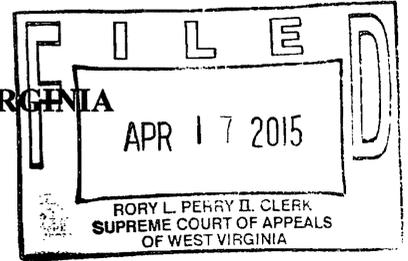


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0876



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

HOWARD CLARENCE JENNER,

Defendant Below, Petitioner.

**BRIEF OF RESPONDENT
STATE OF WEST VIRGINIA**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

HOWARD CLARENCE JENNER,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

On December 22, 2011, Howard Clarence Jenner (“Petitioner”) intentionally, maliciously, deliberately and premeditatedly murdered his aunt, Beni Truax, by shooting her twice—once in her back and once in her head. On this same day, Petitioner attempted to murder and did maliciously assault his uncle, Sherman Truax, by shooting him, which shot hit Sherman in his right wrist area nearly blowing his wrist and hand off. The facts and circumstances of this murder, attempted murder and malicious assault are as follows:

In 2009, Sherman and Beni Truax, husband and wife, along with their 14 year old son Nicholas Truax, were living in their home in Upshur County, West Virginia.¹ App. vol. II, 37-38, 54. During this same time period, Petitioner left Tennessee, where he was living at the time, and returned to West Virginia. App. vol. II, 38. Upon his return, Petitioner began living with Beni (his

¹ The Truaxs lived in the Buckhannon area of Upshur County; the address of their home was 205 Hacker’s Creek Road. App. vol. II, 37, 54.

aunt by blood), Sherman (his uncle by marriage) and Nicholas (his cousin by blood).² App. vol. II, 38, 55, 56. Sometime thereafter, in 2009, due to some problems that arose between the Truaxs and himself, Beni and Sherman threw Petitioner out of their house. These problems included Petitioner not working on a regular basis, his jealousy of Beni's and Sherman's son Nicholas, as well as his attempts to have Beni and Sherman discipline Nicholas for things he had not done.³ App. vol. II, 38-39, 51, 56-57. After he left, the Truaxs did not see and/or have any further contact with Petitioner until December 2011. App. vol. II, 44, 51, 57.

On December 18, 2011, at around 4:00 a.m., Petitioner called for a taxi. App. vol. II, 226. This taxi took Petitioner from the Baxa Hotel in Buckhannon, where he was staying at the time, to the Number Five Mine Road off of Hacker's Creek Road, which was close to the area where Sherman, Beni and Nicholas Truax were living at the time; the taxi dropped Petitioner off at this location around 4:48 a.m. App. vol. II, 226-27, 228, 229, 230, 232, 305, 391.

Later this same morning (December 18, 2011), at around 10:00 a.m., Petitioner went to the Walmart in Buckhannon. There, Petitioner purchased a rifle (equipped with a telescopic sight) and some ammunition.⁴ App. vol. II, 252-53, 254, 255-56, 261, 263.

² Notably, Petitioner's mother, Mary Branam, is Beni Truax's sister. App. vol. II, 56. *See also generally* App. vol. I, 312. During this time period, 2009, Petitioner's mother also began staying with the Truaxs. App. vol. II, 38.

³ Notably, at the time that they threw Petitioner out in 2009, Beni and Sherman also threw Petitioner's mother, Mary Branam, out as well. After they were ousted by Beni and Sherman, Petitioner and his mother did not have anywhere else to go. *See generally* App. vol. I, 324, 328, 337.

⁴ The "make" of this weapon was a Remington 770, .243 caliber rifle. App. vol. II, 237-38, 255, 261, 263, 312, 313, 315, 318, 321. Linda Tenney was the firearm salesman that sold this rifle and ammunition to Petitioner. App. vol. II, 252-53, 254, 255-56, 259. Notably, before purchasing this rifle, Petitioner told Ms. Tenney that he wanted a gun that would kill a deer, as he was going to
(continued...)

Later this same day (December 18, 2011), at around 5:00 p.m., Petitioner again called for a taxi. App. vol. II, 227, 230-31. The taxi took Petitioner from the Baxa Hotel to Jerry's Sporting Goods ("Jerry's") in Lewis County, West Virginia, arriving there at around 5:37 p.m.⁵ App. vol. II, 227, 229, 230-31. On his arrival at Jerry's, Petitioner was seen by a firearm salesman.⁶ App. vol. II, 235, 236. Petitioner had with him a rifle (equipped with a telescopic sight), which the salesman assisted Petitioner in siting, as well as showing Petitioner how to fire the rifle.⁷ App. vol. II, 236-38. Thereafter, the salesman left Petitioner in the firing range area of the store, at which point Petitioner continued firing the rifle. App. vol. II, 237-38. During this period, Petitioner was behaving peculiarly, as "he would fire a few shots, then he would get up and pace, look down the range, . . . hold his hands [in a certain position] . . . like he was thinking, and run his hand through his hair."⁸

⁴(...continued)

start deer hunting. App. vol. II, 260. However, after purchasing the rifle, Petitioner made no inquiries about obtaining a hunting license from the store. App. vol. II, 263. It should also be noted that, at the time that Petitioner purchased the rifle (December 18, 2011), the regular season for hunting deer was over, with the exception of female deer, which required a special permit. App. vol. II, 264.

⁵ The taxi driver, Terry Blake, was the owner/operator/driver of TC Taxi Service in Buckhannon. App. vol. II, 224, 231.

⁶ Eugene Greathouse was the firearm salesman that assisted Petitioner. App. vol. II, 234-35, 236.

⁷ It should also be noted that, when the salesman first encountered him, Petitioner's rifle had a loaded round in the chamber with the safety to the rifle in the off position, which was not the proper way to have a firearm resting in a public place. App. vol. II, 237.

⁸ Notably, after he left Jerry's, Petitioner, who was carrying his rifle and walking down the road (Route 12 in Buckhannon) at the time, was stopped by Officers Tom Posey and Nicholas Caynor, of the Buckhannon Police Department; the stop occurred at around 9:00 p.m. App. vol. II, 266, 267-69. During this stop, these Officers "ran" Petitioner's identification and checked for any outstanding warrants; this check came up "clean." App. vol. II, 266. Thereafter, the Officers gave
(continued...)

App. vol. II, 238.

On December 22, 2011, Beni, Sherman and Nicholas Truax were still living in the same house in the Buckhannon area of Upshur County. App. vol. II, 39. On the afternoon of this same day, at approximately 4:00 p.m., Sherman was sitting in his recliner chair playing with his laptop computer, during which time he “dozed off.” App. vol. II, 39, 43-44, 48. While sleeping, Sherman was awakened by a gunshot sound. App. vol. II, 39. This gunshot prompted Sherman to get up from his recliner, at which point Sherman heard another gunshot. App. vol. II, 39. Sherman then walked out of his house and saw his wife Beni laying face-down and motionless on the ground. App. vol. II, 39, 43, 46.

After discovering Beni, Sherman saw Petitioner step out from behind a parked truck with a rifle (equipped with a telescopic sight), which rifle Petitioner directly aimed at Sherman. App. vol. II, 40, 48, 49, 75. Seeing this, Sherman started to run back into his house. At this moment, Petitioner began firing shots at Sherman, one of which shots hit Sherman in his right wrist area.⁹ App. vol. II, 40-42, 44, 200, 369. Once inside the house, Sherman wrapped a towel around his wrist to control the bleeding and called 911. Back inside, Sherman also retrieved a rifle of his own in case Petitioner came into the house; Sherman’s rifle was unloaded at the time.¹⁰ App. vol. II, 42, 52, 58,

⁸(...continued)

Petitioner a ride back to his hotel, the Baxa Hotel in Buckhannon. App. vol. II, 266, 391.

⁹ The shot to Sherman’s wrist caused significant injuries for which he had to be life-flighted from the scene and undergo multiple surgeries and treatments. In fact, Sherman still continues to suffer from the injuries he sustained during this incident. Essentially, the shot nearly blew Sherman’s wrist and hand off. *See generally* App. volume II, 41-42, 43, 44-45, 50, 58, 77, 119, 121, 123, 125, 126, 128-29, 132-34, 242-44, 249.

¹⁰ The “make” of Sherman’s rifle was a .308 caliber hunting rifle. *See generally* App. vol. (continued...)

73, 102, 369, 371.

