FILED
NOV 13 2015
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-0641

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

v.

Appeal from a final order of the Circuit Court of Hardy County (14-F-41)

SUMMER MCDANIEL,
Defendant Below, Petitioner.

PETITIONER'S BRIEF

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II. The Trial Court erred by admitting into evidence 404(b) evidence of the Petitioner's prior bad acts that occurred in the State of Colorado regarding the mother and infant testing positive for amphetamines at birth, (hearing on December 15, 3014), when the infant did not experience any withdraws within the first four days of birth, was released into the Petitioner's care, and the infant passed away twenty-six days, without any controlled substance in its system, and the cause of death was unknown.

III. The Petitioner was convicted of one count of "child neglect resulting in death" and one count of "child neglect creating substantial risk of death." Because the infant child passed away and the legislature intended the two charges to be a lesser and higher included offense, the Petitioner asserts that these two charges should have been merged together or the failure of the merger resulted in double jeopardy.

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V. The Trial Court erred by admitting into evidence five enlarged colored photographs of the infant's corpse, when the photos held no evidentiary value, the defense stipulated to the infant's death, and the photographs were gruesome in nature in that the photographs showed the infant's distorted face from being buried.

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IX. The Trial Court erred by failing to give a timely limiting instruction under 404(b), when the Petitioner requested that the instruction be given and by informing the jury of the possible sentence for concealment of a deceased human body.

X. Trial Counsel provided ineffective assistance of counsel by crying during the trial of the matter, and by making false promises to the jury by asserting that the Petitioner, Summer McDaniel, would testify in the matter, when the Petitioner, Summer McDaniel, did not testify.

XI. The Petitioner asserts that the evidence presented at trial was insufficient for the jury to convict the Petitioner of all the charges stated in the indictment, with emphasis on the lack of jurisdiction with regard as to where and when the alleged acts occurred.

STATEMENT OF THE CASE

On July 9, 2014, the infant child was born at Penrose-St. Francis Hospital in Colorado Springs, Colorado. (A.R. Volume 1, Page 17). Although the Petitioner did not receive prenatal care, the infant child was born healthy and did not have any complications. (A.R. Volume 4, Page 32-45). Even though the Petitioner and infant tested positive for methamphetamines, the infant did not experience any withdraws, while the infant was at the hospital for four day. Id. at page 50; 52 The infant was then discharged into the Petitioner's care, with a referral to Child Welfare Services in the State of Colorado. (A.R. Volume 4; Page 43). At birth, the infant weighed approximately six pounds and fifteen ounces. Id. at Page 43. However, the pediatrician testified that it was common for infants to lose weight after birth. Id. The pediatrician testified that he would expect an infant to weigh approximately eight pounds after twenty-six days. Id at page 48. Once Child Welfare Services received the referral, a worker met with the Petitioner. (A.R. Volume 4, Page 61). At that time, the worker met with the Petitioner and discussed the allegations. Id. at Pages 61-64. The worker also served the Petitioner with a preliminary protective proceeding, which

is the State of Colorado's first hearing. Id. However, the Petitioner retained physical custody of the infant, and the State of Colorado retained legal custody of the infant. Id. All in all, the Prosecuting Attorney called three witnesses from the State of Colorado to testify about the medical records, toxicology reports, and lack of prenatal care regarding the infant and the Petitioner. Id. Additionally, the worker testified that the children were clean, were clothed, and were fed; the basic necessities were being provided. Id. at Page 74.

Soon after the Petitioner met with the worker from Child Welfare Services, the co-defendant and the Petitioner left the State of Colorado, with all of the children ranging in age from newborn to twelve. (See generally, A.R. Volume 4). Some twenty-six days after the infant's birth, the Petitioner and the co-defendant come to the State of West Virginia. (See generally Volume 4). The Petitioner stopped at her grandfather's and aunt's house to receive some money, blankets, and other supplies. (See Volume 5, Page 56-62 and 62-69, and Volume 7: Interview of Raven). The Petitioner then went to a store and bought food items and other necessities. (Volume 4, Page 85-102; and Volume 7: Interview of Raven). The co-defendant and the Petitioner then stay at various campsites in the George Washington National Forest in Hardy County, West Virginia. Id. At the campsites, the children eat hot dogs and roast smores. Id. Additionally, the children take showers in the provisions provided at the campsites. Id. The children sleep in a tent, and the Petitioner and the co-defendant sleep in the vehicle with the infant. Id. During the early morning hours, the co-defendant wakes-up and finds one of the younger children sleeping in the vehicle with the co-defendant, the Petitioner, and the infant. (A.R. Volume 5). At that time the co-defendant discovered the infant had died. (A.R. Volume 5). The co-defendant then tells the Petitioner. (A.R. Volume 5). After the Petitioner says her goodbyes, the co-defendant then takes the

infant into the woods and buries the infant in a shallow grave, with a large rock as a marker. (A.R. Volume 5). The co-defendant then tells the two oldest children and shows the oldest children the grave. (A.R. Volume 5 and Volume 7: Interview of Raven). The next morning the co-defendant and the Petitioner leave Hardy County, West Virginia. (A. R. Volume 4, Page 106-108).

While attempting to pump gas at the Sheetz store in Morgantown, West Virginia, a caller reports the co-defendant as a suspicious person. (A.R. Volume 4, Page 106). When the officer arrives, the officer runs the license plate of the vehicle, which has been reported stolen. (A.R. Volume 4, Page 107-110). The officer then pursues the vehicle onto the interstate. Id. Although the vehicle was traveling less than the posted speed limit, the co-defendant refused to pull the vehicle over. Id. Eventually, the vehicle is pulled over. Id. At that time, the co-defendant tells the officer that his infant son just passed away. Id. The officers then place the co-defendant into custody, detain the Petitioner, and detain the children. Id. While the co-defendant is being questioned regarding the license plates and his arrest warrant, the co-defendant reports to the officers about the death and burial of the infant. (A.R. Volume 5, Page 3-10). Although the Petitioner did not initially disclose the burial of the infant, the Petitioner then cooperated with the officers and assisted the co-defendant in locating the infant child, within forty-eight hours of the infant's passing. (A.R. Volume 5, Pages 19-55).

