IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 21-0115

STATE OF WEST VIRGINIA,
Respondent,

v.

KELLY MARIE TUSING,
Petitioner.

(An appeal of a final order in Preston County Circuit Court Case No.: 19-F-49)

PETITIONER'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITY

CASES

STATUTES

RULES

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by sentencing the Petitioner in excess of the statutory limitation.
2. The 100 year sentence, if valid, is constitutionally disproportionate.
3. The Circuit Court erred by admitting gruesome photographs, including autopsy photographs, over the Petitioner's objection and to her prejudice.
4. The Circuit Court erred by ruling inadmissible a letter that was obtained from another doctor and relied upon by the Petitioner's expert witness.
5. The Circuit Court erred by denying the Petitioner's Motion for Judgment of Acquittal due to insufficient evidence of the element of malice.

STATEMENT OF THE CASE

The Petitioner was directly indicted by the Preston County Grand Jury in 2019 for Death of a Child by Custodian by Child Abuse. (Appendix Record Volume 1 ["A.R.1."], at 6). She was accused of abusing the infant decedent in this case – a child she was babysitting for days at a time – either by shaking or striking, resulting in brain swelling that was unable to be effectively treated following numerous medical interventions, and ultimately resulting in the child's death.

Pretrial, the State filed motions in limine in an effort to admit both a series of photographs, including autopsy photographs, as well as to admit the Petitioner's alleged past drug use, details from the CPS case, and her juvenile legal entanglements as collateral acts evidence. (A.R.1., at 12-19). The Circuit Court refused to admit the collateral acts evidence. (A.R.1., at 28-35). However, the Court, following a pretrial hearing, and then an *in camera*

hearing during trial, ultimately admitted (A.R.1., 36-44) a number of photographs (A.R.1., at 57-62, 83-89) objected to as gruesome by the Petitioner. (A.R.1., at 15-17).

After the State had presented its case at trial, which consisted of fact witnesses concerning the events of the surrounding days, law enforcement witnesses discussing their investigation, and expert medical witnesses from WVU Hospitals, the Defendant moved for a judgment of acquittal on the grounds of insufficient evidence of malice and intent. The Circuit Court denied the motion. (A.R.3., at 823-825). Thereafter, the State orally moved to exclude from evidence a letter from a neuroradiologist (A.R.1., at 236) that had been obtained by the Petitioner's expert medical witness in the course of his investigation. The Court granted the State's motion, over the Petitioner's objection, with the caveat that the witness could still mention having consulted with the neuroradiologist.

At the conclusion of the trial, the jury was sent to deliberate on the indicted charge, as well as a lesser included charge of child neglect resulting in death, upon which they had been instructed *sua sponte* by the Circuit Court. They returned a guilty verdict on the count of Death of a Child by Custodian by Child Abuse. (A.R.1., at 242). In post-trial motions, the Petitioner renewed the objection concerning the expert witness letter, and the judgment of acquittal. (A.R.1., at 245).

At sentencing, the Circuit Court deferred on ruling on the post-trial motions, but proceeded with sentencing. (A.R.1., at 309-343). Despite the apparent understanding of the parties that the Petitioner faced an indeterminate sentence of fifteen years to life, the Circuit Court instead sentenced her to a determinate 100 years of incarceration, meaning she would not be parole eligible for 25 years. (A.R.1., at 247-249). The Petitioner moved to modify the

sentence on the grounds that the sentence was illegal and contrary to the explicit legislative intent behind a recent amendment to the relevant statute. (A.R.1., at 250-262). However, at a final post-sentencing hearing in the matter (A.R.1., at 344-370), the Circuit Court denied the Petitioner's post-trial motions, and denied the motion to reduce sentence. (A.R.1., at 263). It is from her conviction, sentencing, and orders denying post-trial motions and relief from her sentence that the Petitioner now appeals.

SUMMARY OF ARGUMENT

The single most glaring error in this case is that the Circuit Court sentenced the Petitioner to 100 years of incarceration for a crime that carries a statutory indeterminate sentence of 15 years to life. It is apparent that the Legislature intended for a conviction of the crime of Child Abuse Resulting in Death to carry a "life with mercy" sentence, because the Legislature explicitly said so in its preamble in enacting the 2017 amendments to the relevant code section. Moreover, even disregarding legislative intent, only a tortured rendition of the plain language of the statute would permit the conclusion that it authorizes a sentencing court impose an unlimited number of years. To the extent that statutory language is ambiguous, it is a basic tenet of statutory construction – the rule of lenity – that ambiguities in penal statutes must be resolved in favor of the accused. Furthermore, when compared with the language used throughout West Virginia's various criminal sentencing provisions, it is clear that the statutory language does not contain the features that designate a determinate sentence. In the alternative, the Petitioner argues that her 100 year determinate sentence violates the objective and subjective proportionality tests, and is accordingly unconstitutional.

The Circuit Court also erred pretrial by admitting extremely gruesome photographs of

the deceased child in this case. The pictures at issue include autopsy photographs of the inside of the child's excavated skull cavity with the back of the eyeball visible. The purported reason for exhibiting the most gruesome of these photographs was that the medical examiner identified some purple shading on the optic nerve sheath – a finding the witness downplayed only moments after discussing it. There is nothing a lay jury could learn from the presentation of these photographs that could not simply have been testified to by the witness. The value of showing the jury these photographs did not outweigh the prejudicial effect of this deeply disturbing imagery. They are beyond the pale, and were offered by the State to inflame the passions of a jury in the absence of a coherent theory of motive or criminal intent. The Circuit Court erred by permitting this evidence to go before the jury.

The Circuit Court made another evidentiary error by excluding a letter relied upon by the Petitioner's expert medical witness on the grounds that it was hearsay and its writer could not be cross-examined. The Circuit Court erred by excluding the letter in light of Rule 703 of the Rules of evidence, and cases interpreting it, which allow certain otherwise inadmissible evidence to come in at trial.

Furthermore, the evidence at trial was insufficient to demonstrate intent and malice on the part of the Petitioner. The State's theory of the case is that the child was injured while in the care of the Petitioner, in a manner that could only constitute abuse. The State's expert witnesses differed as to whether the genesis of the injury was shaking, or was a physical blow. The State provided no evidence of an intentional act by the Petitioner, beyond the injury itself. The State provided no evidence of a malicious heart, beyond the mere fact that the injury and death transpired. Intent and malice must be proven – they may not simply be presumed to have been

present in every case involving death. It is not the defendant's burden to disprove these mental states. It was therefore error for the Circuit Court to deny the Petitioner's motion for judgment of acquittal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asserts that this case is appropriate for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because the first assignment of error concerns an issue of first impression regarding the construction of specific statutory language. Alternatively the case is appropriate for oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure because of a result against the weight of the evidence, and an unsustainable exercise of discretion by the trial court. The case should be resolved by signed opinion.

