

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0887

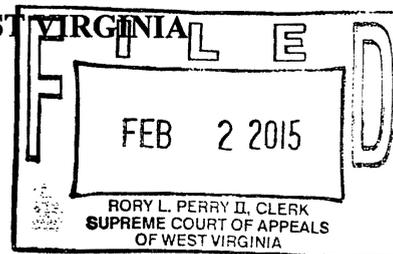
STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

v.

LILLIE MAE TRAIL,

*Defendant Below, Petitioner.*



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RESPONDENT'S BRIEF

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## ASSIGNMENTS OF ERROR

Petitioner claims eight (8) Assignments of Error, which the State specifically and generally denies:

- A. Petitioner's *Remmer* Hearing Was Fatally Flawed as the Circuit Court Erred by Placing the Burden of Proof upon Petitioner Without Determining Whether the Source of the Improper Juror Contact Was an "Interested Party."
- B. The Circuit Court Erred By Applying a Relaxed Evidentiary Standard in the Mercy Phase to Evidence that It Deemed Too Prejudicial to Admit During the Guilt Phase, and by Doing so, It Violated Petitioner's Equal Protection and Due Process Rights.
- C. The Circuit Court Erred by Reading to the Jury West Virginia's Slayer Statute Because It Was Irrelevant, Created Confusion, Was Misleading, and Resulted in Unfair Prejudice Which Was Not Cured by the Limiting Instruction.
- D. The Circuit Court Committed Reversible Error by Permitting the Prosecutor to Imply During Closing Argument That a Verdict of "No Mercy" Would Bring "Atonement" for a Victim in an Unrelated Case.
- E. The Circuit Court Committed Reversible Error When it Permitted the Prosecutor to Make Statements to the Jury That Were Unsupported by Any Evidence at Trial.
- F. The Circuit Court Abused Its Discretion by Admitting a Summary Chart That Was Misleading and Did Not Assist the Jury in Finding the Truth.
- G. The Circuit Court Erred by Not Granting Petitioner a New Trial Based upon Insufficient Evidence.
- H. Petitioner's Conviction Should Be Set Aside in Light of the Cumulative Effect of Errors in Her Trial.

## STATEMENT OF THE CASE

Pursuant to W. Va. Rev. R.A.P. 10(d), the State of West Virginia (hereinafter, "State"), incorporates herein the Statement of the Case as detailed in the Brief of Lillie M. Trail (hereinafter, "Petitioner"), with the following additions/corrections. For purposes of clarification, this case involves Petitioner's murder of Chester Trail, her husband, through the employ of Greg Whittington as a paid hit-man. During Petitioner's trial, however, much time was given to a previous and similar crime in which Petitioner pled "nolo contendere" to paying Mr. Whittington and his father a substantial amount of money to either harm or kill another individual, Mark Medley. Given the similarity of both the criminal actions and the persons involved, and the contentions between Mr. Whittington and Petitioner regarding their respective involvement in both crimes, in-depth testimony of both crimes was proffered and examined in the underlying criminal matter. This Honorable Court should also note that the resulting convictions for both crimes, the murder of Mr. Trail and the unlawful wounding of Mark Medley, were subsequent in time to the underlying criminal matter.

### **A. Petitioner's Trial, October 6, 1997 through October 23, 1997, Guilt Phase**

During the State's case-in-chief, it introduced the testimony of Edward T. Broderick, a claims manager for the Monumental Life Insurance Company, who revealed that Petitioner signed for an additional accidental death/life insurance policy, in the form of a family plan which included the victim, in or around May 1994, roughly six months before the underlying murder. (App. vol. 2 at 79.) Additionally, on the first day of the trial, Sergeant Donnie R. Howell, the investigating officer in the underlying crime, was questioned at great length as to Greg Whittington's reputation, habit, and past history of lying. (Full Testimony, App. vol. 2 at 107-167; App. vol. 3 at 5-48.) Sgt. Howell recognized on many occasions that Mr. Whittington, a

key witness for the State, gave conflicting statements to police in his implication of Petitioner in the underlying crime. (*Id.*; App. vol. 2 at 136-36, 143-44, 146, 150, 153-54, 160; App. Vol. 3 at 26.) Sgt. Howell also gave testimony, however, reciting the evidence of collaboration between Mr. Whittington and Petitioner concerning the murder of her husband. (App. vol. 3 at 7-12.) Chief among Sgt. Howell's statements was the fact that Petitioner had engaged in paying Mr. Whittington to previously carry out a criminal act in the unlawful wounding of Mark Medley. (App. vol. 3 at 9.) Sgt. Howell also reported some of the mysterious conversations between Mr. Whittington and Petitioner. (App. vol. 3 at 31.)

The State also called David Wayne Mason, general manager for Home Beneficial Life Insurance Company, who identified that accidental death life insurance policies were taken out on the victim in the year before and the year of his untimely death. (Full Testimony, App. vol. 3 at 50-67.) The State also called Paul Little, Jr., an employee with the Appalachian Life Insurance Company, who identified another life insurance policy on the victim, effective May 1, 1993. (Full Testimony, App. vol. 3 at 67-71.) While the policy was ultimately paid to the victim's estate, the policy itself was activated through the victim's employment and was commonly referred to as a "burial policy." (App. vol. 3 at 71.)

Following a brief recess, the State moved the Circuit Court of Lincoln County, West Virginia (hereinafter, "Circuit Court"), to judicially notice West Virginia's Slayer Statute, W. Va. Code § 42-4-2. (App. Vol. 3 at 74-83.) After hearing argument from both parties, the Circuit Court judicially noticed the jury of the statute, surmising that the jury was able to reasonably determine its application in concluding Petitioner's motives in giving up her share to the victim's estate. (App. vol. 3 at 89-90.)

The State next called Mr. Whittington to testify. (Full Testimony, App. vol. 3 at 91-226, 236-64; App. vol. 4 at 6-13.) Mr. Whittington identified the weapon he used to shoot the victim, and outlined the benefit of his plea bargain with the State. (App. vol. 3 at 91-92.) He recounted Petitioner giving him and his father three thousand dollars (\$3,000.00) to kill Mr. Medley, the same crime wherein Petitioner was previously convicted of unlawful wounding. (App. vol. 3 at 95.) Mr. Whittington also specified the events surrounding such crime. (App. vol. 3 at 99-103.) The State also addressed Mr. Whittington's reputation as a liar. (App. vol. 3 at 104.)