The officers also search the vehicle and find baby diapers, formula, a tent, and blankets among other items. (A.R. Volume 5, Pages 3-55). The co-defendant also reported to the officers that once the infant passed away he threw the majority of the baby items in the trash. (A.R. Volume 5, Pages 19-55).

After the co-defendant and Petitioner lead the officers to the infant's burial site, the infant's body was exhumed. (A.R. Volume 5, Page 19-55). The infant's body was then examined by the pathologist. (A.R. Volume 5, Page 80-94). The autopsy report stated that the cause of death was unknown. (A.R. Volume 5, Page 80-94). The autopsy report did not contain any findings of a controlled substance in the infant. Id. The pathologist also testified that the infant weighed approximately six pounds at the time of the examination, and it is common for a deceased body to lose weight after passing away. Id.

SUMMARY OF ARGUMENT

First, the Trial Court erred by failing to utilize the balancing test as required by the West Virginia Rules of Evidence when considering the admissibility of certain 404(b) evidence regarding the Petitioner's lack of prenatal care, toxicology reports, and medical records, all from the State of Colorado. In the case at hand, the Trial Court admitted the evidence without stating any findings, legal conclusions, and without conducting the balancing test. The Trial Court stated that the purpose is to show that the infant was abused or neglected from birth until death. Even though the medical records and toxicology reports showed that the Petitioner did not receive prenatal care and tested positive for methamphetamines at birth, the prejudicial harm outweighed the probative value because the infant was born without any complications, was born not addicted to any controlled substances, did not experience withdraws, lived for approximately twenty-six (26) days, and passed away without any controlled substances in the infants system. Additionally, some of the above 404(b) evidence, medical records and records from Child Welfare Services in Colorado, were admitted into evidence to show the "complete story." This is an improper purpose because it does not state with enough particularity what part of the "whole story" the evidence is admitted. In addition, the Trial Court failed to give a timely limiting

instruction after each individual witness testified. Instead, the Trial Court gave the limiting instruction after all three witnesses testified. Furthermore, the Prosecuting Attorney presented the testimony of three witnesses from the State of Colorado, and three witnesses from Morgantown, West Virginia. The Prosecuting Attorney overly relied on this information as these witnesses comprised six of the prosecution's twelve witnesses. Finally, the Prosecuting Attorney argued more about the Petitioner's prior conduct, then the evidence and facts that occurred in the State of West Virginia. (See A.R. Volume 4, Page 17-24, and Volume 5, Pages 134-137 and 147-153).

Next, the Petitioner was convicted of "child neglect resulting in death" and "child neglect creating a substantial risk of death." These charges should have merged into one charge because the alleged acts of child neglect also allegedly caused the death of the infant. Additionally, the Petitioner believes the legislature did not intend for these two charges to be separate offenses but rather lesser and higher included offenses.

Furthermore, the Prosecuting Attorney abandoned his quasi-judicial role and impermissibly argued community standards during closing argument. The Prosecuting Attorney told the jury that the community would see him on the street and ask him what he was going to do with the baby murderers. The Prosecuting Attorney also told the jury that his wife told him that she was glad the incident occurred in Hardy County, West Virginia because she knew the people of Hardy County would convict the Petitioner.

Next, the Trial Court erred by admitting into evidence five enlarged colored photographs of the deceased infant's body that were gruesome in nature because the photos are enlargements of the deceased infant's face and shows the contortion and distortion of the infant's facial features from being buried. In addition, the photographs held no evidentiary value, i.e. showed no physical trauma, no wounds, etc.

Furthermore, the Trial Court erred by allowing the State Trooper to testify that the substance found on a blanket was baby vomit, when the substance was never tested and the source and identity of the substance was never identified.

Next, the Trial Court erred by not dismissing the charge of "concealment of a deceased human body," because the co-defendant and the Petitioner disclosed the event of the infant's passing before the authorities knew to investigate the matter, and the Petitioner aided the co-defendant in locating the infant's body, within the forty-eight hour time period.

Finally, the Prosecuting Attorney called a witness for the sole purpose of impeaching the witness, as stated on the record. The Prosecuting Attorney then improperly impeached the witness by asking the witness a few simple questions over the course of a few minutes. At which time, the witness either explained the answers or stated that the witness did not remember. When the witness stated that he did not remember, instead of refreshing the witness's memory, the Prosecuting Attorney then showed a fifty-five minute video of the witness's recorded interview at the Child Advocacy Center, in which the witness did not know the witness was being recorded, was not sworn, and did not formally adopt the statements. Furthermore, the interview contained other questions, answers, and information that would not have been otherwise permitted, such as the living arrangements of the Petitioner and the children. (The children and the Petitioner were living in a motel room; the Prosecuting Attorney did not notice this for 404(b) evidence). The Trial Court then admitted the entire video into evidence. Additionally, the Prosecuting Attorney should not have been allowed to call a witness for the sole purpose of impeaching the witness because this allowed additional information to come into evidence that would not have otherwise been permitted, and the information that is used to impeach a witness is only permitted to discredit the credibility of the witness and not towards the material issues at

hand.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issues in this case involve assignments of error in the application of settled law and involve an unsustainable exercise of discretion where the law governing that discretion is settled, and involve claims of insufficient evidence, the Petitioner believes that oral argument is necessary, pursuant to Rev. R.A.P. 19.

ARGUMENT

I. The Trial Court erred in admitting into evidence certain 404(b) evidence of the Petitioner's prior bad acts on two different occasions.

The standard of review involves a three step analysis. First, this Court reviews for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. State v. McFarland, 228 W. Va. 492; 721 S. E. 2d 62 (W. Va. 2011). Second, this Court reviews de novo whether the trial court correctly found the evidence to be admissible for a legitimate purpose. Id. Third, this Court reviews for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial. Id.

