

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0512

STATE OF WEST VIRGINIA,

Respondent,

v.

JOHN EUGENE ANDERSON,

Petitioner.

RESPONDENT'S BRIEF

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0512

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JOHN EUGENE ANDERSON,

Plaintiff Below, Petitioner.

BRIEF OF RESPONDENT

I.

STATEMENT OF THE CASE

On May 14, 2010, a Wood County grand jury returned a single-count indictment charging John Eugene Anderson (“Petitioner”) with the murder of sixty-nine year old Williard Wright.¹ (Case No. 10-F-93.) *See* W. Va. Code § 61-2-1. Following a six-day jury trial (Waters, J.), a Wood County petit jury convicted the Petitioner of first degree murder with a recommendation of mercy. The trial court denied Petitioner’s post-trial motion for a judgment of acquittal on March 12, 2012. (Supp. App. at 3.) That same day the trial court sentenced the Petitioner to life with the possibility of parole in fifteen years. The trial court noted on the sentencing order that given the Petitioner’s violent past, the violent and premeditated nature of the offense, and his status as a registered sex

¹Mr. Wright was the Petitioner’s girlfriend’s uncle. (Supp. App. vol. C at 14.)

offender, the Parole Board should never grant the Petitioner parole. (App. at 3.) For purposes of appeal, the trial court resentenced the Petitioner on August 3, 2012.²

II.

SUMMARY OF ARGUMENT

The Petitioner alleges four assignments of error: (1) juror misconduct; (2) the trial court improperly prevented defense counsel from questioning several witnesses about the victim's criminal history; (3) a witness was permitted to testify on behalf of the State although the State failed to provide the defense with the witness' criminal history; and, (4) the lower court erred in not ordering the state to provide to the defense a prior written statement made by a witness regarding his knowledge of the alleged criminal act. (Petr's Br. At 1.)

III.

STATEMENT REGARDING ORAL ARGUMENT

This case presents no issues of first impression. Nor does it require a complex analysis of already existing case law. Therefore, oral argument is not necessary. *See* W. Va. R. App. P. 18(a)(1).

IV.

STATEMENT OF FACTS

Sometime between the late evening hours of March 23, 2010, and the early morning of March 24, 2010, the Petitioner murdered Willard Wright by repeatedly stabbing him. The laceration to his

² It would appear that there was a great deal of pre-appeal litigation in this manner, including an order from this Court holding Petitioner's counsel in contempt for failing to perfect his appeal on time. For the record, neither Respondent's counsel nor this Court received a copy of the trial transcript from Petitioner's counsel until Monday, February 11, 2013, almost two months after he had perfected his appeal.

neck was so deep and wide that his trachea was split in two and both his carotid artery and jugular veins were exposed. Mr. Wright was sixty-nine years old, one-hundred and twenty pounds, small in stature, and afflicted with chronic obstructive pulmonary disease for which he received supplemental oxygen therapy. He lived alone in a small efficiency apartment on Ann Street in Parkersburg. His body was found on his bedroom/livingroom floor, lying on its side, next to his bed. (Supp. App. vol. B at 29.)

The Petitioner's trial began on January 3, 2012. He was represented by Joseph Munoz and John Oshoway. The State appeared by Wood County Prosecutor Jason Wharton³ and assistant prosecutor Pat LeFebure.

During individual *voir dire* two jurors told the court that another juror said that the Petitioner "[J]ust looks guilty."⁴ Prospective Juror Markle commented that she had overheard the remark while standing in the courtroom hallway during a break. (Supp. App. vol. A at 189.) The juror could not name the prospective juror who had made this comment, but identified where this juror sat in the courtroom. (*Id.* at 189.) Although she did not know which other jurors might have overheard the comment, she testified that there were approximately half a dozen within ear-shot when the comment was made. (*Id.* at 190.) The record suggests that the comment did not make much of an impression on Juror Markell. The juror raised the issue as an afterthought as she was leaving the judge's chambers. (*Id.* at 212.)

³Obviously Mr. Wharton believes the more witnesses the better.

⁴It was the Petitioner's resemblance to her ex-husband which motivated the remark. (Supp. App. vol. A at 191.)

From prospective Juror Markell's comments, the court discovered that it was prospective Juror Ankrom who had made this comment. (*Id.* at 190.) The juror was immediately called into the judge's chambers. When asked by the court, the juror didn't deny making the comment. (*Id.* at 191.) The juror told the court that she believed there was a "good chance" that the Petitioner was guilty and that she did not know if she could be fair and impartial. (*Id.* at 191.) Initially, neither the State nor defense counsel followed up. Just before Juror Ankrom was about to leave, defense counsel asked her whether she had directed the comment to anyone in particular; she said that she had made it to a "big, heavysset guy" who had not yet been called back for individual *voir dire*. She denied that any other potential juror overheard her. She also testified that this "big, heavysset guy" did not respond. (*Id.* at 192.)

In his brief to this Court, Petitioner's counsel attempts to portray prospective Juror Ankrom as a substance abuser. His quote from the record is incomplete. After stating that "she took enough drugs" to deal with the pressure serving as a juror might entail, Juror Ankrom clearly stated that these were drugs which had been prescribed to her for anxiety, and that she was taking them by prescription. (*Id.* at 144.) The drugs were never identified, nor was the dosage, or the side effects. If potential jurors were precluded from jury service for taking anti-anxiety medication, we would have a small jury pool indeed. Counsel's edited citation to the record is simply a mean-spirited attempt to portray Juror Ankrom as a drug abuser and a basket case. There is no evidence to justify either assumption.

The court discovered that the "heavy-set man" was prospective Juror Minton. (*Id.* at 195.) From the record it does not appear that Juror Ankrom's comment made much of an impression on

him either. When the trial court asked him if he had any responses to the *voir dire* questions posed in the courtroom he did not mention it; he only mentioned the comment after the court raised the issue. (*Id.* at 194.) Indeed, although he freely admitted that potential Juror Ankrom made the comment while they were walking from the parking lot to the courthouse, all he could recall was that it concerned the defendant's appearance. (*Id.* at 199.) No one else was walking with them. He did say that he thought the juror's comment was inappropriate. (*Id.* at 195-196, 199.)

The trial court asked the next prospective juror if she had heard Juror Ankrom's comment.⁵ The juror had no idea what the court was talking about. (*Id.* at 202.) The court then asked the entire *venire* in open court if any of them heard an inappropriate comment. (*Id.* at 202-203.) None of them responded. (*Id.* at 203.) Neither counsel for the State nor defense counsel followed up.

Before counsel made their peremptory strikes, defense counsel moved for a mistrial based on Juror Ankon's comment.⁶ (*Id.* at 210.) Counsel argued that prospective Juror Markell told the court that she heard the comment in the court hallway, and prospective Juror Minton had heard the comment while walking with Juror Ankrom from the parking lot, therefore, counsel speculated that Juror Ankrom had made this comment more than once. (*Id.* at 210.) He also claimed that it "defied credulity" that none of the other jurors had heard the comment. Counsel had no evidence to support his proposition. (*Id.* at 210-211.)

⁵They were both sitting in the back of the courtroom.

⁶Counsel's request went all the way. He did not request an opportunity to develop the facts supporting his allegation of juror misconduct by evidentiary hearing, he simply moved for a mistrial.

Counsel for the State argued that the prospective jurors were under oath, that the *venire* had been whittled down from forty-five to twenty⁷, and Jurors Markel and Minton's obvious lack of interest in the comments did not justify such a drastic remedy. (*Id.* at 211-12.)