Mr. Whittington also addressed Petitioner asking him to kill her husband, the victim in the underlying criminal action. (App. vol. 3 at 106.) Mr. Whittington stated that Petitioner offered ten thousand dollars for the crime. (App. vol. 3 at 107.) Mr. Whittington recounted that Petitioner wished the death to appear like a hunting accident. (App. vol. 3 at 109.) Mr. Whittington also explained that Petitioner became angry when he had failed to timely murder the victim because of the amount in insurance premiums Petitioner was paying. (App. vol. 3 at 113.)

When Mr. Whittington told Petitioner that he couldn't go through with the murder, Petitioner informed him that she would turn him in for the crime against Mr. Medley, that she would get him fired from his job, and that she would have his kids taken away. (App. vol. 3 at 115.) He also identified that Petitioner gave him money to purchase the weapon he eventually used to shoot the victim. (App. vol. 3 at 117.) Mr. Whittington then recounted the events of the murder, how he "fired some heroin" to work up the courage to shoot the victim, how he missed his first shot, and how he ended up "empty[ing] the gun" to stop the commotion the first shot had caused. (App. vol 3 at 125-26.) He further identified that Petitioner gave him an additional thousand dollars (\$1,000.00) after committing the act. (App. vol. 3 at 129.) Mr. Whittington

stated that Petitioner even gave him a car, deducting the value from the amount agreed upon for the crime. (App. vol. 3 at 131-32.)

During cross-examination, trial counsel for Petitioner absolutely lambasted Mr. Whittington's reputation, his reasons for testifying against Petitioner in the form of the benefits flowing from his plea agreement, his "gaming" of the justice system, and his prior inconsistent statements. (App. vol. 3 at 146-152.) Throughout trial counsel's critique, Mr. Whittington stood steadfast in his position that Petitioner hired him to kill her husband. (App. vol. 3 at 151, 159, 166, 172.) Further, the State explicitly informed him that his testimony would not have an impact on any future motions to reduce his own sentence, and that he would face perjury charges should he lie during his testimony. (App. vol. 4 at 12.)

During the testimony of Mr. Whittington, the State asked for a brief accommodation and called Shelia Harner, an employee of the Mutual of Omaha Insurance Company. (Full Testimony, App. vol. 3 at 226-35.) Ms. Harner reported that Petitioner took out a thirty-seven thousand dollar (\$37,000.00) life insurance policy on herself, while electing additional coverage the victim, about a year-and-a-half before the murder. (App. vol. 3 at 227.) Following Ms. Harner's testimony, the examination of Mr. Whittington continued to the end of the day and into the following morning.

The State next called Mr. Whittington's wife, Michelle Whittington. (Full Testimony, App. vol. 4 at 16-50.) Ms. Whittington testified that Petitioner never seemed afraid of Mr. Whittington, that Petitioner would call and request to speak directly to Mr. Whittington, and that Petitioner never acted as if Mr. Whittington posed a threat. (App. vol. 4 at 20-21.) Trial counsel for Petitioner extensively questioned Ms. Whittington about Mr. Whittington's tendency to be untruthful. (App. vol. 4 at 22-38.) While trial counsel for Petitioner uncovered that Ms.

Whittington knew little about the crime prior to Mr. Whittington's arrest, the State revealed that, in the time leading up to the crime, Mr. Whittington became increasingly agitated, stating that he would have to kill Petitioner's husband, or otherwise continue being harassed by Petitioner to do as much. (App. vol. 4 at 38.)

The State also called Jerry Porter, an employee of Prudential Insurance Company. (Full Testimony, App. vol. 4 at 52-59.) Mr. Porter revealed that Petitioner was listed as the sole beneficiary of a life insurance policy on the victim worth forty-three thousand four-hundred fifty-three dollars and twenty-five cents (\$43,453.25). (App. vol. 4 at 53.) Mr. Porter revealed that he met with Petitioner when she filled out the death claim form, and that she informed Mr. Porter that her husband died in a hunting accident. (App. vol. 4 at 55.) The date of the policy was December 2, 1986. (App. vol. 4 at 58.)

The State next called Peg Spradau, an investigative specialist for the CAN Insurance Company. (Full Testimony, App. vol. 4 at 62-69.) Ms. Spradau indicated that an accidental death policy was taken out on the victim on May 1, 1993, about a year-and-a-half before the victim's murder. (App. vol. 4 at 65.) The policy was worth one-hundred and fifty-one thousand dollars (\$151,000.00). (App. vol. 4 at 64-65.) Petitioner was listed as the sole beneficiary. (App. vol. 4 at 65.) Trial counsel for Petitioner again pointed out the necessity for such insurance in the mining industry. (App. vol. 4 at 69.)

The State then called Richard E. Berg, an employee of Physicians Mutual and Physicians Life. (Full Testimony, App. vol. 4 at 70-.) Mr. Berg recognized that two policies were taken out on the victim, effective May 7, 1994, approximately sixth months before the murder, and September 22, 1994, approximately two months before the murder. (App. vol. 4 at 72-73.) The policies would pay five thousand dollars (\$5,000.00) and three thousand dollars (\$3,000.00),

respectively. (App. vol. 4 at 72-73.) Trial counsel for Petitioner again proffered that both policies were solicited via mailers to Petitioner's address. (App. vol. 4 at 74.) Mr. Berg, however, surmised that the signature on the policies, alleged to be that of the victim, did not match the victim's prior signature, calling the victim's alleged action in taking the policies out on his own volition into question. (App. vol. 4 at 76.) As a result, Mr. Berg stated that no insurance proceeds had been paid at the time of the trial. (App. vol. 4 at 81.)

The State then called Richard Radune, an employee of the Signa Corporation. (Full Testimony, App. vol. 4 at 90-104.) Mr. Radune identified that the victim had obtained three insurance policies through his employer and employees' union. (App. vol. 4 at 92.) While two of those three policies were a benefit of employment, the last policy was a policy the victim had applied for on March 1, 1993. (App. vol. 4 at 95.) The amount of insurance of the aforementioned policies was two hundred thousand dollars (\$200,000.00). (App. vol. 4 at 92-96.) Petitioner was the sole beneficiary of the three policies. (App. vol. 4 at 92-96.)