ARGUMENT

1. The Circuit Court erred by sentencing the Petitioner in excess of the statutory limitation.

Prior to handing down its 100 year sentence (A.R.1., at 247-249), the Circuit Court explained its reasoning for deciding it had the authority to impose a determinate sentence upon the Petitioner:

> The Court is going to touch on a couple things prior to issuing the sentencing. Number 1, during Mr. Frame's remarks and well, I think both attorneys had referred to West Virginia Code §61-8D-2A and the Court has reviewed that statute several, several times. In Mr. Frame's remarks he referred to that as being a -- an indeterminate sentence. This Court has reviewed the history, reviewed the statute and this Court is going to disagree with Mr. Frame. I believe that that statute is a determinant statute that gives the Court the parameter to pronounce sentence on Ms. Tusing.
>
> The legislature modified that statute prior to -- or during the 2017 legislature session. I believe it took affect, if I'm not mistaken, July 6, 2017, it became effective. Prior to the legislatures modification of that statute, the statute read that any person convicted of a felony described in subsection (a) or (b) of this section shall be punished by a term of imprisonment in the penitentiary, which is not less than 10 nor more than

40 years. A person imprisoned pursuant to the provisions of this section are not eligible for parole prior to having served a minimum of ten years of his or her sentence or a minimum period required by the provisions of Section 13 Article 12 Chapter 62 of this case, whichever is greater.

In 2017, the legislature modified that code section and, like I said, I have reviewed that code section for approximately four or five days. Looking at this very, very seriously and basically, the reading of that code section, the way the legislature modified it, states any person convicted of the felony described in subsection (a) or (b) of this section shall be imprisoned in a state correctional facility for a period of 15 years to life. A person imprisoned pursuant to the provisions of this section is not eligible for parole prior to having served a minimum of 15 years of their sentence. Basically, that code section does not state not less than 15 years or more than life. So, the Court has interpreted that code section in regards to the sentencing hearing.

(A.R.1., at 329-330).

During the hearing on post-sentence motions, the Circuit Court further elaborated:

In regards to the reduction of sentence. The Court takes every one of these cases very, very serious. Every ruling the Court makes, whether it is in a criminal case, whether it is in a civil case, whether it's in abuse and neglect or juvenile, it affects peoples' lives. While everybody else was enjoying Christmas holidays, this Court spent time from Saturday through Monday reviewing this case. Not only reviewing the case, but also reviewing the statute very, very clearly.

The Court looked not only at this statute, but the Court looked at other statutes. In 2017, the legislature acted to strengthen the law regarding individuals that hurt children. Prior to 2017, that statute read that is was a determinate sentence of ten to 40 years. Now to strengthen the statute doesn't mean that you weaken the statute. The Court spent numerous hours on this.

Just as Ms. Fields has talked about indeterminate statutes, it gives the Court -- it gives me the authority to send someone to not less than one year nor more than five years, not less than two years not more than ten, or whatever. This statute does not state that. The Court read through this, the Court researched and the Court determined that this was a determine statute. That basically it gave the Court authority to sentence an individual convicted of this offense through some period of incarceration between 15 years and life. The Court, I think to the surprise of everybody in here, because basically the time was spent on it, because I take it serious. I believe the Court is hundred percent right in reading that statute.

So the Court is going to stand by the sentence and Ms. Tusing will be sentenced to -- or was sentenced to a period of incarceration of 100 years.

(A.R.3., at 363-365).

A sentence within statutory bounds is reviewed under an abuse of discretion standard; however, that deferential standard does not apply when a sentencing decision exceeds statutory authority, which constitutes an invalid order:

> While this Court acknowledges the general principle that sentencing decisions are properly within the realm of the trial court, an order which violates statutory restrictions is invalid. See Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997) (finding that sentencing matters are generally reviewed "under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.").

State v. Cookman, 813 S.E.2d 769 (2018). See also, Syl. Pt. 7, *State v. Tewalt*, 849 S.E.2d 907 (W. Va. 2020).

In this case, the appropriate standard of review is *de novo*, as it is the rectitude of the Circuit Court's interpretation of W. Va. Code §61-8D-2a(c) (2017) that governs the outcome of this issue:

> 1. "'Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.' Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)." Syllabus point 3, *Alden v. Harpers Ferry Police Civil Service Commission*, 209 W.Va. 83, 543 S.E.2d 364 (2001).

Syl. Pt. 1, *State v. Brandon B.*, 624 S.E.2d 761, 218 W. Va. 324 (2005).

The statute in question reads as follows:

> (c) Any person convicted of a felony described in subsection (a) or (b) of this section shall be imprisoned in a state correctional facility for a period of fifteen years to life. A person imprisoned pursuant to the provisions of this section is not eligible for parole prior to having served a minimum of fifteen years of his or her sentence.

W. Va. Code §61-8D-2a(c) (2017). This code section had been amended in 2017 by the passage of "Emmaleigh's Law," as described in W. Va. Code §61-8D-1a(c) (2017), which was contained

in Senate Bill 288 of 2017. The prior version of this sentencing provision was:

> (c) Any person convicted of a felony described in subsection (a) or (b) of this section shall be punished by a definite term of imprisonment in the penitentiary which is not less than ten nor more than forty years. A person imprisoned pursuant to the provisions of this section is not eligible for parole prior to having served a minimum of ten years of his or her sentence or the minimum period required by the provisions of section thirteen, article twelve, chapter sixty-two of this code, whichever is greater.

W. Va. Code §61-8D-2a(c) (2013). Notably, the new code section changed the "ten" and "forty" to "15" and "life." Moreover, it removed the words "a definite term of imprisonment."

It has long been the law of this State that "[t]he primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Syl. Pt. 8, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953). "Emmaleigh's Law" served to increase the penalty for the crime of which the Petitioner has been convicted. There is no question as to the intent of the Legislature in modifying this statute, as the preamble to the final version of SB 288 (2017) states the following:

> AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §61-8D-1a: and to amend an reenact §61-8D-2a of said code, all relating to naming the law and increasing the penalty for death of a child by a parent, guardian, custodian or other person by child abuse to **an indeterminate term of fifteen years to life.**

(A.R.1., at 254, 259) (boldface emphasis added). The Petitioner specifically brought the clear legislative intent to the Circuit Court's attention both in her original "Motion for Correction and Reduction of Sentence" filed on January 11, 2021, and in her "Supplement to Defendant's Motion for Correction and Reduction of Sentence" filed on January 19, 2021. (A.R.1., at 250-262).

Although not controlling over the actual text, it is permissible to consider the preamble to

a Bill to determine legislative intent.

> 7. The preamble may be consulted in some cases to ascertain the intentions of the Legislature. But it is chiefly from the main body the purview of the act, that the will of the Legislature is to be learned; when this is clear and express, the preamble will not avail to contradict it.

Syl. Pt. 7, *Slack v. Jacob*, 8 W.Va. 612 (1875). Specifically, in the event that the language is determined to be ambiguous, the preamble may be considered. *State ex rel. Lorenzetti v. Sanders*, 235 W.Va. 353, 361, 774 S.E.2d 19, 27 (2015). Moreover, in the event of an ambiguous statute, the rule of lenity requires that the ambiguity be resolved in favor of the criminal defendant, and not the State. "In construing an ambiguous criminal statute, the rule of lenity applies which requires that penal statutes must be strictly construed against the State and in favor of the defendant." Syllabus Point 5, *State ex rel. Morgan v. Trent*, 465 S.E.2d 257, 195 W.Va. 257 (1995).