While on the phone with 911 and looking out the windows to see the whereabouts of Petitioner, Sherman saw his son Nicholas (who was around 16 or 17 at the time and was coming home from school) walking up the driveway area to the house. App. vol. II, 42, 46, 50, 54-55, 57. Seeing his son, Petitioner stuck his head out the front door and shouted to Nicholas to get inside, which Nicholas did. App. vol. II, 42, 46, 58. Once his son was inside, Sherman related to Nicholas that Petitioner had shot his mother Beni, at which point Nicholas looked outside and saw Beni laying face down on the ground. App. vol. II, 58-59, 60-61. With their concerns that Petitioner was still around the house, and with Sherman unable to load his rifle, Nicholas loaded the rifle for Sherman who, in turn, held onto it until the police later arrived on the scene.¹¹ However, at no time during this incident did Sherman fire this rifle. Lastly, during this same time period, Sherman handed the phone to Nicholas, who then began speaking to the 911 operator who, in turn, dispatched the police to the scene. App. vol. II, 42-43, 58-59, 61, 62, 71, 369.

Thereafter, Upshur County Sheriff Virgil Miller, with West Virginia State Police Trooper Brian Wright following behind, responded to the scene. App. vol. II, 71-72, 101. Upon their arrival,

¹⁰(...continued)
II, 47, 48, 58, 304, 369.

¹¹ It should be noted that the record is a little “hazy” as to whether Sherman or Nicholas held onto this rifle after it was loaded and the police arrived. *See* App. vol. II, 42, 59. From the record, it appears that Sherman’s rifle was loaded with three bullets, which bullets Nicholas unloaded when the police arrived. App. vol. II, 62. It further appears that Nicholas put two of these bullets in his pocket, which he later discovered at the hospital; Nicholas either set the third bullet down or gave it to the police. App. vol. II, 62.

these Officers found Beni Truax dead and laying face down in a pool of blood.¹² App. vol. II, 72, 77, 101, 107, 110, 112, 131, 197-198, 271, 278. Beni had been shot once in her back and once in her head.¹³ App. vol. II, 72, 110, 131, 198, 199, 200, 209, 278.

At this point, another State Trooper, Trooper Rich (first name uncertain), arrived at the scene, after which Sheriff Miller instructed Troopers Wright and Rich to secure the area. App. vol. II, 72-73. Moments later, Sherman and Nicholas Truax came out of their house, at which time Sherman identified Petitioner as having shot him. App. vol. II, 73, 74, 101. During this interaction, Sherman also “pointed” Sheriff Miller in the direction that Petitioner had fled. App. vol. II, 74-75. With Trooper Wright staying behind to secure the scene, Sheriff Miller and Trooper Rich then left the immediate area in order to track (by way of footprints) Petitioner down. App. vol. II, 75-76, 102, 325. This search, however, soon “turned cold” and Sheriff Miller and Trooper Rich returned to the Truaxs’ house.¹⁴ App. vol. II, 76-76, 325. Following this initial failed search, Lieutenant Davis, of the Upshur County Sheriff’s Department, along with a SWAT team, responded to the Truaxs’ house, after which the search for Petitioner continued. App. vol. II, 104.

Thereafter, at around 11:00 p.m. of the same day (December 22, 2011), Upshur County

¹² Also found, in the area of Beni’s body, were two .243 caliber shell casings. App. vol. II, 93-97, 276-77, 279-80, 284, 285, 286. Notably, a bucket was also found underneath of Beni’s body, which bucket Beni was using to feed the chickens at the time that she was killed. *See generally* App. vol. II, 112, 198, 200, 271, 304-05. *See also generally* App. vol. I, 333.

¹³ On December 23, 2011, an autopsy was performed on Beni, which autopsy did indeed reveal that she died from these gunshot wounds. *See generally* App. vol. II, 206, 215-16, 222.

¹⁴ After their return, the investigation of this incident continued well into the evening of December 22, 2011, with Sheriff Miller staying at the scene until 10:30-11:00 p.m. Lieutenant Mark Davis, of the Upshur County Sheriff’s Department, as well as other officers of the crime scene unit, took part in this investigation. *See generally* App. vol. II, 92-93, 98-99, 104, 133, 270-71.

Deputy Sheriff Charles Day was driving his patrol car when he, along with Upshur County Deputy Sheriff Simons (first name uncertain), encountered Petitioner walking on Route 20 towards Buckhannon. App. vol. II, 145-46. *See also generally* App. vol. I, 291. Seeing Petitioner, who was soaking wet and muddy at the time, these Officers stopped their vehicle and approached Petitioner with their guns drawn. App. vol. II, 146. Petitioner then positively identified himself by name, at which point Petitioner was ordered to the ground and handcuffed. App. vol. II, 146.

Moments later, Lieutenant David Malcolm, of the Upshur County Sheriff's Department, arrived and advised Petitioner of his *Miranda* rights. App. vol. II, 146. Thereafter, Petitioner voluntarily agreed to give a statement, which statement was audio recorded by Lieutenant Malcolm.¹⁵ App. vol. II, 146-49. *See also generally* App. vol. I, 291-93. In this statement, Petitioner reported that he had been sleeping in the woods, when, at 2:00 p.m. of this same day (December 22, 2011), he awoke to find that his rifle had been stolen. Petitioner further stated that he walked to the Sheriff's Department to report his rifle stolen, but did not arrive until after it had closed. Thereafter, as stated by himself, Petitioner began walking back to his earlier location in the woods, at which time he was apprehended at 11:00 p.m. *See generally* App. vol. I, 291-92. Following this statement, Petitioner was arrested and transported to the station. App. vol. II, 149, 195.

At the station, at around 11:29 p.m., Lieutenant Malcolm again advised Petitioner of his *Miranda* rights, after which Petitioner voluntarily agreed to give a second statement; this second statement was also audio recorded and conducted by Lieutenant Malcolm, as well as Deputy Sheriff

¹⁵ This audio statement was played for the jury during the guilt phase of Petitioner's trial. *See* App. vol. II, 149. It should also be noted that Upshur County Deputy Sheriff Rodney Rolenson was also present during the taking of this statement. *See generally* App. vol. I, 291.

Rolenson.¹⁶ App. vol. II, 157-62. *See also generally* App. vol. I, 295-339. In this second statement, Petitioner admitted that he did not like Beni and Sherman Truax, as they had thrown him and his mother, Mary Branam, out of their house in 2009, after which Petitioner and his mother did not have anywhere else to go. Petitioner further stated that he went to Beni's and Sherman's house on December 22, 2011. Upon his arrival, Beni, in an unpleasant manner, asked him what he was doing there. Thereafter, according to himself, Sherman came out of the house and shot at Petitioner. In self-defense, as stated by himself, Petitioner began shooting back at Sherman, during which time he shot and killed Beni. *See generally* App. vol. I, 327-28, 333-34.

Notably, during the taking of Petitioner's second statement, through no fault of their own and unbeknownst to Lieutenant Malcolm and Deputy Rolenson, the recording device quit working "for a time," i.e., approximately 27 minutes, thus cutting off a portion of Petitioner's second statement. *See generally* App. vol. II, 169, 173-74, 179, 180, 195. *See generally also* App. vol. I, 336. During this unrecorded portion of his second statement, Petitioner again admitted to shooting and killing Beni Truax. However, as earlier, Petitioner stated that this incident occurred accidentally as he was defending himself against Sherman Truax, who shot at him first, which prompted Petitioner to "return fire," during which time he shot and killed Beni. App. vol. II, 170, 184-85.

Thereafter, at 12:30 a.m. of this same night (December 23, 2011), once the recording device was restored, Petitioner voluntarily gave a third audio recorded statement to Lieutenant Malcolm and Deputy Rolenson.¹⁷ During this third statement, Petitioner again admitted that he went to Beni and

¹⁶ This second audio statement was also played for the jury during the guilt phase of Petitioner's trial. *See* App. vol. II, 163.

¹⁷ Again, this third audio statement was played for the jury during the guilt phase of
(continued...)

Sherman Truax's house on December 22, 2011. Petitioner further admitted that he was "pissed off" when he went there, as Beni and Sherman had previously thrown him and his mother out of the house. Petitioner further stated that, when he got to the house, Beni, in a rude manner, asked him what he was doing there. Then, according to himself, Sherman came out of the house and began shooting at Petitioner. Petitioner then again stated that he shot back at Sherman in self-defense, during which time he accidentally shot and killed Beni. *See generally* App. vol. I, 337-39. *See generally also* App. vol. II, 174-75, 195.

Following this third statement, Lieutenant Malcolm and Deputy Rolenson ended their interview with Petitioner. App. vol. II, 175-76. Petitioner then agreed to go to the crime scene and help locate the rifle that he used to shoot and kill Beni Truax, as well as to shoot Sherman Truax. App. vol. II, 176. Thereafter, Petitioner was taken to the crime scene, shortly after which the rifle was located with Petitioner's help in close proximity to Sherman's and Beni's house. App. vol. II, 176, 306-07, 308, 309, 312, 313, 315, 318, 319, 321, 322, 325.

On January 9, 2012, the Upshur County Grand Jury returned a three count Indictment against Petitioner. This Indictment specifically charged Petitioner with first-degree murder (Count 1), attempted murder (Count 2) and malicious assault (Count 3). App. vol. I, 11.