The State next called Douglas G. Sudduth, a representative of J.C. Penny Life Insurance Company. (Full Testimony, App. vol. 4 at 106-117.) Mr. Sudduth identified one life insurance policy for thirty thousand dollars, taken out approximately one year before the victim's death. (App. vol. 4 at 108.) Mr. Sudduth identified that the policy contained a "provisionary beneficiary," meaning that the spouse, in this case Petitioner, would receive the amount of the policy upon the insured's death. (App. vol. 4 at 108.) Mr. Sudduth also identified that coverage was increased in July 1994, approximately four months prior to the victim's death, for another thirty thousand dollars (\$30,000.00). (App. vol. 4 at 109-110.) Mr. Sudduth further identified Petitioner as the person who negotiated for the coverage. (App. vol. 4 at 116.)

The State then called Robert J. Gamble, an employee of the A.I.G. Life Insurance Company. (Full Testimony, App. vol. 4 at 118-27.) While the content of Mr. Gamble's testimony largely had no evidentiary impact, trial counsel for Petitioner took advantage of the testimony to introduce various forms of the victim's signature and to present to the jury that the victim "almost got killed at work in 1992." (App. vol. 4 at 125-27.)

The State subsequently called Gloria Ross, Mr. Whittington's mother-in-law. (Full Testimony, App. vol. 4 at 152-93.) While Ms. Ross was not intimately familiar with the details surrounding the murder of the victim, she could corroborate Mr. Whittington's story regarding Petitioner's mysterious contact with Mr. Whittington in the days leading up to the murder. (App. vol. 4 at 157-159.) Trial counsel for Petitioner reaffirmed Mr. Whittington's tendency to lie to friends and family. (App. vol. 4 at 188-93.)

The State next called Jim Booth, an employee of the Global Life and Accident Insurance Company. (Full Testimony, App. vol. 5 at 4-14.) Mr. Booth identified two additional insurance policies listing the victim as the insured. (App. vol. 5 at 5.) The first policy was for ten thousand dollars (\$10,000.00), and was effective March 24, 1994, approximately eight months prior to the victim's murder. (App. vol. 5 at 6.) The second policy added five thousand dollars (\$5,000.00), and was effective July 24, 1994, approximately four months prior to the victim's murder. (App. vol. 5 at 7.)

On the seventh day of trial, the State called Dottie Hill, a neighbor of the victim and Petitioner. (Full Testimony, App. vol. 6 at 11-36.) Ms. Hill was one of the individuals to find the victim's body. (App. vol. 6 at 14.) Ms. Hill recounted finding the body, and testified that Petitioner did not come over to look at the body once it had been found, or ask if the victim was alive. (App. vol. 6 at 14, 16.) Ms. Hill further stated that Petitioner showed no emotion at the

crime scene. (App. vol. 6 at 15.) Upon cross-examination, however, Ms. Hill admitted that she did not observe Petitioner for the entire duration she was at the crime scene. (App. vol. 6 at 24.)

The State then called Betty Burns, the victim's sister. (Full Testimony, App. vol. 6 at 37-59.) Ms. Burns stated that she traveled to Petitioner's home after hearing that the victim had been shot. (App. vol. 6 at 45.) Ms. Burns stated that she agreed to handle all the arrangements for the victim's funeral, and noted that during her face-to-face conversation with Petitioner, she never appeared to cry. (App. vol. 6 at 45.) Ms. Burns stated that she and one of her other brothers did all of the receiving during the victim's viewing at the funeral home. (App. vol. 6 at 47.) Ms. Burns further identified that Petitioner failed to tell her, at any time, that the victim's death was the result of murder rather than a hunting accident, or that Petitioner suspected the shooter to be Mr. Whittington. (App. vol. 6 at 51.)

The State next called Arch Runyon, president of the Ross Sales and Processing Company, for which the victim was working at the time of his death. (Full Testimony, App. vol. 6 at 62-139.) Mr. Runyon identified several of the victim's pensions and retirement plans, as well as a burial insurance plan, totaling thirty-six thousand eight hundred eighty-eight dollars and fifty-one cents (\$36,888.51). (App. vol. 6 at 64-70.) Mr. Runyon also stated that Petitioner made a claim on the assets roughly two weeks after the murder, claiming that the victim died as a result of a hunting accident. (App. vol. 6 at 69-70.) Trial counsel for Petitioner had Mr. Runyon agree that the victim's position of "roof bolter" was perhaps the most dangerous job in coal mining. (App. vol. 6 at 72.) As a result, the victim had suffered many injuries throughout the course of his work. (App. vol. 6 at 72-98.)

Petitioner first called Mark Medley, the victim of the prior crime involving Petitioner and Mr. Whittington, as her first witness. (Full Testimony, App. vol. 7 at 11-28.) Mr. Medley

informed the jury that he was never drugged by Petitioner and that Mr. Whittington was a liar. (App. vol. 7 at 12.) The State, however, elicited testimony from Mr. Medley that he had been drinking over at Petitioner's residence on the night he was brutally beaten. (App. vol. 7 at 15-26.)

Petitioner next called Dr. Bruce A. Hoak, a Board Certified General Surgeon at the Charleston Area Medical Center. (Full Testimony, App. vol. 7 at 28-36.) Dr. Hoak testified that the only substance found in Mr. Medley's blood on the night of his beating was alcohol. (App. vol. 7 at 30.) Dr. Hoak did, however, admit that the amount of alcohol in Mr. Medley's system was extraordinarily high. (App. vol. 7 at 33.)

Petitioner then called Freddie P. Michael, the landlord of the apartment the victim rented while at work. (Full Testimony, App. vol. 7 at 43-49.) Mr. Michael characterized the victim as a "fine gentleman," and recounted the day Petitioner arrived to pick up the things the victim had left in the apartment. (App. vol. 7 at 45-47.) Mr. Michael stated that Petitioner openly cried about the victim's death while at the apartment. (App. vol. 7 at 47-48.)

Petitioner subsequently called Gary R. Duncan, the human resources manager of the Roth Sales and Processing Company. (Full Testimony, App. vol. 8 at 6-20.) Mr. Duncan outlined many instances where the victim was injured throughout the course of his mining work with the company. (App. vol. 8 at 8-15.) Petitioner then used the dates of those accidents in conjunction with the State's prior evidence of the dates of the many insurance policies on the victim to show a logical correlation between the two. (App. vol. 8 at 18-20.)