The trial court summarily denied the Petitioner's motion, ruling that it was entitled to rely upon the juror's sworn answers, and that the two jurors who had overheard the remark testified that it had no affect on their judgment. (*Id.* at 213.) In the trial court's opinion, the defense had not proven a manifest necessity for a mistrial. Given defense counsel's position, it is interesting to note that Juror Minton was picked to serve. (*Id.* at 214.)

The State's first witness was James Claypool. (*Id.* at 264.) Before he was permitted to testify before the jury, the trial court conducted an *in camera* hearing to determine his testimony's admissibility. The witness was an enforcer for the Pagans motorcycle gang and had been charged in federal court with obstruction of justice with bodily injury, aid of racketeering, distribution of cocaine, serving as a bodyguard for a convicted felon, and domestic battery by use of a firearm. (*Id.* at 265.) The charges were resolved by plea agreement. The witness pled guilty to the felony of obstruction of justice with bodily injury, in return for a promise that the United States Attorney would not indict him for several other potential charges. He was sentenced to time served—eleven and one-half months—and three years of supervised release.

While serving time in the Washington County, Ohio jail, Mr. Claypool met an individual named Jimmy. (*Id.* at 267.) Jimmy asked Mr. Claypool to help his cousin, who had just been

⁷Although counsel for the State accused defense counsel of speculating, counsel's argument that the people who had overheard the comment had already been discharged had no evidentiary foundation.

incarcerated at the same facility. (*Id.* at 269.) Jimmy introduced Mr. Claypool to the Petitioner. (*Id.*) During a conversation between the two, the Petitioner told Mr. Claypool that he was inside for murder, and that he had killed the victim because his daughter told him that the victim had touched her in an inappropriate manner. When the witness asked the Petitioner if he had, in fact, murdered the victim, he responded, “Fuck yeah, I did it. He had it coming.” (*Id.* at 270, 298.) The Petitioner then asked the witness if he could take care of the witness against him.

The Petitioner also told Mr. Claypool that the investigating officers believed he had broken into the victim’s apartment. He was going to rely upon the fact that he already had a key to the victim’s front door. He also said that, on the day of the murder, he had been to the victim’s earlier that afternoon. (*Id.* at 272.) He said that the victim was bedridden and that he had killed him by pinching off his oxygen tube, and stabbing him until he “damn near cut his head off.” (*Id.* at 272-73, 302.) After he was finished, he changed his clothes and put the clothes he wore during the murder in a plastic garbage bag. He then took the victim’s wallet and threw it alongside the road. (*Id.* at 273.)

Sometime after their talk Mr. Claypool contacted his attorney by letter. (*Id.*) Counsel contacted the FBI who then contacted the investigating officers in Wood County. (*Id.* at 274.) Mr. Claypool gave a statement to these officers. He received no consideration from the State for his cooperation. (*Id.* at 304.) After Mr. Claypool’s *in camera* testimony, the trial court heard argument from counsel regarding its admissibility. Defense counsel argued that the State had never provided them with a complete criminal history. (*Id.* at 290.) The State argued that it had provided a copy of Mr. Claypool’s pre-trial statement in discovery, that trial counsel had represented the Petitioner

when Mr. Claypool testified at the preliminary hearing, and that the State had run the witness' criminal history the day before trial and discovered that he had a single felony conviction. Under W. Va. R. Evid. 609, this was the only offense the defense could use to impeach the witness (*Id.* at 290-291.) The trial court agreed:

Defense can only impeach the witness on prior felony convictions and the State has diligently sought to provide that and Mr. Claypool has testified to his criminal record as far as felony convictions. I think the defense is limited to impeaching him on that.

(*Id.* at 292.)

The Court went on to find:

As far as [Mr. Claypool's] statement, it appears to be relevant and material under Rule 401 under the rules of evidence. Its probative value exceeds its prejudicial effect. It is both probative and prejudicial, but obviously it is not unfairly prejudicial since he's testifying about statements made by the defendant. It appears the statement is voluntary. There's no evidence it's an involuntary statement. The Miranda rules do not apply since it was not a police interrogation and there's no evidence Mr. Claypool was acting as an agent of the government. It will be up to the jury to determine the credibility of Mr. Claypool's testimony, but it is clearly admissible under the rules of evidence as a statement against interest. It is also admissible under the hearsay rules.

(*Id.* at 292-293.)

For the above reasons, the trial court overruled defense counsel's objections to Mr. Claypool's testimony. Once the jury was recalled, the State called Mr. Claypool again. (*Id.* at 293.) The jury heard that the witness was an enforcer for the Pagan's motorcycle gang, a full panoply of the Petitioner's federal charges, and the terms of his plea agreement. (*Id.* at 294-295.) Mr. Claypool then repeated his *in camera* testimony to the jury.

The State's next witness was Wood County 911 Center employee, Duane Jones. (*Id.* at 322.) Mr. Jones testified that, at the time of the murder, he was responsible for responding to official

requests for copies of 911 calls. The Parkersburg Police Department requested a copy of the 911 tape recorded the day of the incident, March 24, 2010, and recordings of any other radio traffic from the same date. (*Id.* at 324.) After laying the proper foundation, the State played the 911 call for the jury. (*Id.* at 329.) According to the tape, the 911 call was made at 1:40 a.m. (*Id.* at 331.)

The State next called Chad Goodnight. (*Id.* at 332.) Mr. Goodnight lived in the same apartment building on Ann Street as the victim. He testified that the apartment complex was a converted house containing four apartments. The victim's apartment was in the back. On the evening of the murder, the witness was watching movies with his then girlfriend and another friend when he heard a loud bang. (*Id.* at 337-38.) He testified that the bang appeared to be coming from outside. He got up to look out the kitchen window of his apartment when he noticed someone running from the victim's apartment out towards an alley. (*Id.* at 338-39.) Although it was nighttime, the witness described the running man as six foot with brownish hair. He appeared to be wearing camouflage pants or shorts and a black hoodie. The witness estimated that he heard the bang between 1:00 and 1:30 a.m. (*Id.* at 346.)

The State next called Dorothy Metz. (*Id.* at 355.) Ms. Metz testified that she had known the Petitioner for years. On the evening of the murder, the Petitioner came to her home sometime between five and seven o'clock. (*Id.* at 357.) He was wearing camouflage pants and a black hoodie and was carrying a backpack. The Petitioner asked the witness to walk with him the two blocks from her home to Ann Street to pick up some money. Although she intended to leave with him, she changed her mind when her husband told her it was a stupid thing to do. (*Id.* at 360.)

Ms. Metz then asked the Petitioner how he intended to get the money. The Petitioner responded, "Well, if you must know, I'm going up here to kill this elderly man and take his money."

(*Id.* 360.) Ms. Metz's husband, her three children, one individual named Ed Stephens, and another whose name she could not recall were present when the Petitioner made this comment. (*Id.* at 361.) Ms. Metz's husband, her youngest son and Mr. Stephens all heard the Petitioner's comment. The Petitioner left approximately fifteen minutes later.

The following morning, Ms. Metz's father told her that law enforcement had found the victim dead in his apartment, and his wallet down the road. Ms. Metz called the Parkersburg police and provided them with a taped statement. (*Id.* at 362.)