Additionally, it is appropriate for this Court to consider this statutory language *in pari materia* with other sentencing statutes. "When two statutes relate to the same general subject, and the two statutes are not in conflict, they are to be read in pari materia." Syl. pt. 2, *Tug Valley Recovery Ctr., Inc. v. Mingo Cty. Comm'n*, 164 W. Va. 94, 261 S.E.2d 165 (1979). "Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in pari materia to assure recognition and implementation of the legislative intent." Syl. pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975).

This Court has previously examined the distinction between indeterminate and determinate sentences:

> Our criminal code prescribes punishment for every statutory crime, and with few exceptions, they are punished by indeterminate sentences with

> specific minimum and maximum years. Code, 61-11-16; Brown, West Virginia Indeterminate Sentence and Parole Laws, 59 W.Va.L.R. 143 (1957). However, determinate life sentences are required for treason, first-degree murder, kidnapping, and certain offenses by prisoners, Code, 61-1-2; 61-2-2; 61-2-14a; 62-8-2: these crimes are certainly "punishable by life imprisonment". Armed robbery, some acts of kidnapping, and embezzlement are crimes for which there may be determinate sentences. Code, 61-2-12; 61-2-14a; 61-3-20.

State ex rel. Faircloth v. Catlett, 267 S.E.2d 736, 737, 165 W.Va. 179 (1980). In the ensuing forty-one years, determinate sentences have remained the exception, rather than the rule. With certain exceptions, they can generally be ascertained by the language deleted from §61-8D-2a(c) by Emmaleigh's Law: "a definite term." There are exceptions to this rule: certain offenses punishable by life imprisonment, like treason, murder, and kidnapping, do not contain that language. Additionally, the First Degree Robbery statute is *sui generis*, or nearly so,[1] in setting a minimum but no maximum.

Every other determinate sentence in the Code containing a minimum and maximum sentence[2] includes "definite term" or "determinate sentence" language. A reasonably comprehensive list of examples using that language in the first several articles of Charpter 61 follows: W. Va. Code §61-2-3 (second degree murder); §61-2-4 (voluntary manslaughter); §61-2-9C (wanton endangerment); various provisions of §61-2-14a (kidnapping); various provisions of §61-2-29a (death of an incapacitated adult); §61-2-9a(g) (harassment); §61-3-1 through 7 (arson and related crimes); §61-3-24e, 24f, and 24g (false testimony in workers' compensation proceedings); §61-3A-7 (organized retail theft); §61-3C-4 (computer fraud); §61-3C-14b (soliciting a minor via computer). Other than the use of "definite term" or "determinate," each

1 "Threats to kidnap" is similarly punishable by not less than five years pursuant to W.Va. Code §61-2-14c, and "Embezzlement" by certain personnel is punishable by not less than ten years pursuant to W. Va. Code §61-3-20.

2 There is another class of determinate sentences, which only include a maximum but not a minimum, such as §61-3-50 and §61-8-28a (among others). However, the existence of these statutory provisions provides little apparent insight into the question addressed in this appeal.

of these provisions is indistinguishable from a typical indeterminate sentence. Many of these determinate sentence code sections also use the "not less than [minimum] nor more than [maximum]" phraseology that is common in indeterminate sentencing language (although not present in the provision relevant to this appeal). It is the presence of the words "determinate" or "definite term" in a sentencing provision that determines whether the default rule of indeterminacy is overridden.

The other language in the statute that might theoretically support the Circuit Court's determination is the second sentence of subsection (c): "A person imprisoned pursuant to the provisions of this section is not eligible for parole prior to having served a minimum of fifteen years of his or her sentence." It is true that this language is found in a number of determinate sentencing provisions, including W.Va. Code §61-2-3 (second degree murder); §61-2-3 (voluntary manslaughter); and the arson provisions of Article 3, Chapter 61 of the West Virginia Code, among others.

However, this language can also be found in sentencing provisions for indeterminate sentences. Consider the following language relating to fleeing in a vehicle causing death:

> (i) A person who intentionally flees or attempts to flee in a vehicle from a law-enforcement officer, probation officer, or parole officer acting in his or her official capacity after the officer has given a clear visual or audible signal directing the person to stop, and who causes death to a person during or resulting from his or her flight, is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than five nor more than 15 years. A person imprisoned pursuant to this subsection is not eligible for parole prior to having served a minimum of three years of his or her sentence or the minimum period required by §62-12-13 of this code, whichever is greater.

W. Va. Code §61-5-17. While there do not appear to be any cases involving sentences for this specific provision, this language, absent the final sentence of subsection (i), mirrors the

language of the other felony subsections of that section. For reference, such sentences, when described in this Court's case law over the course of the past two years, have been described as indeterminate. *See*, *State v. Griffin*, No. 19-1120 (W. Va. March 16, 2021) (memorandum decision) *1; *State v. Wilson*, No. 19-0142 (W. Va. November 16, 2020) *9. There is no reason to think that the limitation on any early parole release contained in the final sentence of subsection (i) would somehow authorize a determinate sentence, in the absence of the express "determinate" or "definite term" provisions.

A final basis upon which the Circuit Court's order could be justified is the language of W. Va. Code § 61-11-16:

> Every sentence to the penitentiary of a person convicted of a felony for which the maximum penalty prescribed by law is less than life imprisonment, except offenses committed by convicts in the penitentiary punishable under chapter sixty-two, article eight, section one of the code, shall be a general sentence of imprisonment in the penitentiary. In imposing this sentence, the judge may, however, designate a definite term, which designation may be considered by the board of probation and parole as the opinion of the judge under the facts and circumstances then appearing of the appropriate term recommended by him to be served by the person sentenced. Imprisonment under a general sentence shall not exceed the maximum term prescribed by law for the crime for which the prisoner was convicted, less such good time allowance as is provided by sections twenty-seven and twenty-seven-a, article five, chapter twenty-eight of this code, in the case of persons sentenced for a definite term. Every other sentence of imprisonment in the penitentiary shall be for a definite term or for life, as the court may determine. The term of imprisonment in jail, where that punishment is prescribed in the case of conviction for felony, shall be fixed by the court.

On one hand, this statute clearly indicates that a "general sentence," without expressly defining that term,[3] shall be imposed for offenses carrying less than a maximum sentence of life. The code section at issue in this appeal does carry a maximum sentence of life, which would seem to support the Circuit Court's position that a determinate sentence is permissible.

3 *See, Cohn v. Ketchum*, 123 W.Va. 534, 17 S.E.2d 43 (1941) and *State v. Bail*, 140 W.Va. 680, 88 S.E.2d 634 (1955) for discussion describing a "general sentence" as an indeterminate sentence.

However, in passing Emmaleigh's Law, which is subsequent in time by many decades to §61-11-16, the Legislature has clearly intended to create an indeterminate sentence with a minimum sentence of fifteen years, and a maximum sentence of life imprisonment. That intent can only be ignored if the statute is unambiguous on its face; if the statute must be read *in pari materia* with §61-11-16 in order to come to the conclusion that it permits a determinate sentence, then it is by definition ambiguous and open to the other rules of statutory construction that prevent the Circuit Court's interpretation. "The rule that statutes which relate to the same subject should be read and construed together is a rule of statutory construction and does not apply to a statutory provision which is clear and unambiguous." Syl. Pt. 1, *State v. Epperly*, 65 S.E.2d 488, 135 W.Va. 877 (1951).