Here, the Prosecuting Attorney filed four separate notice of its intent to use 404(b) evidence. (A.R. Volume 1, Pages 39-46). The first notice provides notice of the prosecutions intention to use evidence of the Petitioner's hospital records from the State of Colorado and the toxicology report that the Petitioner and infant tested positive for amphetamines at birth. The Prosecution asserted that the purpose is to tell the complete story. (A.R. Volume 1, Page 39). The second notice provides notice of the prosecutions intention to use evidence that Child Welfare Services in the State of Colorado served the Petitioner with a notice of Preliminary Protective Proceedings. (A.R. Volume 1, Page 41). The prosecution asserts this evidence will be used to tell the complete story. Id. The prosecution's third notice provides notice of the prosecution's

intention to use evidence that the Petitioner did not obtain any prenatal care in the State of Colorado. (A.R. Volume 1, Page 43). The prosecution asserted this is necessary to tell the complete story. Id. The prosecution's fourth notice provides notice of the prosecution's intention to use as evidence the hospital records and toxicology reports of the Petitioner and infant from the State of Colorado. (A.R. Volume 1, Page 45). The prosecution asserted the purpose of this evidence is to tell the complete story. Id.

a. The Trial Court erred by admitting into evidence 404(b) evidence of the Petitioner's prior bad acts that occurred in the State of Colorado regarding the Petitioner's failure to obtain prenatal care, hospital records, and toxicology report, without conducting a balancing test and without making any findings on the record, and for admitting the evidence for an improper purpose to show that the child was neglected from birth till death. (Hearing on January 13, 2015).

When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. State v. McGinnis, 193 W. Va. 147; 455 S.E. 2d 516 (W. Va. 1994). The trial court shall determine the admissibility of the evidence. Id. After an incamera hearing and by the establishment of the preponderance of the evidence, the trial court must be convinced that the acts or conduct occurred and that the defendant committed the acts. Id. If a sufficient showing has been made, the trial court must then determine the relevance of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. Id. If the evidence is admitted, then the trial court should instruct the jury on the limited purpose for which such evidence has been admitted. Id.

Here, an in-camera hearing was held on January 13, 2015. (See generally: A.R. Volume Three). After counsel's assertion of the facts and argument, the Trial Court simply admitted the 404(b) facts into evidence. Id. The Trial Court did not conduct a proper balancing

test either on the record or in a supplemental order. Id. The Trial Court admitted into evidence the medical records from the State of Colorado that showed the Petitioner did not receive prenatal care, the Petitioner and the infant tested positive for methamphetamine, and the toxicology repots. Id. at Page 21. The order stated that the purpose of the evidence was to show that the Petitioner neglected the child from before birth until the child's death. Id. This is an improper purpose as this goes to show that the charges that were contained in the indictment in Hardy County, West Virginia would have been committed in the State of Colorado, and therefore, the State of West Virginia would lack jurisdiction. Additionally, the prosecution's notice of intent stated that the proper purpose would be to show the complete story. Again, the Petitioner would contend that this would also be an improper purpose because the prosecution has not stated with particularity what purpose the evidence would be offered. The statement to tell the complete story is too vague and would let the jury use the evidence for other improper purposes, such as to show that the child was neglected from before birth until death.

However, the evidence was not admissible under the balancing test as the evidence's prejudicial value outweighed the probative value. First, the child was born a healthy child and lived for approximately twenty-six days after its birth. (A.R. Volume 4, Page 31-57). The fact that the Petitioner did not receive prenatal care was not a factor in the infant's passing, as the infant survived for twenty-six days and was released into the Petitioner's care. Id. Next, the fact that the Petitioner and the infant had methamphetamine in their system at birth was not relevant to prove that the child was abused or neglected some twenty-six days later when the infant passed away. When the infant was released from the hospital into the care of the Petitioner, the infant was not experiencing withdraws and did not experience withdraws during the four days the infant was in the hospital. (A.R. Volume 4, Page 31-57). In fact, the infant did not show any

signs of withdraw after birth. Id. When the infant passed away twenty-six days later, the coroner's report did not show any results for any form of a controlled substance; the infant had a clean drug screening. (A.R. Volume 5, Page 90). Therefore, because the Trial Court failed to conduct a proper balancing test and because the prejudicial effect of the 404(b) evidence was outweighed by its probative value, the medical records from the State of Colorado should have been excluded.

Furthermore, the Prosecuting Attorney presented the testimony of three witnesses from the State of Colorado, and three witnesses from Morgantown, West Virginia. The Prosecuting Attorney overly relied on this information as these witnesses comprised six of the prosecution's twelve witnesses. Finally, the Prosecuting Attorney argued more about the Petitioner's prior conduct (404(b) evidence), then the evidence and facts that occurred in the State of West Virginia. (See A.R. Volume 4, Page 17-24, and Volume 5, Pages 134-137 and 147-153).

b. The Trial Court erred by admitting into evidence 404(b) evidence of the Petitioner's prior bad acts that occurred in the State of Colorado regarding the mother and infant testing positive for amphetamines at birth, (hearing on December 15, 3014), when the infant did not experience any withdraws within the first four days of birth, was released into the Petitioner's care, and the infant passed away twenty-six days without any controlled substance in its system, and the cause of death was unknown.

Here, an incamera hearing was held on December 13, 2015. (A.R. Volume 1, Page 24). After the hearing, the Trial Court provided its own order outlining the courts findings and conclusions regarding the admissibility of certain 404(b) evidence. (A.R. Volume 1, Page 24). The Trial Court held that the hospital records from the State of Colorado and toxicology reports that the Petitioner and the child tested positive for amphetamines may be admitted into evidence to tell the complete story, and the records from Child Welfare Services in the State of Colorado should be admitted into evidence to tell the complete story. Id.

While the Trial Court performed the balancing test and articulated its findings and conclusions, the Trial Court erred by admitting these 404(b) facts into evidence. While the Trial Court found that the proper purpose for the 404(b) evidence would be to show the complete story, this is not a proper purpose because the prosecution has not stated with particularity what purpose the evidence would be offered. The statement to tell the complete story is too vague and would let the jury use the evidence for other improper purposes, such as implying the Petitioner neglected the child in the State of Colorado and is thus guilty of neglect in the State of West Virginia, rather than for a proper purpose. For instance, with regard to the records from Child Welfare Services in the State of Colorado, a proper purpose would be to show that this is the alleged reason that the Petitioner may have fled the State of Colorado, which would be to evade court proceedings regarding the fact that the child tested positive at birth for a controlled substance.