The State next called Detective Don Brown of the Parkersburg Police Department. (*Id.* at 370.) The evening of the murder he was responsible for responding to calls coming into the department after midnight. He was dispatched to the victim's apartment building on an unknown disturbance call. (*Id.* at 372.) After arriving, he noticed a large group of people standing on the front porch and they all motioned for him to go to the back of the building. He noticed that the victim's back door was open.

When Detective Brown walked to the back of the apartment he found another Parkersburg officer, John Pelfrey, and a group of paramedics standing in the victim's bedroom/living room. He noticed the victim's bed and a great deal of blood on the bed, the floor and the walls. He saw the victim lying on the floor. Because the room was small and there were already numerous individuals present, Detective Brown left the victim's apartment and took the names and addresses of the individuals standing on the front porch. He started a crime scene log, a written log tracking who arrived and who left the crime scene, at 1:45 a.m. (*Id.* at 378.) The investigating officers cleared the scene at 6:39 that morning.

The State next called paramedic Randall Wollard. (*Id.* at 383.) He was dispatched to the murder scene at 1:45 a.m. Mr. Wollard saw the victim lying on his bedroom floor. He also noticed tanks of oxygen and pill bottles. There was a large amount of blood on the victim's bed, walls and floor. Since the victim's carotid artery was exposed by a wound to his neck, there was no need to feel for a pulse. (*Id.* at 386.) The victim's jugular veins were exposed and his trachea was cut in two. After observing the victim for two or three minutes, Mr. Wollard pronounced the victim dead.

The morning of the third day trial defense counsel made another motion for a mistrial. This time it was based upon Mr. Claypool's testimony. (Supp. App. vol. B at 3.) Mr. Claypool testified that he had provided his attorney with a letter relating the contents of the Petitioner's conversations. Counsel claimed the letter was potentially *Brady* material which might contain exculpatory information. *See Brady v. Maryland*, 373 U.S. 83 (1963). The trial court again noted that the State had provided defense counsel with Mr. Claypool's statement two years before trial. This statement referred to the letter. Counsel also argued that the State had failed to turn over Mr. Claypool's federal sentencing order, a public document. According to defense counsel this document might also be *Brady* material. Once again, the trial court summarily denied the motion. (*Id.* at 8.)

Defense counsel then addressed the trial court's pre-trial ruling that prohibited any mention that the victim was a registered sex offender.⁸ Defense counsel claimed this evidence was relevant to motive. The trial court once again ruled that counsel had failed to establish the relevance of this evidence and denied the motion. (*Id.* at 9.) The State then moved to introduce a photo depicting the victim's injuries. The trial court denied the State's motion, describing the photo as unfairly

⁸As was the Petitioner.

prejudicial. The State then provided the grand jury minutes to the defense pursuant to West Virginia Rules of Criminal Procedure 26.2.

The State next called Parkersburg Police Officer Pelfrey. (*Id.* at 17.) Officer Pelfrey testified that he was parked in a nearby supermarket parking lot with Officer Brown when he received the call dispatching him to the crime scene. He arrived just prior to Brown. (*Id.* at 18.) He noticed that the victim's back door was open, sitting slightly ajar. Based on his observations, he opined that the door had been forced open. (*Id.* at 19.) He entered the apartment, and went into the victim's living room/bed room.

When he entered the bedroom he noticed a large pool of blood on the victim's bed and wall. He found the victim's body lying beside his bed covered with a blanket. He pulled the blanket off and noticed a gaping wound to his neck, a large amount of blood on the victim's body, and in front of him where his face would be. He did not move or touch the victim.

The State also called West Virginia Chief Medical Examiner, Hamada Mahmoud.⁹ (*Id.* at 50.) Dr. Mahmoud opined that the victim died from multiple sharp force injuries leading to exsanguination. (*Id.* at 65, 71.) He identified seven discreet injuries; five were incise wounds, one was a stab wound to the chest area, and one was a defensive wound to the victim's left hand. The incise wounds were to the victim's neck, right cheek, and left forehead. The chest wound was a 3/4 inch deep stab wound running upwards and slightly to the left. (*Id.* at 54-58, 60, 84.) The neck wound was eight inches long and three inches deep, extending from the right side of the victim's

⁹The State never asked the trial court to recognize Dr. Mahmoud as an expert witness. Despite this, he testified to the cause of death without objection from the defense.

neck extending to the left side.¹⁰ (*Id.* at 62.) According to Dr. Mahmoud it nearly split the victim's neck in half. (*Id.* at 65.)

The State next called Detective Shawn Graham of the Parkersburg Violent Crime and Narcotics Task Force. (*Id.* at 96.) During a search of the area conducted the morning of March 24, the witness found the victim's wallet in a storm drain approximately one half to three quarters of a block from the victim's apartment.¹¹ (*Id.* at 98-99.)

The State next called Megan Rollyson. At the time of trial, Ms. Rollyson was incarcerated at the Washington County, Ohio jail after a conviction for one count of selling marijuana. (*Id.* at 104-05.) In March of 2010, the witness was dating one of the Petitioner's friends, James Summers.¹² The witness testified that she worked at a filling station in Ohio. On March 23, she lent the Petitioner her cell phone. Later that evening, the Petitioner called and requested that she pick him up at the Camden Clark parking lot in Parkersburg. (*Id.* at 112.) The witness drove Ms. Rollyson's car to Camden Clark with her boyfriend, Derek Zimmerman¹³. She then waited ten minutes for the Petitioner to arrive. (*Id.* at 113.) He was wearing a camouflage jacket, camouflage pants, a dark hoodie, and a ball cap. (*Id.* at 115, Supp. App. C at 73-74.) When he arrived, he told Ms. Rollyson

¹⁰Dr. Mahmoud testified that the most common manner of inflicting such a wound is to hold the victim on the ground face-down, lift his head and slice his throat. (Supp. App. vol. B at 74.)

¹¹State's witness Derek Zimmerman later testified that the Petitioner handed him this same wallet near the crime scene as he removed his jacket. The Petitioner took it back a few seconds later. (Supp. App. vol. C at 74-75.)

¹²This is the same James who introduced Mr. Claypool to the Petitioner at the Washington County jail.

¹³The State also called Mr. Zimmerman as a witness. (Supp. App. vol. C at 66.)

that he had lost her cell phone; she told him to go back for it. When he came back without the phone he told Ms. Rollyson to drive to the victim's apartment. She stated that he retrieved the phone, which had a dark liquid covering it. (Supp. App. vol. B at 122.) On the way back, the Petitioner disposed of the black hoodie he was wearing, They stopped one more time and then drove back to Ohio.

Once they arrived home, the Petitioner changed out of his pants, and cleaned the liquid off of the witness' phone. The witness also testified that the Petitioner had what was ordinarily called a "barbers knife." (*Id.* at 127-28.) After she heard about the murder, she contacted the Washington County Sheriff's Department, who placed her in touch with the investigating officers. Ms. Rollyson provided the investigating officers with a forty-page pre-trial statement. (*Id.* at 140.)

The State also called forensic analyst Jennifer Howard. (*Id.* at 184.) Ms. Howard testified that she received two submissions from the investigating officers. The first submission contained swabs from Ms. Rollyson's car¹⁴, the victim's kitchen sink drain, three swabs from a bathtub drain, two swabs labeled left hand bicycle grip, two swabs labeled right hand bicycle grip, a cell phone, an item labeled kitchen sink trap, and another labeled bathroom skin trap. She also received a pair of camouflage pants, a tee shirt, a jacket, a bag with a black, red and grey, size nine tennis shoe, another pair of tennis shoes and a dried blood specimen from the victim.¹⁵ (*Id.* at 189-190.)

