to give the following instruction:

“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.”

This instruction is based on a point of law from State v. Dobbs, 163 W.Va. 630, 259 S.E.2d 829 (1979), which was later overruled by State v. Guthrie, *supra*. In Guthrie, the West Virginia Supreme Court adopted the standard of review for sufficiency of evidence claims articulated by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and, in so doing, “necessarily overturn[ed]” its precedent that when the State relies on circumstantial evidence, in whole or in part, it has to show that all other reasonable hypotheses are excluded. Guthrie, 194 W.Va. at 668, 461 S.E.2d at 174.

Justice Cleckley went on to state in Guthrie that

“we hold there should be only one standard of proof in criminal cases and that is proof beyond a reasonable doubt. We start along this route by acknowledging that there is no qualitative difference between direct and circumstantial evidence. Thus, it follows *a fortiori* that once a proper instruction is given advising the jury as to the State’s heavy burden under the guilt beyond a reasonable doubt standard, an additional instruction on circumstantial evidence is no longer required even if the State wholly relies on circumstantial evidence.”

Id. at 669, 175.

Based on the above, the court clearly made the proper finding that this instruction offered by the Petitioner is (and was) no longer a correct statement of law. [ARII, 1281-1282.] Looking at the trial court’s instruction as a whole, it properly informs the jury as to their duties, the elements of the offenses charged, and the standard of proof, beyond a reasonable doubt. It is a correct statement of law, supported by the evidence adduced at trial. [ARII, 1285-1309.]

As such, the court did not abuse its discretion in refusing to give this instruction offered by the Petitioner. State v. Guthrie, *supra*.

V. THE COURT PROPERLY ALLOWED THE TESTIMONY OF JOSEPH MEDINA.

A. Standard of Review

“In order to obtain a new trial on a claim that the prosecutor presented false testimony at trial, a defendant must demonstrate that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict.”

Syl. Pt. 2, State ex rel. Franklin v. McBride, 226 W. Va. 375, 701 S.E.2d 97 (2009).

B. Discussion

The Petitioner alleges that the State knowingly allowed Joseph Medina to present false and perjured testimony and that the court erred in failing to grant the Petitioner’s motion for new trial on that basis.

It is a basic principle of law that prosecutors have a duty to the court not to knowingly

encourage or present false testimony. *See State ex rel. Franklin v. McBride*, 226 W. Va. 375, 378-79, 701 S.E.2d 97, 100-01 (2009); *see also* Rule 3.3 of the West Virginia Rules of Professional Conduct. It is also equally well-settled that it is a violation of due process when the State obtains a conviction through the knowing use of false or perjured testimony. *State ex rel. Franklin v. McBride*, 226 W.Va. at 378-79, 701 S.E.2d at 100-01. However, this Honorable Court has also previously held that

“[a]lthough it is a violation of due process for the State to convict a defendant based on false evidence, such conviction will not be set aside unless it is shown that the false evidence had a material effect on the jury verdict.” Syl. pt. 2, *Matter of Investigation of W. Va. State Police Crime Lab., Serology Div.*, 190 W.Va. 321, 438 S.E.2d 501 (1993). *See also United States v. Bagley*, 473 U.S. 667, 678–79, 105 S.Ct. 3375, 3381–82, 87 L.Ed.2d 481 (1985) (“ ‘[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.’ *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976).”).

Id.

Significant in this case is that the Petitioner filed a Motion in Limine, based upon the alleged inconsistencies in Joseph Medina’s prior recorded statements, which sought to prevent the State from calling Joseph Medina as a witness. The court and counsel had a very thorough exchange concerning the statements and anticipated testimony of Joseph Medina during the pre-trial hearing, at which time the court denied the Petitioner’s Motion to exclude and/or limit the testimony of Joseph Medina, finding that there was no conclusive proof of falsity and that the credibility determination would be best left for the jury to decide and not for the prosecutor or for the court. [AR, 101-110.] The State believes this ruling of the court to be sound taking into consideration the content of Medina’s statements and testimony.