The guilt phase of Petitioner's bifurcated trial took place on April 21, 22 and 23, 2014, and ended with the jury convicting Petitioner of all counts of the Indictment. App. vol. II, 458.

The mercy phase of Petitioner's trial took place on April 24, 2014, during which the jury did not make a recommendation of mercy in the sentencing of Petitioner on his conviction of first-degree

¹⁷(...continued)
Petitioner's trial. *See* App. vol. II, 175.

murder (Count 1). App. vol. II, 558.

Following his trial, Petitioner, on May 30, 2014, filed a *Motion for New Trial*.¹⁸ See generally App. vol. I, 260-74. On this same day, May 30, 2014, Petitioner also filed further *Post-Trial Motions*.¹⁹ See generally App. vol. I, 257-59.

On August 4, 2014, a sentencing hearing was conducted in this case, during which Petitioner again presented all of his Motions for a new trial and a judgment of acquittal, after which the circuit court (“court”) denied the same.²⁰ See generally App. vol. I, 137-210.

Following the denial of these Motions, the court went on to sentence Petitioner to life in the penitentiary without the possibility of parole for his conviction of first-degree murder (Count 1). For his conviction of attempted murder (Count 2), the court sentenced Petitioner to a term of 3 to 15

¹⁸ This Motion was based upon Petitioner’s assertions of misconduct on the part of the jury. See generally App. vol. I, 260-74. These assertions will be fully addressed below.

¹⁹ These Motions consisted of Petitioner’s claims that he was entitled to a judgment of acquittal, as well as a new trial. Regarding his entitlement to a judgment of acquittal, Petitioner claimed that the evidence presented at trial was insufficient to sustain his conviction. On his entitlement to a new trial, Petitioner claimed, among other things, that the court erred in allowing the prosecution to introduce, during the mercy phase of his trial, a photograph of a shirt that he was wearing at time of his arrest. This shirt, as argued by Petitioner, contained inflammatory language, the prejudicial effect of which outweighed its probative value. Petitioner further claimed that the court erred in permitting the prosecution to introduce, again during the mercy phase of his trial, a video game that was found in his backpack entitled Assassin’s Creed. Again, Petitioner argued that the prejudicial effect of this video game outweighed its probative value. See generally App. vol. I, 257-59. Again, these assertions will be fully discussed below.

²⁰ During this hearing, in support of his Motion for a new trial based on jury misconduct, Petitioner presented the testimony of his sister, Elizabeth Grindstaff, as well as his mother, Mary Branam. See generally App. vol. I, 142-81. Notably, in support of this Motion, Petitioner also filed with the court the Affidavits of Elizabeth Grindstaff and his trial counsel, Harry A. Smith, III, respectfully dated May 29, 2014 and May 30, 2014. See generally App. vol. I, 153, 269-71, 272-74. During this same hearing, in response to Petitioner’s Motion for a new trial based on jury misconduct, the prosecution presented the testimony of Laura Queen, a Victim Advocate with the Upshur County Prosecuting Attorney’s Office. See generally App. vol. I, 187-203.

years. For his conviction of malicious assault (Count 3), the court sentenced Petitioner to a term of 2 to 10 years. The court further ordered that Petitioner's sentences for first degree murder (Count 1) and attempted murder (Count 2) run consecutively to one another, and further that Petitioner's sentences for attempted murder (Count 2) and malicious assault (Count 3) run concurrently with one another. App. vol. I, 279-81. Thereafter, Petitioner brought the current appeal.

II.

SUMMARY OF ARGUMENT

In his "bid" to convince this Court that he did not receive a fair trial because of jury misconduct, Petitioner has failed to put forward clear and convincing evidence that he was injured, in any significant way, by the alleged communications between juror Crites and Sherman Truax. This less than clear and convincing evidence consisted of nothing more than some people congregating outside the courthouse to smoke cigarettes during Petitioner's trial, two of which included juror Crites and Sherman Truax, who may have exchanged some words with one another during these smoke breaks. And this is assuming, *arguendo*, that any such communications took place to begin with.

The same is true of the alleged exchange between juror Zickefoose and alternate juror Ryan. At most, this exchange concerned nothing more than the anticipated length of the rest of Petitioner's trial. Thus, there is absolutely no undue influence to be taken from juror Zickefoose's and alternate juror Ryan's alleged conversation. And again, this assuming, *arguendo*, that this exchange occurred in the first place.

Furthermore, the extraneous prejudicial information, arising out of the alleged communications alluded to above, that Petitioner complains of in this case is tenuous at best.

Because of this tenuousness, the court, in its sound discretion, correctly denied Petitioner's request to take the post-trial testimony of jurors Crites and Zickefoose, as well as the testimony of alternate juror Ryan. In doing so, the court was also protecting its established and sound policy of not allowing the post-trial questioning of jurors after each and every verdict occurring in the court. This is especially true where, as here, there was no clear and convincing evidence of any real prejudicial information passed, whether it be between juror and witness (juror Crites and Sherman Truax) or between juror and juror (juror Zickefoose and alternate juror Ryan).

"To say the least," the evidence presented at trial against Petitioner was damaging. In fact, this evidence was overwhelmingly lopsided against Petitioner. Furthermore, as this Court knows well, there is no set amount of time that a jury has to deliberate before arriving at its verdict—and this is so regardless of the amount and/or complexity of the evidence that was presented at trial. Thus, there was nothing wrong with the jury's verdicts (guilty and no mercy), even though these verdicts occurred after a somewhat short period of deliberation—i.e., a little over one hour total.

Bluntly stated, as it concerns their "no mercy" verdict, the jury could have "put Petitioner down for good" based on nothing more than the evidence presented during the guilt phase of his trial. In short, this evidence showed that Petitioner, in full first-degree fashion, murdered his aunt, Beni Truax, by shooting her twice—once in her back and once in her head. Furthermore, and again as this Court knows well, the scope of evidence that is admissible during the mercy phase of a bifurcated first-degree murder trial is much broader than the evidence that is admissible during the guilt phase of such trial. This broader scope of evidence includes the photograph of the T-shirt (with the language at issue here) that Petitioner was wearing on the day that the crimes in this case occurred, as well as the video game (containing its title at issue here) found in Petitioner's backpack the day

before. In short, this evidence went to Petitioner's state of mind at the time of the murder, as well as his character in that it showed his propensity for violence and revenge, which is exactly what Petitioner had in mind when he went to Beni's home and killed her.

Furthermore, any prejudicial effect that the T-shirt and video game may have had did not clearly outweigh the probative value of this evidence. Nor did this evidence inflame the jury to the point that they "hit" Petitioner with a "no mercy" verdict based on their disdain for him flowing from this evidence. In fact, if anything sealed Petitioner's fate as to the jury's "no mercy" verdict, it was the evidence presented during the guilt phase of his trial—not a T-shirt and video game.

Additionally, the evidence presented during Petitioner's trial was more than sufficient to justify the jury's verdict. As for the assertions that Petitioner makes in this appeal to the contrary, such assertions amount to nothing more than mere gaps, discrepancies and inconsistencies in the evidence. Again, as this Court well knows, such matters are for the jury to "sort through." Here, the jury did just that and correctly determined that Petitioner was guilty of all the charges for which he was tried—first-degree murder, attempted murder and malicious assault.

Lastly, as explained above and more fully explained below, the court committed no error in denying Petitioner's various post-trial Motions based on the same alleged errors that he raises in this appeal.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Being that this is a first-degree murder case that resulted in Petitioner receiving a life without mercy sentence, the State believes that the Court should set this case for oral argument. If so ordered by the Court, the State further believes that such argument should be of the Rule 19 "variety," and

further that an opinion, rather than a memorandum decision, should be issued by the Court. Lastly, the State defers to the wisdom and discretion of the Court on all of these points.

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION FOR A NEW TRIAL BASED UPON HIS ASSERTIONS OF JURY MISCONDUCT.

1. Standard of Review.

In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential 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.

Syl. Pt. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

“A trial court's order denying a defendant's motion for a new trial is entitled to substantial deference on appeal. The trial court's findings of fact supporting this decision may be reversed only when the defendant proves that they are clearly wrong.” *State v. Cooper*, 217 W. Va. 613, 616, 619 S.E.2d 126, 129 (2005).

2. Alleged Communications Between Sherman Truax and Juror Crites.

On appeal, from a number of different “angles,” Petitioner asserts that the court committed error in denying his Motion for a new trial based upon his claims of jury misconduct. *See generally* Pet'r's Br. 8-19. As asserted by Petitioner, this misconduct included improper communications between one of the jurors (Diana Crites) and two of the prosecution's witnesses (Sherman and Nicholas Truax). *See generally* Pet'r's Br. 8-9, 10-13, 14, 15-16, 18. In support of this claim,

Petitioner relies on the affidavit (of May 29, 2014) and hearing testimony (of August 4, 2014) of his sister–Elizabeth Grindstaff (“Grindstaff”), the hearing testimony (of August 4, 2014) of his mother –Mary Branam (“Branam”), as well as the affidavit (of May 30, 2014) of his trial counsel.²¹ *See generally* Pet’r’s Br. 8, 9, 13, 14.