However, the probative effect of the evidence that the Petitioner and the infant tested positive for amphetamines at birth was severely outweighed by the prejudicial effect. (A.R. Volume 4, Page 31-57). Id. The fact that the Petitioner and the infant had amphetamine in their system at birth was not relevant to prove that the child was abused or neglected some twenty-six days later when the infant passed away. When the infant was released from the hospital into the care of the Petitioner, the infant was not experiencing withdraws. (A.R. Volume 4, Page 31-57). In fact, the infant did not show any signs of withdraws after birth. Id. When the infant passed away thirty days later, the coroner's report did not show any results for any form of a controlled substance; the infant had a clean drug screening. (A.R. Volume 5, Page 90). Additionally, even though Child Welfare Services were involved in the State of Colorado, Child Welfare Services continued to allow the child to remain in the care of the Petitioner. (A.R. Volume 4, Page 64).

Furthermore, the Prosecuting Attorney presented the testimony of three witnesses from the State of Colorado, and three witnesses from Morgantown, West Virginia. The Prosecuting Attorney overly relied on this information as these witnesses comprised six of the prosecution's twelve witnesses. Finally, the Prosecuting Attorney argued more about the Petitioner's prior conduct, then the evidence and facts that occurred in the State of West Virginia. (See A.R. Volume 4, Page 17-24, and Volume 5, Pages 134-137 and 147-153).

Therefore, because the prejudicial effect of the 404(b) evidence regarding the toxicology records and medical records from the State of Colorado outweighed the probative value and because the evidence was not introduced for a proper purpose, the evidence should have been excluded.

II. The Petitioner was convicted of one count of "child neglect resulting in death" and one count of "child neglect creating substantial risk of death." Because the infant child passed away and the legislature intended the two charges to be a lesser and higher included offense, the Petitioner asserts that these two charges should have been merged together or the failure of the merger resulted in double jeopardy.

The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. State v. Wilkerson, 230 W. Va. 366; 738 S. E. 2d 32 (W. Va. 2013). However, an offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense. Id. The question of whether a jury was properly instructed is a question of law, and the review is de novo. Id.

Under the Blockburger Test, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the

other does not. State v. Rummer, 432 S. E. 2d 39; 189 W. Va. 369 (1993). The determination can be resolved by determining the legislative intent as to punishment. Id.

In this case, the Petitioner was convicted of "child neglect resulting in death." (A.R. Volume Five, Page 155). The jury charge states that child neglect resulting in death is committed "when a parent . . . . neglects a child . . . and that such neglect causes the death of a child. (A.R. Volume 5, Page 123). "Gross Neglect" means reckless or intentional conduct, behavior or inaction by a parent, guardian, or custodial that evidences a clear disregard for the minor child's heath, safety, or welfare. Id. "Neglect" means unreasonable failure by a parent, guardian, or custodial to exercise a minimum degree of care to assure a minor child's safety or health. Id.

The Petitioner was also convicted of one count of "child neglect creating substantial risk of death." (A.R. Volume 5, Page 127 and Page 156). The jury charge states that the offense of child neglect creating substantial risk of death as is used in this indictment is committed when "any parent . . . neglects a child, and such neglect causes serious bodily injury to the child." Id. "Neglect" is defined as any unreasonable failure by the parent, guardian, or person accepting a supervisory role of the minor child to exercise a minimum degree of care concerning the child's physical safety or health." Id. at Page 127-128. "Serious bodily injury" is defined as a bodily injury which creates a substantial risk of death which causes a serious or prolonged disfigurement, prolonged impairment of health, or prolonged loss of impairment in the functions of any body organ. Id. at Page 128.

Here, the two charges should have been merged. Child neglect creating substantial risk of death is the lesser included as the other charge requires the death of the child. While the one offense includes the additional phrase "creating substantial risk of death" and the other offense " resulting in death," the legislative intent does not show that the legislature intended for these

two offense to be separate offenses but rather that the charges should be merged together when death occurs. Therefore, the two charges should have been merged together and the failure of the Trial Court to merge the offenses resulted in double jeopardy for the Petitioner.

III. Because the Prosecuting Attorney repeatedly told the jury that the co-defendant plead guilty to four of the charges in the indictment early that day and commented about community standards during closing argument, the Prosecuting Attorney abandoned his quasi judicial role and became a partisan eager to convict.

Under West Virginia common law, "it is an abuse of a [prosecutor's position] to make statements, in his argument, of fact outside the evidence . . . and to do so is error." State v. Moose, 110 W. Va. 476; 158 S. E. 715 (W. Va. 1931).. A prosecutor cannot assert his personal opinion as to the justness of a cause, as to the credibility of a witness or as to the guilt or innocence of the accused. State v. Critzer, 167 W. Va. 388; 280 S. E. 2d 288 (W. Va. 1981); Rule 3.4 of the West Virginia Rules of Professional Conduct. Personal opinion or belief statements by a prosecuting attorney if calculated to prejudice the jury and inflame the passion of the jurors, is reversible error. State v. Graham, 119 W. Va. 85; 525 S.E. 2d 303 (W. Va. 1937). The basis for the rule is that "prosecuting attorneys occupy a quasi-judicial position in the trial of a criminal case." State v. Boyd, 160 W. Va. 234; 233 S. E. 2d 710 (W. Va. 1977). The prosecutor has a duty to set a tone of fairness and impartiality, and this standard becomes more elevated when the offense charge is of a serious nature because a jury in this type of case may be more easily inflamed against the defendant by the very nature of the crime charged. Id.

To determine whether improper prosecutorial comments were made, the West Virginia Superior Court of Appeals has adopted the following four part test. (1) The degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused, (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent

proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters. State v. Stephens, 206 W. Va. 420; 525 S. E. 2d 301 (W. Va. 1999) (citing State v. Sugg, 193 W. Va. 388 (1995).

Here, the Prosecuting Attorney abandoned his role of a quasi-judicial position and became a partisan eager to convict by repeatedly telling the jury that the co-defendant had plead to four of the five counts in the indictment earlier that morning and by arguing community standards during closing argument.

During opening statement, the Prosecuting Attorney told the jury that "this case is really about two parents, but one of them already plead guilty to four of the five counts in the indictment earlier this morning; so we're only dealing with the [Petitioner, Summer McDaniel]." (A.R. Volume Four, Page 17, Lines 5-9). Again, during opening statement, the Prosecuting Attorney commented about the co-defendant, and then corrected himself by stating that "he is not a defendant anymore because he's already entered a plea." (A.R. Volume Four, Page 23, Lines 1-5).