A reading of Joseph Medina's first statement reveals that he disclosed receiving calls and text messages from the Petitioner in the couple of days following the commission of the crimes. Medina discloses to the officers that the Petitioner texted Medina that the Petitioner was "in a situation" on the night of the murders, and Medina goes on to reveal that he spoke to the Petitioner on the phone while Medina was at the Valley Mall in Hagerstown, MD. [ARII, 1550.] When the officers ask Medina if he knows why the Petitioner would kill A , Medina answers that "she probably took some money from him. That's the only conclusion I can come up with..." [ARII, 1547.] Not until the second interview does Medina tell officers that during his previously mentioned conversation with the Petitioner that the Petitioner specifically told him that A had been "going through [the Petitioner's] pockets," so the Petitioner did what he had to do. [ARII, 1568.] During his testimony, Medina included this exchange between he and the Petitioner during the course of the phone call. [ARI, 823.] While there certainly seems to have been an omission in the first statement, it's not clear that the two are inconsistent or that they are absolutely false.

The Petitioner also alleges that the phone call that Medina says took place was impossible because Medina stated during his statements that Medina believed that the Petitioner called him on Medina's girlfriend's phone, and his girlfriend testified that she had a pre-paid phone, and she did not think she had any minutes left on it at the time. However, throughout the entire trial, there was a lot of conflicting testimony about cell phones, who had pre-paid phones, who was using someone else's phone, who had more than one phone, etc. The phone records did establish, though, that there was a call of some significance that took place between the Petitioner's phone and Medina's phone on the date alleged by Medina. In fact, the Petitioner **acknowledged** that he had a substantive phone conversation with Medina on the date alleged by

Medina, but that the content of the conversation was markedly different than Medina's version. [ARII, 1047-1049.] Therefore, the Petitioner cannot argue in good faith that it was impossible for him to have had this conversation with Medina. The content of the call between the two was, again, a credibility assessment to be considered and decided by the jury.

The Petitioner next attempts to cite his own call to law enforcement regarding alleged threats made by Medina as wholly credible evidence that he would not have called Medina for help or made any statements to Medina concerning the Petitioner's culpability. The Petitioner's argument on this point is self-serving, as an equally compelling argument can be made that the Petitioner made those vague, non-specific calls to law enforcement precisely for this reason—so that he could use the fact that he made them to later bolster his own version of events.

Furthermore, the Petitioner argues that the timing of and reasons for the Petitioner's addition of this omission was suspicious considering the refusal of the court to accept a plea deal in an unrelated matter in which Medina was the defendant. The Petitioner fully explored those issues with Medina during cross-examination such that the jury was able to consider all of the circumstances surrounding Medina's second statement and his testimony at trial. [ARI, 830-872, 878-879.]

The Petitioner alleges that it made no sense that Medina fled Berkeley County, West Virginia out of concern for being arrested for his outstanding probation violation in Virginia. However, Medina and his girlfriend both testified that they left Berkeley County, West Virginia, because the police had come to ask Medina questions based upon his known association with the Petitioner. Additionally, Medina testified that he knew that when the police ran his information that he would likely be arrested for his outstanding probation violation. Both Medina and his girlfriend testified that they went to Hagerstown, Maryland. After exhausting what money they

had in Maryland, they got a ride with an associate of Medina's to Virginia where Medina knew people that they could stay with to lie low. Medina was found at his mother's residence in Virginia, and his girlfriend was located at the home of a friend of Medina's in Virginia. The testimony of Medina and his girlfriend in this regard is certainly plausible and was consistent. [ARII, 767-879, 1532-1578.]

After examining the statements of Medina together with the evidence introduced at trial, the Petitioner fails to demonstrate that Joseph Medina's testimony was false. In this case, like in the McBride case and in the case of State v. Brown, 210 W.Va. 14, 552 S.E.2d 390 (2001), the best that this Court can determine from the Petitioner's conclusory allegations is that Medina had poor character and may have had incentive to lie. From that, the Petitioner argues that this should have put the prosecutor on notice that this witness was not telling the truth. However, this Court has consistently rejected that argument. In doing so, the Court stated:

“We are not convinced by the defendant's argument. Not only is there no evidence in the record which supports the claim that the prosecutor knew or should have known that evidence was false, there is no proof that any of the State's evidence was actually false. Rather, all that the defendant can demonstrate is that [the] State's witnesses were disreputable persons who had reasons to lie. The witnesses' characters and motives were adduced at trial and argued at length to the jury.