Taken together, these affidavits and testimony indicate that various people, including Sherman Truax, were observed (by Grindstaff and Branam) outside the courthouse smoking. During these smoke breaks, Sherman was seen (by Grindstaff and Branam) on numerous occasions speaking with a woman, which woman turned out to be juror Diana Crites. On one of these occasions, Nicholas Truax was present (as observed by Grindstaff) when Sherman and juror Crites were speaking with one another. *See generally* App. vol. I, 142-49, 154-57, 159-60, 174-80, 270-71, 272-74.

Based on these sightings, Petitioner asserts that the communications between juror Crites and Sherman Truax (as well as Nicholas Truax) were prejudicial to the point that he did not receive a fair trial from an impartial jury. Petitioner further argues that the prejudicial effect of these communications was heightened because of Sherman’s connection to the case, in that Sherman was the husband of the murder victim Beni Truax, as well as the victim himself to the attempted murder and malicious assault. Petitioner additionally argues that the prejudice of these communications must be presumed given Sherman’s connection with the case.²² As further argued by Petitioner, this

²¹ Notably, and as the Court is aware, Petitioner’s trial counsel, Harry Smith, also serves as Petitioner’s counsel in the current appeal.

²² The State must concede that this point is an important consideration for this Court, as Sherman was certainly an interested party to the outcome of this case. *See* Syl. Pt. 3, *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995) (“ In the absence of any evidence that an interested
(continued...)”)

presumed prejudice attaches regardless of whether the communications between Sherman and juror Crites concerned the case or were nothing more than “small talk” between Sherman and juror Crites –i.e., about the weather or “what have you.” Petitioner also argues that, because she defiantly and blatantly ignored the court’s instructions not to talk to anyone other than the other jurors, juror Crites’ motives and impartiality were called into question. Based on all of this, Petitioner argues that the court committed error in denying his Motion for a new trial based upon jury misconduct. *See generally* Pet’r’s Br. 10-12, 16, 18-19. The State disagrees.

To begin with, serious consideration must be given to the source of the so-called communications between juror Crites and Sherman (as well as Nicholas) Truax. That is, these alleged communications came from two individuals who certainly have a substantial interest in the outcome of this case. These two individuals, of course, are Petitioner’s sister and mother, Grindstaff and Branam. On this same point, no one other than Grindstaff and Branam has come forward about actually seeing any communications between juror Crites and Sherman (or Nicholas) Truax—not the trial judge, not the prosecutor, not Petitioner’s trial counsel, not any of the other witnesses (apart from Sherman and Nicholas Truax) that appeared and testified at Petitioner’s trial, nor any of the other jurors (apart from juror Crites) that sat for Petitioner’s trial.

²²(...continued)

party induced juror misconduct, no jury verdict will be reversed on the ground of juror misconduct unless the defendant proves by clear and convincing evidence that the misconduct has prejudiced the defendant to the extent that the defendant has not received a fair trial.”). However, as fully explained below, Sherman did not truly induce juror misconduct by his communications with juror Crites, and that is assuming, *arguendo*, that any such communications occurred in the first place. Furthermore, as also fully explained below, Petitioner has not proved by clear and convincing evidence that the alleged communications between Sherman and juror Crites prejudiced him to the extent that he did not receive a fair trial.

More importantly, both below and in this appeal, Petitioner has put forth nothing more than some evidence of people congregating outside the courthouse to smoke cigarettes during his trial. Two of these people included juror Crites and Sherman Truax (and to a much lesser extent Nicholas Truax), who may have exchanged some words with one another during these smoke breaks. And this is assuming, *arguendo*, that any such communications took place to begin with. In other words, no one knows what was said between juror Crites and Sherman, if anything. This “no one” includes Grindstaff, who was at least 50 feet away and did not hear the alleged communications between juror Crites and Sherman. App. vol. I, 155, 156, 165, 166. The same can be said of Branam, who was not a party to the alleged communications between juror Crites and Sherman. App. vol. I, 178.

In short, and at best, Petitioner has merely shown that there was an opportunity to influence the jury, through the alleged communications of juror Crites and Sherman (and Nicholas) Truax. This is simply not enough. Instead, Petitioner must show, by clear and convincing evidence, that juror Crites was subjected to improper influence (through her alleged communications with Sherman and Nicholas), which improper influence affected the jury’s verdict. This, as correctly found by the court, Petitioner has failed to show:

[T]he most that I’ve heard here today, is that they [juror Crites and Sherman Truax] were out there on smoke breaks and nobody knows what they talked about . . . but all—the only thing that you have proven is that there was an opportunity to influence the jury and that’s . . . wholly insufficient.

App. vol. I, 182.

[T]he Court finds that it’s not satisfied that there is clear and convincing evidence that there has been anything more than the mere opportunity to come into contact with the jurors and there has been no evidence about what was discussed, so that’s how the Court’s going to rule[.]

App. vol. I, 203-04.

Put simply, the above rulings of the court are “on the money” as far as the facts and law of this case are concerned.

“A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of. The question as to whether or not a juror has been subjected to improper influence affecting the verdict is a fact primarily to be determined by the trial judge from the circumstances, *which must be clear and convincing to require a new trial; proof of mere opportunity to influence the jury being insufficient.*”

Syl. Pt. 1, *State v. Daniel*, 182 W. Va. 643, 391 S.E.2d 90 (1990) (emphasis added) (quoting Syl. Pt. 7, *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932)).

3. Alleged Communications Between Juror Zickefoose and Alternate Juror Ryan.

In his quest to convince this Court that he did not receive a fair trial because of jury misconduct, Petitioner also points to some alleged improper communications between a juror (Edward Zickefoose) and an alternate juror (Samantha Ryan). *See generally* Pet’r’s Br. 9-10, 13-15, 18. In support of this claim, Petitioner again relies on the affidavit and hearing testimony of Grindstaff (his sister), as well as the affidavit of his trial counsel. *See generally* Pet’r’s Br. 8-9, 13-14.

In sum, these affidavits and testimony indicate that, during the third day of Petitioner’s trial, a man and a woman, who turned out to be juror Zickefoose and alternate juror Ryan, were overheard (by Grindstaff and Branam) on one occasion in the hallway outside the courtroom talking to one another. During this conversation (as relayed by Grindstaff), the matter of whether juror Zickefoose should call off from work came up, after which alternate juror Ryan commented to juror Zickefoose that they may not be there for long, unless he (juror Zickefoose) was still undecided. *See generally*

App. vol. I, 149-54, 157-58, 160-61, 170-71, 270-71, 273-74.

Based on this one alleged conversation, Petitioner again asserts jury misconduct. On this assertion, Petitioner argues that juror Zickefoose and alternate juror Ryan defiantly and blatantly violated the court's instructions that they not discuss the case outside the jury room and until the case had been submitted to them for their deliberations. Petitioner further argues that alternate juror Ryan was clearly aware of juror Zickefoose's "undecided" status well before closing arguments, and that if juror Zickefoose's "undecided" status was obvious to alternate juror Ryan, then it must have been obvious to the other jurors as well. Building on this, Petitioner also argues that it is more than likely that the case had been prematurely discussed not only by juror Zickefoose and alternate juror Ryan, but by the other jurors and alternate jurors. Because of all of this, Petitioner again argues that the court committed error in denying his Motion for a new trial based upon jury misconduct. *See generally* Pet'r's Br. 10, 18. The State disagrees.

In the State's view, Petitioner is trying to make "a mountain out of a molehill." At most, the exchange between juror Zickefoose and alternate juror Ryan concerned the anticipated length of the rest of Petitioner's trial—and nothing more. And this assuming, *arguendo*, that this exchange occurred in the first place. Again, the source of this so-called exchange between juror Zickefoose and alternate juror Ryan comes from two people who have a substantial interest in the outcome of this case, that being Petitioner's sister and mother, Grindstaff and Branam.

More importantly, there is absolutely no undue influence to be taken from juror Zickefoose's and alternate juror Ryan's alleged conversation. In discussing the prospect of allowing the defense to present the testimony of juror Zickefoose and alternate juror Ryan (at the August 4, 2014

hearing),²³ so too was the finding of the court:

BY THE COURT: But even if they—even if she [alternate juror Ryan] says, “Yeah, we [alternate juror Ryan and juror Zickefoose] talked about being undecided”, that doesn’t prove to me that there was any undue influence. I mean, I have to—that’s the hurdle that you have to meet, that there was some kind of undue influence or extraneous information, if they’ve broken the Court’s rules about deliberating ahead of time or whatever, that’s not grounds for a [new] trial, Mr. Smith, it’s—we’re talking about jury misconduct[.]