During closing argument, the Prosecuting Attorney made extemporaneous statements. The Prosecuting Attorney stated that "the last thing I want to do is disrupt the child's life any more than his mother already has, but the Defendant has a constitutional right to a jury trial that she knew when this case went to jury trial he was going to be here to testify against her so she's the one to blame for that, not the State." (A.R. Volume Five, Page 135-136). The Prosecuting Attorney then went on to state that "if there is one good thing that comes out of this case is that the other four children this woman had may be able to make it now." (A.R. Volume Five, Page 136, Lines 3-5). "They didn't have a chance in life." (A.R. Volume Five, Page 136, Lines 3-5).

The Prosecuting Attorney argued community standards by stating as follows, "I walk around in the community and people say what are you going to do with these baby killers, what are you going to do with these baby killers." (A.R. Volume Five, Page 150, Lines 6-11). "My first thought was they didn't really kill this baby, but then when I start thinking about it they did kill this baby because they caused the death." (A.R. Volume Five, Page 150, Line 6-11.) The Prosecuting Attorney continued by stating, "this case is going to tell a lot about the community we live in here today." (A.R. Volume Five, Page 150, Lines 17-22). "Are we going to hold people accountable when they come here from meth heads from the State of Colorado come here, fail to give the child medical attention - - he needs medical attention, fails to call law enforcement when the baby dies." (A.R. Volume Five, Page 150, Line 17-22).

The Prosecuting Attorney continues to argue community standards by stating, "I was talking to my wife about this case last night and she reminded me that Trooper Hartman when he testified here a day earlier that this crime barely occurred in Hardy County. " (A.R. Volume Five, Page 151-152, Lines 24-8). "She said she was glad - - as horrific as this event was, she was glad it occurred here in Hardy County because she knew the people of Hardy County would do what was right, they would find this Defendant guilty of all charges." (A.R. Volume Five, Pages 151-152, Lines 24-8).

The case at hand involved the death of a new born child. The Prosecuting Attorney made these comments, when the passions of the jury was already inflamed because of the nature of the case. By stating that the co-defendant had already plead in the midnight hours just before the trial started, implied to the jury that the Petitioner, Summer McDaniel, was also guilty. The Prosecuting Attorney implied this not just once during opening statements

but twice.

In closing argument, the Prosecuting Attorney continuously commented about community standards, by stating that the people in the community repeatedly asked him what he was going to do with the baby murderers and by stating his wife was thankful this happened in Hardy County because she knew the people in the community would find the Petitioner guilty. The Prosecuting Attorney's wife is also a prominent figure in the community, a school teacher. The Prosecuting Attorney repeatedly argued community standards by stating this case is going to tell a lot about the community we live in here today." (A.R. Volume Five, Page 150, Lines 17-22). "Are we going to hold people accountable when they come here from meth heads from the State of Colorado come here. . . ." Furthermore, the jury charge specifically instructs that the jury to disregard community standards. However, here, the Prosecuting Attorney is specifically telling the jury what the community standard and community opinion is regarding the Petitioner's guilt or innocence, when the community at large had not sat in the trial and heard the evidence and testimony presented to the jury. (A.R. Volume 5, Page 96-133). While Defense Counsel did not object to the Prosecuting Attorney's comments about the community standard, Defense Counsel's failure to object constitutes plain error, as the comments from the Prosecuting Attorney were improper.

IV. The Trial Court erred by admitting into evidence five enlarged colored photographs of the infant's corpse, when the photos held no evidentiary value, the defense stipulated to the infant's death, and the photographs were gruesome in nature in that the photographs showed the infant's distorted face from being buried.

When an objection is made to the admissibility of photographs on the basis of the gruesomeness of the photographs, the admissibility of the photographs must be made on a case

by case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence. To be admitted into evidence a photograph must be proven relevant. Under Rule 401 of the West Virginia Rules of Evidence, evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action. If a photograph is relevant, whether a photograph should be admitted in evidence rests in the sound discretion of the trial court, and its ruling will be upheld unless there is a clear showing that its discretion has been abused. State v. Rowe, 259 S. E. 2d 26; 163 W. Va. 593 (W. Va. 1979). However, gruesome photographs are not per se inadmissible but the photographs must have something more than probative value. Id. Because the photographs are gruesome, the photographs are presumed to have a prejudicial and inflammatory effect on a jury. Id. To determine if a photograph is gruesome, a determination should be made as to whether or not the photograph shows contorted facial or bodily features, and color photographs of a corpse magnifying its revolting aspects will be more likely condemned as gruesome. State v. Copen, 566 S. E. 2d 638; 211 W. Va. 501 (W. Va. 2002).

In Rowe, the defense objected to the State's use of fourteen colored photographs on the basis of their gruesomeness. Rowe, 566 S. E. 2d 638; 211 W. Va. 501. Because the photos provided a close-up view of the victim's battered and lacerated face, this Court found that the photographs were gruesome and should not have been admitted into evidence.

Here, the State introduced five enlarged photographs of the infant's corpse. (A.R. Volume 1, Pages 81-89 and Page 98). The photographs were admitted into evidence despite trial counsel's objection. The photographs should not have been admitted into evidence as the photographs were not relevant. The photographs provided no evidentiary value, and Trial Counsel stipulated that the infant passed away. Even though the Prosecution said the photos were

to rebut Trial Counsel's argument that the infant suffered a weight loss because of bowel movements, only one photo showed the loss of body fluid and this photo was not an enlargement and did not focus on the infant. Further, the coroner's report or autopsy report determined that the cause of death was unknown. Additionally, the photographs depicted distortion on the infant from where the blanket and skin bonded together, which caused red marks and deforming marks on the infant child. Additionally, the infants face, mouth, and neck were also distorted from where the infant had been buried. Because the photographs held no evidentiary value, the photographs prejudicial and inflammatory effect on the jury outweighed the probative value, which was essentially zero.

V. The Trial Court erred by permitting the State Trooper to offer opinion testimony regarding the identity of a substance that was found in the back of the vehicle that was untested and otherwise unknown, when the State Trooper was not qualified to identify the substance.

Under Rule 701 of the West Virginia Rules of Evidence regarding opinion testimony by a law witness, if a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 of the West Virginia Rules of Evidence.