¹⁴A maroon Mercury Tracer. (Supp. App. vol. C at 71.) The same car used by Ms. Rollyson to pick up the Petitioner at Camden Clark the evening of the murder. (*Id.* at 71.)

¹⁵The shoes were recovered from witness Tammy Wilfong's home. Later she testified that they did not belong to the Petitioner. (Supp. App. B at 308.)

Two swabs from Ms. Rollyson's car¹⁶, the swabs from the bathtub drain, the pants, and the jacket all tested positive for blood. (*Id.* at 191.) Ms. Howard sent the swabs for DNA testing. Forensic scientist David Miller testified that he found blood on the cell phone by using a rubbing technique. (*Id.* at 207.) Forensic examiner Richard Theiss examined a cast of a footprint impression, and a lift from a door.¹⁷ (*Id.* at 214.) He then compared them to the shoes submitted by the investigating officers. He discovered that the shoe cast was not the same size as the impression supplied by the police; thus, he eliminated it. (*Id.* at 226.) He determined that the lift was caused by the ball area of a shoe, but could not conclusively identify it as the same shoe provided by the investigating officers. (*Id.* at 223-224, 227.) His findings were consistent with someone kicking the door. (*Id.* at 221.)

The State next called DNA forensic examiner Chris Francis. (*Id.* at 233.) Mr. Francis testified that he received the swabs from the bathtub drain, the right and left hand grip of the bicycle, hairs from a pair of camouflage pants, a cutting from those pants, hairs from a Miami Ink and Bugle Boy tee shirt, the Route 66 jacket, a cutting from that jacket, and known samples from the victim and the Petitioner. (*Id.* at 237-238.) He found the Petitioner's DNA on the Route 66 jacket, a mixture of DNA, including the Petitioner's but not the victim's on the pants, and the victim's DNA on left and right hand fingernail scrapings. The rest of the tests were either negative or inconclusive.

¹⁶According to State's witness Derek Zimmerman, the Petitioner threw a bloody knife into the back seat of the car he and Ms. Rollyson used to pick him up at Camden Clark hospital. (Supp. App. vol. C at 88.)

¹⁷The footwear prints were discovered by the investigating officers in the gravel behind the victim's apartment. (Supp. App. vol. B at 255.) The casted footprint was found in the mud near the same location.

The State next called Parkersburg Police evidence technician Ross Clegg. (*Id.* at 246.) Officer Clegg was responsible for processing the crime scene. Initially he noticed that the victim's apartment door had been damaged. He noticed an oxygen machine in the hallway which appeared to have blood stains. (*Id.* at 252.) The telephone cord had been cut. Mr. Clegg found the bedroom/living room in disarray, the victim's body lying on the floor in the center of the room, with his bed located on the far wall. (*Id.* at 254.)

The State next called Tamara Wilfong. At the time of her testimony Ms. Wilfong resided in Virginia, but at the time of the murder she lived in Marietta, Ohio. (*Id.* at 289.) The victim was her great-uncle. (*Id.* at 290.) At the time of the murder she was involved in an intimate relationship with the Petitioner. (*Id.* at 292.) Because of his weakened physical condition, Ms. Wilfong often visited her uncle. Sometimes she brought the Petitioner with her. (*Id.* at 293.) On the day of the murder, Ms. Wilfong and the Petitioner visited the victim at approximately 3:00 p.m. They stayed approximately an hour.

In the early morning hours of March 24, 2000, the Parkersburg Police Department contacted Ms. Wilfong to tell her that her uncle was dead. She gave them two separate statements. At trial she admitted that these statements were not truthful. She had lied to the police because she was afraid and was in love with the victim. (*Id.* at 296.) Ms. Wilfong told the officers that the Petitioner was with her the evening of the murder. On March 25, she modified her statement, telling the investigating officers that the Petitioner left her apartment wearing black Nikes and was carrying a backpack. She could not remember what sort of pants he was wearing, but testified that he ordinarily wore camouflage pants. (*Id.* at 298.) The Petitioner rode his bike from Marietta to Parkersburg.

Somewhere between 11:00 and 11:15 p.m., Ms. Rollyson and her boyfriend, Derek Zimmerman, arrived at Wilfong's apartment. While they were watching a movie, the Petitioner called and asked to be picked up at Camden Clark Memorial Hospital. Because Ms. Wilfong was starting a new job the next day, and had her daughter, Ms. Rollyson and Mr. Zimmerman picked him up. They used Ms. Wilfong's car. The three of them returned sometime later that morning. Ms. Wilfong described Ms. Rollyson and Mr. Zimmerman as "shook up." The Petitioner immediately went into the bathroom to take a shower. (*Id.* at 303.) When Ms. Wilfong asked where he had been, the Petitioner told her that he had killed her uncle to protect her baby girl. (*Id.* at 303.)

Ms. Wilfong testified that, on the day of the murder, her five-year old daughter told her that the victim had licked her ear. (*Id.* at 317, 320.) Upon hearing this, Ms. Wilfong, her daughter, and the Petitioner immediately left the victim's apartment. (*Id.* at 331.) On the drive back to Ohio, Ms. Wilfong told the Petitioner that the victim had licked her daughter's ear. (*Id.* at 331.)

During a recess, defense counsel asked the trial court for permission to question Ms. Wilfong about the victim's criminal history, and his status as a registered sex offender. (*Id.* at 348.) Counsel argued that this inquiry went to identity. Earlier, Ms. Wilfong had testified that she had a knife. Counsel contended that evidence of the victim's status would shift the focus of the crime from his client to Ms. Wilfong. (*Id.* at 348.) Apart from her daughter's statement, defense counsel had no evidence that Ms. Wilfong was involved in the murder. Indeed, he had no evidence that Ms. Wilfong was anywhere near the victim's apartment at the time of the murder. Counsel did not offer any precedent supporting his position.

The trial court held that the prejudicial effect of this evidence outweighed its potential probative value. *See* W. Va. R. Evid. 403. The court also noted defense counsel's failure to produce dispositive precedent. (Supp. App. vol. B at 351.)

Ms. Wilfong conceded that she visited the Petitioner at the Washington County jail and that she spoke to him numerous times on the phone. At one point, the Petitioner urged her to reaffirm her statement that he was at her house the evening of the murder.

The State then called Michael Randall of the Parkersburg Police Department. (Supp. App. vol. C at 36.) The Wood County Emergency Dispatch dispatched Detective Randall, along with Detectives Stalnaker and Gonzales, to the victim's apartment on a shots fired call. Detective Randal soon was appointed lead detective. His job was to be a contact point between the officers, the other detectives and the county prosecutor's office. (*Id.* at 39.)

After inspecting the victim's apartment and the area surrounding it, the detectives spoke with Ms. Rollyson and Mr. Zimmerman. (*Id.* at 48.) Both witnesses retraced the route they took the evening of the murder. They showed the detectives where the Petitioner had discarded his jacket, and despite a broad search of the areas, the detectives could not find it.

After they had arrested the Petitioner, the FBI told the detectives that an inmate named James Claypool had information relevant to their investigation.¹⁸ (*Id.* at 55.) The detectives took a statement from Mr. Claypool which was consistent with his trial testimony. On March 24, they searched Ms. Wilfong's apartment and car.

¹⁸Although the investigating officers did not offer Mr. Claypool consideration for his assistance, they knew he was a member of the Pagans and had entered a guilty plea in federal court. (*Id.* at 63.)

