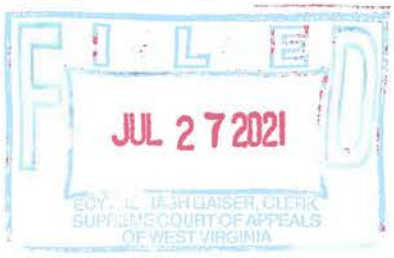
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0115



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

KELLY MARIE TUSING,

Defendant Below, Petitioner.

RESPONDENT'S BRIEF

Arising out of January 26, 2021 Order Following Post-Trial Motions
Circuit Court of Preston County
Case No. 19-F-49

PATRICK MORRISEY
ATTORNEY GENERAL

KATHERINE M. SMITH
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar No. 12787
Office of the Attorney General
1900 Kanawha Blvd. East
State Capitol
Building 6, Suite 406
Charleston, WV 25305
Telephone: (304) 558-5830
Fax: (304) 558-5833
Email: Katherine.M.Smith@wvago.gov

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I. ASSIGNMENTS OF ERROR

Petitioner presents five assignments of error:

1. The Circuit Court erred by sentencing 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 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.

(Pet'r's Br. 1.)

II. STATEMENT OF THE CASE

On March 5, 2019, a Preston County grand jury indicted Petitioner on one count of death of a child by parent, guardian, or custodian by child abuse, in violation of West Virginia Code § 61-8D-2a(a) (2017). (*See* App. Vol. I at 6.) The indictment charged that on or about November 10, 2018, Petitioner, "while babysitting and by non-accidental means, struck and/or shook [B.L.], DOB: 10/16/2017,[1] causing a traumatic brain injury and subdural hemorrhage, resulting in the death of the child on November 18, 2018." (App. Vol. I at 6.)

A. Photographic Evidence

On September 29, 2020, Petitioner filed a Motion in Limine to Exclude Gruesome Photographs. (App. Vol. I at 15–17.) On October 1, 2020, the State filed its Notice of Photographic Evidence, identifying thirteen photographs that it intended to introduce at trial,

[1] At trial, B.L.'s mother testified that B.L. was born on *November* 16, 2017. (App. Vol. II at 246:15–16.) However, the medical documents in the record are consistent with the date provided in the indictment, and list B.L.'s date of birth as October 16, 2017. (*See, e.g.*, App. Vol. I at 54, 63–71, 90, 222–23.)

which the defense sought to exclude, including an explanation as to the relevance of each photograph. (App. Vol. I at 18–19.)[2] That same day, the State filed its Amended Notice of

[2] The State's October 1, 2020 Notice of Photographic Evidence as contained in the Appendix is incomplete. (*See* App. Vol. I at 18–19.) The photographs sought to be admitted in evidence by the State through that Notice are not included. For the purpose of this appeal, the State provides the full version of this Notice in its Supplemental Appendix, except that one of the exhibits, exhibit 9, has been removed. (*See* Suppl. App. 1–14.) Exhibit 9 has been removed because during the October 8, 2020 *in camera* hearing, the circuit court ordered exhibit 9 inadmissible as duplicitous. (*Compare* App. Vol. I at 37, *with* App. Vol. II at 689:1–17.) The exhibits attached to the State's October 1, 2020 Notice of Photographic Evidence are important because those exhibit numbers are referenced by the circuit court during the *in camera* hearings regarding, and in its orders ruling on, the admissibility of the State's photographic evidence. The exhibit numbers of the photographs contained in the State's October 1, 2020 Notice of Photographic Evidence were later altered and admitted in evidence at trial as follows:

Photograph Description	**Exhibit Number in State's October 1, 2020 Notice of Photographic Evidence**	**State's Trial Exhibit Number**
B.L. in hospital on November 11, 2018, after receiving emergency surgery, showing medical intervention	1	6a
B.L. in hospital on November 11, 2018, showing bruise above eye	2	6b
B.L. in hospital on November 11, 2018, after receiving emergency surgery, showing medical intervention	3	6c
Condition of B.L. following death on November 18, 2018	4	10a
Condition of B.L. following death on November 18, 2018	5	10b
Autopsy photograph showing scapular hemorrhages	6	18
Autopsy photograph showing scapular hemorrhages	7	19
Autopsy photograph showing superficial bruising on B.L.'s head	8	20
N/A (excluded as duplicitous evidence at trial)	9	*Excluded as duplicitous evidence*
Autopsy photograph showing subscalpular hemorrhage, subdural hemorrhage, subarachnoid hemorrhage, cerebral edema, and cerebral contusion	10	21

Photographic Evidence, which contained a list of the same thirteen photographs as well as the addition of the autopsy report that it intended to introduce through the medical examiner. (App. Vol. I at 20–21.)

Following an *in camera* hearing, the circuit court entered an order on October 2, 2020, permitting the use of photographs 1, 2, 3, 4, 5, and 8 as evidence at trial. (App. Vol. I at 39, 43.) These photographs were subsequently assigned different trial exhibit numbers—specifically, State's trial exhibits 6a, 6b, 6c, 10a, 10b, and 20.[3] With respect to these photographs, the circuit court, after due consideration of West Virginia Rule of Evidence 403, *State v. Mongold*, 220 W. Va. 259, 647 S.E.2d 539 (2007), and *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994),[4] specifically found:

> The photographs identified by counsel for the Defendant as "gruesome" are undeniably difficult photographs to view, particularly the photographs of B.L.'s exposed brain, skull, and optic nerve/sheath from the autopsy. The nature of the allegations against the Defendant are unpleasant because it involves the death of a child through non-accidental means. In order to prove the allegations, the State must present evidence of conduct or circumstances which could have caused the death of B.L.
>
> . . . .

Autopsy photograph showing subdural hemorrhage	11	22
Autopsy photograph showing cerebral contusion	12	23
Autopsy photograph showing optic nerve sheath hemorrhage	13	24

Compare App. Vol. I at 18, *with* Suppl. App. 1–14, *and* App. Vol. I at 57–59, 61–62, 83–89; *see also* App. Vol. I at 37–38; App. Vol. II at 447:8–451:10, 464:16–465:17, 689:1–15, 706:9–707:15, 708:21–719:13.

[3] *See supra* note 2 and accompanying text.

[4] *See* App. Vol. I at 41–42.

> The explanations given by the State for why it must present photographs 1, 2, 3, 4, 5, and 8 [State's trial exhibits 6a, 6b, 6c, 10a, 10b, and 20][5] are easily understandable from a lay perspective (the extent of medical intervention, bruising, and general condition of B.L.). These photographs are not so gruesome as to bar their admission at trial, particularly because they are necessary to the State's case in chief.

(App. Vol. I at 42–43.) The circuit court ordered these photographs, State's trial exhibits 6a, 6b, 6c, 10a, 10b, and 20,[6] admissible at trial. (*See* App. Vol. I at 43.) The circuit court deferred ruling on the admissibility of the autopsy photographs, which, at that time, were identified as photographs 6, 7, 9, 10, 11, 12, and 13 in the State's Notice of Photographic Evidence.[7] (App. Vol. I at 43–44.)

Following a second *in camera* hearing,[8] during which the State's medical examiner[9] was questioned by counsel regarding the photographs taken during B.L.'s autopsy[10] (*see* App. Vol. I at 36–37; App. Vol. II at 674:14–686:11), the circuit court entered an order permitting the State's use of photographs 6, 7, 8,[11] 10, 11, 12, and 13 as evidence at trial (App. Vol. I at 37–38). Photograph 9 was excluded as duplicitous. (*Compare* App. Vol. I at 37, *with* App. Vol. II at 689:1–17.) These

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[5] *See supra* note 2 and accompanying text.

[6] *See supra* note 2 and accompanying text.

[7] *See supra* note 2 and accompanying text.

[8] The *in camera* hearing regarding the autopsy photographs occurred outside the presence of the jury on the fourth day of trial. (*See generally* App. Vol. II at 673:23–689:17.)

[9] Dr. Allen Mock, Chief Medical Examiner of West Virginia.

[10] "Counsel for the State and the Defendant questioned [Chief Medical Examiner] Dr. Mock regarding whether the photographs pertained to his testimony and what injuries each photograph would show." (App. Vol. I at 37.)

[11] Although photograph 8 was previously deemed admissible in its prior order, the circuit court again considered its admissibility. (*See* App. Vol. I at 37 n.1.)

autopsy photographs were renumbered, admitted in evidence at trial, and published to the jury as State's exhibits 18 through 24.[12]

During trial, defense counsel reasserted his objections to the photographs' introduction, but the circuit court stood by its prior rulings, overruled defense counsel's objections, admitted the photographs, and permitted the State to publish the photographs to the jury.[13] (*See* App. Vol. II at 444:22–451:10, 464:16–467:1, 706:9–719:13.)