App. vol. I, 185.

In short, and with no offense intended, Petitioner’s arguments on the alleged exchange between juror Zickefoose and alternate juror Ryan are “much ado about nothing.”

4. Court’s Decision to Disallow Testimony of Jurors Crites and Zickefoose, as Well as Alternate Juror Ryan.

As part of his overall claim of jury misconduct, Petitioner also asserts that the court committed error in not allowing the testimony of jurors Crites and Zickefoose, as well as alternate juror Ryan, which jurors had been subpoenaed and were present (at the August 4, 2014 hearing). *See generally* Pet’r’s Br. 14-16. In refusing this testimony, as further argued by himself, the court denied Petitioner the ability to address critical issues bearing on the integrity of the jury’s verdict. *See* Pet’r’s Br. 19.

In support of this overall position, Petitioner argues the court did not permit this testimony (from Crites, Zickefoose and Ryan) despite the fact that the court stated that Grindstaff and Branam appeared to testify truthfully concerning their allegations of improper communications between juror Crites and Sherman Truax, as well as between juror Zickefoose and alternate juror Ryan. In so arguing, Petitioner points to the following statements of the court (during the August 4, 2014

²³ The court’s decision not to permit (at the August 4, 2014 hearing) the testimony of juror Zickefoose and alternate juror Ryan, as well as juror Crites, will be fully discussed below.

hearing): “[T]he witnesses [Grindstaff and Branam] testified truthfully to that matter[.]” “[T]hey [Grindstaff and Branam] appeared to testify truthfully[.]” App. vol. I, 182, 206. *See* Pet’r’s Br. 14, 15.

While the court did make these particular statements, these statements were accompanied by other findings of the court that it was not convinced of the truth of Grindstaff’s and Branam’s testimony concerning the alleged communications between juror Crites and Sherman Truax:

BY THE COURT: . . . [I]t’s a credibility issue and the Court—I don’t believe that every time the jurors and the Court recessed, that suddenly everybody in the witness all simultaneously went out to smoke, it doesn’t make any sense that that would happen, so I think, . . . the Court has a problem with the credibility of the witness [Grindstaff and/or Branam], . . . I think for the witness to say, “Each and every time there was a Court recess, I saw Mr. Truax talking with one particular juror,” is suspect[.]

App. vol. I, 203.

BY THE COURT: . . . [T]he Court’s not convinced that there’s clear and convincing evidence here. Matter of fact, . . . the only thing that’s been proven here today is that there was a—perhaps an opportunity for jurors to meet with Mr. Truax. Again, I’m not convinced that they even did, really, so—because, . . . I have to look at the motivation of the witnesses [Branam and Grindstaff] in this case and they appeared to testify truthfully, but . . . you’ve got the mother and the sister of the Defendant here, so the Court has to take that into consideration and again, I find it incredible that each and every time that the Court recessed, that these witnesses observed Mr. Truax talking to the same juror [juror Crites], I just don’t—the empirical odds, number one, are against that, so, again, I find it suspect[.]

App. vol. I, 206.²⁴

²⁴ Notably, in making these findings, the court was also presented with and considered the testimony (at the August 4, 2014 hearing) of Laura Queen, a Victim Advocate with the Upshur County Prosecuting Attorney’s Office. During her testimony, Ms. Queen stated that her job, as a Victim Advocate, is to meet with the prosecution’s witnesses, at the offices of the prosecuting attorney, to verse them on what is expected of them—i.e., what time to be at the courthouse, the proper attire, where they will be located (the witness lounge) when they are not actually in the courtroom, and not to talk to anyone. App. vol. I, 188. Ms. Queen also stated that, during the times
(continued...)

“Along the way,” Petitioner also points to a number of comments that the court made before ultimately arriving at its decision not to allow the testimony of these jurors (Crites, Zickefoose and Ryan). Suffice it to say, these comments, along with the other findings of the court, should be viewed as a whole rather than in isolation. When viewed as such, it is easy to see that the court’s decision to disallow the testimony of these jurors was factually and legally sound.

For example, Petitioner points to the court’s statement that “[t]here’s no indication that that’s an indication that they [Zickefoose and Ryan] were talking about their verdict, who was, you know, undecided, and it—to me, it’s not clear even when that conversation took place.” App. vol. I, 182. *See also* Pet’r’s Br. 14-15. On appeal, Petitioner argues that this statement was contrary to the evidence and a minimization, on the court’s part, of the effect of the conversation between juror Zickefoose and alternate juror Ryan. *See* Pet’r’s Br. 14. The State disagrees.

Again, when viewed with its other findings, the above statement of the court is neither contrary to the evidence, nor a minimization of the effect of the conversation between juror Zickefoose and alternate juror Ryan. More specifically, prior to and following the above statement that Petitioner complains about here, the court found as follows:

The only other matter that’s before the Court is there was some evidence that a lady [alternate juror Ryan] who may or may not have been on the jury, I think

²⁴(...continued)

that she saw him at the courthouse for Petitioner’s trial, she did not observe Sherman Truax speaking with any of the jurors. App. vol. I, 190, 201. After hearing this testimony, as well as the testimony of Grindstaff and Branam, the court ruled that it was not going to make a determination as to which of these witnesses’ testimony was more accurate. The court further ruled that such a determination was not necessary given that it had not been presented with clear and convincing evidence that juror Crites, through the alleged communications between herself and Sherman (and Nicholas) Truax, had been improperly influenced to the point that the verdict in Petitioner’s trial had been affected. App. vol. I, 206-07.

perhaps she was one of the jurors had spoken to another juror [juror Zickefoose] and they talked about whether a person [juror Zickefoose] would have to call off work or not, and I think the time it was, it depends on if that one juror [juror Zickefoose] is still undecided, and I don't know what they're undecided about . . . that bare statement . . . could mean . . . how late do we want to stay today, . . . or have we talked about how long we're going to stay and how much evidence we're going to take today or how long we're going to deliberate.

App. vol. I, 182.

I understand why you [defense counsel] think that . . . it exclusively means they were talking about being decided on the merits of the matter, but, I mean, in my mind, it could be that there was something else, it was how long they [the jury] were going to deliberate or how long they were going to eat lunch, or whether they were going to—I don't know, I mean, I don't have enough evidence to say it's clear and convincing evidence. I mean, I can't say that that's clear and convincing evidence that jurors had made up their mind or had begun deliberating before the appropriate time.

App. vol. I, 183.

Taken together, these findings indicate that the court “took in” what it heard from Grindstaff and Branam, thought about the same in a rational manner, and reasonably concluded that there was no undue influence to be taken from the alleged conversation (as overheard by Grindstaff and Branam) between juror Zickefoose and alternate juror Ryan. Thus, and correctly so, the court decided to disallow the testimony of these two jurors.

The same can be said of the court's denial of the testimony juror Crites. On this point, Petitioner also seems takes issue with the court's statement that “if the witness [Grindstaff and/or Branam] had come in and said, ‘I heard them talking about the case’, that'd be a very easy hurdle to meet, but the witness says, ‘I don't know what they talked about, they sat out there and they smoked together.’” App. vol. I, 184-85. *See also* Pet'r's Br. 15.

Again, to understand this comment, one must look at the context in which it was made. More

specifically, when it made its comment, the court was carrying on a discussion with Petitioner's trial counsel concerning the taking of juror Crites' testimony. This discussion centered on the issue of whether extraneous prejudicial information had been exchanged during the alleged communications (as observed by Grindstaff and Branam) between juror Crites and Sherman Truax. More specifically, during this discussion, the court indicated as follows:

[I]f I do bring him [juror Crites] in, Mr. Smith, I'm going to ask him that question and that's the only question that the Court's going to ask and I'm going to ask him [juror Crites] that question and only if the juror indicates there was extraneous prejudicial information, or there was any outside influence, then we'll explore it further, but if the jurors answer "no", then that's going to be the extent of this inquiry, Mr. Smith.

App. vol. I, 184.

Of course, Petitioner's trial counsel did not "cotton" very much to this approach, stating that such approach would give him "a hurdle that's almost insurmountable[.]" App. vol. I, 184. It was at this point that the court made the comment that Petitioner complains about here. Specifically, in its entirety, the court stated as follows:

BY THE COURT: No, I don't believe it is. I mean, if the witness [Grindstaff and/or Branam] had come in and said, "I heard them talking about the case", that'd be a very easy hurdle to meet, but the witness says, "I don't know what they talked about, they sat out there and they smoked together."

App. vol. I, 184-85.

Petitioner takes further issue with the following remarks of the court:

[W]hy would I bring him [juror Crites] in to ask him that, when I don't think you've even put on enough evidence for me really to—I mean, I'm reluctant to begin, you know, after every trial, bringing in jurors and start this questioning process of them.