Furthermore, the specific legislative intent manifested in the passage of Emmaleigh's Law cannot be subordinated to the older, more general statute. This Court's prior holding on this principle prevents the outcome arrived upon by the Circuit Court:

> 3. "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syllabus point 1, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984).
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> 4. "`It is always presumed that the legislature will not enact a meaningless or useless statute.' Syllabus Point 4, *State ex rel. Hardesty v. Aracoma-Chief Logan No. 4523, Veterans of Foreign Wars of the United States, Inc.*, 147 W.Va. 645, 129 S.E.2d 921 (1963)." Syllabus point 1, *Richards v. Harman*, 217 W.Va. 206, 617 S.E.2d 556 (2005).
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> 5. "`The Legislature must be presumed to know the language employed in former acts, and, if in a subsequent statute on the same subject it uses different language in the same connection, the court must presume that a change in the law was intended.' Syl. pt. 2, *Hall v. Baylous*, 109 W.Va. 1, 153 S.E. 293 (1930)." Syllabus point 2, *Butler v. Rutledge*, 174 W.Va. 752, 329 S.E.2d 118 (1985).

Syl. Pts. 3, 4, and 5, *Newark Ins. Co. v. Brown*, 624 S.E.2d 783, 218 W.Va. 346 (2005).

For the myriad reasons stated above – the explicit legislative preamble, the rule of lenity, and the guidance derived from other sentencing provisions – any ambiguity in the statute leads to a result in which this Court must reverse the Circuit Court. The only way to find that the sentence is valid is to determine that §61-8D-2a(c) is both unambiguous, and that it unambiguously requires the imposition of a determinate sentence.[4] It is self-evident that the statutory language does not unambiguously require a definite term of years. The subsection is ambiguous for the same reason that *all* indeterminate sentencing provisions are facially ambiguous in a literal sense; they do not announce themselves as indeterminate. There is no facial reason why "not less than one nor more than five"[5] could not mean a determinate sentence of one, two, three, four or five years. Of course, that would be a grossly aberrant and illegal sentence to derive from such language in the absence of express language authorizing a determinate sentence. For that reason, the interpretation arrived at by the Circuit Court[6] to justify its 100 year sentence in the instant case is equally aberrant.

This Court, under the direction of the Supreme Court of the United States,[7] has previously held that an indeterminate sentence imposed for a crime in which the sentence is statutorily required to be determinate is void. *State ex rel. Nicholson v. Boles*, 148 W.Va. 229,

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4 To the extent that the statute could be read to be unambiguous, it clearly mandates that a defendant "shall be imprisoned in a state correctional facility for a period of fifteen years to life," not that a defendant *may* be imprisoned for a period of [X] years.

5 The Circuit Court's reasoning rested on the absence of the "not less than"/"not more than" language in the pertinent statute. (A.R.1., at 330). That language is extremely common in both indeterminate and determinate sentencing provisions, but nothing about its use or absence has any bearing on whether or not a statute is facially ambiguous. Undoubtedly, it would have been more consistent and traditional for the Legislature to employ that language, but there is nothing talismanic about it. This Court, in assessing the procedural history of cases, regularly employs the "_____ to _____" formulation to describe indeterminate sentences, having used that language around 20 times since the beginning of the Fall 2020 term of court. The meanings of "one to five," "five to twenty-five," or "ten to thirty-five" are clear.

6 It is worth considering that only a few months before the sentencing in this matter, this Court reversed another illegal sentence imposed by the same judge in *State v. Tewalt*, 849 S.E.2d 907 (W. Va. 2020).

7 *Nicholson v. Boles*, 375 U.S. 25, 84 S.Ct. 89, 11 L.Ed.2d 43 (1963)

134 S.E.2d 576 (1964). The Petitioner asserts that the result in this case violates her right to due process under the Fifth and Fourtheenth Amendments to the United States Constitution, and Article 3, Section 10 of the West Virginia Constitution. Her prejudice in the instant scenario exceeds that of the appellant in *Nicholson*. In this case, the Petitioner is specifically prejudiced by having her parole eligibility date extended from fifteen to twenty-five years. This Court should grant the requested relief, vacate the 100 year sentence, and remand this matter for the imposition of the statutory sentence, consonant with the clear intention of the Legislature.

2. The Petitioner's 100 year sentence, if valid, is unconstitutionally disproportionate.

The Petitioner believes that the Court will not actually need to consider this assignment of error because it will be rendered moot by the result of the first assignment of error on the question of the validity of the 100 year determinate sentence. However, in the event that the Court does not grant relief on the first assignment of error, the Petitioner asserts that the 100 year sentence violates constitutional proportionality principles.

The Eighth Amendment of the United States Constitution (see *Harmelin v. Michigan*, 501 U.S. 957 (1991)), as well as Article III of the West Virginia Constitution, proscribe the sentencing of criminal defendants in a manner disproportionate to their offenses. Article III, Section 5 of the West Virginia Constitution explicitly states that "penalties shall be proportioned to the character and degree of the offence." In assessing this matter, the court should be guided by the appellate standard of review: the standard of review for sentencing orders is typically "a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997). In this matter, the Petitioner is asserting sentencing error of a constitutional magnitude, which requires a de novo

review:

> The issue in this case calls on us to examine a question of constitutional dimension and as such, "[w]here the issue on an appeal from the circuit court is clearly a question of law ... we apply a de novo standard of review." Syl. Pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

State v. Finley, 639 S.E.2d 839, 841 (2006).

Specifically, a proportionality challenge to a sentence requires the application of the two-part test set forth in *State v. Cooper*, 304 S.E.2d 851, 172 W.Va. 266 (1983). The first part of the *Cooper* test is "whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further." *Id.*, 304 S.E.2d at 857, 172 W.Va. at 272. If a sentence does not meet that first prong of the test, then it is subject to the second test as set forth in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981):

> 5. In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

West Virginia's proportionality test typically is only applicable to the imposition of life sentences and statutory sentences that have no upper limits, such as First Degree Robbery, or, one can only presume based upon the Circuit Court's reasoning, the sentence in the instant case. Syllabus Point 4 of *Wanstreet* sets forth that:

> 4. While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.

The Petitioner asserts that her 100 year sentence shocks the conscience pursuant to the

subjective *Cooper* test. The Petitioner is confident in asserting that she is personally being punished more than any other person in West Virginia has been punished for a conviction of §61-8D-2a, as any similar result from a court outside Preston County, while improbable to begin with, would certainly be subject to appeal, and no such instances are apparent in this Court's case law. Furthermore, the objective test is also violated, as her parole eligibility date is 25 years, which is vastly more than other forms of homicide that require a specific intent to kill, rather than the specific intent to abuse, including second degree murder and voluntary manslaughter.[8]

While the Petitioner does not contest that various forms of homicide, especially involving children, are punished very harshly in this and other jurisdictions, the Circuit Court's use of a limitless cap on the years of imprisonment puts this sentence in stark contrast with second degree murder – an intentional killing with malice[9] – which may only be punished with a maximum 40 year determinate sentence. In this case, the State was not even required to prove intent to kill. Even accounting for the death of a child being an aggravating factor, there is no objective justification for a penalty two and a half times higher than that imposed for second degree murder, which has elements that are more difficult to prove – an intent to kill rather than injure, per *Drakes*. For this reason, the Petitioner respectfully requests that this Court vacate the 100 year sentence, and remand for the imposition of a lawful sentence.