B. Evidence of Malice and Intent

B.L. was the daughter of Crystal Radovich and David L. (App. Vol. II at 245:21–246:6.) When B.L. was approximately four or five months old, Petitioner, a friend of David L., began babysitting her. (App. Vol. II at 251:11–252:12.) On November 8, 2018, B.L.'s parents arranged for Petitioner to watch B.L. for the night. (*See* App. Vol. II at 261:3–263:11.) B.L. remained in Petitioner's care and custody from the night of November 8, 2018, through November 10, 2018. (*See* App. Vol. II at 261:3–266:8, 361:16–376:24.) On Saturday, November 10, 2018, between approximately 11:00 a.m. and 2:03 p.m., other than a very brief, fifteen- to twenty-minute visit from nameless and otherwise unidentified individuals who Petitioner referred to as "church people" (*see* Suppl. App. Recording of Nov. 19, 2018 Interview at 11:28–12:30, 20:00–20:59), Petitioner was alone with her two children and B.L. (*see* Suppl. App. Recording of First Nov. 11, 2018 Interview at 15:10–15:40, 15:45–16:12, 32:15–32:22 ("My husband was here the entire time except for those three hours.")).[14]

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[12] *See supra* note 2 and accompanying text.

[13] The photographs at issue are located on pages 57–59, 61–62, and 83–89 of Volume I of the Appendix Record.

[14] As further explained in the State's Motion for Leave to File Supplemental Appendix, only certain portions of Petitioner's November 11, 2018; November 19, 2018; and January 11, 2019 interviews were admitted in evidence and played for the jury. However, these recordings were filed in their

Around 2:03 p.m. on November 10, 2018, Petitioner called Robin Pyles, B.L.'s paternal grandmother,[15] and told her B.L. had fallen off a bed and was not breathing. (*See* App. Vol. II at 369:12–19.) When Robin and her husband arrived to Petitioner's home a few minutes later,[16] B.L. was on the floor in the back bedroom, her skin was purple in color, she was not breathing, and her eyes "were rolled in the back of her head." (*See* App. Vol. II at 370:22–371:13.) "[S]he was just lifeless." (App. Vol. II at 372:8–9.) Because Petitioner had not done so, Robin's husband called 9-1-1. (App. Vol. II at 372:13–15, 374:15–16.) "As soon as the EMT came in and took one look at [B.L.], [the EMT] yelled out the door to call life-flight[.]" (App. Vol. II at 376:16–17.) B.L. was then life-flighted to WVU Hospital in Morgantown, West Virginia. (*See* App. Vol. II at 265:23–266:8, 376:19–24, 557:7–11, 732:20–22.) On November 18, 2018, as a result of her extensive injuries and anticipated lifelong vegetative state, B.L.'s parents elected to remove her from life support. (*See* App. Vol. II at 269:9–19, 463:20–23, 580:1–582:5, 763:17–764:6.)

During trial, the State presented testimony from West Virginia State Police Trooper Levi Hall regarding his investigation into the death of B.L. (*See generally* App. Vol. II at 435:6–527:10.) During his investigation, Trooper Hall interviewed Petitioner. (*See* App. Vol. II at 451:18–461:8, 467:20–470:12, 475:6–479:19, 487:6–489:6; *see generally* Suppl. App. Recording of First Nov. 11, 2018 Interview, Recording of Second Nov. 11, 2018 Interview, Recording of Nov. 19, 2018 Interview, Recording of January 11, 2019 Interview.) Trooper Hall testified that

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entirety with the Preston County Circuit Clerk's Office. To preserve the integrity of the record below, the versions of the interview recordings as filed with the Preston County Circuit Clerk's Office are what is produced in the Supplemental Appendix. The portions of the recordings that were played for the jury, as identified by the trial transcript, are noted in the Motion for Leave to File Supplemental Appendix.

[15] *See* App. Vol. II at 359:3–9.

[16] App. Vol. II at 370:13–19.

Petitioner advised him at the time B.L. became unresponsive Petitioner was "alone in the house with the kids." (App. Vol. II at 456:15–21.) Petitioner told Trooper Hall that when B.L. was in her care on November 10, 2018, B.L. began "[g]asping, [had a] dazed look, [was] foaming at the mouth, [and] appeared to be having a seizure, twitching." (App. Vol. II at 456:24–457:1.) Trooper Hall further testified that Petitioner told him she "deleted messages [on her phone] from that day." (App. Vol. II at 457:4; *see also* App. Vol. II at 522:21–523:9, 526:11–15.) Trooper Hall advised that his first interview of Petitioner raised red flags because "[t]he doctors had already told [him] that [B.L.'s condition] wasn't from a fall" and Petitioner "deleted information from her phone and the incident had just happened the day before." (App. Vol. II at 462:24–463:6.) When asked by the State how he "exclude[d] everyone else . . . from causing [B.L.'s] death except [Petitioner]" (App. Vol. II at 489:14–16), Trooper Hall responded,

> From the doctor[s'] opinions and their timeline. They all said that [B.L.] would have collapsed immediately upon receiving that injury. The fact that it wasn't from a fall, and from [Petitioner's] timeline, she puts herself at the house alone with [B.L.] for several hours. Everyone else in this case agrees with that, there's no dispute on the timeline. [Petitioner] was with that child for several hours alone.

(App. Vol. II at 489:17–23.)

The State presented multiple medical experts to testify as to the extent and cause of B.L.'s injuries. Dr. Melvin Wright, a Pediatric Intensive Care Physician at WVU Children's Hospital in Morgantown, West Virginia, treated B.L.'s injuries that she sustained in early November 2018. (*See* App. Vol. II at 539:19–540:11.) Dr. Wright testified that, following her injuries, B.L. was life-flighted to WVU Children's Hospital. (*See* App. Vol. II at 557:5–11.) She was admitted as a Trauma I patient, in a comatose state, minimally responsive, and hooked up to a ventilator to help her breathe. (*See* App. Vol. II at 557:12–19, 558:13–16.) Dr. Wright testified that B.L.'s brain was swollen and subdural bleeding was present. (App. Vol. II at 566:8–20, 567:9–11.) B.L. also

had "multiple hemorrhaging in both eyes in all layers of the retina." (App. Vol. II at 576:23–24.) Dr. Wright described B.L.'s brain as "very, very injured . . . . Not subtly injured, not maybe a little injured, this [was a] very injured brain." (App. Vol. II at 567:2–3.)

Dr. Wright discussed three separate procedures that were performed to relieve the pressure on B.L.'s brain: an external ventricular drain ("EVD")[17] and a hemicraniotomy[18] of the left and right sides of her skull. (*See* App. Vol. II at 568:19–573:16.) Dr. Wright testified that these procedures were performed on B.L. as "attempted lifesaving measures," and are procedures that are not performed "routinely," but rather "when circumstances are dire." (App. Vol. II at 573:18–574:1.)

Dr. Wright also opined as to the cause of B.L.'s injuries: "I cannot find any compelling, convincing medical argument for [B.L.'s] injur[ies] to be anything other than abuse." (App. Vol. II at 579:2–4.) Dr. Wright testified that it "was reported to hospital staff . . . that [B.L.] had been playing on either a couch or a bed, I'm unclear which, and that the caregiver didn't see her fall, but found her on the ground unresponsive." (App. Vol. II at 579:17–20.) Dr. Wright disagreed with this report and confirmed that, in his opinion, B.L.'s injuries could not have been sustained "from anything other than abusive head trauma." (*See* App. Vol. II at 579:21–24; *see also* App. Vol. II at 597:4–14 (stating that B.L.'s injuries were "highly, highly characteristic of abusive head trauma" and "[t]his is a diagnosis recognized and supported by an abundance of medical literature").) Dr. Wright opined that a fall from a bed could not have caused B.L.'s injuries (App. Vol. II at 590:2–15) and that B.L.'s injuries were "most consistent with the patient, a baby, a child,

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[17] An EVD is a procedure, performed by neurosurgeons, where a hole is drilled in the skull and a small tube is placed inside the hole, "through the brain and . . . into th[e] ventricles" in order to take out fluid and relieve pressure on the brain. (*See* App. Vol. II at 570:14–23.)

[18] A hemicraniotomy is a procedure where the surgeon "take[s] out a large circle of bone [from the skull] and that frees up space for the brain to continue to expand." (App. Vol. II at 572:8–10.)

who has been aggressively shaken with or without an impact" (App. Vol. II at 591:14–16; *see also* App. Vol. II at 595:14–16 ("[Y]ou still have to apply a large amount of force to produce the injuries [B.L.] came in with. Those forces are not available in a fall from a sofa or a bed.")).

Dr. Wright explained that the injuries suffered by B.L. would have caused immediate symptoms of "collapse, loss of consciousness, poor ability to breathe, unarousable, heart slowing down, breathing slowing down, she needed rescued." (*See* App. Vol. II at 590:16–23.) The State then questioned Dr. Wright:

> [The State]. Do you believe that if there is somebody that has indicated, like [Petitioner] has, that she was alone with the baby for at least three hours prior to her collapse, do you believe that she attacked [B.L.]?
>
> [Dr. Wright]. When asked that way, yes. If -- So I believe that the individual who attacked [B.L.] was the one with her at the time symptoms started. If she was previously described, when in the presence of two individuals, as being well and then becomes unwell in the presence of a single individual, my conclusion is that that individual assaulted her.