Here, the Trial Court admitted into evidence the testimony of State Trooper Hartman regarding whether an untested and unknown substance in the back of the vehicle was vomit with stomach content and whether the source of the vomit was from the deceased infant. (See A.R. Volume 1, Page 95-96).

During the trial, Trooper Hartman testified that he has been employed with the West Virginia State Police for approximately nine (9) years. (A. R. Volume 5, Page 19). No other

qualifications were given for Trooper Hartman to offer an opinion regarding the source of the substance and the identity of the substance. Id. Additionally, no tests or toxicology reports were performed on the substance. (A.R. Volume 5, Page 19-41). Furthermore, no one else gave a first-hand account as to the source of the substance or the identity of the substance. Id. With no other qualifications, Trooper Hartman testified that the substance was vomit from the infant. (A.R. Volume 5, Page 36, Line 7). After counsel's repeated objection, the Prosecuting Attorney also stated that "that's what it is, Your Honor." (A.R. Volume 5, Page 37, Line 4).

The testimony of Trooper Hartman should have been excluded because the testimony was not based on the witness's rational perception. Trooper Hartman did not receive any corroborating evidence regarding the source of the substance. Trooper Hartman does not know if the substance was merely spilled formula, vomit, or some other substance. Furthermore, the testimony should be based on scientific, technical, or other specialized knowledge to determine the source of the substance, whether it was from the deceased infant, spilled formula, from someone else, something else all together, and to determine the identity of the substance. Because no foundation was given by Trooper Hartman regarding his qualifications to identify both the source of the substance and the identity of the substance, the admission of the testimony of Trooper Hartman into evidence was in error.

VI. The Trial Court erred by not dismissing the charge of "Concealment of a Deceased Human Body" because the death and location of the deceased infant was disclosed within forty-eight hours of the infant's death.

Under 61-2-5(a) of the West Virginia Criminal Code, Concealment of a Deceased Human Body occurs when, "any person who . . . knowingly and willfully conceals, attempts to conceal or who otherwise aids and abets any person to conceal a deceased human body where death occurred as a result of criminal activity . . . ." However, "it shall be a complete defense in a

prosecution . . . that the defendant affirmatively brought to the attention of law enforcement within forty-eight (48) hours of concealing the body and prior to being contacted regarding the death by law enforcement the existence and location of the concealed deceased human body." Id.

Here, the testimony and evidence is limited regarding the involvement of the Petitioner, Summer McDaniel, in burying the deceased infant. The record is very clear that the co-defendant buried the child. The record further indicates that the parties were pulled over in Monongalia County, West Virginia after the license on the vehicle was known to be stolen. (A.R. Volume 4, Page 106-109). At that time, the officers pull the co-defendant, the Petitioner, and the children over. (A.R. Volume Four, Page 109). The co-defendant then mentions to the officer that he was upset because he just buried his infant son the day before. Id. The police then take the children, the co-defendant, and the Petitioner into custody.(A.R. Volume Five, Pages 3-17). While in three separate locations, the co-defendant reports to the officers the infant child passed away and is buried in West Virginia, and the children are also talking about the infant child's passing. (A.R. Volume 5, Pages 3-17). At this point, the Petitioner, Summer McDaniel, did not divulge any information regarding the child other than the child had passed away from SIDS. Id. Even though the Petitioner, Summer McDaniel, did not divulge any other information regarding the passing of the infant child, the Petitioner joined the co-defendant in assisting officers with locating the infant child. (A.R. Volume Five, Pages 19-23). The co-defendant and the Petitioner lead authorities to the George Washington National Forest in Hardy County, West Virginia and lead the authorities to the location of the infant's grave. Id. While the co-defendant was primarily leading the way, the Petitioner, Summer McDaniel, was also present and was attempting to help locate the child. Id. Furthermore, the co-defendant reported the passing of the child to the authorities before the authorities knew about the passing of the child, and the co-defendant and

the Petitioner lead the authorities to the grave site of the infant child within forty-eight hours of the infants passing. Id. Additionally, the Petitioner could only assist and aid the co-defendant in locating the infant because the Petitioner did not participate in burying the infant child. The co-defendant buried the child alone, and it is unclear from the record as to whether or not the Petitioner knew the location of the burial site. Therefore, the charge of concealment of a deceased human body should have been dismissed.

VII. The Trial Court erred in denying the Petitioner's objection to the improper impeachment of a witness when the Prosecuting Attorney stated on the record that the witness was being called for the sole purpose of being impeached, the Prosecuting Attorney did not follow procedure when attempting to impeach the witness, and the Trial Court erred by showing and admitting into evidence the entire fifty-five minute child advocacy center video

Under Rule 607 of the West Virginia Rules of Evidence, "the credibility of a witness may be attacked by any party, including the party calling the witness." Under Rule 613 of the West Virginia Rules of Evidence, extrinsic evidence of a witness's prior inconsistent statement is admissible "only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it.

The three requirements must be satisfied before admission at trial of a prior inconsistent statement can be admitted. First, the statement must be inconsistent. State v. Blake, 197 W. Va. 787; 329 S. E. 2d 860 (W. Va. 1985). If the statement comes in the form of extrinsic evidence as opposed to oral, the area of impeachment must pertain to a matter of sufficient relevancy and notice and an opportunity to explain or deny must be met. Id. Finally, the jury must be instructed that the evidence is admissible only to impeach the witness and not as evidence of a material fact. Id.

Here, the Prosecuting Attorney stated on the record that he was calling R.S., the Petitioner's twelve year old son as a witness for the sole purpose of impeaching the child. (A.R. Volume Four, Page 82, Lines 4-8). While the rules state that any party may impeach a witness including the party calling a witness, the rules are unclear as to whether or not a party may call a witness for the sole purpose of impeaching the witness. However, the rules state that purpose of impeaching a witness is to attack the credibility of a witness and not to introduce other facts into evidence. In this case, the Prosecuting Attorney stated on the record that he was calling R. S. for the sole purpose of impeaching the witness. The Prosecuting Attorney presented the testimony of the child during his case in chief. The Prosecuting Attorney used this tactic for the sole purpose of getting other information before the jury, and not for the purpose of attacking the witness's credibility.

Furthermore, the Prosecuting Attorney asked the child the following questions:

Q: Did (the infant) begin puking?

A: I didn't see him.

Q: You didn't see him puke?

A: No.

Q: Did your mom attempt to keep (the infant) away from you?