App. vol. I, 184. *See also* Pet'r's Br. 15. Again, these remarks are better understood by looking at the other findings of the court. Specifically, after making the above comments, the court, in

prohibiting the testimony of the jurors (Crites, Zickefoose and Ryan), found as follows:

I'm not going to bring the jurors in and question, that's not a practice—if . . . something was-specific was said that the Court could rely on, but I'm just not going to start bringing in jurors after each and every verdict, start asking them, "Did anybody say anything or did anybody . . . do any—" , that's not going to be a new review process of Court verdicts, so—

Again, I'm not satisfied that there is clear and convincing evidence, so I'm not going to permit any questioning of the jurors in this case and again, your objection to that is preserved[.]

App. vol. I, 204.

For legal support, Petitioner further argues that Rule 606(b) of the West Virginia Rules of Evidence permits the testimony of jurors Crites and Zickefoose, as well as alternate juror Ryan. *See* Pet'r's Br. 16. Admittedly, Rule 606(b) does permit the testimony of jurors under certain circumstances.²⁵ However, as this Court has found, such circumstances are narrowly drawn:

Rule 606(b) provides a *narrow exception* that would allow jurors to testify to certain matters occurring during deliberations. Under that exception "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

State v. Daugherty, 221 W. Va. 15, 18, 650 S.E.2d 114, 117 (2006) (emphasis added) (citing Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* (Vol.1), § 6-6(B), pg. 6-55 (2000)).

Here, the extraneous prejudicial information and/or unfair outside influence (brought on by the alleged communications between juror Crites and Sherman Truax, as well as the alleged communications between juror Zickefoose and alternate juror Ryan) that Petitioner complains of is

²⁵ In pertinent part, W. Va. R. Evid. 606(b)(2) provides that "[a] juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury's attention;[or] (B) an outside influence was improperly brought to bear on any juror[.]"

tenuous at best. Furthermore, as properly found by the trial judge, “it’s in the Court’s discretion whether or not to bring these jurors in and question them and the Court is not going to do that[.]” App. vol. I, 204.

5. Length of Jury’s Deliberations Before Arriving at Verdict.

The guilt phase of Petitioner’s trial took place on April 21, 22 and 23, 2014, and ended with the jury convicting Petitioner of all counts of the Indictment—first-degree murder (Count 1), attempted murder (Count 2) and malicious assault (Count 3). The mercy phase of Petitioner’s trial took place on April 24, 2014, during which the jury did not make a recommendation of mercy in the sentencing of Petitioner on his conviction of first-degree murder (Count 1). As for the guilt phase, the jury retired to the jury room to begin its deliberations at 12:36 p.m. (on April 23, 2014). Per their request, the court gave the jury a short recess, which recess began at 12:47 p.m. By 1:08 p.m., the jury was back from the recess and deliberating the case. Thereafter, at 1:32 p.m., the jury returned to the courtroom and announced their guilty verdicts. *See generally* App. vol. II, 449-58.

As for the mercy phase, the jury commenced its deliberations at 11:12 a.m. (on April 24, 2014). At 11:44 a.m., per their request, the court sent the jury to lunch. By 12:59 a.m., the jury was back in the jury room, where they continued their deliberations. Thereafter, at 1:05 a.m., the jury returned to the courtroom and announced their “no mercy” verdict. *See generally* App. vol. II, 552-58. Based on these times and factors, the jury deliberated for approximately 35 minutes before finding Petitioner guilty of the charges for which he was tried, and, the jury deliberated for approximately 38 minutes in coming to their “no mercy” verdict.

With this “backdrop” in place, Petitioner, in support of his overall claim of jury misconduct, takes issue with the length of time that the jury deliberated his case, including both the guilt and

mercy phases of the case, before arriving at their verdicts. Essentially, Petitioner argues that these verdicts were returned after unusually short periods of deliberation even though they had been presented with a voluminous amount of evidence.²⁶ Thus, as further argued by Petitioner, the jury did not reasonably consider this evidence before rendering their verdicts of guilty and no mercy.²⁷ Finally, as argued by Petitioner, because this case involves the most serious criminal offense in West Virginia (first-degree murder) plus two other serious offenses (attempted murder and malicious assault), as well as the imposition of the harshest penalty in this State (life without the possibility of parole), the jury's total one-hour deliberation of the case indicates that the "jury simply did not care about what it did and made a sham and mockery of what is a very serious responsibility of the citizens of this State." Pet'r's Br. 18. The State disagrees.

In denying Petitioner's Motion for a new trial, the court fully addressed this issue, which the State now adopts:

[T]he issue about the length of time, the jury deliberation, . . . there's no—you can't fix a time that a jury has to deliberate and . . . , in this case, maybe it was the fact that . . . the State had volumes of evidence and the Defendant didn't have any evidence, . . . the jury only had to deliberate the evidence that they heard and it was all one-sided, so I don't know why the jury deliberated as long as they did, but again, there's no fixed time for a jury to deliberate, so the Court doesn't find that there is anything wrong with that, . . . other than . . . you [the defense] don't like it, . . . you'd like to see them deliberate more, but again, . . . it was a one-sided case and there, . . . as far as the Court is concerned, there wasn't a lot to deliberate, . . . they [the jury] deliberated the State's evidence and that's all they had and they made their decision quickly . . . more or less, in both instances [on the issues of guilt and mercy].

²⁶ Per Petitioner's brief, this evidence included 20 witnesses and almost 50 exhibits that were presented during the guilt phase, and five witnesses that were presented during the mercy phase. *See generally* Pet'r's Br. 17.

²⁷ Notably, Petitioner argues likewise about the jury's consideration of the extensive instructions of the court on all of the possible verdicts (14 verdicts), the elements of the counts contained in the Indictment, as well as the arguments of the parties. *See generally* Pet'r's Br. 17, 18.

App. vol. I, 210.

In short, the above findings of the court are in absolute keeping with the facts and law surrounding this case.

Petitioner's argument that the jury did not spend sufficient time considering the evidence constitutes an intrinsic challenge to the verdict. We have held that "[a] jury verdict may not ordinarily be impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict."

State v. Mayle, No. 13-0437, 2014 WL 2782126, at *4 (W. Va. June 19, 2014) (quoting Syl. Pt. 1, *State v. Scotchel*, 168 W. Va. 545, 285 S.E.2d 384 (1981)). See also *U.S. v. Penagaricano-Soler*, 911 F.2d 833, 846, n.15 (1st Cir. 1990) ("[N]o rule requires a jury to deliberate for any set length of time."); *U.S. v. Anderson*, 561 F.2d 1301, 1303 (9th Cir. 1977) ("There is no established rule that any specified time is required to reach unanimity."); *U.S. v. Brotherton*, 427 F.2d 1286, 1289 (8th Cir. 1970) ("[T]here is no rule of law which requires a jury to deliberate for any particular period of time[.]"); *State v. Hernandez*, 612 A.2d 88, 93 (Conn. App. 1992) ("The length of time that a jury deliberates has no bearing on nor does it directly correlate to the strength or correctness of its conclusions or the validity of its verdict.").

As a final afterthought on Petitioner's overall argument of jury misconduct, it is important to note, as this Court has found, that "courts recognize that even where extraneous information adverse to the defendant has been revealed during jury deliberations, reversible error may not exist if the evidence of the defendant's guilt is overwhelming." *State ex rel. Trump v. Hott*, 187 W. Va. 749, 754, 421 S.E.2d 500, 505 (1992). Such is the case here and that is assuming that the jury received any extraneous prejudicial information to begin with, which it did not.

B. THE TRIAL COURT DID NOT ERR IN PERMITTING THE INTRODUCTION, DURING THE MERCY PHASE OF THE TRIAL, OF A PHOTOGRAPH OF THE SHIRT THAT PETITIONER WAS WEARING AT THE TIME OF HIS ARREST. NOR DID THE TRIAL COURT ERR IN PERMITTING THE INTRODUCTION, DURING THE MERCY PHASE OF THE TRIAL, OF A VIDEO GAME FOUND IN PETITIONER'S BACKPACK THE DAY BEFORE HIS ARREST.

“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. 3, *State v. Larry M.*, 215 W. Va. 358, 599 S.E.2d 781 (2004) (quoting Syl. Pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998)). “[A] circuit court’s denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of law, or, based on the entire record, it is clear that a mistake has been made.” *State v. Milburn*, 204 W. Va. 203, 210, 511 S.E.2d 828, 835 (1998).