(App. Vol. II at 591:2–12.)

The State then called Dr. Allen Mock, West Virginia's Chief Medical Examiner. (*See* App. Vol. II at 696:11–21.) Dr. Mock performed the autopsy on B.L. (App. Vol. II at 703:2–4.) Dr. Mock testified that B.L.'s cause of death was homicide. (App. Vol. II at 705:6–11; *see also* App. Vol. II at 731:21–23.) His autopsy revealed various injuries, including "contusions about the head," "bleeding into the scalp," "evidence of medial therapy where, what we call a subdural hemorrhage or bleeding underneath the skull was evacuated by medical personnel," "residual subdural hemorrhage, . . . [or] bleeding around the brain," "[s]ubarachnoid hemorrhage," "[c]erebral contusions, . . . [or] bruise[s] of the brain," and "minor injuries to the extremities and abdomen." (App. Vol. II at 705:20–706:4.) Dr. Mock testified that B.L.'s injuries were a result of "multiple blunt force injuries of the head," which may also be described as "abusive head

trauma" or "shaken impact." (App. Vol. II at 720:12–15.) Dr. Mock testified that, in his opinion, and based on scientific literature, B.L.'s injuries were not caused by a "fall[ ] from a bed" or "a fall from two to three feet." (*See* App. Vol. II at 723:12–17, 724:24–725:2.) Dr. Mock indicated that the defense theory of B.L. falling two to three feet from a bed was not consistent with what he observed during the autopsy. (*See* App. Vol. II at 726:2–5.) In Dr. Mock's opinion, B.L.'s injuries were caused by an intentional act. (App. Vol. II at 725:3–5.)

The State next called Dr. Claudiu Faraon. (*See* App. Vol. II at 753:15–23.) Dr. Faraon, an attending physician at WVU Hospital's Pediatric Intensive Care Unit in Morgantown, West Virginia,[19] treated B.L.'s injuries that she sustained in November 2018. (App. Vol. II at 753:21–755:19.) Dr. Faraon testified to three medical procedures performed on B.L. in an attempt to reduce the "very, very high" pressure in her brain. (*See* App. Vol. II at 757:18–23, 760:8–9, 762:10–763:13.) The surgeries did not improve B.L.'s condition. (App. Vol. II at 763:14–16.) Dr. Faraon testified that B.L. suffered a

> catastrophic brain injury, which should she survive, it would be very likely that she will be rendered profoundly disabled with lifelong disabilities manifested [as] an inability to breathe by herself, she would need to be on a ventilator to have a tracheostomy tube inserted in her throat and be hooked up to a ventilator all the time. She will be blind. She will not be able to see and interact with her environment. She wouldn't probably -- very likely she wouldn't be able to smile to her parents or recognize her parents. She would never walk, never talk. She would be, essentially, confined all her life in a long-term care facility on technology.

(App. Vol. II at 763:19–764:6.) Dr. Faraon opined that B.L.'s injuries, which included her brain injury, subdural hemorrhage, and retinal hemorrhages, were, in combination, "highly, highly indicative of nonaccidental injury to the brain, nonaccidental trauma or inflicted brain injury," also known as "abusive head injury." (*See* App. Vol. II at 765:13–22; *see also* App. Vol. II at 766:11–

[19] *See* App. Vol. II at 755:7–19.

16, 768:18–20, 781:17–20.) Dr. Faraon testified that B.L.'s injuries were "very" inconsistent with the reported accident of falling from a bed. (*See* App. Vol. II at 766:17–767:5.) Dr. Faraon explained, "The extent and severity of this child's injuries were not consistent with the story provided on admission that the child may have fallen out of a bed onto the carpeted floor while playing rough with other children. And were strongly suggest[ive] of abusive trauma." (App. Vol. II at 778:15–19.) With respect to the cause of B.L.'s injuries, the State questioned:

> [The State]. Absent an extreme motor vehicle accident or a fall from maybe a second story building, is there any way that [B.L.] could have received these injuries accidentally?
>
> [Dr. Faraon]. No.

(App. Vol. II at 768:10–13.)

Dr. Faraon further testified that from the time B.L. sustained her injuries, he

> would expect that within minutes, she would become sleepy or lethargic, unable to wake up. Immediately [B.L.] would cry, she would cry, then she would stop crying, she would become lethargic. She may have vomited, because of the swelling of the brain. She may have had a seizure, but definitely she wouldn't be described as normal. And then she would progress to become unresponsive and to become comatose.

(App. Vol. II at 769:17–24.) Dr. Faraon opined that B.L.'s responses should have occurred "within minutes" of her injuries. (App. Vol. II at 770:3–5.) The State then inquired:

> [The State]. . . . . Is it your opinion that if the testimony and the evidence shows that [B.L.] was alone with one person for at least three hours prior to becoming symptomatic, would that caregiver be responsible for [B.L.'s] injuries?
>
> [Dr. Faraon]. I would . . . say so, yes.

(App. Vol. II at 776:19–24.)

C. Oral Motion for Judgment of Acquittal

At the close of the State's case-in-chief, the defense moved for judgment of acquittal. (*See* App. Vol. II at 822:9–823:3.) Defense counsel argued that the State failed to present sufficient

evidence of malice and intent to sustain a conviction. (*See* App. Vol. II at 823:1–8.) In response, the State advised that it

> 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's nonaccidental, so that makes it intentional. If it's not an accident, it's an intentional act. Malice comes from . . . evil heart, an evil spirit, something to that effect. The injuries themselves are what proved the evil intention.
>
> The injuries that [B.L.] had, the one doctor described it as catastrophic brain injuries. The next doctor described it as a devastated [*sic*] 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.

(App. Vol. II at 824:9–825:4.) The circuit court denied the defense motion. (*See* App. Vol. II at 826:9–827:6.)

D. Dr. Gabriele's July 30, 2019 Letter

Prior to the trial testimony of defense expert Dr. David Myerberg, the State raised issue with a July 30, 2019 letter from Dr. Frederick Gabriele,[20] which was addressed to Dr. Myerberg. (*See* App. Vol. I at 236; App. Vol. II at 827:8–18.) Because Dr. Gabriele was not disclosed as a defense expert witness and because he would not be called by the defense to testify at trial, the State argued that Dr. Gabriele's letter to Dr. Myerberg should be excluded as evidence. (*See* App. Vol. II at 827:8–828:3, 830:9–24.) Prior to Dr. Myerberg's trial testimony, he was called into chambers for an *in camera* examination on the issue. (*See* App. Vol. II at 835:17–843:20.)

[20] Although the trial transcript references "Dr. Gabriel," Dr. Gabriele's own July 30, 2019 letter contains a different spelling. The spelling of Dr. Gabriele's name in this Brief is consistent with the spelling in his July 30, 2019 letter. (*See* App. Vol. I at 236.)

Dr. Myerberg advised that he "basically confirmed [his own] opinions by going to Dr. Gabriel[e]." (App. Vol. II at 840:12–13.) The Court proceeded to question Dr. Myerberg:

> 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 [of B.L.] and you formed your own opinion?
>
> [Dr. Myerberg]: Correct.
>
> THE COURT: And basically, all you did with Dr. Gabriel[e] was you went down there and he confirmed your opinion?
>
> [Dr. Myerberg]: Absolutely.
>
> THE COURT: Nothing he did helped you make your opinion?
>
> [Dr. Myerberg]: No.

(App. Vol. II at 841:17–842:4.)

In light of these responses, the circuit court concluded that Dr. Myerberg did not use information from Dr. Gabriele to form an opinion, but, rather, Dr. Myerberg "formed his own opinion and all he was doing was looking for confirmation" from Dr. Gabriele. (*See* App. Vol. II at 842:7–10.) As a result, the circuit court excluded Dr. Gabriele's July 30, 2019 letter from evidence. (*See* App. Vol. II at 842:12–13, 843:16.)

E. Jury Verdict, Sentencing, and Post-Trial Motions

On October 9, 2020, the jury found Petitioner "guilty of death of a child by parent, guardian, or custodian by child abuse," in violation of § 61-8D-2a(a). (App. Vol. I at 242 (capitalization altered); *see also* App. Vol. I at 244.) Six days later, Petitioner filed her Motion for a New Trial. (App. Vol. I at 245–46.) In support, Petitioner argued that there was insufficient evidence of malice and intent to sustain the conviction and the circuit court erred in refusing to allow Dr. Gabriele's letter in evidence. (App. Vol. I at 245.)

The circuit court proceeded to sentencing prior to ruling on the defense Motion for a New Trial. Via its January 7, 2021 Sentencing Order, the circuit court sentenced Petitioner to a determinate sentence of 100 years in the state penitentiary. (App. Vol. I at 248.)