Petitioner then called her youngest son, Mark A. Trail, Jr (hereinafter, "Jr. Trail"). (Full Testimony, App. vol. 8 at 21-49.) Jr. Trail recognized that the victim and Petitioner routinely signed documents for one another. (App. vol. 8 at 25-26.) Jr. Trail also recalled that Mr.

Whittington persistently asked the victim to purchase the car eventually sold to him by Petitioner. (App. vol. 8 at 29.) Jr. Trail also expressed that Petitioner never seemed to enjoy speaking with Mr. Whittington. (App. vol. 8 at 30.) The State, however, pointed out some major inconsistencies in the signatures purportedly written by the victim on official insurance documents. (App. vol. 8 at 37-40.) In response, Petitioner pointed out that the victim had an “inconsistent signature.” (App. vol. 8 at 43.) The State also elicited testimony from Jr. Trail that he and his older brothers had been signing over checks received from insurance companies to Petitioner, despite Petitioner’s contention that she had relinquished all of the insurance proceeds resulting from the victim’s death. (App. vol. 8 at 40.)

Petitioner next called T. Rebecca Combs, a friend of the victim and Petitioner. (Full Testimony, App. vol. 8 at 54-59.) Ms. Combs identified that Petitioner had put a television on layaway for the victim as a Christmas gift before the victim’s murder. (App. vol. 8 at 58.) Thereafter, the defense rested. (App. vol. 8 at 60.) In its closing argument, the State pointed out that the total amount of insurance proceeds that Petitioner could have gained by murdering her husband was approximately six hundred and eighty-five thousand dollars (\$685,000.00) at minimum. (App. vol. 9 at 24.) Further, the State reasoned that, while Mr. Whittington was, by all means, an awful human being, Petitioner would not have attempted to find a good or righteous person to contract with for purposes of murdering her husband. (App. vol. 9 at 25.) Finally, the State pointed out that, in the months leading up to the murder, the victim obtained a grossly disproportionate amount of life insurance when compared to his life insurance policies prior to the Mark Medley incident.<sup>1</sup> (App. vol. 9 at 29-31.) The State also called into question Petitioner’s motives in attempting to claim insurance while listing the victim’s death as a hunting

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<sup>1</sup> The amount of insurance the victim had prior to the Mark Medley incident was approximately one hundred and fifty-three thousand dollars (\$153,000.00). (App. vol. 9 at 45.) Compare that with the amount obtained after the Mark Medley incident, five hundred and thirty-one thousand dollars (\$531,000.00). (App. vol. 9 at 45.)

evidence two weeks after the murder, when the parties should have dutifully known that the victim died as a result of murder. (App. vol. 9 at 50.)

After deliberations, the jury returned a verdict of guilt. (App. vol. 9 at 115.) Petitioner requested that the jury be polled, and the verdict returned unanimous. (App. vol. 9 at 117.)

**B. Petitioner's Trial, October 24, 1997, through October 27, 1997, Mercy Phase**

During the mercy phase of Petitioner's trial, the Circuit Court allowed crime scene photographs of the victim to be admitted into evidence over the objection of Petitioner. (App. vol. 11 at 5.) While Petitioner objected to the prejudicial impact of the photographs, the Circuit Court determined that the probative value outweighed prejudicial concerns with respect to a finding of mercy. (App. vol. 11 at 5.) The State again called Sgt. Howell for purposes of admitting the photographs. (Full Testimony, App. vol. 11 at 12-14.)

The State then called Gail W. Medley, the father of Mark Medley. (Full Testimony, App. vol. 11 at 15-18.) Gail Medley testified as to the physical debilitation suffered by Mark Medley following the attempt on his life by Petitioner and Mr. Whittington. (App. vol. 11 at 15-16.)

Petitioner introduced Catherine L. Medley, Petitioner's sister. (Full Testimony, App. vol. 11 at 20-27.) Catherine Medley stated that she and Petitioner had never plotted the murder of Mark Medley. (App. vol. 11 at 20-21.) No other mitigating evidence was introduced.

In closing the State used the theme of "atonement" stressed in Petitioner's opening, asking for atonement for Chester Trail and Mark Medley. (App. vol. 11 at 27.) The jury returned a verdict of life without mercy, and was polled on their unanimity. (App. vol. 11 at 34-36.)

**C. Petitioner's *Remmer* Hearing, November 5, 1998.**

On November 5, 1998, the Circuit Court held a hearing to determine if a new trial would be warranted under *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995), or its federal counterpart, *Remmer v. United States*, 347 U.S. 227 (1954), for purposes of alleged jury tampering by the State. (App. vol. 12 at 7.) After reviewing *Sutphin*, the Circuit Court determined that the Petitioner had the burden of proof by clear and convincing evidence. (App. vol. 12 at 7.) Petitioner did not object to such a holding. (App. vol. 12 at 9.)

Petitioner first called Linda Shamblin, an employee of Sam's Club. (Full Testimony, App. vol. 12 at 13-28.) Ms. Shamblin's daughter was at one time married to one of Petitioner's sons. (App. vol. 12 at 14.) Ms. Shamblin admitted that, years ago, there had been "bad blood" with the Trial family as a result of her daughter dating Petitioner's son. (App. vol. 12 at 15.) Ms. Shamblin recalled certain occasions when Petitioner lied to cover up the fact that Ms. Shamblin's daughter was staying the night at Petitioner's residence. (App. vol. 12 at 17.) She also recalled one occasion when Petitioner took up for her son after he had physically abused Ms. Shamblin's daughter. (App. vol. 12 at 17.) Ms. Shamblin, however, denied having a lot of interaction with Petitioner. (App. vol. 12 at 18.) Ms. Shamblin also repeatedly denied having any hard feelings against Petitioner, asserting that Petitioner's claims of such were disingenuous. (App. vol. 12 at 19.)

Moving on to the point of the hearing, trial counsel began questioning Ms. Shamblin's interactions with Teresa Nunley, a juror in Petitioner's trial. (App. vol. 12 at 20.) Ms. Shamblin worked at the Sam's Club with Ms. Nunley, and was the person responsible for delivering paychecks to other employees, including Ms. Nunley. (App. vol. 12 at 21-22.) Ms. Shamblin reported that she asked Ms. Nunley if she were on the jury for Petitioner's trial, and that Ms.