Here, at the time of his arrest (on December 22, 2011), Petitioner was wearing (under his coveralls) a T-shirt, the front and back of which shirt was photographed by the police. The back of the shirt contained the following language: “May God Have Mercy On My Enemies, Because I Sure As Hell Don’t”. Also, the day before his arrest (on December 21, 2011), the police came into possession of Petitioner’s backpack, which backpack contained a video game entitled, “Assassin’s Creed Revelations.”²⁸ During the guilt phase of Petitioner’s trial (April 21, 22 and 23, 2014), the court prohibited the prosecution from introducing the photographs of the T-shirt, as well as the video

²⁸ The Court may be wondering how the police came into the early possession of this backpack (containing the video game), as the crimes giving rise to this case had not occurred. From the record, it appears that Petitioner left the backpack in front of the library in Tennerton, West Virginia, where it was found by the librarian. After finding the backpack, the librarian called the police who, in turn, went to the library, picked the backpack up, and took it back to the station, where the video game was discovered inside the backpack. *See generally* App. vol. II, 526.

game. However, during the mercy phase of the trial (April 24, 2014), the court permitted the prosecution to introduce these items. *See generally* App. vol. I, 250, 368-69; App. vol. II, 340-45, 471-74, 526-34.

On appeal, Petitioner asserts that the court committed error in admitting the above items during the mercy phase of his trial. As for the photograph of the T-shirt, Petitioner argues that there was no evidence presented that he selected this shirt on the day that the offenses took place or that the shirt had any connection whatsoever to the crimes of which he was charged. Petitioner further argues that, under Rule 403 of the West Virginia Rules of Evidence, any probative value that the photograph of the T-shirt may have had was clearly outweighed by its prejudicial effect. As for the video game, Petitioner argues that, although the prosecution did not have any knowledge of the content or nature of the game, the court permitted its introduction. Petitioner further argues that the fact that the game contained the word “assassin” rendered it unfairly prejudicial under Rule 403. As further asserted by Petitioner, the T-shirt photograph and the video game acted to offset the mercy phase testimony of Dr. Robert Rush and Petitioner’s sister, Elizabeth Grindstaff, both of whom painted a different picture of Petitioner.²⁹ Lastly, Petitioner argues that the prosecution’s use of the T-shirt photograph and the video game was nothing more than an attempt to arouse the passions of the jury and thereby induce their “no mercy” verdict, rather than persuading the jury by way of probative evidence as to the issue of his sentence. *See generally* Pet’r’s Br. 19-21. The State disagrees.

²⁹ Per Petitioner’s brief, Dr. Rush described Petitioner as having low-average intelligence, developmental issues, a loner, but not an evil person. Again, per Petitioner’s brief, Elizabeth Grindstaff described Petitioner as a loner, a loving and caring brother and son, and not having any predisposition to violence or anger. *See generally* Pet’r’s Br. 20.

To begin with, the jury could have sent Petitioner “up the river for good” based solely on the evidence presented during the guilt phase of the trial. In a “nutshell,” this evidence showed that Petitioner, in full first-degree fashion, murdered his aunt Beni Truax by shooting her twice—once in the back and once in the head. Needless to say, in carrying out this murder, Petitioner’s actions were cold, callous, calculated and cowardly! Thus, even assuming that the court committed error in admitting the T-shirt photograph and the video game, the result of the mercy phase of the trial would have been the same without this evidence—life without mercy. *See* Syl. Pt. 13, *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995) (“In the realm of nonconstitutional error, the appropriate test for harmlessness is whether we can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence independently was sufficient to support the verdict and that the judgment was not substantially swayed by the error.”).

Furthermore, and at any rate, the court did not commit error in admitting these items (T-shirt photograph and video game) during the mercy phase of the trial. As this Court has found,

[t]he type of evidence that is admissible in the mercy phase of a bifurcated first degree murder proceeding is much broader than the evidence admissible for purposes of determining a defendant’s guilt or innocence. Admissible evidence necessarily encompasses evidence of the defendant’s character, including evidence concerning the defendant’s past, present and future, as well as evidence surrounding the nature of the crime committed by the defendant that warranted a jury finding the defendant guilty of first degree murder, so long as that evidence is found by the trial court to be relevant under Rule 401 of the West Virginia Rules of Evidence and not unduly prejudicial pursuant to Rule 403 of the West Virginia Rules of Evidence.

Syl. Pt. 7, *State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010) (emphasis added), *cert. denied*, 131 S. Ct. 1056 (2011).

Simply put, given the much broader scope of evidence that is admissible during the mercy phase of a bifurcated first-degree murder case, the court correctly permitted the introduction of the

evidence that Petitioner complains about here—the T-shirt photograph and video game. Put differently, in the “matter at hand,” the court made an “on the spot call” that these items were admissible and, in so doing, the court did not abuse its discretion. With this point aside, the State will now address some of Petitioner’s arguments.

First, contrary to his assertion, there was evidence that Petitioner selected the T-shirt (with the language at issue on its back) on the day that the offenses occurred in this case. The evidence is the T-shirt itself, which Petitioner was wearing when he was apprehended, which was the same day that the crimes occurred. In other words, if he hadn’t selected it (the shirt), then he wouldn’t have had it on. Admittedly, there was no evidence, necessarily, that Petitioner had a specific purpose in choosing to wear the T-shirt on the day that the crimes occurred. Such evidence could realistically only come from Petitioner himself and he certainly was not going to testify to the same. However, in the State’s view, the fact that he chose to wear this T-shirt went to his state of mind—i.e., that he had no mercy when he came to his enemies—at the time that he carried out the crimes for which he was convicted.

Furthermore, contrary to Petitioner’s assertion, there was a connection between the T-shirt and the crimes in this case. This connection included evidence produced at trial that Petitioner was “pissed off” when he went to Beni and Sherman Truax’s house on the day that the crimes occurred. This same evidence showed that Petitioner’s anger at Beni and Sherman arose out of a past incident where Beni and Sherman threw Petitioner and his mother, Mary Branam, out of their house, after which Petitioner and his mother had no place else to go. Again, in the State’s view, these matters went to Petitioner’s state of mind—i.e., that he had no mercy when it came to his enemies and, further, that he considered the Truaxs as his enemies.

The State also disagrees with Petitioner's assertion that the court permitted the introduction of the video game, although the prosecution had no knowledge of the content or nature of this game. In short, the content and nature of the video game became sufficiently apparent during the mercy phase of Petitioner's trial. More specifically, the back of the game (on its outside) contained a description as to what the game was about. Through the prosecution's questioning of Sheriff Virgil Miller, this description was read into the record during the mercy phase of the trial:

Q And then as it relates to what's on--what it says--what's the name of it, again?

A It's called Assassin's Creed Revelations.

Q Okay and then on--is there a kind of a description about what the game is all about on the back?

A There is. It says, "Two assassins, one destiny. I have always lived by the creed. My blades have dispensed death and justice in equal measure, yet I am no closer to discovering the truth behind our order, so I must walk the path of my ancestor, Apilia, in his footsteps I will find my true purpose."

App. vol. II, 530.

Again, in the State's view, this video game, which the court noted that he brought with him all away from Tennessee, *see* App. vol. II, 474, goes to Petitioner's state of mind at the time that the crimes in this case occurred. This is further evidenced by the mercy phase testimony of Dr. Rush:

Q You indicated also that he [Petitioner] is somebody that's a loner and was highly involved in video gaming?

A That is correct, sir.

Q And isn't [it] also correct that video gaming could probably have an impact on his thought process and the actions that he took?

A Yes, it is.

App. vol. II, 504.

Lastly, on this point, the content of the T-shirt and video game goes to Petitioner's character in that these items show Petitioner's propensity for violence and revenge, which is exactly what he had in mind when carried out the crimes in this case—first-degree murder, attempted murder and malicious assault against Beni and Sherman Truax. “Admissible evidence [during the mercy phase of a first-degree murder trial] necessarily encompasses *evidence of the defendant's character*[.]” Syl. Pt. 7, in part, *McLaughlin, supra* (emphasis added).

Moving more directly to Petitioner's unfairly prejudicial/inflammatory arguments, of which the State disagrees, Rule 403 of the West Virginia Rules of Evidence, in pertinent part, provides that “[t]he court may exclude relevant evidence³⁰ if its probative value is substantially outweighed by a danger of . . . unfair prejudice[.]” “Unfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” *State v. LaRock*, 196 W. Va. 294, 312, 470 S.E.2d 613, 631 (1996). Stated in a different manner, evidence causing unfair prejudice relates to evidence tending “to lead the jury, often for emotional reasons, to desire to convict a defendant for reasons other than the defendant's guilt.” *State v. Guthrie*, 194 W. Va. 657, 683, 461 S.E.2d 163, 189 (1995).

Simply put, under Rule 403, the probative value of the T-shirt (containing the language at issue here), as well as the video game (containing its title at issue here), were not clearly outweighed

³⁰ As the Court is well aware, “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” W. Va. R. Evid. 401. *See also State v. Sugg*, 193 W. Va. 388, 404, 456 S.E.2d 469, 485 (1995) (*citing State v. Derr*, 192 W. Va. 165, 178, 451 S.E.2d 731, 744 (1994) (“To satisfy the relevancy requirement under Rule 401 of the West Virginia Rules of Evidence, the offered evidence merely needs to make a fact of consequence more or less probable than it would be without the evidence.”)).

by their prejudicial effect, as Petitioner insists in this appeal. Stated differently, the admission of these items during the mercy phase of his trial did not inflame the jury to the point that they “socked” Petitioner with a “no mercy” verdict based on their disdain for him flowing from these items. Put yet another way, the admission of these items did not unfairly sway the jury’s verdict from one of “mercy” to one of “no mercy.” If anything sealed Petitioner’s fate as to the jury’s “no mercy” verdict, it was the evidence presented during the guilt phase of Petitioner’s trial—not a T-shirt and video game.