Thereafter, on January 11, 2021, Petitioner filed her Motion for Correction and Reduction of Sentence, seeking both the "correction of an illegal sentence" and "a reduction of that sentence." (App. Vol. I at 250.) In support, Petitioner argued that § 61-8D-2a "does not provide for a definite or a determinate sentence." (App. Vol. I at 251.) Petitioner acknowledged that the statute "was amended during the 2017 regular term of the West Virginia Legislature" and, through that amendment, the language "'shall be punished by a definite term of imprisonment'" was removed. (*See* App. Vol. I at 251.) The penalty of "'not less than 10 nor more than 40 years'" was also removed. (*See* App. Vol. I at 251.) Petitioner advised that the amended statute, effective July 6, 2017, "mandate[s] an indeterminate sentence of a period of 15 years to life." (App. Vol. I at 251.) Petitioner also cited Senate Bill 288 (2017 regular session), which provided that the intent of § 61-8D-2a's amendment was to "increase[e] the penalty for death of a child by a parent, guardian, custodian or other person by child abuse to an indeterminate term of 15 years to life." (App. Vol. I at 252 (emphasis deleted) (internal quotations omitted).)

On January 22, 2021, the circuit court held a post-trial motions hearing, during which it heard argument on Petitioner's Motion for a New Trial, Motion for Judgment of Acquittal, and Motion for Correction and Reduction of Sentence. (App. Vol. I at 263; *see also* App. Vol. I at 344–67.) With respect to her Motion for a New Trial and Motion for Judgment of Acquittal,[21]

[21] Petitioner's Motion for a New Trial was filed on October 15, 2020—six days after the jury verdict. (*See* App. Vol. I at 242, 245–46, 346.) Later, during a motions hearing, Petitioner "asked the [circuit court] to recast the motion as a motion for judgment of acquittal or in the alternative, motion for new trial." (App. Vol. I at 346.) The State argued that the circuit court should decline to consider the Motion for Judgment of Acquittal as untimely. (*See* App. Vol. I at 348–49.) The circuit court nevertheless entertained the motion. (*See* App. Vol. I at 359–60.)

Petitioner argued that there was insufficient evidence of malice and intent to sustain her conviction. (App. Vol. I at 347.) In response, the State referred to the instructions provided to the jury for implied and inferred malice. (App. Vol. I at 349–50.)

> It takes implied malice to beat a child over the head. I don't have to have a reason, there doesn't have to be hatred for that child, it can be implied just in the fact that [Petitioner] snapped and beat that child.
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> . . . .
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> It requires implied or inferred malice, that [Petitioner] had an intentional act. A baby cannot -- the testimony was that it would take the baby falling from several floors of a building or being thrown from a vehicle from a car accident to have that kind of blunt force trauma. So the jury was full[y] within its realm of being able to determine whether that child was injured by malice.
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> . . . .
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> I think that the jury looked at not only what was happening that day in the life of [Petitioner], but what had happened throughout her life. She was abused -- an abused woman, she was an abused mother, she had a history of abuse growing up, and she . . . portrayed [that] to the police, that was her story to the police. So they had a very tortured woman that they were looking at that was not far from just snapping, and that was the State's theory.
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> . . . .
>
> So I would ask the Court to consider that it takes an intentional act, according to Dr. Mock and according to Dr. Wright, an intentional act to cause the injuries that that child . . . experienced, and the only way that they could describe that that child would have experience[d] that kind of trauma by accident was being thrown from a multiple story building or being thrown in a vehicle crash causing substantial injuries, and none of that happened.

(App. Vol. I at 351–52.)

With respect to the issue of the circuit court's exclusion of Dr. Gabriele's July 30, 2019 letter, Petitioner relied on her arguments in "the written papers." (App. Vol. I at 354.) The State also stood on its previous arguments and indicated its "belie[f] that [the letter] was properly excluded by the Circuit Court." (App. Vol. I at 355.)

Regarding Petitioner's Motion for Correction and Reduction of Sentence, Petitioner argued that the statute requires an indeterminate sentence of fifteen years to life, as opposed to her determinate 100-year sentence. (*See* App. Vol. I at 356–57, 359.) The State responded that it "believe[d] that the Court c[ould] look at the not less than nor more than language being removed [by the 2017 amendment] to indicate that that requires a determinate sentence, because in our other statutes when we have an indeterminate sentence, the language is, not less than nor more than." (App. Vol. I at 358.) In considering Petitioner's Motion for Correction and Reduction of Sentence, the circuit court advised,

> Just as [the State] has talked about indeterminate statutes, it gives the Court -- it gives me the authority to [sentence] someone to not less than one year nor more than five years, not less than two years not more than ten . . . . This statute does not state that. The Court read through this, the Court researched and the Court determined that this [§ 61-8D-2a] was a determin[ate] statute. That basically it [gives] the Court authority to sentence an individual convicted of this offense through some period of incarceration between 15 years and life.

(App. Vol. I at 364.)

Via its order entered on January 26, 2021, the circuit court denied Petitioner's Motion for a New Trial, Motion for Judgment of Acquittal, and Motion for Correction and Reduction of Sentence. (App. Vol. I at 263.) Petitioner appealed.

III. SUMMARY OF ARGUMENT

With respect to Petitioner's first assignment of error, because West Virginia Code § 61-8D-2a(c) plainly prescribes a determinate sentence for a period between fifteen years and life, the circuit court did not err in ordering Petitioner to serve a determinate sentence. Because the statute is clear and unambiguous, the preamble to Senate Bill 288 (2017 regular session) should not be referenced in an attempt to interpret it. *See* Syl. Pt. 9, *State v. Mills*, 243 W. Va. 328, 844 S.E.2d 99 (2020); *State ex rel. Lorenzetti v. Sanders*, 235 W. Va. 353, 360, 774 S.E.2d 19, 26

(2015). The second sentence of § 61-8D-2a(c) further articulates the legislature's intent to provide a determinate sentence. The statute explicitly mandates that an inmate must serve a minimum of fifteen years prior to eligibility for parole. In West Virginia, an inmate is eligible for parole if she has served either the minimum term of her indeterminate sentence or one fourth of her determinate sentence. *See* W. Va. Code § 62-12-13(b)(1). If § 61-8D-2a(c) called for an indeterminate sentence of not less than fifteen years nor more than life, given § 62-12-13(b)(1), the legislature would not have explicitly mandated the defendant serve a minimum of fifteen years prior to eligibility for parole. In other words, if § 61-8D-2a(c) called for an indeterminate sentence, the second sentence in that subsection would be meaningless. It is therefore evident that § 61-8D-2a(c) provides for a determinate term of incarceration. *See Jordan v. Jenkins*, -- S.E.2d --, Nos. 19-0890, 19-0899, 2021 WL 2432094, at *24 (W. Va. 2021) (opinion); *Jackson v. Monitor Coal & Coke Co.*, 98 W. Va. 58, 126 S.E. 492, 494 (1925).

With respect to Petitioner's second assignment of error, because the crime for which she was convicted and sentenced has a fixed statutory maximum and is not a life recidivist sentence, her sentence is not subject to proportionality analysis or review. *See* Syl. Pt. 2, *State v. Patrick C.*, 243 W. Va. 258, 843 S.E.2d 510 (2020); Syl. Pt. 4, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). Notwithstanding this fact, Petitioner's proportionality claim is substantively meritless. Petitioner's determinate 100-year sentence is constitutionally proportionate to the crime she committed: the killing of a thirteen-month-old infant as a result of her intentional and malicious infliction of physical injuries. The sentence passes both applicable subjective and objective inquiries. First, it does not shock the conscience and, second, given the nature of the offense, the legislative purpose behind the sentence, a comparison of punishments for similar offenses in other states, and a comparison of punishments in this State, Petitioner's

sentence passes constitutional muster. *See State v. Cooper*, 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983); *see also State v. Woodall*, 182 W. Va. 15, 25, 385 S.E.2d 253, 263 (1989).

With respect to Petitioner's third assignment of error, the circuit court did not abuse its discretion in admitting the photographs of the infant victim, B.L. The photographs were relevant, exceptionally probative, and necessary to demonstrate the extensive internal injuries sustained by B.L. The potential danger of unfair prejudice did not "substantially outweigh" their extremely probative value. *See State v. Derr*, 192 W. Va. 165, 178, 451 S.E.2d 731, 744 (1994). B.L.'s internal injuries served as the basis for the opinions of the State's medical experts: her injuries were not caused by accidental means, but were, rather, the result of intentional, abusive head trauma. Although they are bleak, the photographs are not "hideous, ghastly, horrible, or dreadful." *See Derr*, 192 W. Va. at 178, 451 S.E.2d at 744. What is hideous, ghastly, horrible, and dreadful is Petitioner's crime. Accordingly, Petitioner's claim that the photographs of B.L. were excessively gruesome and, therefore, unfairly prejudicial, fails.