After Mr. Zimmerman's testimony, the trial court reviewed the Petitioner's rights under Syllabus Point 7 *State v. Neuman*, 179 W. Va. 580, 581, 371 S.E.2d 77, 78 (1988).¹⁹ (Supp. App. vol C at 142-145.) The following Monday, the State rested. (*Id.* at 152.) Defense counsel renewed his motion for a mistrial due to the tainted jurors; which was, once again, summarily denied by the trial court. Defense counsel also moved for a mistrial based on the Sate's alleged failure to disclose the letter from James Claypool to his attorney. (*Id.* at 153.) Defense counsel also moved for a mistrial because the trial court prohibited the defense from mentioning the victim or Mr. Wright's criminal history and status as a registered sex offender.²⁰ (*Id.* at 154.) Counsel argued that evidence of the victim's status buttressed his defense. The Petitioner claimed that the victim had touched his girlfriend's prepubescent daughter inappropriately. The trial court responded that there was no evidence that the touching was sexual—the victim had licked the young girl's ear. (*Id.* at 156.) Counsel argued that the Petitioner's knowledge of the victim's status, coupled with his inappropriate contact, might amount to sufficient provocation to reduce the charge from murder to voluntary manslaughter. (*Id.* at 156-158.)

After considering counsel's arguments, the court denied his motion. Defense counsel then made a *pro-forma* motion for a judgment of acquittal, which the court also denied.

¹⁹After defense counsel expressed doubts that the Petitioner fully understood his rights, the trial court went through them with him again. (*Id.* at 176-179.) After explaining his rights, the trial court gave the Petitioner a brief recess to afford him an opportunity to talk with counsel.

²⁰According to counsel for the state, the convictions leading to the victim or Mr. Wright's status took place in 1964 and 1988. The victim is deceased. (Supp. App. vol. C at 155, 159.)

The defense's first witness was James Summers. (*Id.* at 160.) Mr. Summers allegedly shared a cell with Mr. Claypool. The witness testified that he had seen news stories covering the murder before the Petitioner arrived at the jail. Mr. Claypool then asked Mr. Summers, who was the Petitioner's cousin, to introduce him to Mr. Anderson. (*Id.* at 163.) Mr. Summers testified that he was present during the conversations between Mr. Claypool and the Petitioner. At no time did he hear the Petitioner admit to killing the victim, and the idea to kill the witnesses came from Mr. Claypool, not the Petitioner. (*Id.* at 165.) The Petitioner's primary interest was in West Virginia law regarding the admissibility of evidence, including the witness statements. (*Id.* at 165.) On cross-examination Mr. Summers admitted that he did not spend all of his time with Mr. Claypool and the Petitioner, and that they could have engaged in private conversations at some point. Indeed, Mr. Summers was released while Mr. Claypool and the Petitioner remained incarcerated. (*Id.* at 169-170.)

At the close of Mr. Summer's testimony the defense rested. (*Id.* at 179.) The State had no rebuttal. After an extended argument over the proper instruction on the elements of premeditation and deliberation, the trial court chose to read footnote 23 from *Guthrie*. *State v. Guthrie*, 194 W. Va. 657, 676 fn. 23, 461 S.E.2d 163, 182 fn. 23 (1995). Neither side objected to the trial court's charge or its jury instructions. The Court instructed the jury on first degree murder, and the lesser included offenses of second degree murder, voluntary manslaughter, and involuntary manslaughter.

After approximately two hours of deliberation the jury found the Petitioner guilty of first degree murder. (*Id.* at 270.) The trial court then moved to the mercy phase of the trial. On the morning of the mercy phase of Petitioner's trial, defense counsel once more moved to admit

evidence of the victim's criminal record and status as a sex offender. (*Id.* at 276.) Without specifying why, defense counsel argued that the victim's status was a mitigating factor. This time the trial court granted defense counsel's motion. (*Id.* at 281.)

In order to balance the probative value of the Petitioner's criminal history against the danger of unfair prejudice, the trial court held a pre-trial, *in-camera*, hearing. Its first witness was Detective Randall. (*Id.* at 284.) The witness ran an NCIC check on the Petitioner as part of the murder investigation. This search revealed that the Petitioner was also a registered sex offender. (*Id.* at 285.) The Petitioner was also convicted of several breaking and enterings beginning in 2000. The trial court ruled that this evidence was relevant to the mercy phase of the trial and admitted it. (*Id.* at 293-294.)

The defense presented its case-in-chief first. Their first witness was the Petitioner's mother, Rose Haines. Ms. Haines was a single mother with three children, including the Petitioner. (*Id.* at 298.) One of Ms. Haines' live-in boyfriends was a drunk who abused her, and her children. This caused her to move to a shelter in Marietta, Ohio. (*Id.* at 299.) After an incident at the shelter, the Petitioner was placed at a facility for troubled children; the Ray Clark Center. (*Id.* at 301.) When he was three he was struck by a car. He remained at the Ray Clark Center for ten months and was diagnosed with attention deficit and bipolar disorders. (*Id.* at 303.) While at the center, when he was seven, the Petitioner was raped by a fifteen year old boy. (*Id.*) Although upset, Ms. Haines did not report this incident to the police. The Clark Center placed the two boys in different rooms. (*Id.* at 305-06.)

After ten months, Ms. Haines took her son home. He began taking Ritalin, and continued to take it for five years. (*Id.* at 308.) He also attended counseling, but by the time he was fourteen or fifteen he was confined in a juvenile detention facility in Ohio and then sent to the Buckeye Boy's Ranch in Columbus. (*Id.* at 309.)

When he was fifteen the Petitioner was involved in a severe car wreck in which he suffered a broken bone running from his hip to his knee, and several head injuries. (*Id.* at 310.) After his release from the Buckeye Boy's Ranch he lived in a foster home. (*Id.* at 312.) He stayed there six months and was released to his mother again. (*Id.*)

The Petitioner attended alternative school and was supervised by a juvenile probation officer. He completed the tenth grade before he dropped out. (*Id.* at 313-14.) Sometime shortly thereafter, the Petitioner began to steal objects from parked cars. Ms. Haines called the police who searched her home and found a large amount of stolen merchandise.

On March 23, 2010, the Petitioner, Ms. Wilfong and her daughter came to Ms. Haines' home in Marietta. The Petitioner told his mother that the victim had placed his hand in Ms. Wilfong's daughter's lap and on her "privates." (*Id.* at 320.) Ms. Haines suggested the Petitioner call the police and Children's Protective Services. That same day Ms. Haines urged Ms. Wilfong to report this incident. She declined.

Ms. Haines then told the jury that the victim was a sex offender, and that he had been in jail a "couple of times" before he came to Parkersburg. (*Id.* at 324.)

There is no doubt that, despite his troubles, the Petitioner's mother loves him very much. (*Id.* at 335.) Her testimony was both touching and effective.

The defense next called Detective Randall. Through his testimony the defense was able to expound upon the victim's criminal history including the fact that he was a registered sex offender.

Counsel for the State and defense counsel delivered short summations. Upon instruction and due consideration of the evidence, the jury returned a recommendation of mercy.

V.

ARGUMENT

A. **THE PETITIONER HAS FAILED TO PROVE THAT THERE WAS A MANIFEST NECESSITY TO DECLARE A MISTRIAL SIMPLY BECAUSE OF JUROR ANKROM'S COMMENT.**

1. **The Standard of Review.**

We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Tennant v. Marion Health Care Found., Inc., 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995).