... 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.”

State v. Brown, 210 W.Va. at 27, 552 S.E.2d at 403; *see also* State v. Rivera, 210 Ariz. 188, 109 P.3d 83, 89 (2005), quoted with approval in State ex rel. Franklin v. McBride, 226 W.Va. at 381, 701 S.E.2d at 103 (“Absent a showing that the prosecution was aware of any false testimony, the credibility of witnesses is for the jury to determine.”).

In the instant proceeding, the Petitioner, like Mr. Brown and like Mr. Franklin, has done no more than argue that this State's witness, Joseph Medina, had motives to lie. Such an assertion has been determined to be legally insufficient to sustain a claim that the State presented false testimony. State ex rel. Franklin v. McBride, *supra*.

VI. THERE ARE NO GROUNDS FOR THE REVERSAL OF THE PETITIONER'S CONVICTION BASED UPON PROSECUTORIAL MISCONDUCT.

Prior to addressing this allegation, the State objects to its appearance in the brief of the Petitioner. Petitioner's counsel indicates that the Petitioner himself authored this allegation and that it was being included only on the Petitioner's insistence. The State objects to the allegation, as it was not authored (nor necessarily endorsed or verified) as a legitimate, good faith allegation by Petitioner's counsel.

A. Standard of Review

“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. 6, State v. Sugg, 193 W. Va. 388, 456 S.E.2d 469 (1995).

“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. 5, State v. Sugg, 193 W. Va. 388, 456 S.E.2d 469 (1995).

B. Discussion

Insofar as the Petitioner cites error with regard to the remarks on his silence, it is addressed above in section III.

Insofar as the Petitioner cites error with regard to the introduction of the testimony of

Joseph Medina, it is addressed above in section V.

Insofar as the Petitioner cites error with regard to the State's use of the novel in cross-examination, it is address above in section II.

The remainder of the Petitioner's pro se allegations consist basically of objections to the State's closing argument wherein the prosecutor is doing nothing more than vigorously arguing the State's theory of the case. The Petitioner first misclassifies the prosecutor's appeal to the jury to use their common sense in thinking about whether or not someone would have a woman and child executed for a laptop that wasn't even his to begin with as "using her position to undermine [the petitioner's] credibility and bolster State's witnesses."

The Petitioner next argued that the prosecutor "intentionally misquoted witness testimony." As the Court is aware, the attorneys in these cases live with the discovery sometimes years before going to trial. Contained therein are numerous witness statements and other evidence, some of which never even makes it before the jury. It is not unusual for attorneys to recall a witness' testimony differently than it was presented, especially having reviewed their previous statements and while making notes and preparing for cross or redirect of that witness while said witness is being questioned by the other party during trial. This is why the court instructs the jury that

"...nothing said or done by the lawyers who have tried this case is to be considered by you to be evidence of any fact. Opening statements by the lawyers are intended to give you a brief outline of what each side expects to prove so that you may better understand the testimony of the witnesses. The closing arguments are often very helpful in refreshing your recollection as to the testimony of the witnesses and such facts as may be developed thereby. But it is my duty to caution you that your verdict shall not be based upon statements made to you by lawyers at the opening of the trial or upon their closing arguments. Your verdict shall be based upon the exhibits received and the evidence as you heard it from the witness stand, as you recollect it, not as the

lawyers or this Court may recollect it...the attorneys will be restating the evidence and instructions as they recollect them, but you must rely upon your recollection of what the evidence and the instructions were.”

[ARII, 1301-1302, 1309.]

The Petitioner next alleges that the prosecutor “attacked” him regarding his legal name change. The Petitioner admittedly used a fake name for purposes of obtaining his residency and medical attention in the State of North Carolina. The prosecutor asked the Petitioner what name he had used to obtain the bus ticket he purchased in Virginia. The Petitioner indicated that he did not remember. The prosecutor then asked the Petitioner one question regarding if his given name had been “McCready.” The Petitioner answered that it was “McCreary” and confirmed that he had changed it to Prophet. There was no further questioning of the Petitioner regarding this name change. [ARII, 1193-1194.] The Petitioner put his aliases at issue when he admittedly used a fake name in North Carolina and was unable to recall what name he used to obtain his bus ticket. This was a wholly proper line of questioning by the State.