With respect to Petitioner's fourth assignment of error, the circuit court properly excluded Dr. Gabriele's July 30, 2019 letter to defense expert Dr. Myerberg. Dr. Myerberg provided expert testimony at trial. Dr. Gabriele was not called as a trial witness. Dr. Gabriele did not provide any facts, data, or opinions to Dr. Myerberg that Dr. Myerberg used to form his expert opinion. In other words, there was nothing provided by Dr. Gabriele that helped form the basis of Dr. Myerberg's opinion. *But see* Syl. Pt. 3, *Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 558 S.E.2d 663 (2001). The opinion of Dr. Gabriele in his July 30, 2019 letter, therefore, falls outside the scope of *Doe* and West Virginia Rule of Evidence 703, and the circuit court properly acted in ordering its exclusion.

With respect to Petitioner's fifth assignment of error, there was sufficient evidence of intent and malice for a rational jury to convict her. A jury verdict may 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." Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). The evidence presented during trial included that, on the day B.L. sustained her injuries, she was in Petitioner's sole care for at least three hours. Petitioner claimed that immediately before B.L. lost consciousness, she fell off of a bed. However, the State's expert witnesses all vehemently refuted that a fall from two or three feet could have caused the traumatic brain injuries sustained by B.L. The State's medical experts all agreed that B.L.'s injuries were caused by intentional, abusive heard trauma. Accordingly, because there was sufficient evidence to prove, beyond a reasonable doubt, the essential elements of intent and malice, the jury's verdict should not be disturbed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter is unnecessary as this appeal involves issues of settled law and the facts and legal arguments are adequately presented in the briefs and appendix record. The State represents that a memorandum decision affirming the circuit court's January 26, 2021 Order Following Post Trial Motions is appropriate.

V. STANDARDS OF REVIEW

"Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). If a sentence that does not violate statutory or constitutional commands is reviewed by this Court, the review will be conducted "under a deferential abuse of discretion standard." *See* Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). With respect to claims of unconstitutionally disproportionate sentences, while this Court's

"constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to [only] those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syl. Pt. 4, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205. "Where the issue involves the application of constitutional protections, [this Court's] review is de novo." *Patrick C.*, 243 W. Va. at 261, 843 S.E.2d at 513.

"A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 5, *State v. Gibbs*, 238 W. Va. 646, 797 S.E.2d 623 (2017) (internal quotations and citations omitted). Therefore, a circuit court's ruling on the admissibility of photographs, which turns on its application of Rule 403 of the West Virginia Rules of Evidence, is reviewed by this Court under an abuse of discretion standard. *See* Syl. Pt. 10, *Derr*, 192 W. Va. 165, 451 S.E.2d 731. Because "[t]he Rule 403 balancing test is essentially a matter of trial conduct, . . . the trial court's discretion will not be overturned absent a showing of clear abuse." *Id.*

Finally,

> [A] trial court's disposition of a motion for judgment of acquittal is subject to our *de novo* review; therefore, this Court, like the trial court, must scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict's favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt.

State v. LaRock, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996).

> 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.
>
> . . . .

> 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.

Syl. Pts. 1 and 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163.

VI. ARGUMENT

A. The circuit court did not err in ordering a determinate sentence.

With respect to her first assignment of error, Petitioner argues that the circuit court erred in sentencing her to a determinate 100-year sentence. (*See* Pet'r's Br. 5–15.) Given the plain language of the statute, however, Petitioner's determinate sentence is appropriate.

West Virginia Code § 61-8D-2a(c) provides:

> Any person convicted of a felony described in [§ 61-8D-2a(a) or § 61-8D-2a(b)] 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). Notably absent from the text of the statute is the characteristic indeterminate sentence language: "not less than *x*, nor more than *y*." *See, e.g.*, W. Va. Code § 60A-4-401(a)(i) (prescribing indeterminate sentence for offense of possession with intent to distribute methamphetamine as "imprison[ment] in a state correctional facility for not less than one year nor more than 15 years"), § 61-2-9 (prescribing indeterminate sentence for offense of malicious assault as "confinement in a state correctional facility [for] not less than two nor more than ten years"), § 61-8B-7(b) (prescribing indeterminate sentence for offense of sexual abuse in the first degree as "imprison[ment] in a state correctional facility [for] not less than one year nor

more than five years"), § 61-8D-5(a) (prescribing indeterminate sentence for offense of sexual abuse by a parent, guardian, custodian, or person in a position of trust as "imprison[ment] in a correctional facility [for] not less than ten nor more than twenty years").

"Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 9, *Mills*, 243 W. Va. 328, 844 S.E.2d 99 (internal quotation omitted) (quoting Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970)). Because § 61-8D-2a(c) is clear and unambiguous, Petitioner's reference to material outside the four corners of the statute—specifically, the preamble to Senate Bill 288 (2017 regular session) (*see* Pet'r's Br. 8–9)—is not warranted. *See State ex rel. Lorenzetti*, 235 W. Va. at 360, 774 S.E.2d at 26 (advising that although preambles may, in some instances, be consulted to ascertain the Legislature's intent, when the statute is "clear and express, the preamble will not avail to contradict it" (internal quotation and citation omitted)).

Moreover, if the legislature intended to provide for an indeterminate sentence, as opposed to a determinate sentence, the second sentence of § 61-8D-2a(c) would be meaningless. That sentence provides that an individual "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). The calculation of parole eligibility differs with respect to indeterminate and determinate sentences. In this State, an inmate is eligible for parole if he or she

> (1)(A) *Has served the minimum term of his or her* ***indeterminate*** *sentence or has served one fourth of his or her* ***definite*** *term sentence*, as the case may be; or
>
> (B) He or she has applied for and been accepted by the Commissioner of Corrections and Rehabilitation into an accelerated parole program.

W. Va. Code § 62-12-13(b)(1) (2020)[22] (emphasis added). If § 61-8D-2a(c) prescribed an *indeterminate* sentence of fifteen years to life, then the legislature's express requirement in § 61-8D-2a(c) of serving "a minimum of fifteen years" prior to being eligible for parole would, in light of § 62-12-13(b)(1)(A), be superfluous. "It is *not* presumed that the Legislature intended any part of a statute to be without meaning." *Jackson*, 98 W. Va. 58, 126 S.E. at 494 (emphasis added) (internal quotation omitted). On the contrary, it *is* "presume[d] the Legislature drafts and passes statutes with full knowledge of existing law." *Jenkins*, -- S.E.2d --, 2021 WL 2432094, at *24 (internal quotation and citation omitted). Had the legislature meant for § 61-8D-2a(c) to provide an indeterminate sentence, it would not have included verbiage requiring the serving of at least fifteen years prior to the inmate's eligibility for parole.

Accordingly, because Petitioner's determinate 100-year sentence is "within statutory limits," and Petitioner does not contend and the record does not reveal that it was "based on [any] [im]permissible factor," it is "not subject to appellate review." *See* Syl. Pt. 4, *Goodnight*, 169 W. Va. 366, 287 S.E.2d 504. Petitioner's first assignment of error should be denied.

B. Petitioner's 100-year sentence is constitutionally proportionate to the crime committed: the killing of a thirteen-month-old infant.

First, because the crime for which Petitioner was convicted and sentenced has a fixed statutory maximum and is not a life recidivist sentence, it is not subject to proportionality analysis or review. *See* Syl. Pt. 2, *Patrick C.*, 243 W. Va. 258, 843 S.E.2d 510 ("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

[22] Because Petitioner's sentencing hearing was conducted on December 28, 2020, and her sentence pronounced via the circuit court's order entered on January 7, 2021 (*see* App. Vol. I at 247–49), the version of § 62-12-13 in effect from May 19, 2020, to July 8, 2021, is used. Both the 2017 amendment and the 2021 amendment of subsection (b)(1)(A) of the statute provide the same parole calculation.

is a life *recidivist* sentence." (emphasis added) (internal quotation and citation omitted)); Syl. Pt. 4, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205 (same); *see also State v. Tyler*, 211 W. Va. 246, 250, 565 S.E.2d 368, 372 (2002) ("Sentences imposed under statutes *providing no upper limits* may be contested based upon allegations of violation of the proportionality principles contained in Article III, Section 5 of the West Virginia Constitution." (emphasis added)). Notwithstanding this fact, a substantive review of this claim demonstrates that it is without merit.

As this Court announced in *State v. Cooper*, "[t]here are two tests to determine whether a sentence is so disproportionate to a crime that it violates our constitution." 172 W. Va. at 272, 304 S.E.2d at 857. The first inquiry "is subjective and asks 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.* If the sentence does not shock the conscience, an objective inquiry is made: "[C]onsideration 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." *Id.* (internal quotation omitted) (quoting Syl. Pt. 5, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205).

Here, Petitioner's determinate 100-year sentence passes the initial subjective inquiry. A jury convicted Petitioner of *maliciously* and *intentionally*—not accidentally—inflicting on thirteen-month-old B.L. such substantial physical pain, illness, or impairment of a physical condition, that it caused B.L.'s death. *Compare* W. Va. Code § 61-8D-2a(a), *with* App. Vol. I at 244. Society's view of this offense is reflected by the maximum sentence permitted under the plain language of the statute: life imprisonment. *See* W. Va. Code § 61-8D-2a(c). An intentional killing of the youngest and most vulnerable members of society—particularly by a trusted

caretaker—justifies the severest of sentences. A 100-year sentence for the intentional killing of an infant child does not shock the conscience.