Nunley responded that she was unable to discuss the trial. (App. vol. 12 at 23.) Ms. Shamblin did admit that the trial was routinely spoken about at work because of her daughter's relationship to Petitioner's son. (App. vol. 12 at 24.) Ms. Shamblin denied speaking further to Ms. Nunley about the trial, however, claiming that she did not really know who Ms. Nunley was based off of extremely limited interaction in the workplace. (App. vol. 12 at 24.)

Upon cross-examination, Ms. Shamblin denied having any relationship with Ms. Nunley whatsoever beyond giving her a weekly paycheck. (App. vol. 12 at 25.) Further, Ms. Shamblin admitted that she was unsure if her conversation with Ms. Nunley even took place at the time of the trial. (App. vol. 12 at 26.)

Petitioner next called Teresa Nunley, the juror in question. (App. vol. 12 at 28-51.) Ms. Nunley agreed that she barely knew of Ms. Shamblin, but contended that Ms. Shamblin asserted that Petitioner was guilty during the brief interaction. (App. vol. 12 at 30-31.) Ms. Nunley stated that she "just walked on out [of the breakroom] and went and smoked." (App. vol. 12 at 31.) Ms. Nunley reported that Ms. Shamblin did not say anything else to her about the trial, even though Ms. Shamblin appeared to be trying to influence her. (App. vol. 12 at 31-32.) Ms. Nunley further affirmed that the interaction took place at the time of Petitioner's trial. (App. vol. 12 at 40.) Ms. Nunley denied discussing the interaction with Ms. Shamblin with any of the other jurors. (App. vol. 12 at 42.)

Upon cross-examination, Ms. Nunley stated that Ms. Shamblin was simply a co-worker, that Ms. Shamblin had no authority to fire her or withhold her paycheck, and that, in fact, Ms. Shamblin even failed to use Ms. Nunley's correct name in greeting her. (App. vol. 12 at 44.) Ms. Nunley further recalled that the interaction lasted no longer than fifteen (15) seconds. (App. vol. 12 at 44.) Ms. Nunley ultimately reported that Ms. Shamblin's statement that Petitioner was

“guilty as sin” had “absolutely” no impact in her finding of guilt. (App. vol. 12 at 47.) Ms. Nunley also stated that, as a juror in such a high-profile case, she had numerous people try to speak to her about the matter but diligently turned them away. (App. vol. 12 at 50.)

Finally, Petitioner called Misty Dawn Holtzman, who was also employed by Sam’s Club at the time of Petitioner’s trial. (Full Testimony, App. vol. 12 at 55-68.) Ms. Holtzman stated that Ms. Nunley directly approached her and asked her about Petitioner’s trial. (App. vol. 12 at 58.) Ms. Holtzman stated that Ms. Shamblin went into detail about Petitioner with Ms. Nunley, and that Ms. Nunley appeared to be influenced by the interaction. (App. vol. 12 at 61.) Ms. Holtzman stated that Ms. Nunley “facially” appeared to have concurred with Ms. Shamblin. (App. vol. 12 at 62.)

Upon cross-examination, Ms. Holtzman admitted that she was “good friends” with Petitioner, and that her mother and Petitioner were friends, and that she had grown up with Petitioner’s children. (App. vol. 12 at 64.) Ms. Holtzman also admitted that Ms. Nunley never stated that she had come to a decision at any time, either before or after her interaction with Ms. Shamblin. (App. vol. 12 at 65.)

Following witness testimony, trial counsel for Petitioner revisited the ruling from *Remmer*, cautioning the Circuit Court that the State held the burden of proving that Ms. Nunley was not improperly influenced or affected by Ms. Shamblin’s statement. (App. vol. 12 at 71.) Thereafter, in an Order dated June 8, 2006, the Circuit Court denied Petitioner’s motions under W. Va. R.C.P. 29 and 33 for a new trial and a directed verdict of acquittal, respectively. (App. vol. 13 at 51-54.) The Circuit Court subsequently issued a Further and Final Order on January 8, 2007, finding that sufficient evidence existed for a finding of guilt beyond a reasonable doubt, finding that Petitioner failed to proffer clear and convincing evidence that juror misconduct

prejudiced the underlying criminal trial, recognizing that Ms. Holtzman was a friend of Petitioner's, and finding that no prejudice manifested against Petitioner as a result of Ms. Shamblin's interaction with Ms. Nunley. (App. vol. 13 at 55-72.)

The Circuit Court subsequently reissued a final Order on July 15, 2014. (App. vol. 13 at 81-82.) Petitioner now appeals her conviction to this Honorable Court.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This case is ripe for decision by Memorandum Opinion as the law contemplated within Petitioner's Assignment of Error is well practiced although the State acknowledges that oral argument under W. Va. Rev. R.A.P. 19 is also proper.

### **ARGUMENT**

**A. The Circuit Court Correctly Applied *Sutphin* in Finding That Petitioner Was Not Unfairly Prejudiced as a Result of the Interaction Between Ms. Shamblin and Ms. Nunley.**

**1. The Circuit Court Correctly Applied this Honorable Court's Holding in *Sutphin*.**

West Virginia has long-standing precedent that the issue of juror misconduct is addressed to the sound discretion of the trial court:

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. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995) (citing *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932)). When determining improper influence, the trial court first has the responsibility of determining whether the juror was contacted by an interested party or a

“third-party stranger having no interest in the litigation.” *Sutphin*, 195 W. Va. at 557, 466 S.E.2d at 408.

This Honorable Court used the United States Supreme Court’s ruling in *Remmer v. United States*, 347 U.S. 227 (1954), as a guideline for defining the importance of conducting an independent hearing to determine the likelihood that juror misconduct resulted in unfair prejudice to a criminal defendant. The *Remmer* Court held that, “[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.” *Sutphin*, 195 W. Va. at 558, 466 S.E.2d at 409 (citing *Remmer*, 347 U.S. at 229).

In *Remmer*, the United States Supreme Court vacated the ruling of a district court where the district court independently researched an instance of juror tampering when a juror was informed he could profit should he bring about a favorable verdict. *Remmer*, 347 U.S. at 228. The United States Supreme Court held that the district court erred in failing to hold a hearing on the matter to determine whether prejudice resulted from the misconduct. *Id.* at 230.