A: Not really.

Q: She didn't? Was (the infant) having difficulty eating?

A: I didn't think so, no. Not with me.

Q: You never saw him throw up? Do you remember being interviewed by Kristin Kelly on July 9th, 2014? Do you remember telling Kristin that (the infant) was sick - - (the infant) was sick?

A: Yeah, I think.

Q: Do you remember telling Kristin that you could tell by looking at him?

A: I don't remember it. I remember saying that he looked sick because he was like pale. He's kind of pale.

Q: Was he extremely pale? Was he extremely pale?

A. He was - -yeah. Like not like really pale but he was pale.

Q: Do you remember telling Kristin (the infant) would not eat anything?

A: No.

Q: Do you remember telling Kristin he was throwing up?

A: No.

Q: Do you remember telling Kristin nobody would really help (the infant).

A: No.

Q: Do you remember telling Kristin that your mom was trying to keep (the infant) away from you and the other children?

A: No.

Q: Do you remember telling Kristin that (the infant) had got sick a few days before going to the campground?

A: I think so.

(A.R. Volume Four, Pages 88-89).

Next, the Prosecuting Attorney requested that the Trial Court allow Defense Counsel the opportunity to question the child regarding his prior interview at the Child Advocacy Center. (A.R. Volume 4, Page 89). Defense Counsel objected to the manner in which the Prosecuting Attorney was trying to impeach the witness. Id. The objection was overruled. Id. Defense

Counsel then proceeded to question the child about the events in question. Id. at Page 89-98. Next, the Prosecuting Attorney requested the Trial Court admit into evidence and show to the jury the entire Child Advocacy Center recorded interview of the child. Id. at Page 98-101. The Trial Court permitted the video to be introduced. Id. The Prosecuting Attorney then presented the testimony of Kristin Kelly, the person that conducted the interview. Id. at Page 101. After her testimony, the Prosecuting Attorney then proceeded to play the entire video of approximately fifty-five minutes in length. Id. at Page 103.

However, as the video depicts, the child was never aware that the child was being interviewed. (A.R. Volume 7). The child was never sworn, and the child never subscribed to the statement such as by giving a written statement. Id. Additionally, the fifty-five minute recording introduced other information to the jury that was not to be admitted into evidence on the material issues in question but only to challenge the credibility of the witness that was called by the Prosecuting Attorney. Id. For instance, the Prosecuting Attorney asked the witness approximately eleven questions spanning less than five minutes. However, the video showed substantially more than the eleven narrow questions the Prosecuting Attorney asked, covered a larger subject and topic area, was more in depth, and covered fifty-five minutes of material. Furthermore, the child was answering the questions that the Prosecuting Attorney was asking and was cooperating with the Prosecuting Attorney. When the Prosecuting Attorney asked the child if "he remembered . . . .", the child began to have memory problems and was unable to answer the questions. When the witness stated that he did not remember, instead of refreshing the witness's memory, the Prosecuting Attorney then showed a fifty-five minute video of the witness's recorded interview at the Child Advocacy Center, in which the witness did not know the witness was being recorded, was not sworn, and did not formally adopt the statements.

Furthermore, the interview contained other questions, answers, and information that would not have been otherwise permitted. The Trial Court then admitted the entire video into evidence. Additionally, the Prosecuting Attorney should not have been allowed to call a witness for the sole purpose of impeaching the witness because this allowed additional information to come into evidence that would not have otherwise been permitted, and the information that is used to impeach a witness is only permitted to discredit the credibility of the witness and not towards the material issues at hand.

In the alternative, after Defense Counsel examined the witness or after attempting to refresh the witness recollection, the Prosecuting Attorney should have asked the witness the questions again. If the witness continued with the same inconsistent answer, then the Prosecuting Attorney should have played a narrow clip of the child being asked the same question and the answer the child had previously given. The entire fifty-five minute video should not have been admitted into evidence and should not have been played in its entirety. Finally, the Prosecuting Attorney should not have been allowed to call a witness for the sole purpose of impeaching the witness, especially since the information can only be used to attack the credibility of the witness.

VIII. The Trial Court erred by failing to give a timely limiting instruction under 404(b), when the Petitioner requested that the instruction be given and by informing the jury of the possible sentence for concealment of a deceased human body.

When a limiting instruction is requested, the Trial Court must give the proper limiting instruction under 404(b) at the time the evidence is offered, and the instruction must tell the jury for what purpose the evidence is offered. State v. McGinnis, 455 S. E. 2d 516; 193 W. Va. 147 (W. Va. 1994). The Trial Court's failure to do so is reversible error. Id.

Here, the Petitioner requested that the Trial Court give a proper limiting instruction after each individual witness tesified to 404(b) evidence. (A.R. Volume 4, Pages 31-84). Instead, the Trial Court waited until all of the witnesses that would be testifying to 404(b) evidence had testified before giving the instruction. (A.R. Volume 4, Page 84, Lines 6-13).

Next, the Trial Court informed the jury as to the possible sentence of concealment of a deceased human body. (A.R. Volume 5, Page 125, Lines 22-24). The Trial Court read the jury charge to the jury which stated that "to conceal a deceased human body where death occurred as a result of criminal activity is guilty of a felony and upon conviction shall be confined in the correctional facility for not less than one year nor more than five years and fined not less than $1,000.00 nor more than $5,000.00. Id. Additionally, the jury charge was given to the jury during deliberations. (A.R. Volume 5, Pages 152-156). The Petitioner was unable to find any specific case law that prohibits the Trial Court from informing the jury with regard to the possible penalties on a charge. However, the Petitioner would argue that this is prejudicial to the Petitioner and is prohibited.

IX. Trial Counsel provided ineffective assistance of counsel by crying during the trial of the matter, and by making false promises to the jury by asserting that the Petitioner, Summer McDaniel, would testify in the matter, when the Petitioner, Summer McDaniel, did not testify.

Claims of ineffective assistance of counsel are to be governed by the two-prong test established in Strickland v. Washington, 104 S. Ct. 2052; 466 US 668 (1984). The first prong of the test states that "counsel's performance was deficient under an objective standard of reasonableness." Id. Under prong two, "there is a reasonable probability that, but for counsel's errors, the results of the proceedings would have been different. State v. Miller, 194 W. Va. 3; S. E. 2d. 114 (W. Va. 1995).