With respect to the second inquiry, the nature of the offense is wicked, contemptable, and cruel. In 2017, the legislature increased the punishment for a violation of § 61-8D-2a from a "definite term of imprisonment" of "not less than ten nor more than forty years" to "fifteen years to life." *Compare* W. Va. Code § 61-8D-2a(c) (1994), *with* W. Va. Code § 61-8D-2a(c) (2017). The legislature also increased the minimum time required to be served prior to parole eligibility from ten years to fifteen years. *Compare* W. Va. Code § 61-8D-2a(c) (1994), *with* W. Va. Code § 61-8D-2a(c) (2017). The severity of the offense is clear.

In addition, other jurisdictions provide similar punishments. For example, Maryland recently amended Criminal Law Article § 3-601,[23] punishing abuse resulting in the death of a minor under thirteen years of age by a parent, family member, household member, or other person who has permanent or temporary care, custody, or responsibility for the minor's supervision, to a term of "imprisonment not exceeding life." Md. H.B. 277 (2021 regular session). Relatedly, the Court of Appeals of North Carolina, in *State v. Perry*, upheld a sentence of life imprisonment without the possibility of parole based on the defendant's conviction for felony murder, which was predicated on the underlying offense of felonious child abuse. *See* 750 S.E.2d 521, 528, 534–36 (N.C. Ct. App. 2013). South Carolina punishes "homicide by child abuse," which is defined as "the death of a child under the age of eleven while committing child abuse or neglect, . . . under circumstances manifesting an extreme indifference to human life," with a term of imprisonment of not less than twenty years up to life. *See* S.C. Code § 16-3-85(A)(1), -(C)(1). Ohio classifies felony child endangering resulting in death as felony murder, which is punishable by a mandatory

[23] The amendment is effective October 1, 2021. *See* Md. H.B. 277 (2021 regular session).

term of imprisonment of fifteen years to life. *See State v. Dawson*, 91 N.E.3d 140, 143–44 (Ohio Ct. App. 2017) (affirming conviction of felony murder based on child endangering and affirming sentence of fifteen years to life).

In *State v. L.M.C.*, this Court affirmed the petitioner's convictions and related sentences of life without mercy for the offense of murder of a child by a parent, guardian, custodian, or other person by refusal or failure to provide necessities, and a forty-year determinate sentence for the offense of death of a child by a parent, guardian, custodian, or other person by child abuse, among other sentences for child abuse-related offenses. *See* No. 18-0851, 2020 WL 4355064, at *3 n.6, *8 (W. Va. Supreme Court, July 30, 2020) (memorandum decision). Because the crimes occurred in 2011, however, the current version of § 61-8D-2a(c) was not used by the circuit court in crafting petitioner's death-by-child-abuse sentence. *See id.* at *1–2, *3 n.6. In contrast to the current version, which provides a maximum sentence of life, *see* W. Va. Code § 61-8D-2a(c) (2017), the prior version of § 61-8D-2a(c) provided for a definite sentence of imprisonment which was not less than ten nor more than forty years, *see* W. Va. Code § 61-8D-2a(c) (1994). Based on the research conducted utilizing the Westlaw database, it does not appear that this Court has engaged in a proportionality review of a sentence ordered under the current version of § 61-8D-2a(c), which was effective July 6, 2017.

This Court has held that "any sentence short of [death], including life without parole, for serious crimes against the person, passes constitutional muster." *Woodall*, 182 W. Va. at 25, 385 S.E.2d at 263 (first citing *Rummel v. Estelle*, 445 U.S. 263 (1980); then citing *Solem v. Helm*, 463 U.S. 277 (1983)). Accordingly, because Petitioner's 100-year sentence is not unconstitutionally disproportionate to the crime she committed—the killing of a thirteen-month-old infant as a result

of her intentional and malicious infliction of physical injuries—her second assignment of error should be denied.

C. The circuit court did not abuse its discretion in admitting the photographs of B.L.

For Petitioner's third assignment of error, she contends that the circuit court erred by admitting "gruesome photographs" without considering their prejudicial effect under Rule 403 of the West Virginia Rules of Evidence. (Pet'r's Br. 17–18.) Specifically, Petitioner argues that the photographs presented as State's trial exhibits 6a, 6b, 6c, 10a, 10b, 18, 19, 20, 21, 22, 23, and 24[24] are "graphic" and "emotionally disturbing" and, therefore, subject to exclusion as "unduly prejudicial." (*See* Pet'r's Br. 18–19.)[25]

"The admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence." Syl. Pt. 8, *Derr*, 192 W. Va. 165, 451 S.E.2d 731.

> Rule 401 defines relevant evidence in terms of probability. The relevant inquiry is whether a reasonable person, with some experience in the everyday world, would believe that the evidence might be helpful in determining the falsity or truth of any fact of consequence. Rule 402 provides that all relevant evidence is admissible limited only to certain specified exceptions not pertinent here. It can be said that although Rules 401 and 402 strongly encourage the admission of as much evidence as possible, Rule 403 restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.
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[24] Petitioner identifies as "gruesome" the photographs contained on pages 57–62 and 83–89 of Volume I of the Appendix. (Pet'r's Br. 18.)

[25] Petitioner's cited page range includes State's trial exhibit 9, which is a photograph of Petitioner's hand, showing an abrasion. (*See* App. Vol. I at 60; *see also* App. Vol. II at 461:10–462:17.) Because the State believes that this photograph was identified as gruesome in error, it will not be addressed.

> 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.

Id. at 178, 451 S.E.2d at 744 (internal citations omitted). As this Court noted in *Derr*,

> Gruesome photographs simply do not have the prejudicial impact on jurors as once believed by most courts. The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced. . . . [G]ruesome or inflammatory pictures exist[ ] more in the imagination of judges and lawyers than in reality.

Id. at 177 n.12, 451 S.E.2d at 743 n.12 (internal quotations and citation omitted). Since *Derr*, this Court has affirmed circuit courts' admissions of allegedly gruesome photographs on various occasions.[26]

With respect to State's trial exhibits 6a, 6b, 6c, 10a, 10b, and 20,[27] the circuit court conducted an *in camera* hearing and, after due consideration of West Virginia Rule of Evidence

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[26] *See, e.g.*, *State v. Jones*, No. 18-0162, 2020 WL 1487802, at *2 (W. Va. Supreme Court, Mar. 23, 2020) (memorandum decision) (finding no error in the circuit court's admission of photographs that depicted a "fatal intestinal injury, as well as numerous other injuries confirming the long-term abuse inflicted on the child [victim]," including "scars and contusions on all areas of the body, two black eyes, an abrasion over the nose, a bruised jaw, several burns to [the child's] chest and hands and other areas, an inner-mouth injury, several subgaleal hemorrhages, a fractured rib, a leg muscle hardened from blunt force trauma, and a hemorrhage in the bowel area"); *State v. Anderson*, 228 W. Va. 58, 61, 66–67, 717 S.E.2d 245, 248, 253–54 (2011) (finding photographs of a murdered twelve-week-old infant, including one photograph taken at the ER and three taken by the medical examiner at autopsy, which showed "the baby's physical condition, including the ulcerated lesions on his stomach, thighs, penis, scrotum, anus, and other body parts," admissible as trial evidence because "[t]he prosecution was entitled to show the[m] . . . to the jury as evidence relevant to the material elements that the prosecution needed to prove"); *State v. Mongold*, 220 W. Va. 259, 263, 272–73, 647 S.E.2d 539, 543, 552–53 (2007) (finding that although photographs of the two-year-old child abuse victim "on a morgue table, face up and face down," as well as three autopsy photographs "revealing parts of [the child victim's] exposed skull," could "be characterized as gruesome, we do not believe that those photographs were unduly prejudicial").

[27] *See supra* note 2 and accompanying text.

403, *Mongold*,[28] and *Derr*[29] (*see* App. Vol. I at 41–42), specifically found that the photographs were "not so gruesome as to bar their admission at trial, particularly because they are necessary to the State's case in chief" (App. Vol. I at 43). With respect to State's trial exhibits 18 through 24,[30] the circuit court initially deferred ruling "pending an *in camera* hearing on the[ir] necessity . . . for the anticipated witnesses at trial." (App. Vol. I at 43–44.) During the *in camera* hearing for the purpose of determining the admissibility of the autopsy photographs, both the State and defense counsel questioned Chief Medical Examiner Dr. Mock regarding the photographs' relationship to his post-mortem examination findings. (*See* App. Vol. II at 674:14–688:20.) Following that *in camera* hearing, the circuit court ordered State's trial exhibits 18 through 24[31] admissible. (*See* App. Vol. I at 37–38.)