In *Sutphin*, the trial court held a *Remmer* hearing after finding out that a juror contacted a witness for the State to speak about the underlying trial. *Sutphin*, 195 W. Va. at 557, 466 S.E.2d at 408. The juror was not aware that the witness, a good friend, was testifying for the State. *Id.* After the witness’ testimony, the juror traveled to the witness’ home to inform him that his decision in the case had no impact in his judgment of the case. *Id.* Following the *Remmer* hearing, the trial court held that, although the contact was improper, “there was no clear and

convincing evidence that the contact affected the jury's deliberations or prejudiced the defendant." *Id.*

Here, the Circuit Court held a hearing under *Sutphin/Remmer* to determine the extent and possible prejudice arising from Ms. Nunley's out-of-court interaction with Ms. Shamblin. Ultimately, the Circuit Court found that no clear and convincing evidence existed upon which to change the jury's verdict of guilty. First and foremost, Ms. Shamblin and Ms. Nunley both agreed that they were not friends, and that they barely knew one another. Second, the complained-of interaction did not last more than fifteen (15) seconds. While the content of the interaction is in various stages of dispute, Ms. Nunley affirmed that it did not bias her decision, and that she did not discuss the interaction with the other jurors.

The only individual who claimed that the interaction affected the outcome of the trial was Ms. Holtzman, who openly admitted that she was a long-time family friend of Petitioner. Beyond Ms. Holtzman, whose testimony greatly conflicted with that of both Ms. Shamblin and Ms. Nunley, there was no evidence that the interaction resulted in prejudice to Petitioner. Under *Sutphin*, the Circuit Court held a proper hearing, heard all of the evidence proffered by Petitioner and the State, and simply could not find that evidence existed warranting a grant of Petitioner's motions for acquittal and/or new trial.

**2. Ms. Shamblin Was Clearly Not an Interested Party Under Petitioner's Application of *Sutphin***

Petitioner asks this Honorable Court to treat Ms. Shamblin as if she was an interested witness. While Petitioner offers considerable case law defining and implementing the differing standards between an interested and uninterested party contacting a juror during the course of a trial, the fact remains that Ms. Shamblin was clearly not an interested party. Ms. Shamblin was not a representative or witness for the State. While Ms. Shamblin was indirectly related to

Petitioner and her husband through her daughter's relationship with Petitioner's son, the record clearly establishes that she had no interest in the outcome of Petitioner's proceedings. Petitioner tries to argue that "bad blood," or an old vendetta, establishes Ms. Shamblin as an interested party, but compared to the facts of *Sutphin* or *Remmer*, such allegations are simply insufficient.

Rather, Ms. Shamblin engaged in workplace gossip with a stranger that, while improper, created no prejudice in Petitioner's case. Therefore, in applying the *Sutphin* holding, the Circuit Court correctly examined Petitioner's underlying claim and found insufficient evidence on which to grant Petitioner's motion for new trial and/or acquittal. Such procedure and holding is clearly within the discretion of the Circuit Court.

**3. The State Proved That Petitioner Suffered No Prejudice as a Result of the Interaction Between Ms. Shamblin and Ms. Nunley.**

In the alternative, should this Honorable Court find that proper procedure demanded the Circuit Court to treat Ms. Shamblin as an interested party, the State more than proved its burden, through clear and convincing evidence, that Petitioner suffered no prejudice. Again, Ms. Nunley affirmatively stated that her interaction with Ms. Shamblin played no part in her individual finding of guilt, and she affirmatively stated that her interaction with Ms. Shamblin was not mentioned at any point during jury deliberations. The only person stating otherwise was Ms. Holtzman, a witness with a definite and illustratable interest in reversing Petitioner's interest, and a witness with no first-hand knowledge of the juror deliberations.

Therefore, the State respectfully requests that this Honorable Court affirm Petitioner's conviction in the Circuit Court below.

**B. The Circuit Court Applied the Correct Evidentiary Standard, and Found the Crime Scene Photographs to Have Higher Probative Evidentiary Value in the Mercy Phase of Petitioner’s Trial.**

Next, Petitioner contends that the Circuit Court erred in allowing crime scene photographs during the mercy phase of Petitioner’s underlying criminal case. In doing so, Petitioner contends that the Circuit Court erred in applying a relaxed evidentiary standard when admitting the crime scene photographs showing the victim’s body.

“The admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence.” Syl. Pt. 8, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994). “Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.” Syl. Pt. 9, *Derr*.

Further:

Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. 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. 10, *Derr*.

While not in existence at the time of Petitioner’s trial, this Honorable Court has since established that admissibility during a mercy phase is “much broader” than during a guilt phase:

The 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). This Honorable Court has found that the West Virginia Legislature has bestowed upon trial courts discretion to determine proper sentencing and consider the weight of aggravating and mitigating factors on a case-by-case basis. *See State v. Tyler*, 211 W. Va. 246, 251, 565 S.E.2d 368, 373 (2002).

Here, the Circuit Court did not abuse its discretion in admitting crime scene photographs during the mercy phase of Petitioner's underlying trial. The Circuit Court found the photographs to be probative for purposes of the State's argument that Petitioner should not receive mercy in her sentencing. The Circuit Court also found that, as Petitioner had already been found guilty of committing the crime, the prejudicial effect against Petitioner was minimal. The State argues that the probative value of the crime scene photographs in Petitioner's criminal case is even higher than a typical murder case, largely because of Petitioner's actions in orchestrating the murder of her husband. She paid Mr. Whittington to perform the crime in an attempt to directly remove herself from committing the action in person. As a result, her distance from the situation was an effective hurdle the State had to pass in proving to the jury that mercy should not be granted. By seeking admission of the crime scene photographs, the State showed the jury that Petitioner's actions had a real effect, and were just as devastating as the actual shooting performed by Mr. Whittington.

Petitioner also relies on *State v. Saunders*, 166 W. Va. 500, 275 S.E.2d 920 (1981), in arguing that such photographs serve only to inflame the jury. The State, however, argues that Petitioner's inference is no longer based upon good law, as *Saunders* is the direct progeny of *State v. Rowe*, 163 W. Va. 593, 259 S.E.2d 26 (1979), which was directly overruled by this

Honorable Court in *Derr*, in favor of giving a trial court discretion to determine admissibility issues on a case-by-case basis.