To explain further, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance, while at the same time refraining from engaging in hindsight or second-guessing, of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted under the circumstances, as defense counsel acted in the case at issue. Miller, 194 W. Va. 3; 459 S. E. 2d. 114.

Here, Trial Counsel provided ineffective assistance of counsel by crying during the trial and by telling the jury that the Petitioner, Summer McDaniel, was going to testify in her own defense. During closing argument, Trial Counsel admitted to the jury that this is the first case that he has ever cried in the court room. (A.R. Volume 5, Page 139). While the record is unclear as to the degree Trial Counsel cried, the fact that Trial Counsel cried prejudiced the Petitioner by abandoning Trial Counsel's role of impartiality. Additionally, Trial Counsel prejudiced the Petitioner by telling the jury during opening statement that the Petitioner was going to testify. (See A.R. Volume Four, pages 24-31). However, during the defense's case-in-chief, the Petitioner did not testify. This was ineffective assistance of counsel because Trial Counsel made a false promise to the jury, which also gave the impression that Trial Counsel and the Petitioner's were liars, or in the alternative, had something to hide.

X. The Petitioner asserts that the evidence presented at trial was insufficient for the jury to convict the Petitioner of all the charges stated in the indictment, with emphasis on the lack of jurisdiction with regard as to where and when the alleged acts occurred.

Under the West Virginia common law, "a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state has evidence sufficient to convince impartial minds of the guilt of the accused beyond a reasonable doubt." State v. Lewis, 133 W.

Va. 584 (1950). To interfere with a guilty verdict on the ground of insufficiency evidence, the Court must be convinced that the evidence was manifestly inadequate, and that consequent injustice has been done. Id. The Court shall view the evidence in the light most favorable to the prosecution. State v. Ocheltree, 289 S. E. 2d 742 (W. Va. 1982).

Here, the Petitioner, Summer McDaniel, was found guilty of the following charges: Involuntary Manslaughter, Child Neglect Resulting in Death, Concealment of a Deceased Human Body, Conspiracy to Commit an Offense Against the State of West Virginia, and Child Neglect Creating a Substantial Risk of Death.

While the infant passed away in Hardy County, West Virginia. The conduct of the Petitioner and the co-defendant prior to entering the Hardy County area, and the State of West Virginia remains open. Additionally, the conduct of the Petitioner while in Hardy County area also remains open. The Petitioner provided the children and the infant with clothing, shelter, and food. As was stated during the trial, the officers found baby diapers and formula in the vehicle. The co-defendant told the officers that after the infant passed away, he threw away most of the baby items. While two of the children said the infant may have appeared sick and was vomiting, it is unclear as to when this occurred and in what state. No one testified that the infant was sick in the State of West Virginia. Furthermore, the cause of the infant's death is undetermined. The pathologist acknowledged that it is just as likely that the infant passed away as a result of another child rolling onto the infant in the middle of the night as it is possible that the infant passed away from some other reason. In addition, the infant did not test positive for any controlled substance at the time of its death. With regard to concealing the infant's body, the Petitioner did not assist the co-defendant in burying the infant. The co-defendant buried the child alone. Nonetheless, the

Petitioner attempted to aid the officers and the co-defendant in locating the infant's body by participating in the search for the burial site.

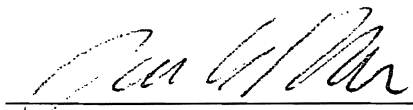
Furthermore, the Prosecuting Attorney presented the testimony of three witnesses from the State of Colorado, and three witnesses from Morgantown, West Virginia. The Prosecuting Attorney overly relied on this information as these witnesses comprised six of the prosecution's twelve witnesses. Finally, the Prosecuting Attorney argued more about the Petitioner's prior conduct, then the evidence and facts that occurred in the State of West Virginia. (See A.R. Volume 4, Page 17-24, and Volume 5, Pages 134-137 and 147-153).

CONCLUSION

In conclusion, the Petitioner did not receive a fair trial because the Trial Court erred by failing to administer the balancing test in accordance with the West Virginia Rules of Evidence when considering certain 404(b) evidence, the evidence was not admitted for a proper purpose, and the Trial Court improperly admitted into evidence the medical records and other 404(b) evidence from the State of Colorado. Additionally, the Petitioner was convicted on two counts that should have been merged together. Next, the Petitioner did not receive a fair trial because the Prosecuting Attorney argued community standards when he stated that the people in the community asked him what he was going to do about the baby murderers, and when he told the jury that his wife stated that she knew the people in Hardy County, West Virginia would do the right thing and convict the Petitioner. Furthermore, the Petitioner did not receive a fair trial when the Trial Court entered into evidence five enlarged colored photographs of the deceased's infants body, when the photographs held no evidentiary value and showed a close-up view of the infant's distorted face from being buried. In addition, the Trial Court erred by allowing the State Trooper to state that the substance on the blanket was baby vomit, when the source and the

identity of the substance was unknown, as no tests were conducted on the substance. The Trial Court erred by not dismissing the charge of "concealment of a deceased human body" because the Petitioner reported the death to the authorities before the authorities started to conduct an investigation into the matter, and assisted the co-defendant in leading authorities to the location of the infant's body, within the forty-eight hour time frame. Next, the Petitioner was not given a fair trial because the Prosecuting Attorney failed to properly impeach a witness and called a witness for the sole purpose of impeaching the witness. Finally, the Trial Court erred by failing to give a timely limiting instruction under 404(b); the Trial Court waited until after all three witnesses testified. Therefore, when 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, the defendant's conviction should be set aside, even though anyone of such errors standing alone may be harmless. State v. Plumley, 181 W. Va. 685 (W. Va. 1989).

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Jonie E. Nelson, hereby certify that on this the 12 day of November, 2015, true and accurate copies of the foregoing Petitioner's Appendix Record were deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows and to the Office of the Clerk Supreme Court of Appeals of West Virginia State Capitol Building, Room E-317 1900 Kanawha Blvd. East Charleston, WV 25305

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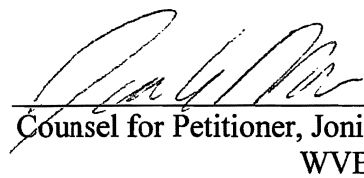

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