The Petitioner goes on to allege a number of “improper remarks” the prosecutor made. Many, again, are merely disagreements the Petitioner has with the State’s theory of the case. To address some of those, the Petitioner alleges that it was improper for the prosecutor to assume he had wanted to remain anonymous on his call to law enforcement because he was an African-American and that the prosecutor inappropriately took his comment about his “culture” to equate to race. This was not an assumption by the prosecutor. The State twice asked the Petitioner about what he meant by his “culture” frowning upon reporting incidents to law enforcement. The exchange was as follows:

Prosecutor: “...you told us that the reason you didn’t leave your name yesterday is this was a cultural thing with you?”

Petitioner: “I didn’t say those exact words. I said my culture that

it's frowned upon to have to call the police or have any dealings with the police in that fashion is frowned upon and I didn't want to be labeled a snitch or, you know, pretty much—“

Prosecutor: “What culture are you representing, sir?”

Petitioner: “I guess when I say culture basically I'm talking about maybe like my age group, race, just background.”

Prosecutor: “Are you trying to tell us that this is a young African-American's version of the world that we don't report murders?”

Petitioner: “First of all, I'm not that young. I'm in my mid-30s, so I wouldn't call myself a young African-American...”

[ARII, 1122.] Clearly, when asked what he meant by culture, the Petitioner stated that his race was a part of that. The prosecutor merely referenced the Petitioner's own words in her argument.

The Petitioner further alleges that the prosecutor argued without any evidence that there was no soot on D's clothing despite the fact that the Petitioner testified that D was on a mattress next to the burning bodies when the Petitioner went back into the apartment to retrieve him. However, the Petitioner himself testified that there was no soot on the baby.

[ARII, 1172.]

The remainder of his allegations complain of the prosecutor recollecting evidence differently, as has been addressed above, or vigorously arguing the State's theory of the case to the jury, which is the nature of closing argument.

Any actual misstatements by the prosecutor were unintentional and simply a product of mis-recollection of what was stated during the course of testimony. This is why the court instructs the jurors to rely on their own recollections of evidence rather than those of counsel. Despite such isolated and rare points of minutia, the fact remains that the strength of the evidence introduced established the Petitioner's guilt beyond a reasonable doubt, and the Petitioner has failed to show that he was clearly prejudiced or that manifest injustice occurred.

State v. Sugg, *supra*.

VII. THERE ARE NO GROUNDS FOR THE REVERSAL OF THE PETITIONER'S CONVICTION BASED UPON JUDICIAL MISCONDUCT.

Once again, prior to addressing this allegation, the State objects to its appearance in the brief of the Petitioner. Petitioner's counsel indicates that the Petitioner himself authored this allegation and that it was being included only on the Petitioner's insistence. The State objects to the allegation, as it was not authored (nor necessarily endorsed or verified) as a legitimate, good faith allegation by Petitioner's counsel.

A. Standard of Review

“A criminal defendant is entitled to an impartial and neutral judge. In a criminal trial, when a judge's conduct in questioning witnesses or making comments evidences a lack of impartiality and neutrality, or when a judge otherwise discloses that the judge has abandoned his role of impartiality and neutrality as imposed by the Sixth Amendment of the United States Constitution, we will reverse and remand the case for a new trial.”

Syl. Pt. 7, State v. Thompson, 220 W. Va. 398, 647 S.E.2d 834 (2007)

B. Discussion

The Petitioner attacks the Judge as having a bias against him and being part of a conspiracy to unlawfully convict him.