3. The Circuit Court erred by admitting gruesome photographs, including autopsy photographs, over the Petitioner's objection and to her prejudice.

The Petitioner strenuously objected pretrial to the admission of gruesome photographs,

8 Presumably, if the State believed that it had any hope of proving an intent to kill, then it would have simply indicted the Petitioner for homicide under W. Va. Code §61-2-1.

9 *See*, Syl. Pt. 2, *State v. Drakes*, 844 S.E.2d 110 (W. Va. 2020).

including autopsy photographs, by written motion. (A.R.1., at 15-17). The State aggressively sought the admission of even the most grotesque photographs, including those depicting the inside of the child's skull after her brain was removed during an autopsy. (A.R.1., at 18-21). The Circuit Court permitted the admission of the pre and post-mortem photographs from the hospital following a pretrial hearing (A.R.1., at 39-44), and then deferred ruling on the autopsy photographs until after an *in camera* hearing with the medical examiner. (A.R.2., at 663-689). Following that hearing, the Circuit Court permitted the admission of most of the autopsy photographs, over the Petitioner's continuing objection. (A.R.1., at 33-36). The objected-to material that was ultimately admitted is both graphic, and emotionally disturbing. (A.R.1., at 57-62, 83-89).

The Circuit Court erred in this matter, because it gave no consideration to the prejudicial effect of the photographs. Simply because the medical examiner testified that a photograph depicted something relevant to his findings, the Circuit Court allowed that photograph to be admitted. In failing to conduct a balancing test, and admitting them solely because the photographs satisfied the relevance test, the Circuit Court has abused its discretion. Doctors testify every day before judges and juries in this state in criminal and abuse and neglect cases without resorting to the exhibition of stomach-turning medical gore. If the standard adhered to by the Circuit Court is upheld in this case, any meaningful legal limitations on the types of photographs that can be presented to a jury are effectively moribund.

In *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994), Justice Cleckley, writing for the Court, considered the objection to photographs depicting a body in a field.

> Applying these rules to a "gruesome" photograph objection, Rule 401 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. 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.
>
> In the case at bar, we find that although the photographs had only slight relevance, they were not in any way "unfairly prejudicial." A careful review of the exhibits reveals nothing more than a body laying in a field. The exhibits were not hideous, ghastly, horrible, or dreadful. We find that the probative value in showing the jury the condition, identity, and location of the body clearly outweighs any speculative prejudicial effect. While proof of the condition and identity of the body was amply established by the testimony of the witnesses who found the body and the pathologist, the photographs were simply not of the nature to arouse passion and cause the jury to decide this case on improper grounds. Here, there was no parade of horrors, and we refuse to interfere with the trial court's exercise of its discretion.

Id., 192 W.Va. at 178-79, 451 S.E.2d 744-45.

There are two major differences in this *Derr* and this case. First, there is nothing in the Circuit Court's order admitting the autopsy photographs, nor in the incorporated *in camera* testimony, that addresses a finding under the 403 balancing test. (A.R.1., at 33-36; A.R.2., at 663-689). Second, the autopsy pictures are, indeed, a "parade of horrors" if such a thing exists. They are "hideous, ghastly, horrible" and "dreadful." By admitting these photographs without considering their admissibility under Rule 403, the Circuit Court prejudiced the Petitioner. There is simply no likelihood that the jury is going to obtain any more useful information by viewing the hollowed-out skull of an infant for slight discoloration of an anotomical feature that they are not trained to identify, than they would gain by simply having the observation described by the doctor. If it is even possible under West Virginia law for a photograph to be unduly prejudicial, then surely these autopsy photographs (A.R.1., at 83-89) must qualify.

4. The Circuit Court erred by excluding a letter relied upon by the Defendant's expert witness.

During the Defendant's case at trial, the State moved that the Circuit Court exclude from evidence a letter, which was marked as Defense Exhibit 5 but not admitted (A.R.1., at 238) from neuroradiologist Dr. Frederick Gabriele that had been obtained by defense expert Dr. David Myerberg in the course of his review of the medical records in this matter. The Defendant objected, and the following exchange and *in camera* hearing took place:

> MS. FIELDS: Your Honor, I have one more issue to raise. I don't want to do this in open court and I kind of want to do what Bill did with the autopsy photos, if the Court admits it. There is an Exhibit A that Bill's provided in his expert witness disclosure. It's a letter from a Frederick Gabriel, a doctor. He apparently is a neuroradiologist. He has written this letter and I don't think that it can be authenticated through Dr. Myerberg. He didn't write it. He wasn't the author of the letter. So I would ask to exclude that letter and it's findings.
> THE COURT: I haven't seen the letter.
> MS. FIELDS: I can provide the Court a copy.
> MR. FRAME: It was part of the defendant's expert witness disclosure.
> MS. FIELDS: But it's not something that Dr. Myerberg prepared.
> MR. FRAME: It was prepared at his request --
> MS. FIELDS: Well, that doesn't mean he can authenticate it.
> MR. FRAME: -- at their consultation.
> THE COURT: Okay. So basically, what this letter is doing is -- it's Dr. Gabriel giving an opinion, and basically he's not here to be qualified as an expert. So basically I'm not going to permit this part to go to the jury. I mean, it's --
> MR. FRAME: Judge, does -- do I get an opportunity to make an argument?
> THE COURT: Go ahead.
> MR. FRAME: The Rule 703, of the Rules of Evidence, say that an expert witness may rely upon reports and data from other experts. If that is the sort of information that experts commonly rely upon, Rule 703 goes on to say that that information may be admissible at the discretion of the Court, if the probative value outweighs any unfair prejudice. There is no unfair prejudice. I mean, there's -- it's evidence that's not favorable to the State, but it's certainly not prejudicial to the State. Now every one of the State's experts has talked about consulting with neuroradiologists and what they said and what they found, and, you know, that's come in without even objection. But clearly under 703, this is a piece of information that's relied upon, that Dr. Myerberg relied upon, that he's entitled to base his opinion upon, and if