Petitioner also relies upon this Honorable Court's opinion in *State v. Rygh*, 206 W. Va. 295, n.1, 524 S.E.2d 447, n.1 (1999), in challenging that her due process rights were violated through the Circuit Court's allegedly relaxed evidentiary standard. This Honorable Court recently revisited recently *Rygh*, however, and decided that its previous assumption was incorrect, instead finding that "[i]n order to make a recommendation regarding mercy, the jury is bound to look at the broader picture of the defendant's character – examining the defendant's past, present and future according to the evidence before it – in order to reach its decision regarding whether the defendant is a person who is worthy of the chance to regain freedom." *McLaughlin*, 226 W. Va. at 238, 700 S.E.2d at 298 (citing *State v. Finley*, 219 W. Va. 747, 752, 639 S.E.2d 839, 844 (2006)). As a result, this Honorable Court held the following:

The 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, *McLaughlin*.

Therefore, the Circuit Court performed well within its discretion in admitting crime scene photographs in the mercy phase of Petitioner's underlying trial that otherwise would have not been admitted during the guilt phase after considering the enhanced probative value of such photographs after the jury had returned a determination of Petitioner's guilt. Therefore, this Honorable Court should affirm Petitioner's conviction in the Circuit Court below.

**C. The Circuit Court Correctly Read West Virginia’s Slayer Statute to the Jury, Including Appropriate Admonishment, Because Trial Counsel for Petitioner Repeatedly Inferred Petitioner’s Innocence Based upon Her Willingness to Forego Insurance Proceeds.**

Petitioner next claims that the Circuit Court erred in judicially noticing West Virginia’s “Slayer Statute” and creating a presumption that she was guilty of murder because she forfeited her insurance proceeds. Under West Virginia’s “Slayer Statute,” codified as W. Va. Code § 42-4-2:

No person who has been convicted of feloniously killing another, or of conspiracy in the killing of another, shall take or acquire any money or property, real or personal, or interest therein, from the one killed or conspired against, either by descent and distribution, or by will, or by any policy or certificate of insurance, or otherwise; but the money or the property to which the person so convicted would otherwise have been entitled shall go to the person or persons who would have taken the same if the person so convicted had been dead at the date of the death of the one killed or conspired against, unless by some rule of law or equity the money or the property would pass to some other person or persons.

Petitioner’s argument here is disingenuous. During the opening statements of Petitioner’s trial and numerous insurance witnesses thereafter, Petitioner repeatedly made known to the jury that she was not receiving any insurance benefits and that she had charitably turned the proceeds of any such insurance over to her children. The State demanded that the Circuit Court judicially notice W. Va. Code § 42-4-2 to, in fact, remove the presumption that Petitioner’s actions were based purely upon her own kindness and generosity. As such, the reading of W. Va. Code § 42-4-2 in the case below was not “virtually valueless” as Petitioner claims, but incredibly and insurmountably relevant, as the “Slayer Statute” showed a motive to Petitioner’s actions beyond the motive she had already and repeatedly claimed. Therefore, the reading of W. Va. Code § 42-4-2 was not prompted by the State to show guilt, as Petitioner here claims, but was prompted in response to Petitioner’s own actions and arguments during trial.

**D. The Circuit Court Did Not Err in Permitting the State to Argue a Theme of Atonement In Closing During the Mercy Phase of Petitioner’s Underlying Trial.**

Petitioner here argues that the State engaged in misconduct in arguing for “atonement” for Mark Medley, and that the Circuit Court erred in allowing such argument to occur. Petitioner then goes beyond the closing remarks of the mercy phase of Petitioner’s trial and argues that her entire trial, guilt phase included, was improperly prejudiced by references to the Mark Medley incident.

As stated above, a jury during the mercy phase of a criminal trial is able to hear “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, *McLaughlin*. Here, the State flipped the theme of Petitioner’s trial counsel during the mercy phase. Trial counsel for Petitioner instructed the jury that “[m]ercy is about atonement. . . .” (App. vol. 11 at 11.) The State then requested atonement not only for Chester Trial, but Mark Medley. (App. vol. 11 at 27-28.) Petitioner immediately objected to the State’s statement, and while the Circuit Court overruled the objection, it instructed the State to “move on and get off that.” (App. vol. 11 at 28.)

Petitioner clearly faced no unfair prejudice as a result of the statement, as the State is able to show and make arguments of aggravating factors to the jury just as the Petitioner herself could proffer evidence of mitigating factors. *See* Syl. Pt. 7, *McLaughlin*. As a result, even though the Circuit Court expressed concern over the State’s reference to the Mark Medley incident, for which Petitioner was convicted, the State was rightfully in its power to do so. Therefore, such

remarks were neither unfairly prejudicial nor improper, and certainly did not rise to the level of prosecutorial misconduct.

Petitioner next argues that the State's reference to the Mark Medley incident unfairly prejudiced the whole trial. This argument is again disingenuous. The Mark Medley incident was a veritable hotbed of evidence attacking Mr. Whittington's credibility as a witness. Such evidence was supremely beneficial to Petitioner. As such, Petitioner spent much time during the trial, if not more time than the State, cross-examining various witnesses about Petitioner's alleged involvement in the Mark Medley incident to show conflicting evidence, discredit the State's witnesses, and show that the State's key witness, Mr. Whittington, was nothing more than a liar. The crux of Petitioner's defense relied upon showing Mr. Whittington was a liar, and had lied in implicating Petitioner in the crime below. Petitioner therefore used the conflicting testimony and statements of Mr. Whittington during the Mark Medley incident to show his tendency to lie.

Frankly, if Petitioner could not show Mr. Whittington was lying, her defense would be greatly diminished. As a result, Petitioner mined for information regarding the Mark Medley incident just as much, if not more, than the State did with the same witnesses. Therefore, Petitioner's contention now, that the State unfairly introduced all such information, is not only clearly countered by a reading of the record below, but is clearly disingenuous, as Petitioner's defense tactics relied upon the Mark Medley incident much more than any strategy of the State.

**E. The Circuit Court Did Not Permit the State to Make Statements to the Jury That Were Unsupported by Evidence at Trial.**

Petitioner next complains of a remark made by the State, that the victim was becoming suspicious of Petitioner's finances, during the State's rebuttal argument at the close of the case. "A prosecutor may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the

jury as to the inferences it may draw.” Syl. Pt. 2, *State v. Smith*, 190 W. Va. 374, 438 S.E.2d 554 (1993) (citing Syl. Pt. 7, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988)).