A review of the photographs here demonstrates no danger of unfair prejudice.[32] State's trial exhibits 6a, 6b, and 6c were taken by Trooper Hall, the investigating officer, after B.L.'s emergency surgery on November 11, 2018. (*See* App. Vol. II at 447:8–22.) Exhibit 6a was taken by Trooper Hall to document B.L.'s overall condition and the extent of her injuries on that date. (*See* App. Vol. II at 448:23–449:4.) Exhibit 6b was taken by Trooper Hall to document "a bruise over [B.L.'s] eye." (App. Vol. II at 449:6–15; *see also* App. Vol. II at 450:14–22.) State's trial

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[28] 220 W. Va. 259, 647 S.E.2d 539.

[29] 192 W. Va. 165, 451 S.E.2d 731.

[30] *See supra* note 2 and accompanying text.

[31] *See supra* note 2 and accompanying text.

[32] The State notes that Petitioner does not contest the relevance of the photographs. (See Pet'r's Br. 17–19.) Rather, she simply argues that the circuit court's failure to conduct an on-the-record balancing test under Rule 403 was error. (See Pet'r's Br. 17–19.) Notwithstanding Petitioner's narrow argument, the State will analyze the photographs' relevance, in addition to its consideration of Rule 403's balancing test, as it is important to demonstrate their extremely probative value.

exhibit 6c is a photograph of B.L.'s head and skull taken by Trooper Hall in an attempt to document "the aftermath" of B.L.'s emergency surgery. (App. Vol. II at 451:2–10.) State's trial exhibits 10a and 10b are photographs that were taken by Trooper Hall at the hospital after B.L.'s death on November 18, 2018. (App. Vol. II at 464:16–465:14.) These photographs show B.L.'s "very swollen and bruised" head and the results of her medical procedures, which included removing parts of her skull on both sides of her head "to try to relieve the swelling." (*See* App. Vol. II at 466:3–467:1.)

The remaining photographs contained in State's trial exhibits 18 through 24, those from B.L.'s autopsy, were described by Chief Medical Examiner Dr. Mock. Exhibit 18 is a photograph of B.L.'s scalp, showing a "scapular hemorrhage." (*See* App. Vol. II at 708:21, 709:10–12.) Exhibit 19 is also a photograph of B.L.'s scalp, but with an incision that shows bruising of the scalp and "bleeding into the skin in that area." (*See* App. Vol. II at 709:17–710:7.) Exhibit 20 is a photograph of B.L.'s external head and face, which shows bruising, contusions, and closed "incisions that were made by medical personnel, life-saving interventions to try to evacuate the bleeding in the head." (*See* App. Vol. II at 710:12, 710:21–711:4.) Exhibit 21 is a photograph of B.L.'s scalp, but from a different view; this particular view "from above down" permits a visual of B.L.'s "subscalpular hemorrhage, subdural hemorrhage . . . , subarachnoid hemorrhage, cerebral edema and cerebral contusion." (*See* App. Vol. II at 711:12, 711:19–23, 713:18–714:11.) Exhibit 22 is a picture of B.L.'s scalp, which shows a "large craniectomy line" where a "portion of the skull" and "portions of the dura" were removed. (*See* App. Vol. II at 715:14–716:3.) "[U]nderneath the dura," in State's trial exhibit 22, bleeding, or subdural hemorrhage, is visible. (*See* App. Vol. II at 716:5–17.) State's exhibit 23 shows bruising, or cerebral contusion, on B.L.'s brain. (*See* App. Vol. II at 717:1–718:3.) Finally, State's exhibit 24 "shows optic nerve sheath

hemorrhage." (App. Vol. II at 718:5–10.) Dr. Mock opined that these various injuries, together, constituted "multiple blunt force injuries of the head," or "abusive head trauma." (*See* App. Vol. II at 720:12–14, 721:15–17.) In Dr. Mock's opinion, the photographs depicted injuries that were caused by an intentional act—a homicide. (*See* App. Vol. II at 725:3–5, 731:21–23.)

Although they are bleak, the photographs are not "hideous, ghastly, horrible, or dreadful." *See Derr*, 192 W. Va. at 178, 451 S.E.2d at 744. The autopsy photographs that show B.L.'s internal brain injuries do not show her face. (*See* App. Vol. I at 83–84, 86–89.) The photographs that *do* show B.L.'s facial features do not show gaping wounds and do not portray contorted expressions. *See State v. Waldron*, 218 W. Va. 450, 458, 624 S.E.2d 887, 895 (2005) ("We have also relied on the amount of blood and gore in the picture, and . . . whether the body is pictured with unnatural facial positions or contortions in determining that the photograph is not gruesome and in determining whether a photograph is prejudicial."). Most importantly, the autopsy images were necessary to show the internal physical injuries sustained by B.L. It was B.L.'s *internal* injuries—those which could not be seen on her body's surface—that resulted in the State's expert witnesses' medical diagnoses of intentional, abusive head trauma. (*See* App. Vol. II at 597:4–14, 705:19–706:4, 720:12–721:17, 765:13–22.) These internal injuries—specifically, subdural hematoma, subdural hemorrhage, retinal hemorrhages, optic nerve sheath hemorrhages, subarachnoid hemorrhage, and cerebral contusions[33]—were used by the State to show lack of accident and to demonstrate the required elements of malice and intent. To prove these elements, it was necessary for the State to present the extent and gravity of B.L.'s internal injuries, which these pictures display.

[33] *See* App. Vol. II at 597:4–8, 705:19–706:4, 720:12–20, 765:13–22.

Strikingly similar to this case, in *State v. Meadows*, following the death "of a seventeen-month-old girl due to profound abuse," the petitioner was indicted "for one count of murder in the first degree, one count of a guardian or custodian causing the death of a child, and one count of child abuse resulting in bodily injury." 231 W. Va. 10, 14–15, 743 S.E.2d 318, 322–23 (2013). Following his conviction on all three counts, the petitioner appealed. *See id.* at 13, 743 S.E.2d at 321. One of the petitioner's claims raised on appeal was that the circuit court abused its discretion by admitting "twenty-seven photographs of the victim, twenty-two taken during the time she was unconscious in the hospitals and five autopsy photographs." *Id.* at 23, 743 S.E.2d at 331. The petitioner argued "that the gruesomeness of the photos overwhelmed the jury." *Id.* This Court disagreed.

> The hospital photographs in question depicted the toddler in an unconscious state, with the various tubes inserted into her body to stabilize her condition. The pictures showed bruises over the victim's entire body. The pictures were taken when the toddler was first taken to the emergency room, and every twelve hours thereafter per the instruction of the medical examiner. During his testimony, the medical examiner explained that the purpose of the series of photographs while the toddler was hospitalized was to identify the more recently inflicted blows since the bruising would continue to intensify in those areas. He also noted that the changes in bruising could have changed dramatically had the toddler lived any length of time, so the pictures served to document the child's condition closer to the time of the beating. The hospital photos were the only pictures which depicted the bruising over the victim's full body. *The five autopsy photos were head shots, focusing on the injuries inflicted on the face and brain. Three of the five autopsy photos were views of the child's exposed brain (her face was not visible) which allowed the jury to see the depth of the bruises the toddler sustained to her head, and to understand why the medical examiner determined that those blows were most likely the cause of the child's death.* One of the pictures focused on the underside of the toddler's upper lip, which the medical examiner noted exhibited a tear in the tissue which could only be caused by a striking blow. The remaining autopsy photo showed bruising on the victim's chin, used by the medical examiner to explain that such an array of contusions were indicative of assault rather than a medical procedure such as intubation.
>
> While the photographs depicting the toddler from the time closest to the infliction of the fatal blows through autopsy are unquestionably disturbing, they were admissible as evidence relevant to material elements of the prosecution's burden of

> proof and the probative value clearly outweighed any prejudicial impact. *The autopsy photos were used to explain the force of the blows causing the child's ultimate death by showing how deeply the brain tissue itself had been damaged, negating that the child's injuries were the result of an accident or fall.* The autopsy pictures of the child's lip and chin were used to dispel any misconception that the injuries were caused by anything other than forceful blows to the child's head. The photographs taken prior to death document the number and location of bruises on the child's entire body, and provided the fact-finder with information as to the extent of the blows which had more recently been inflicted on the child. Accordingly, we find no error in the trial court's admission of the photographs.

Id. at 23–24, 743 S.E.2d at 331–32 (emphases added).

Just as in *Meadows*, here the photographs of B.L. depicted the gravity of the injuries suffered, alongside testimony explaining the force that was needed to cause those injuries. As the State maintained below, the "abusive head trauma in and of itself is intentional." (App. Vol. II at 824:15–16.) "The injuries themselves are what proved [Petitioner's] evil intention." (App. Vol. II at 824:21–22.) Given the nature of the offense (death of a child by a custodian by child abuse) and the required elements of malice and intent, the probative value of the photographs was not substantially outweighed by a danger of unfair prejudice. Accordingly, the circuit court did not abuse its discretion in permitting their admission in evidence at trial.