it's probative, should be admitted as evidence in the case.
THE COURT: Well, basically, I'm going to refer back to my private practice in many DUI cases wherein the prosecutor would send either reports -- lab reports and everything to -- drugs and everything to the state police lab, and the state police lab did not have time to analyze that, so they farmed it out to another toxicology place, and basically, I think, the law is very clear that the prosecutor, the prosecuting attorney agency, has to have that individual that performed the test be there to testify -- that the state police lab cannot come up and testify to a toxicology report that someone else did. And I think that's the way with this, I think if Dr. Gabriel was the one that looked at this that basically he's giving his opinion. I mean, if Dr. Myerberg looked at this and he wants to give his opinion as to what he believes it shows, then I will allow him to give his opinion. But this isn't a clinical study or research or stuff that basically is done out there with a funded study that is accepted. This is basically one doctor's interpretation -- giving another doctor his interpretation of what this shows. He's giving his --
MR. FRAME: Which is exactly what doctors do all day long every day.
THE COURT: Well, then those doctors --
MR. FRAME: And that's what experts do. It's not -- I'm not going to dispute your practice in DUI court, I'm relying on Rule 703 and what it clearly mandates, and what's been the established practice --
THE COURT: Let me look at Rule 703.
MS. FIELDS: And, Your Honor, it is highly prejudicial, because it's coming from an expert -- a quote expert, that we don't even have the opportunity to voir dire to determine what his expertise is. He says he's a neuropathologist, we -- or excuse me, a neuroradiologist, we don't know that. We don't know anything about him. I don't even have a -- I don't even have his resume. If that's his opinion, he needed to be here and put in an expert witness disclosure to testify, and he never was. And the people that have testified --
MR. FRAME: This opinion was disclosed more than a year ago.
MS. FIELDS: He's not identified in your expert witness disclosure.
MR. FRAME: It was disclosed --
MS. FIELDS: He's simply not disclosed, Bill.
MR. FRAME: -- as information that Myerberg would rely upon.
MS. FIELDS: And I'm moving to exclude it. Same as you moved to exclude the autopsy report.
MR. FRAME: Yeah, and I wasn't successful either.
THE COURT: Alison, can you print out *Capper v. Gates*? Also I'm looking here and it's talking about conclusions or inferences drawn by others. Expert witnesses, may not bias his opinion upon conclusions or inferences drawn by witnesses or other individuals, *Sisler v. Hawkins*, 1975, it's 217 S.E.2nd 60, 158 W.Va 1034, so basically -- and I think that's here this falls in, is basically this is an opinion from Dr. Gabriel that is not here to testify.
MS. FIELDS: And I would also move that it be suppressed from any mention of Dr. Gabriel's findings.

MR. FRAME: Judge, that is absolutely clear error. It's a violation of 703.
THE COURT: If that's a violation of 703, then the Supreme Court will have to reverse me, but I'm reading, and I'm going to look at *Capper v. Gates* to see what it says, but, you know, basically this is one expert coming in here testifying as to what another doctor has said, and --
MR. FRAME: What's the difference between that and Mel Wright saying he consulted with a neuroradiologist?
MS. FIELDS: Because it's in the medical records.
THE COURT: There's a difference saying they consulted with them than saying -- then coming in here and giving the opinion of another doctor.
MR. FRAME: Well, whatever you rule. That one's going up.
THE COURT: Okay. Well, it can go up. I mean, you know, this --
MR. FRAME: This is a capital case, Your Honor.
THE COURT: Yes, it is. Yes, it is.

[...]

THE COURT: ... I'm reading here underneath Johnson -- *Johnson v. General Motors*, expert witnesses may base his opinions on professional treatise or publications, but first must show the authoritative nature of the work. I mean, it's --
MR. FRAME: That's a different issue.
THE COURT: Well, I agree -- that's what I'm saying, it's different. And I believe that this was a -- if this was a treatise or a study that come out here and said this, but this is one doctor looking at this report and you got Dr. Myerberg coming in here -- it would be no different than bringing a local doctor in here to testify regarding – I'm reading in *Capper v. Gates*, Rule 703 does not limit admissibility of expert opinions to opinions formed solely on the basis on first-hand experience, Frank Cleckley, Handbook on Evidence For West Virginia Lawyers. Section 7-3(B)(3rd ed. 1994). The ultimate determination of an experts qualifications to state an opinion is left to the discretion of the circuit court. *Jones v. Garnes*, 183 W.Va 304, 305 S.E.2nd 548 (1990).
And basically what I find here is, I don't know Dr. Gabriel from Adam. He's not been determined an expert in this court, so therefore the Court is not going to permit this part to come in.
MS. FIELDS: And I would ask that it be suppressed from any comment by the doctor -- well, Dr. Myerberg.
THE COURT: Yeah, I, mean, I'm not going to permit it. I'm not going to permit anything. I'll save the defendant an exception to the ruling of the Court.
MR. FRAME: Yeah, and I'm going to need some time to make a record on this.
THE COURT: Okay.
MR. FRAME: To have Myerberg testify that -- what he did, who he consulted, if it's the type of material that experts in his position in his profession commonly rely upon in formulating opinions or confirming their opinions and, you know, and then attach that and make it part of the

record for identification purposes.
THE COURT: Okay. Because I mean, you know -- like I said, if Dr. Gabriel was here, I'd let him be recognized as an expert and if he's an expert, we would let him testify to this. But basically, I'm not going to have, you know, one doctor bring another letter in from another doctor that I don't know anything about that's not here for anyone to voir dire, and I'm just not going to do it.
MS. FIELDS: And I don't think that we have to make a record. You can put that -- I mean --
MR. FRAME: Yes, I do.
MS. FIELDS: But, I mean --
MR. FRAME: Don't tell me how to practice law. I am going to vouch the record on this issue.
THE COURT: You can vouch the record. All right.
MS. FIELDS: So are we just bringing Dr. Myerberg in here?
THE COURT: Yeah, we can do that.
MR. FRAME: Your Honor, can I have a few minutes for a break?
THE COURT: Yeah.

* * * * *
RECESS
* * * * *
THE COURT: Okay. We're still on the record here in chambers, in camera. Mr. Frame has brought in Mr. Myerberg -- Dr. Myerberg. Mr. Frame.
MR. FRAME: Yes. Is it appropriate to swear him in for this?
THE COURT: We can.
* * * * *
DR. MYERBERG WAS SWORN
* * * * *
DIRECT EXAMINATION
BY MR. FRAME:
Q. Dr. Myerberg, what is your profession or occupation?
A. I am a physician, board certified in pediatrics and perinatal medicine, and I am also a lawyer.
Q. Okay. How long did you practice pediatric medicine?
A. I practiced pediatric medicine from 1976 until 1992.
Q. Okay. And have you maintained your certifications and state licenses in medicine and pediatrics?
A. I have.
Q. And have you continued to study and stay up-to-date on issues relating to injuries to children?
A. Absolutely.
Q. And you've been retained as an expert witness in this case; correct?A. Yes, that's correct.
Q. In the course of your investigation and work on this case, did you formulate opinions about the subdural hematomas in [the child]'s brain?