2. **The trial court's methodology and decision were a reasonable exercise of its discretion.**

The Petitioner first alleges that the entire *venire* was "tainted" by Juror Ankrom's comment that the defendant, "just looks guilty." He then declares that the trial court's procedures for dealing with this obvious taint were insufficient. Instead of generally inquiring whether any of the prospective jurors overheard any inappropriate comments, the Petitioner contends that the trial court should have called each member of the *venire* in, one at a time, and asked whether they heard Ms. Ankrom's comment.

The Petitioner offers no legal support for his position. Instead of citing to a single dispositive case he conclusory pronounces “Given the ramifications and pressures²¹ of stating on the record in open court about their knowledge of these comments, the group questioning method chosen by the court failed to adequately address the serious concerns brought up by [prospective] Juror Markell and perhaps most egregiously, failed to take into consideration her honest remarks that began the court’s investigation into this issue.” (Petr’s Br. at 9.)

The Petitioner’s claim suffers from several fatal flaws. Initially, as the trial court judge was actually present, he was in the best position to sense whether the jury was able to proceed properly with its deliberations. *United States v. Parker*, 903 F.2d 91, 100 (2d Cir. 1990). Therefore, his decision should be afforded broad discretion to decide upon the appropriate course to take in view of his personal observations of the jurors and parties. *United States v. Aiello*, 771 F.2d 621, 629 (2nd Cir. 1985) *abrogated on other grounds by Rutledge v. United States*, 517 U.S. 292 (1966).

Although it is true that a trial court must take appropriate steps to ensure that jurors will not be exposed to information or influences that could affect their ability to render an impartial verdict based solely upon the evidence, due process does not require a new trial every time a “juror has been placed in a potentially compromising situation.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982). As the Court found, “Were that the rule, few trials would be constitutionally acceptable.” *Id.*

Nor did defense counsel object to the trial court’s methodology:

²¹He does not bother to state exactly what these ramifications and pressures are. Since the trial court’s question had nothing to do with the jurors’ personal lives, or had the potential to expose them to public ridicule they had no motivation to lie.

MR. MUNOZ: Judge, we need to make a motion or something before we bring this other juror in. I think that it's apparent that [Juror] Ankrom's made this comment at least more than once, which I believe [Juror] Minton --

Hold on for a second, [court reporter] sorry about that.

It seems apparent if [Juror] Minton is speaking truthfully, which I don't think we have any reason to doubt him, that [Juror Ankrom] said it to him. She also said it at least another time -- That was outside the building. She at least said it another time inside the building if [Juror] Markell is to be believed. So I don't know what's going on here, but it's obviously been made more than one time if these jurors are to be believed.

THE COURT: We can question the entire panel when we get back into open court and see if anyone's been influenced by the remark.

(Supp. App. vol. A at 200.)

Defense counsel did not object to the trial court's suggested solution until after the court inquired, the process of striking the jury had begun, and the trial court had delivered its preliminary instructions. Even then, defense counsel did not request any additional investigations or alternative methods; he simply moved for a mistrial, a drastic remedy given the lack of any proof of prejudice. (*Id.* at 210.) "A declaration of a mistrial, the most drastic remedy for trial error, should be granted only when it appears that justice will otherwise be thwarted." *State v. Adamson*, 665 P.2d 972, 984 (Ariz. 1983). *See also State v. Williams*, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983) (decision to declare mistrial is a discretionary decision made by the trial court and may only be rendered when there is a manifest necessity for discharging the jury before rendering a verdict). Prospective Juror Markell testified that she had overheard prospective Juror Ankrom's comment during a break, while waiting in the courtroom hallway. (*Id.* at 189.) She did not know Juror Ankrom's name, but did

know where she sat in the courtroom. She could not say who was with her when Juror Ankrom made the comment, but said there were approximately a half-dozen other prospective jurors in the hallway. When asked if this comment would affect her ability to be fair and impartial, Juror Markell emphatically said no. (*Id.* at 189-190.) Indeed, the record suggests that she was well aware of her duty to ignore it. (*Id.* at 189.) Defense counsel did not follow this up with any additional questions. Thus, there is no evidence that the comment had any influence of the juror's position.

Juror Minton testified that Juror Ankrom made the comment while they were walking from the parking lot to the courthouse. (*Id.* at 195.) He knew that the comment was inappropriate, and also emphatically stated that he could remain impartial. (*Id.* at 196.) Defense counsel followed up, asking Juror Minton if anyone was standing near him when Juror Ankrom made this comment. He responded that it was just the two of them. He also testified that he did not respond, but just kept on walking.²² (*Id.* at 199.) Defense counsel did not follow up. Clearly, defense counsel did not believe that Juror Minton was unredeemably tainted; he was chosen to sit on the Petitioner's jury. (*Id.* at 214.)

More importantly Petitioner's quotation of Juror Ankrom's comment regarding her use of drugs is not consistent with the record. On page 6 of his brief to this Court, Petitioner's counsel quotes Juror Ankrom:

JUROR: Oh, yeah, that wouldn't be a problem. I take enough drugs for that.

(Pet'r's Br. at 6.)

²²Juror Ankrom corroborated his testimony. (Supp. App. vol. A at 192.)

He then states, “This exchange is enlightening for the information that was provided to the parties by [Juror Markell] as individual *voir dire* continued on the 4th day of January 2012. This juror informed the court that [Juror Ankrom] had stated to other jurors, “He just looks guilty.” (*Id.* at 7.)

Counsel’s attempt to draw a connection between Juror Ankrom’s “drug” use and her comment that the Petitioner just “looked guilty” is misleading. Juror Ankrom did admit that she takes “enough drugs for that.” But before making this statement she told the court that she did not want to serve because of the pressures which accompany being a juror. (Supp. App. vol. A at 143.)

When asked about her drug use, this is what she said:

JUROR: Prescription drugs.

MR. WHARTON: Are you currently prescribed medication?

JUROR: Yes.

MR. WHARTON: Is that for nerves, anxiety, that kind of thing?

JUROR: Mm-Hm.

MR. WHARTON: And are you taking that prescription medication according to the prescription?

JUROR: Yes.

MR. WHARTON: Does that prescription medication affect your ability to comprehend things that are going on around you?

JUROR: No.

MR. WHARTON: Are you under any limitations at all with the medication you take?

JUROR: No.

(*Id.* at 144.)

According to a 2011 survey taken by Medco Health Solutions, more than one in five Americans take at least one prescription drug to treat psychological disorders, ranging from Prozac to anti-anxiety drugs like Xanax. See <http://www.cchrint.org/2011/11/18/americas-startling-use-of-mental-illness-drugs-by-the-numbers-a-nation-of-pill-poppers/>.

As there is no legal support for the position that these millions of people are unqualified for jury service simply because they use anti-anxiety drugs, counsel's incomplete quotation can only be interpreted as a misleading, mean-spirited, attempt to portray Juror Ankrom as a basket case suffering from a mental disorder. He then improperly attempts to link this imaginary disorder to her comment.

As the Petitioner moved the trial court for the limited and draconian remedy of a mistrial, his issue on appeal is narrow. He has utterly failed to produce any concrete evidence remotely suggesting that the trial court abused its discretion. After investigating the circumstances surrounding the comment, an investigation which defense counsel did not object to until after it was completed, the court decided that there was no evidence of manifest necessity. The jury was not exposed to outside influences, improper third party contact, or biased press coverage. Even if the Petitioner's speculation is that the comment was made more than once, it still may be characterized as an isolated incident which did not render the Petitioner's jury venire impermissibly biased. The trial court's decision was well within the bounds of its discretion.