The Petitioner incorrectly cites to the court's jury instructions in the appendix record, but it is clear that he is referencing the pretrial hearing and motions hearing. During those hearings, the court made several rulings that were **favorable** to the Petitioner. Among them, the court excluded photographs of the victim's bodies, the court released the probation officer to discuss with the Petitioner's defense counsel her notes and conversations with State's witness Joseph Medina, and the court ruled that the Petitioner could introduce evidence of an anonymous call he claimed that he made days before the murder reporting that Joseph Medina had made certain

threats over the objection of the State. The Petitioner then claims that the Judge made the statement that his defense “doesn’t hold water” with him, but notes that such a statement does not appear anywhere in the transcripts of the hearing, so he then goes on to accuse the court reporter of intentionally omitting that statement from the transcript.

The Petitioner then discusses Joseph Medina’s unrelated criminal case, which his counsel was able to fully cross examine Medina about as well as call the probation officer as a witness to testify as to the circumstances surrounding the rejection of that unrelated plea agreement. The Petitioner goes on to accuse the Judge of engaging in a conspiracy to induce Joseph Medina to testify falsely against the Petitioner. There is absolutely no basis shown that these accusations having any grounding in fact.

Insofar as the Petitioner alleges error in the court’s allowance of the State to cross examine the Petitioner based upon his pre-arrest silence, it is address above in section III.

Insofar as the Petitioner alleges error in the court’s allowance of the State to cross examine the Petitioner regarding similarities of this crime to those contained in a novel that he had written, it is addressed above in section II. The only addition the State would make regarding a quoted statement of the court by the Petitioner is that when the court stated “...it just downright isn’t fair to let somebody to have created a story here and then have done the same thing...” The State’s interpretation of that statement by the court is that it would be unfair to not allow cross-examination on the novel in such a circumstance where someone writes a book about a crime and then later is accused of committing a similar crime.

Similarly, the Petitioner alleges that the court’s findings and rulings on evidentiary matters were attempts by the court to “guide and advise” the prosecution on how to conduct her case. Naturally, the court’s evidentiary rulings have an effect on how both the State and defense

counsel can conduct their cases, but there is no showing that the court was biased in his rulings.

Finally, the Petitioner alleges that the judge “for no reasonable provocation” interrupted the testimony of the Petitioner to chastise him for being argumentative. From a reading of the transcript, it is apparent that cross examination of the Petitioner by the State was contentious. During this exchange, the court repeatedly gave instructions to both the prosecutor and the Petitioner. Twice the Court instructed the prosecutor to let the Petitioner finish his answers to questions that had been asked of him. [ARII, 1109-1110.] The court then had to instruct the Petitioner to answer the question that the prosecutor had asked. [ARII, 1126.] Similarly to his instructions to the prosecutor earlier, the court instructed the Petitioner not to interrupt the prosecutor in the middle of asking a question. [ARII, 1170.] At the point the Petitioner complains of, the court again had to instruct the Petitioner to answer a question that was asked of him. [ARII, 1173.] At that point, the Petitioner began to argue with the court about the way the prosecutor was asking him questions. [Id.] The court then simply instructed the Petitioner not to be argumentative. [Id.] Instead of answering the question or asking the prosecutor to repeat the question at that point, the Petitioner ironically began to argue with the court that he was not being argumentative. [Id.] The court then instructed the Petitioner again to answer the State’s question, and the Petitioner finally asked the prosecutor to repeat her question again. [Id.] This exchange was extremely brief, was brought about by the Petitioner’s comments to the court, and occurred during a cross-examination wherein the court gave instructions to both the prosecutor and the Petitioner. The judge also properly instructed the jury at the end of the trial as a matter of routine that nothing he has “said or done at any time during the trial is to be considered as evidence of any fact or as indicating any opinion concerning any fact, the credibility of any witness, the weight of any evidence, or the guilt or innocence of the Defendant.” [ARII, 1301.]

Based upon the above, there is no evidence that the judge abandoned his role of impartiality and neutrality in the handling of the Petitioner's case. State v. Thompson, supra.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to refuse the Petition for Appeal.

Respectfully submitted,
State of West Virginia,

A handwritten signature in black ink, appearing to read "Cheryl K. Saville", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Cheryl K. Saville, Assistant Prosecuting Attorney, hereby certify that I have served a true and accurate copy of the foregoing Respondent State of West Virginia's Brief by mailing of the same, United States Mail, postage paid to the following on this 14th day of June, 2013:

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