A. Yes, I did.
Q. And specifically the timing and the stages of those subdural bleeds?
A. Yes, I did.
Q. Okay. In addition to forming your own opinions, did you consult with a neuroradiologist?
A. Well, I confirmed my findings with a neuroradiologist, yes.
Q. Okay. And what is that person's name?
A. Frederick Gabriel.
Q. And where does he practice?
A. He practices in the WVU system. I think mostly in Clarksburg, but I'm not sure exactly where now.
Q. Okay. Did you and I meet and talk with Dr. Gabriel at his office?
A. Yes, we did.
Q. And that was in the United Hospital Center?
A. Correct.
Q. And did you ask him to read the scan, the CT scans of [the child]?
A. Yes, I did.
Q. And was he able to confirm your opinions and conclusions with respect to the nature and timing of the subdural bleed?
A. Entirely.
Q. Okay. The -- and did you receive a written letter report from Dr. Gabriel following that consultation?
A. Yes, I did.
Q. Okay. The -- consulting with a subspecialist, such as a neurosurgeon, is that something that a medical doctor and an expert medical witness would commonly rely upon in formulating your own opinions and conclusions in preparing to testify in a case?
A. Yes.
Q. In fact it would be unusual for that not to occur; is that a fair statement?
A. Correct.
Q. Doctors in hospitals consult with other specialists, for example a pediatric intensive care specialist might consult with a neurosurgeon, might consult with a radiologist or neuroradiologist, a palliative care expert, down the line; correct?
A. Yes.
Q. Okay. And is the same true with an expert medical witness in your position?
A. Yes.
Q. So, again, that report and the read of the CT scan by Dr. Gabriel is something that you would commonly rely upon in formulating and confirming your opinions in the case?
A. Yes.
MR. FRAME: Your Honor, I would like to mark as -- for identification as an exhibit, a copy of the letter report from Dr. Fred Gabriel.
THE COURT: Okay.
MR. FRAME: And I'll do that once we return to the courtroom, if that's okay.

THE COURT: All right. Okay. Is that it?
MR. FRAME: Yes.
THE COURT: Ms. Fields.
* * * * *
CROSS EXAMINATION BY MR. [sic] FIELDS:
Q. Dr. Myerberg, I'm going to show you -- this is just a copy, this is not what's in evidence, Mr. Frame's going to put it in evidence, but that's a copy of what you're talking about from Dr. Gabriel; correct?
A. Yes, that is correct.
Q. Okay. And that's -- this document right here, that was written by Dr. Gabriel; correct?
A. That is correct.
Q. And this is his opinion; correct?
A. That's his opinion, yeah.
Q. That -- this document is his opinion. And you indicated -- well, it's indicated in the expert witness disclosure that the correct reading of the initial CT scan was relied upon by you -- by Dr. Myerberg -- or I'm sorry, Dr. Gabriel, he's the one who provided you that opinion?
A. He provided me that opinion when I went to him. When I first saw the CT scan myself, that was my opinion.
Q. But you're not a radiologist either; right?
A. No, ma'am. I'm not.
Q. Okay. And so you relied on this opinion to make your findings, is that what you're telling the Court?
A. No, I'm telling the Court that I basically confirmed my opinions by going to Dr. Gabriel. That was my -- my way of practicing medicine when I was practicing medicine, and it's the way that I conduct myself as an expert.
Q. Okay. And so nothing about this document is your opinion?
A. No. It expresses my opinion the same way.
Q. But -- right. I understand.
A. But no, that's --
Q. That's not your opinion at all. Okay. What did you -- did you have the financial responsibility to Dr. Gabriel or did Mr. Frame?
A. I don't believe anybody paid Dr. Gabriel anything.
Q. Okay. So he --
A. I'm not sure of that. -- you're just like a friend? He's a friend of yours? Colleague?
A. He is a long term colleague.
Q. Okay. So you kind of went to him and said, hey, can you look at this?
A. Yes.
Q. Okay. So we don't think -- it's your understanding that he has not been paid for this service?
A. That's my understanding.
MS. FIELDS: I don't think I have anything further.
THE COURT: Okay. Mr. Frame.
MR. FRAME: No further questions, Your Honor.
THE COURT: I just want to get clarification.

Dr. Myerberg, it's my understanding that you're saying you looked at this, you looked at these scans and you formed your own opinion?
THE WITNESS: Correct.
THE COURT: And basically, all you did with Dr. Gabriel was you went down there and he confirmed your opinion?
THE WITNESS: Absolutely.
THE COURT: Nothing he did helped you make your opinion?
THE WITNESS: No.
THE COURT: Okay. I'm going to stand by my ruling. I believe that that clarifies my ruling. That
basically he did not use an opinion -- or he did not use an opinion of another expert to form his own opinion. He formed his own opinion and all he was doing was looking for confirmation. And so basically Dr. Gabriel is not here to be qualified as an expert, so basically, you know, I'm not going to permit the letter to be shown to the jury.
MS. FIELDS: And I would also ask that you advise Dr. Myerberg, that he cannot reference the letter or his contact with Dr. Gabriel.
THE COURT: If he wants to say what he did in his -- in order to do this, I'll let him talk about it, but I will not let him -- the letter will not come in and go to the jury. All right.
MS. FIELDS: So you're going to let him say what another doctor's opinion is?
THE COURT: I will -- I will let him -- he can say that he went to another doctor or another whatever and talked to him --
MS. FIELDS: Well, Judge, that's clear hearsay.
THE COURT: Well --
MS. FIELDS: That's clear hearsay. He can't bring in another opinion of a doctor that's not even here.
MR. FRAME: Megan, there's a rule.
THE COURT: There's -- if you remember back just about an hour ago, Dr. Faraon talked about consulting with a neuro -- I've got it written down in there and talked with him to confirm what he was doing. Now, but there was no report done, there was no letter, it's not going back to the jury as another doctor's opinion. He is not here to offer an opinion. Dr. Myerberg is the doctor that is here to offer an opinion, and so he can say what he did to -- in his work, and I'll permit him to do that. But the letter will not come in.
THE WITNESS: I understand.
THE COURT: And I've read through the case law here and I believe that I'm 100 percent right on what I've -- the ruling I've made. Okay.

(A.R.2., at 827-843).

Rule 703 of the West Virginia Rules of Evidence reads as follows:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in

> forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

W.Va. R. Evid. 703.

Clearly, by allowing Dr. Myerberg to testify about consulting Dr. Gabriele, the Circuit Court did not find his discussion regarding that consultation and confirmation of his opinion to be unduly prejudicial to the state. Based upon this Court's holding in *Doe v. Wal-Mart,* 210 W.Va. 664, 558 S.E.2d 663 (2001), the limitation on actually admitting into evidence the relied-upon letter was error, and is prejudicial to the Defendant by limiting the persuasive effect of her presentation of the expert opinion in her case.

The Circuit Court stated the following during the hearing on the Petitioner's motion for new trial:

> The Court made the correct decision in regards to Dr. Myerberg and the letter from Dr. Gabriel. So the Court let Dr. Myerberg testify, but the Court would not permit the letter from Dr. Gabriel to be brought into evidence. Basically if the Court would have allowed the letter from Dr. Gabriel to come into evidence and be presented to the jury, the Court would have been presenting testimony to the jury through Dr. Gabriel that it didn't afford the Prosecuting Attorney, or the State, the opportunity to cross-examine that witness. And so that's the reason the Court would did not permit the letter itself to be admitted into evidence. So the Court is going to stand by its ruling, and I'm going to deny the motion for the new trial.

(A.R.1., at 363).

Doe v. Wal-Mart, which is explicitly mentioned in the Comments to Rule 703, makes it straightforward that the mere fact that something relied upon as hearsay, which by definition does not present the opportunity for cross-examination, is not a reason to exclude material relied upon by an expert witness. Because of the error in the Circuit Court's ruling, and because of the

prejudice to the Petitioner in presenting her defense, this Court should grant relief and order a new trial.