Petitioner argues that the State engaged in prosecutorial conduct by implying that the victim “start[ed] sniffing around the bank accounts.” (App. vol. 9 at 101.) Petitioner argues that the State’s unfounded statement further aggravated the prejudice against her based upon the repeated references to the Mark Medley incident, as complained of above. Petitioner claims, as a whole, that such comments amounted to a number of improper remarks which warrants reversal of her conviction. The State, however, again refers to the record in disproving Petitioner’s claim. The Circuit Court did not “permit” the State to make such a comment, insomuch as the State moved on following an objection by trial counsel.

The evidence of Petitioner’s case did establish, however, that Petitioner was becoming increasingly worried that her husband would find out about the obscene amount of insurance premiums that she was paying per month. The evidence established that Petitioner, in obtaining roughly three-and-a-half times the amount of insurance previously on the victim during the months leading up to the murder, was paying an exorbitantly large amount of insurance premiums in the process. The evidence established that Petitioner was the party responsible for maintaining the finances of the household. Evidence was introduced that Petitioner was worried that the victim would eventually find out about the insurance premiums. Evidence was introduced that Petitioner was having trouble paying the premiums each month. As a result, while Petitioner’s claim that the State’s comment was improper may have some merit simply because of the phrasing of such a comment, Petitioner’s claim that she suffered unfair prejudice as a result of the statement is simply unsupported. Therefore, this Honorable Court should affirm Petitioner’s conviction in the Circuit Court below.

**F. The Circuit Court Properly Admitted a Summary Chart That Was Used by Both Petitioner and the State, to Show Numerous Insurance Policies at Issue in Petitioner's Criminal Case.**

Pursuant to W. Va. R. Evid. 1006:

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place, unless the originals or duplicates to be used are identified and previously produced by any party. The court may order the proponent to produce the originals or duplicates in court.

While Petitioner argues that the act of admitting a summary chart as evidence was improper, this Honorable Court has allowed the use of summary charts for purposes of simplifying otherwise difficult and/or complicated issues. *See State v. Nuckols*, 152 W. Va. 736, 166 S.E.2d 3 (1968). The summary charts in the instant case were verified by the various insurance company witnesses and served to summarize the overly numerous insurance policies taken out on the victim before his murder in 1994.

Further, in continuing the trend of Petitioner's allegations, Petitioner's contention that she was unfairly prejudiced by the summary chart is, again, disingenuous. The record clearly illustrates that Petitioner willingly acquiesced to use of the chart because it simplified the dates on which the insurance policies became effective. Petitioner's defense against the increase in insurance coverage based upon accidents and injuries allegedly suffered by the victim in the years and months leading up to the murder while working as a roof-bolter. The record clearly indicates that Petitioner's defense was strengthened through admission of the chart, because the jury would then be able to clearly relate the dates different insurance policies became effective to the dates the victim suffered work-related accidents and injuries.

Further, during the examination of the many insurance representatives called as State witnesses, the State verified the date, amount, premium, insured, and beneficiary of every single insurance policy covered in the summary chart. The same is illustrated above and covered in full throughout Petitioner's lengthy trial transcripts.

**G. The State Proffered Sufficient Evidence to Warrant the Jury's Finding of Guilt Beyond a Reasonable Doubt.**

This Honorable Court has previously held that an insufficiency of the evidence claim must surpass an incredibly high bar:

In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

Syl. Pt. 5, *Smith* (citing Syl. Pt. 1, *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1978)).

Here, the State proffered the evidence of Mr. Whittington, a key witness hired by Petitioner to murder the victim. The State offered collaborative evidence of mysterious communications between Petitioner and Mr. Whittington, as well as money and vehicles either given or sold at very low values by Petitioner to Mr. Whittington. The State offered an incredibly numerous amount of insurance representatives who illustrated the exorbitant amount of insurance taken out on the victim within the last year-and-a-half of the victim's life, totaling roughly three-and-a-half times more insurance than the victim previously carried.

The State offered evidence that the victim's signature on the policies may have well been forged by Petitioner. The State offered that Petitioner previously contracted with Mr. Whittington to commit a crime. The State indicated that Petitioner showed very little emotion

after discovering the victim's body. Combining all such evidence, the State painted a convincing portrait of Petitioner's guilt.

The jury also considered the evidence offered by Petitioner, including evidence attacking Mr. Whittington's credibility, evidence of the victim's numerous mining accidents and injuries, and evidence of Petitioner's anguish at the loss of her husband. Petitioner spent much time attempting to destroy the credibility of Mr. Whittington, offering contrasting statements arising from the Mark Medley incident and statements to police regarding this underlying criminal matter. The jury considered all of the evidence offered by Petitioner, but found Petitioner guilty based off of the evidence proffered by the State.

In viewing all evidence in the light most favorable to the State, it is clear that the jury's underlying finding of guilt and Petitioner's conviction should not be disturbed. As a result, this Honorable Court should affirm Petitioner's conviction in the Circuit Court below.

**H. The Errors Petitioner Now Complains Of Did Not Exist, Were Otherwise Not Numerous, and Were Harmless.**

Finally, Petitioner claims that cumulative errors deprived her of her right to a fair and impartial proceeding. "Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." Syl. Pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972).

Here, the State has affirmatively proven that such errors were simply not in existence, and in many instances, are based off of the disingenuous allegations of Petitioner. Petitioner received a fair and impartial jury trial, as guaranteed her by the West Virginia and United States Constitutions, and suffered no degree of unfair or undue prejudice throughout the course of her

lengthy proceedings. As a result, the State respectfully requests that this Honorable Court affirm Petitioner's conviction in the Circuit Court below.

**CONCLUSION**

WHEREFORE, for the foregoing reasons, the State of West Virginia respectfully requests that this Honorable Court deny Petitioner's claim for relief and affirm the Circuit Court of Lincoln County, West Virginia.

**Respectfully Submitted**

**STATE OF WEST VIRGINIA,**

***Respondent, By Counsel,***

**PATRICK MORRISEY  
ATTORNEY GENERAL**



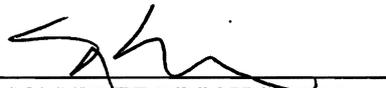
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**CERTIFICATE OF SERVICE**

I, Shannon Frederick Kiser, Assistant Attorney General and counsel for the Respondent State of West Virginia hereby verify that I have served a true copy of "*Respondent's Brief*" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 2nd day of February, 2015, addressed as follows:

Todd S. Bailess  
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SHANNON FREDERICK KISER