B. THERE WAS NO DISCOVERY VIOLATION AS MR. CLAYPOOL'S CRIMINAL RECORD WAS EQUALLY AVAILABLE TO BOTH SIDES, NOR WAS THE PETITIONER PREJUDICED.

1. The Standard of Review.

The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.

Syl. pt. 1 *McDougal v. Mcammon*, 193 W. Va. 229, 232, 455 S.E.2d 788, 791 (1995).

2. Counsel for the Petitioner thoroughly cross-examined Mr. Claypool regarding his criminal record.

In his next assignment of error, the Petitioner claims that he was entitled to a copy of Mr. Claypool's updated rap sheet. Before trial, the State had provided the Petitioner with a copy of the witness' rap sheet up to 2006. The Petitioner entered a guilty plea to obstructing an officer with bodily injury in federal district court. In *State v. Hall*, 172 W. Va. 138, 142, 304 S.E.2d 43, 47 (1983) this Court ordered the remand of a case to the trial court based upon its holding that, given the state of the record, it could not determine how the State's failure to provide the defense with a copy of its eyewitness' criminal record had would effect the trial court record on appeal. This Court also remanded to determine the extent of the defendant's efforts to discover this information. Upon remand, the trial court was instructed to determine the "prejudicial effect on the preparation and presentation of the defendant's case." *Id.*

A brief search of Pacer website reveals that Mr. Claypool, along with fifty-eight other members of the Pagans, was indicted on September 29, 2009. The United States Attorney filed a

superceding indictment on February 3, 2010. Mr. Claypool entered a guilty plea to a single count of intimidation or force against a witness on December 16, 2009, and was sentenced on September 17, 2010, to time served, three years of supervised release, and a \$100 assessment. All of this information was gathered by counsel for the Respondent without engaging in discovery. The information was equally available to the defense.

During the first day of trial, the court held an *in camera* hearing, during which Mr. Claypool testified that he was in the Washington County Jail due to a series of federal charges. (Supp. App. vol. A at 265.) He also testified that he pled guilty to obstructing justice with bodily injury, a felony, and was sentenced to time served, a three years of supervised release. (*Id.* at 267.) Defense counsel thoroughly cross-examined the witness regarding his criminal history. (*Id.* at 275.)

Mr. Claypool had testified to his criminal history at the Petitioner's preliminary hearing. At that time, the Petitioner was represented by Mr. Munoz. (*Id.* at 291.) The State re-ran Mr. Claypools' criminal history the day before the trial. The witness had one felony conviction after 2006, the intimidating a witness, a federal offense. This information came as no surprise to defense counsel. (*Id.* at 292.)

After the hearing, Mr. Claypool testified before the jury. He admitted that he was an enforcer for the Pagans motorcycle gang, and that he had been indicted in federal court for racketeering, cocaine distribution, serving as a bodyguard for a convicted felon, domestic battery and possession of a firearm. (*Id.* at 295, 297, 309-310.) The witness testified that he pled guilty to obstruction of justice with bodily injury, a felony. (*Id.* at 295, 310.)

Rule 609(a)(2) of the West Virginia Rules of Evidence permits defense counsel to impeach a non-party witness with evidence of a conviction for an offense that carries over a one year sentence, or crimes involving dishonesty or false statements regardless of the punishment. Both the State and the defense thoroughly explored Mr. Claypool's criminal history in addition to his membership in the Pagans. There is no evidence of prejudice. Nor has the Petitioner made any effort to prove that there were additional convictions which the witness failed to mention. He is merely speculating.

Unlike *Hall*, the record proves that the Petitioner knew about the witness' criminal history long before trial. It would appear that defense counsel failed to make even a token effort to discover this information by searching Pacer, or any other database. On remand, the trial court in *Hall* found that the Petitioner had not requested a copy of the witness' criminal history, that the State had not concealed this information, and that the jury's verdict would not have been any different if the defense had received a copy of the witnesses' rap sheet. *See State v. Hall*, 174 W. Va. 787, 789, 329 S.E.2d 860, 861 (1985).

The same may be said for the case-at-bar. The Petitioner was afforded every opportunity to question Mr. Claypool about his prior felony convictions. He is merely speculating that there were other, phantom convictions which the State failed to disclose. He was not the victim of unfair surprise, nor did the State deliberately withhold this evidence. There is no evidence of a *Brady*

violation.²³ His rights to confrontation and cross-examination were not impaired. Counsel for the Petitioner learned about Mr. Claypool's past at his preliminary hearing. Despite knowing this information, defense counsel did nothing to confirm it. This information was not in the sole possession of the State, it was a public record. Most importantly, the Petitioner possessed the information in time to use it to impeach the witness before the jury.

C. THE PETITIONER HAS UTTERLY FAILED TO PROVE A *BRADY* VIOLATION.

1. The Standard of Review.

In *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007), this court determined that a *Brady* violation claim is a mixed question of law and fact. This Court should subject a trial court's factual findings to a clearly erroneous standard of review. Questions of law are subject to *de novo* review.

2. Mr. Claypool's letter was written to a private party, this party then shared the information contained in the letter with the FBI. There is no evidence that the State ever possessed the letter.

The Petitioner next claims that the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963) when it failed to turn over a letter written by Mr. Claypool to his attorney, written after his incriminating conversation with the Petitioner. (Supp. App. vol. B at 8.)

²³Even if the Petitioner were to argue that failure to turn over a State witness' rap sheet constitutes a *Brady* violation, the evidence was not material. Evidence is material if there is a reasonable probability that, had the State disclosed the evidence, there is a reasonable probability that the outcome of the trial would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

There are three components of a constitutional due process violation under *Brady*: (1) the evidence at issue must be favorable to the defendant; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and, (3) the evidence must have been material. *Strickler v. Green*, 527 U.S. 263, 281-282 (1999).

Mr. Claypool testified that he wrote his attorney a letter after the Petitioner admitted to him that he had murdered the victim. (Supp. App. vol. A at 303.) Counsel forwarded the information from the letter to the FBI who forwarded it to the local investigating officers. There is no evidence that he forwarded that actual letter. Constructive or imputed possession occurs when evidence may not physically be in the State's control, but is readily available. *See United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980).

The issue is whether the letter, forwarded by Mr. Claypool to his attorney, was ever possessed by some arm of the state. *United States v. Perdomo*, 929 F.2d 967, 971 (3rd Cir. 1991). *But see United States v. Pelullo*, 399 F.3d 197, 217 (3rd Cir. 2005) (“[G]overnment is not under an obligation to obtain and disclose all information in possession of other arms of government that are not involved in the prosecution . . . the prosecution is under no obligation to ferret out evidence from another pending proceeding.”); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) (government only obliged to turn over information which is known to them). There is nothing in the record to indicate that anyone but Mr. Claypool's attorney possessed the letter. He may have relayed the information, but there is no evidence he shared the actual letter. Nor is there any evidence that the FBI told local law enforcement that there was a letter. Thus, it was not “readily available” to the State. Indeed, defense counsel conceded that it could not prove that the

State ever possessed the letter. (Supp. App. vol. B at 7.) Nor did the State possess the authority to order its production.²⁴ This was not a case in which one branch of government possessed exculpatory evidence which another branch failed to obtain. Mr. Claypool's counsel was a private citizen.