5. The Circuit Court erred by denying the Petitioner's Motion for Judgment of Acquittal due to insufficient evidence of malice.

The standard by which this Court will judge a challenge to the sufficiency of the evidence has been set forth in Syllabus Points 2 and 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), as follows:

> 2. The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.
>
> 3. A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

This standard requires essentially a near total absence of evidence concerning an element of the offense before the denial of a motion for judgment of acquittal will be reversed by this Court. The Petitioner asserts, however, that a judgment of acquittal was appropriate in this case because of a failure of the State to prove two specific elements of the offense: that the Petitioner intended to abuse the child, and that the Petitioner possessed the mental state of malice.

Before reasserting the motion in post-trial motions (A.R.1., at 245), the Petitioner made

the motion at the close of the State's case:

> MR. FRAME: Your Honor, I move the Court for judgment of acquittal on the charge of child abuse resulting or causing death. The burden is on the State to prove every essential element of the crime. Two of the essential elements are that the abuse be malicious and intentional. And up to the is point, I don't believe there's any evidence from which a reasonable person would conclude that the defendant, Kelly Tusing, acted in a malicious or an intentional manner.
>
> In fact the State's witnesses can't even agree on the manner of death in this case. Certainly there's been no motive presented, none whatsoever. On the contrary, the evidence indicates that Kelly had been a caring and loving caregiver for [the child] throughout her life for extended periods of time. She's had her from Saturday till Wednesday, a period of five days, and there was a couple bumps and bangs, but nothing remarkable.
>
> She went home to a home -- to a family that was in chaos, fighting and arguing and infidelity and other women present, spending the night, drug use. Had to make a middle of the night emergency transfer of [the child] from that home to Kelly's home for her safety. And so the evidence viewed in a light most favorable to the State of West Virginia does not establish that there was any act committed by Kelly that was either malicious or intentional. And for that reason, I move for a judgment of acquittal.

(A.R.2., at 823-824).

The assistant prosecutor replied:

> MS. FIELDS: Judge, I would ask the Court to deny the motion. I think that the Court has to look at the evidence like Mr. Frame said, in the light most favorable to the State. In that regard, we have put on three medical professionals who all agree to the manner of death being homicide. They all agree it's due to abusive head trauma. Two of the three say that it's shaking, one of them believes it's blunt force trauma. All three of them believe it's from abusive head trauma.
>
> That abusive head trauma in and of itself is intentional. You cannot have accidental abusive head trauma. They've testified to that. They've testified to the intent. They've testified that it is nonaccidental, so that makes it intentional. If it's not an accident, it's an intentional act. Malice comes from, I think, it's an evil -- evil heart, an evil spirit, something to that effect. The injuries themselves, are what proved the evil intention. The injuries that this child had, the one doctor described it as catastrophic brain injuries. The next doctor described it as a devastated brain injury. These -- the injuries in and of themselves show the evil intent that a person has to cause and inflict this kind of traumatic brain injury on a child.
>
> The pictures, in and of themselves, show the trauma that this

> child suffered. If that's not evil intent and evil and malicious heart, I don't know what it. I've never seen anything more critical or more devastating than baby [the child]. And to say that there's no maliciousness or intent there, that's exactly what the doctors have testified. All three of them have testified and so, you know, this is – we're trying to define the irrational. Shaking a baby is irrational. It's not a rational -- I don't have to show a motive, there doesn't have to be a motive shown.
>
> And it's sad that we're at that state where people are shaking babies, but it comes from frustration. Dr. Wright testified it comes from frustration, it comes from risk factors such as low socioeconomic status, low education. The fact that she is an abused victim in the past, the fact that she a domestic violence abuse victim presently, all of those are risk factors to become an abuser. So there's -- that's a partial motive right there, the risk factors that she already possesses. And, you know, the State has shown, through her own testimony, how hateful she can be. I mean, listening to her own statements, I mean, she becomes increasingly more chaotic, increasingly more erratic, increasingly more hateful. So I think that her statements coupled with the doctor's statement prove her maliciousness and intentional act. So I would ask that the Court send this to the jury.

(A.R.2., at 824-825).

This Court has stated, when considering a sufficiency challenge on the element of malice:

> The customary manner of proving malice in a murder case is the presentation of evidence of circumstances surrounding the killing. *State v. Starkey*, 161 W.Va. at 522, 244 S.E.2d at 223. Such circumstances may include, inter alia, the intentional use of a deadly weapon, *State v. Toler*, 129 W.Va. 575, 579-80, 41 S.E.2d 850, 852-53 (1946), words and conduct of the accused, *State v. Hamrick*, 112 W.Va. at 166-67, 163 S.E. at 873, and, evidence of ill will or a source of antagonism between the defendant and the decedent, *State v. Brant*, 162 W.Va. 762, 252 S.E.2d 901, 903 (1979).
>
> We conclude from our review of the trial record that there was sufficient evidence from which the jury could find malice. Evidence was presented below which established a source of antagonism between the appellant and the victim. Therefore, we find that there was sufficient evidence to convince impartial minds beyond a reasonable doubt that the appellant acted with malice.

State v. Evans, 310 S.E.2d 877, 879-80, 172 W.Va. 810 (1983).

In this case, there is no evidence of use of a deadly weapon, and no evidence of ill will or

a source of antagonism between the defendant and the decedent. There are no words or conduct of the accused referred to in support of a malicious state of mind other than that her statements to law enforcement become increasingly more "chaotic," "erratic," and "hateful."[10] (A.R.1., at 825). Of course, all of these complained-of utterances happened after the child's hospitalization, and are not indicative of the Petitioner's frame of mind during the appropriate alleged interval. Furthermore, the State's suggestion that the Petitioner's low socioeconomic status, and low education are substitutes for malice is revealing in its classist candor, but certainly a tendency existing in a population is not a substitute for evidence of a mental state. The evidence is simply insufficient to support a conviction requiring proof of malice, and this Court should grant relief accordingly.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant the following relief:

1. That the conviction be vacated and remanded for entry of a judgment of acquittal;
2. That the conviction be vacated and remanded for a new trial;
3. That the sentence be vacated and the matter remanded for entry of a lawful sentence;
4. That the Court grant the Petitioner any other relief the Court deems just and proper.

Respectfully Submitted,

10 The undersigned counsel attempted to obtain the recorded statements, which are on disks, from the Circuit Clerk, but was told by personnel in that office that they do not possess the means to copy the disks. The undersigned counsel also requested to obtain them from the prosecutor's office; however no copies have been provided in response to repeated requests. The Petitioner does not object to a partial designation of the record, or the subsequent filing of a supplemental appendix that would include those recordings. The time codes of the recordings that were played at trial are reflected in the transcript.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 21-0115

STATE OF WEST VIRGINIA,
Respondent,

v.

(An appeal of a final order in Preston County Circuit Court Case No.: 19-F-49)

KELLY MARIE TUSING,
Petitioner.

CERTIFICATE OF SERVICE

On this 21st day of May, 2021, I, Jeremy B. Cooper, hereby Certify to this Court that I have delivered a true and exact copy of the foregoing Petitioner's Brief to Katherine Smith, Esq., by U.S. Mail to 812 Quarrier Street, 6th Floor, Charleston, WV 25301.

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