Correctly, so too was the finding of the court prior to admitting these items: “I don’t think it’s going to unfairly prejudice the Defendant under all the circumstances[.]” App. vol. II, 474. In so ruling, the court did not abuse its discretion. “As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court’s discretion will not be overturned absent a showing of clear abuse.” Syl. pt. 4, *State v. Winebarger*, 217 W. Va. 117, 617 S.E.2d 467 (2005) (quoting Syl. Pt. 10, in part, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994)). See also *State v. Knuckles*, 196 W. Va. 416, 424, 473 S.E.2d 131, 139 (1996) (citing *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994)) (“[A]n appellate court should find an abuse of discretion [in Rule 403 rulings] only when the trial court acted ‘arbitrary or irrationally.’”).

Finally, contrary to his contention, the introduction of the T-shirt photograph and video game did not unfairly act to offset and overshadow the testimony of Dr. Rush and Petitioner’s sister, Elizabeth Grindstaff, both of whom painted a different picture of Petitioner. Again, if anything offset and overshadowed this testimony, it was the evidence presented during the guilt phase of Petitioner’s trial—not a T-shirt and video game. On top of this, the testimony of Dr. Rush went a long

way towards hurting, rather than helping, Petitioner during the mercy phase of the trial. The following testimony of Dr. Rush bears this out:

Q So just to back up a second, Dr. Rush, what I was asking about is particularly he [Petitioner] had indicated that he didn't have any rage or problem when [sic] the Truax[s] when you interviewed him, is that correct?

A Right, correct.

Q Okay and in reviewing the records and documentation, isn't it true that actually sometime before this murder occurred, that his mom [Mary Branam] had indicated that he had told her that he blamed the Truaxes for th4em [sic] losing their home in Tennessee and having—and being basically homeless?

A I believe that is correct, sir.

Q Okay and then isn't it also true that she—in the record, she had said that, when asked about what he's going to do to the Truaxes, he said that . . . Beni Truax, Sherman Truax and Nicholas Truax needed to die?

A I believe that is correct, sir.

App. vol. II, 502.³¹

C. THE EVIDENCE PRESENTED AT TRIAL WAS MORE THAN SUFFICIENT TO CONVICT PETITIONER OF FIRST-DEGREE MURDER, ATTEMPTED MURDER AND MALICIOUS ASSAULT.

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

Syl. Pt. 1, *Guthrie, supra*.

³¹ It should be noted that Petitioner objected to this testimony on hearsay grounds, which objection the court overruled. *See generally* App. vol. II, 500-02. However, because Petitioner has not raised, as error, the denial of this objection in this appeal, the State will not address the same.

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 weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

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

Contrary to his contention in this appeal, the evidence presented during Petitioner's trial was more than sufficient to justify the jury's verdict—guilty of first-degree murder, guilty of attempted murder, and guilty of malicious assault. At its barest minimum, this evidence showed the following:

1. In the “wee hours” of December 18, 2011, Petitioner took a taxi from his hotel to the area where Beni and Sherman Truax's home was located. Beni is Petitioner's aunt (by blood); Sherman is Petitioner's uncle (by marriage).
2. Midmorning of this same day, Petitioner went to a store where he purchased a rifle (equipped with a telescopic sight) and some ammunition.
3. In the afternoon of this same day, Petitioner took a taxi from his hotel to a sporting goods store. There, Petitioner sighted and test fired his rifle.
4. On December 22, 2011, Petitioner returned to the Truax's house. At the time, Petitioner was “pissed off” at Beni and Sherman Truax, as they had previously (in 2009) thrown Petitioner and his mother, Mary Branam, out of their house. After being ousted by Beni and Sherman, Petitioner and his mother did not have anywhere else to go.

5. During this same time period, on December 22, 2011, Sherman Truax was awakened from a sleep by the sound of two gunshots. After hearing these shots, Sherman went outside his house where he saw his wife Beni lying face down and motionless on the ground. Beni had been shot twice, once in the back and once in the head; these shots, of course, ended Beni's life.
6. Immediately after discovering Beni, Sherman saw Petitioner; Petitioner was armed with a rifle, which rifle Petitioner directly aimed at Sherman. Sherman then began to run back into his house, at which point Petitioner began shooting at Sherman. One of these shots hit Sherman in the right wrist area and nearly blew his wrist and hand off. Thereafter, Petitioner fled the scene and was later apprehended.

Despite this overwhelming evidence, and much-much more, Petitioner asserts that the evidence presented to the jury was insufficient to convict him of the charges for which he was tried—first-degree murder, attempted murder and malicious assault. In making this assertion, Petitioner points to nothing more than mere gaps, discrepancies and inconsistencies in the evidence.³² See

³² As characterized and argued by Petitioner, these gaps, discrepancies and inconsistencies include: (1) Sherman Truax's incorrect description of the clothes that Petitioner was wearing at the time of the crime—i.e., blue jeans and a black hoodie (as testified to by Sherman), when another police officer (Virgil Miller) stated that Petitioner was wearing a set of coveralls at the time of his arrest; (2) Petitioner's rifle was never determined to be the murder weapon, as the two shell casings found at the crime scene (near Beni Truax's body) were never analyzed so as to confirm that these shell casings were fired from Petitioner's rifle; (3) the gunshot residue test performed on Petitioner did not show that he had fired a gun within a few hours of this test; (4) although the prosecution presented evidence of multiple shots being fired into the Truax's house, only two shell casings were found at the crime scene, those being the shell casings found near Beni Truax's body; (5) a further inconsistency in Sherman Truax's testimony—i.e., in his original 911 call, Sherman reported that his wife and son had been killed and were lying dead in the yard when, in fact, his son had not even returned from school at the time that the shooting occurred and was never injured; (6) the prosecution's failure to provide an analysis of Petitioner's laptop computer and/or cell phone; (7) (continued...)

generally Pet’r’s Br. 21-23. Simply put, these matters were within the province of the jury and the jury has spoken—and spoken well!

“[T]he jury, as the finders of fact, have the responsibility of weighing the evidence and the credibility of the witnesses and resolving . . . inconsistencies within the framework of the instructions given to them by the court.” *State v. Houston*, 197 W. Va. 215, 230, 475 S.E.2d 307, 322 (1996). *See also* Syl. Pt. 8, *State v. McGilton*, 229 W. Va. 554, 729 S.E.2d 876 (2012) (citations omitted) (internal quotation marks omitted) (“The jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses.”); Syl. Pt. 2, *State v. Smith*, 225 W. Va. 706, 696 S.E.2d 8 (2010) (quoting Syl. Pt. 1, *State v. Harlow*, 137 W. Va. 251, 71 S.E.2d 330 (1952)) (“In the trial of a criminal prosecution, where guilt or innocence depends on conflicting evidence, the weight and credibility of the testimony of any witness is for jury determination.”).

D. THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER’S POST-TRIAL MOTIONS FOR A NEW TRIAL.

On appeal, and in a “catchall” manner, Petitioner lastly asserts that the court committed error in denying his post-trial motions for a new trial, based on jury misconduct, the court’s admission of unfairly prejudicial evidence during the mercy phase of his trial, and insufficiency of the evidence to convict him of the charges (first-degree murder, attempted murder and malicious assault) for which he was tried. *See generally* Pet’r’s Br. 23-24. For all of the reasons set forth above, the State

³²(...continued)

the prosecution’s failure to explain a 27 minute gap during Petitioner’s statement to the police, when the recording device did not need batteries, had never failed before, and has not failed since; and (8) the failure of any footprint impressions or photographs to be taken, despite evidence being presented by the prosecution as to the path that Petitioner took from the crime scene. *See generally* Pet’r’s Br. 21-23.

disagrees.

V.

CONCLUSION

Petitioner's conviction should be affirmed.

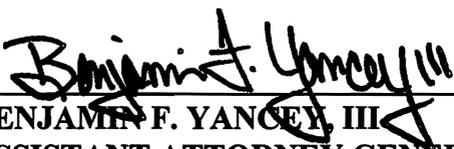
Respectfully submitted,

STATE OF WEST VIRGINIA,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0876

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

HOWARD CLARENCE JENNER,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, Benjamin F. Yancey, III, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Brief of Respondent State of West Virginia* upon Petitioner's counsel by depositing said copy in the United States mail, with first-class postage prepaid, on this 17th day of April, 2015, addressed as follows:

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