D. The circuit court properly excluded Dr. Gabriele's July 30, 2019 letter.

Petitioner argues that the circuit court erred by excluding Dr. Gabriele's July 30, 2019 letter. (*See* Pet'r's Br. 20–27.) Prior to trial, Dr. Gabriele, a neuro-radiologist who was *not* called as a witness at trial,[34] provided a letter to defense expert Dr. Myerberg. (*See* App. Vol. I at 236.) At the request of Dr. Myerberg, the letter provided an "interpretation of the CT scan" of the child victim. (App. Vol. I at 236.) Petitioner contends that, although Dr. Gabriele was not called as an expert witness at trial, West Virginia Rule of Evidence 703 and *Doe v. Wal-Mart Stores, Inc.*, 210

[34] *See* App. Vol. II at 828:5–7, 833:22–24, 834:17–23.

W. Va. 664, 558 S.E.2d 663 (2001), permit the introduction of his July 30, 2019 letter and related medical opinion. (*See* Pet'r's Br. 26–27.) Petitioner is wrong.

West Virginia Rule of Evidence 703 provides, in pertinent part:

> 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.

W. Va. R. Evid. 703 (emphases added). In *Doe*, this Court reviewed Rule 703 and considered "whether an expert may testify to presumably inadmissible facts that helped form the basis of his legal opinion." 210 W. Va. at 676, 558 S.E.2d at 675. In answering this question, the *Doe* Court held, in pertinent part:

> An expert witness may testify *about facts he/she reasonably relied upon to form his/her opinion* even though such facts would otherwise be inadmissible as hearsay if the trial court determines that the probative value of allowing such testimony to aid the jury's evaluation of the expert's opinion substantially outweighs its prejudicial effect.

Id. at Syl. Pt. 3 (emphasis added).

Here, Dr. Myerberg did not rely on facts or data provided to him by Dr. Gabriele to form his medical opinion. Rather, Dr. Myerberg—*after* forming his opinion—simply went to Dr. Gabriele to confirm his findings. During an *in camera* hearing, the State asked Dr. Myerberg if he "relied on [Dr. Gabriele's] opinion to make [his] findings." (App. Vol. II at 840:10–11.) Dr. Myerberg replied, "No, I'm telling the Court that I basically *confirmed* my opinions by going to Dr. Gabriel[e]." (App. Vol. II at 840:12–13 (emphasis added).) The circuit court then inquired:

> 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?
>
> [Dr. Myerberg]: Correct.

> THE COURT: And basically, all you did with Dr. Gabriel[e] was you went down there and he confirmed your opinion?
>
> [Dr. Myerberg]: Absolutely.
>
> THE COURT: *Nothing he did helped you make your opinion?*
>
> [Dr. Myerberg]: *No.*
>
> THE COURT: Okay. I'm going to stand by my ruling. I believe that that clarifies my ruling. That basically [Dr. Myerberg] did not use an opinion -- or [Dr. Myerberg] did not use an opinion of another expert to form his own opinion. [Dr. Myerberg] formed his own opinion and all he was doing was looking for confirmation.
>
> And so basically Dr. Gabriel[e] is not here to be qualified as an expert, so basically, you know, I'm not going to permit [Dr. Gabriele's] letter to be shown to the jury.

(App. Vol. II at 841:17–842:13 (emphases added).)

In other words, Dr. Myerberg conferred with Dr. Gabriele in order to get a second opinion—not to aid Dr. Myerberg in forming his opinion in the first instance. The opinion of Dr. Gabriele in his July 30, 2019 letter, therefore, falls outside the scope of *Doe* and Rule 703. Accordingly, because Dr. Gabriele was not called as a witness at trial, the circuit court properly excluded Dr. Gabriele's letter. *See* W. Va. R. Evid. 801(c), 802.

E. There was sufficient evidence of intent and malice for a rational jury to convict Petitioner.

Finally, Petitioner argues that there was insufficient evidence of intent and malice to sustain her conviction under § 61-8D-2a(a). (*See* Pet'r's Br. 28.) Specifically, Petitioner contends that because "there is no evidence of use of a deadly weapon, . . . no evidence of ill will or a source of antagonism between the [Petitioner] and the decedent," and "no words or conduct of the [Petitioner] referred to in support of a malicious state of mind other than that her statements to law enforcement bec[a]me increasingly more 'chaotic,' 'erratic,' and 'hateful,'" the evidence at trial

was "insufficient to support a conviction requiring proof of malice." (Pet'r's Br. 30–31.) As discussed below, this Court has previously rejected similar arguments. Petitioner's claim fails.

Petitioner does not meet the "heavy burden" announced in Syllabus Point 3 of *Guthrie* to show that the evidence of malice and intent was insufficient to support her conviction. When reviewing a sufficiency of the evidence challenge, this Court views "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.*" Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (emphases added). Indeed, "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." *Id.* at Syl. Pt. 1 (emphases added).

> [A]ll the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the [court] to resolve all evidentiary conflicts and credibility questions *in the prosecution's favor*; moreover, as among competing inferences of which two or more are plausible, the [court] *must choose the inference that best fits the prosecution's theory of guilt.*

Syl. Pt. 2, *LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (emphases added). A jury verdict may 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." Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (emphasis added).

Similar to the instant case, in *State v. Fannin*, the petitioner was convicted in the Circuit Court of Cabell County of death of a child by a parent, guardian, custodian, or other person by child abuse. No. 14-0797, 2015 WL 2364295, at *1 (W. Va. Supreme Court, May 15, 2015) (memorandum decision). On appeal, the petitioner claimed that, in light of the State's alleged failure to prove malice, the lower court erred in denying his motion for judgment of acquittal. *Id.*

at *4. In support, the petitioner "contend[ed] that because no weapon was used, malice [could not] be inferred, and that the only evidence remotely related to malice was from the neighbor who testified that petitioner yelled at [the victim] to shut up." *Id.* In affirming the petitioner's conviction, this Court found:

> As the State correctly argues, the jury heard testimony that petitioner initially lied about [the victim's] condition. Then, he lied about what happened to [the victim], stating the he dropped her onto the sofa. His eventual story that he dropped [the victim] onto the floor was not consistent with the overwhelming medical testimony. The jury could infer from the neighbor's testimony that petitioner acted with malice and intent, *as well as from the testimony of multiple physicians who testified that [the victim's] injuries were not the result of being accidentally dropped.*

Id. at *5 (emphasis added).

Just as in *Fannin*, here there was sufficient evidence of malice and intent to convict Petitioner. B.L. was in Petitioner's sole care for at least three hours prior to B.L. becoming unresponsive. (*See* Suppl. App. Recording of First Nov. 11, 2018 Interview at 32:15–32:22 ("My husband was here the entire time except for those three hours."); *see also* App. Vol. II at 489:20–23.) Petitioner told Trooper Hall that, at the time B.L. became unresponsive, she was "alone in the house with the kids." (App. Vol. II at 456:15–21.) When Petitioner realized B.L. was not breathing, she called B.L.'s paternal grandmother, but did not call 9-1-1. (*See* App. Vol. II at 369:12–19, 372:13–15.) Petitioner claimed that B.L. fell off of a bed. (*See* App. Vol. II at 369:12–19.) The State's expert witnesses, however, all vehemently refuted that a fall from two or three feet could have caused the traumatic brain injuries sustained by B.L. (*See* App. Vol. II at 590:2–15, 595:14–16, 723:12–17, 724:24–725:2, 726:2–5, 766:17–767:5, 768:10–13, 778:15–19.) The State's medical experts all agreed that B.L.'s injuries were caused by intentional, abusive head trauma. (*See* App. Vol. II at 579:21–24, 597:4–14, 720:12–15, 765:13–22, 766:11–16, 768:18–20, 778:15–19, 781:17–20.)

The evidence in the record proves, beyond a reasonable doubt, the essential elements of malice and intent. The jury's verdict should not be disturbed.

VII. CONCLUSION

In light of the foregoing, the State of West Virginia requests that this Court affirm the Circuit Court of Preston County's January 26, 2021 Order Following Post Trial Motions.

STATE OF WEST VIRGINIA,
By Counsel

PATRICK MORRISEY
ATTORNEY GENERAL

Per procurationem:

Lara K Bissett (9102) for

Katherine M. Smith
Assistant Attorney General
West Virginia State Bar No. 12787
Office of the Attorney General – Appellate Division
1900 Kanawha Blvd. East
State Capitol
Building 6, Suite 406
Charleston, WV 25305
Telephone: (304) 558-5830
Fax: (304) 558-5833
Email: Katherine.M.Smith@wvago.gov

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

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

KELLY MARIE TUSING,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, Katherine M. Smith, counsel for the State of West Virginia, hereby certify that on July 27, 2021, I served the foregoing ***"Respondent's Brief"*** on the below-listed counsel by depositing a true and accurate copy of the same in the United States mail, postage prepaid, in an envelope addressed as follows:

Jeremy B. Cooper, Esq.
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215

Per procurationem:

(9102)
Lara K Bissett for

Katherine M. Smith, Assistant Attorney General
West Virginia State Bar No. 12787
Office of the Attorney General – Appellate Division
1900 Kanawha Blvd. East
State Capitol
Building 6, Suite 406
Charleston, WV 25305
Telephone: (304) 558-5830
Fax: (304) 558-5833
Email: Katherine.M.Smith@wvago.gov