Nor is there any evidence of unfair surprise. The State turned over Mr. Claypool's statement to the defense two years before the Petitioner's trial. The statement specifically mentions him sending a letter to counsel.²⁵ (*Id.* at 6.) Thus, defense counsel knew as much as the State; there is no evidence of suppression. (*Id.* at 3.) *See United States v. Earnest*, 129 F.3d 906, 910 (7th Cir. 1997) ("Furthermore, evidence is not regarded as suppressed by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence.")

Nor is there any evidence that Mr. Claypool's trial testimony did not contain the same information contained in the letter. His testimony was not exculpatory, and it was only after he spoke with the Petitioner, that he chose to contact his attorney. Upon their receipt of this information, local law enforcement took a statement from Mr. Claypool and the State chose to call him as a witness against the Petitioner. Ordinarily, the State does not choose to call witnesses who may damage their case.

²⁴If Mr. Claypool authorized his attorney to disclose what was written in the letter to a third party, he waived his attorney-client privilege. But, if there is material in the letter not disclosed, those parts of the letter remain confidential, and cannot be revealed by counsel.

²⁵There is no evidence from Mr. Claypool's letter to counsel that counsel turned the letter over to the FBI.

Once again, the Petitioner’s counsel sought a mistrial. Once again, he failed to demonstrate manifest necessity for such a drastic remedy. His assignment of error is completely speculative. He says there might be something exculpatory in Mr. Claypool’s letter, and that it was “potentially materially relevant.” (Pet’r’s Br. at 12.) Speculation does not justify a mistrial.

D. THE VICTIM’S STATUS AS A REGISTERED SEX OFFENDER WAS NOT RELEVANT.

1. The Standard of Review.

“A trial court’s evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.” Syl. pt. 4 *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998).

2. The defense sought to admit this evidence for purposes of jury nullification.

The Petitioner’s final assignment of error claims that the trial court abused its discretion by excluding evidence that the victim was a registered sex offender. The first day of trial, defense counsel argued that the victim’s status, coupled with testimony that he had licked Ms. Wilfong’s daughter’s ear,²⁶ was relevant to the issue of motive. (Supp. App. vol. A at 8, 317, 320.) Counsel also argued that the victim’s status might shift the focus away from his client to another, unnamed third party. (*Id.* at 9.) When asked by the trial court, counsel conceded that he had no evidence that anyone else had murdered the victim. They were seeking to extrapolate that information

²⁶The record does no indicate that the State seriously contested that the victim did, in fact, lick this five-year old’s ear.

solely from the victim's status. (*Id.* at 11.) The trial court denied the motion, but reserved the right to change its ruling based on the evidence introduced at trial. (*Id.* at 11.) The trial court permitted the defense to introduce evidence of the victim's status during the mercy phase of Petitioner's trial.

Simply put, defense counsel sought to introduce this evidence to prove that the victim did, in fact, lick the juvenile's ear. The child was not called to testify at the Petitioner's trial. The trial court ruled that her statement was not introduced for the truth of the matter asserted, but as circumstantial evidence of Ms. Wilfong and the Petitioner's state of mind. When Ms. Wilfong told the Petitioner what her daughter told her the victim had done, he either became so enraged that he rode a bicycle from Marietta to Parkersburg and murdered the victim; or, upon hearing this, decided to murder the victim for some undisclosed motive such as revenge.

"The character rule is based on the deeply entrenched view that trials are conducted to determine what happened in the situation at issue and not to judge the morality of the parties." David H. Kaye et. al., *The New Wigmore on Evid.* § 8.3 at 493 (Cum. Supp. 2013). Whether the victim was a registered sex offender was irrelevant to anything but his character. *See* W. Va. R. Evid. 404(a). It did not legally justify the Petitioner's conduct.²⁷ Indeed, there is no evidence that it played a part in his decision to murder the victim. Introduction of this evidence would only have served to divert the jury's attention from the facts of the case to the victim's character. This

²⁷The law does not tolerate vigilantism. Nor is a trial court expected to sit on its hands when either side presents evidence for the sole purpose of jury nullification.

is not in conformity with the law. *See* W. Va. R. Evid. 403 (trial court may exclude relevant evidence if the danger of unfair prejudice outweighs the probative value).

The Petitioner also argues that evidence of the victim's status, coupled with Ms. Wilfong's daughter's statement, may have convinced the jury to convict him of the lesser included offense of voluntary manslaughter. *See State v. Jones*, 128 W. Va. 496, 499, 37 S.E.2d 103, 105 (1946) (the absence of malice distinguishes voluntary manslaughter from premeditated murder). Whether the victim's alleged act constituted sufficient evidence of subjective and objective provocation was a jury question. *See State v. Johnson*, 909 S.W.2d 461, 464 (Tenn. Crim. App. 1991).

There is no doubt that this was a brutal crime. The injuries suffered by the victim were horrific. But, as the defendant, also a registered sex offender, chose not to testify there is no evidence regarding his state of mind at the time of the murder. Had the evidence been admitted, the jury would be expected to infer from the victim's status that the Petitioner acted while in a state of fury. The evidence does not support such a finding. The record proves that the Petitioner murdered the victim for financial gain. On the day of the murder the Petitioner lied to Tammy Rollyson when she asked him where he was going. (Supp. App. vol. B at 109.) He rode a bicycle from Marietta to the victim's apartment in Parkersburg.²⁸ This afforded him additional time to cool his passions. *See Walden v. State*, 491 S.E.2d 64 (Ga. 1997) (if the killer's passion has cooled or there was sufficient time between the provocation and the killing for his passion to cool, he is guilty of murder not manslaughter). When Ms. Rollyson picked him up later that evening

²⁸Somewhere between fourteen and seventeen miles. www.mapquest.com.

she described him as anxious, not angry. (*Id.* at 118.) Ms. Metz testified that the Petitioner told her he was due for some money. When she asked him how he responded, “Well, if you must know, I’m going up here to kill this elderly man and take his money.” (Supp. App. vol. A at 360.) At that time the witness’ husband, her three children, one individual named Ed Stephens, and another whose name she could not recall, were present.²⁹ (*Id.* at 361.) A canvass of the crime scene by the investigating officers revealed the victim’s wallet stuck in a storm drain near his apartment.

Nor could the victim, pursuant to West Virginia Rules of Evidence 404(a)(2) introduce inadmissible character evidence to buttress his claim that he acted without malice. This does not mean that the Petitioner’s belief that the victim had improperly touched Ms. Wilfong’s child was not relevant to this issue. But the victim’s character does not reduce the seriousness of Petitioner’s conduct. A defendant may not argue that his victim was such a bad person that it caused him to kill him in a fit of rage. Nor can he argue that his character made the act of licking Ms. Wilfong’s child’s ear more likely. If this were so, it would render West Virginia Rules of Criminal Procedure 404(a)(2) a nullity.

The Petitioner’s “phantom suspect” defense is so lacking in merit it is hardly worth mentioning. The Petitioner did not introduce a scintilla of evidence suggesting that anyone other than the Petitioner was the murderer; his alleged argument is a red herring.

²⁹The State did not call any of these individuals to testify.

VI.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Wood County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



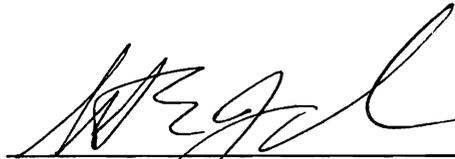
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CERTIFICATE OF SERVICE

I, Robert D. Goldberg, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Brief of Respondent* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 1st day of March, 2013, addressed as follows:

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