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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 22-0042**

**STATE OF WEST VIRGINIA,**

***Respondent,***

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FROM FILE

**v.**

**BRIAN E. LYON, II,**

***Petitioner.***

# RESPONDENT'S BRIEF

Appeal from the December 17, 2021, Order
Circuit Court of Marion County
Case No. 20-F-145

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## I. INTRODUCTION[1]

Respondent, State of West Virginia, by and through its counsel, William E. Longwell, Assistant Attorney General, responds to the appellate brief filed by Bryan E. Lyon, II ("Petitioner"), wherein he challenges the judgment of the Circuit Court of Marion County adjudging him guilty of eight felony counts as set forth in the indictment in 20-F-145. Because Petitioner has failed to demonstrate the existence of reversible error, this Court should affirm.

## II. ASSIGNMENTS OF ERROR

Petitioner alleges four assignments of error in his appellate brief:

1. The circuit court committed reversible error by delivering an instruction to the jury for Sexual Assault in the First Degree, which was fatally defective for failing to state an essential element of the crime.

2. The State was permitted to present evidence and a theory of the case based on Felony Murder, but only allowed the jury to make a determination of premeditated First Degree Murder.

3. The Petitioner's Conviction should be overturned because the prosecutor made extremely inappropriate comments to the jury during opening and closing argument, repeatedly referring to the Petitioner as a "Monster,["] and "Evil."

4. There was insufficient evidence presented at trial to sustain convictions to convict on Premeditated First Degree Murder, Burglary, and First Degree Robbery of Mr. Moses.

## III. STATEMENT OF THE CASE

Christopher Moses was shot multiple times and killed in his home located at 244 Lanham Lane near the city of Fairmont, Marion County, West Virginia, in the early morning hours of September 29, 2019. A.R. 1019-20. In addition to murdering Mr. Moses, the assailant also

[1] By Order entered on May 23, 2022, this Court granted Petitioner's Motion to Exceed the page limit. In this same Order, the Court also permitted Respondent to exceed the normal forty-page limit for appellate briefs by four pages. Accordingly, Respondent's brief totals forty-four pages, in accordance with this Court's May 23, 2022 Order.

sexually and physically assaulted Mr. Moses's girlfriend, Dawn Nicole Smith—who was staying at Mr. Moses's home that night—stole her debit cards at gunpoint, and shot and critically injured her before leaving her for dead for her eight-year-old daughter to find. A.R. 1026-28.

Officers soon identified Petitioner as the suspect in the horrific crimes committed at 224 Lanham Lane on September 29, 2019. A.R. 955-56. After an extensive investigation that uncovered a plethora of evidence, the Marion County Grand Jury returned a nine-count felony indictment on June 30, 2020, in Criminal Action Number 20-F-45, charging Petitioner with the following offenses: Count 1, Burglary; Count 2, First Degree Murder; Count 3, First Degree Robbery by Use of a Firearm; Count 4, Use of a Firearm During the Commission of a Felony; Count 5, Kidnapping[2]; Count 6, First Degree Robbery by Use of a Firearm; Count 7, First Degree Sexual Assault; Count 8, Attempted First Degree Murder; and Count 9, Use of a Firearm During the Commission of a Felony. A.R. 1-5. Petitioner's jury trial upon said indictment began on September 8, 2021, and would last six days, concluding on September 16, 2021. A.R. 902.

**A. Trial testimony as to events that transpired in the morning of September 29, 2019.**

At trial, the State elicited testimony that Ms. Smith and her eight-year-old daughter arrived at Mr. Moses's residence at 244 Lanham Lane at approximately 7:30 p.m. to help Mr. Moses clean and prepare his home for an open house scheduled for the following day. A.R. 1462, 1498. Mr. Moses was not home at the time, as he was at a bar in Clarksburg watching a Mixed Martial Arts fight on television. A.R. 1466-67. Ms. Smith entered the home through the garage by using the electronic keypad and began cleaning and staging the house. A.R. 1466-67. Ms. Smith waited for Mr. Moses at the residence with her daughter until approximately 1:00 a.m. A.R. 1467-68. After

[2] Count Five was later dismissed prior to trial upon Petitioner's motion, and over the State's objection. A.R. 521; 694-95.

Mr. Moses had still not returned, Ms. Smith sent Mr. Moses a text message advising that she was going to bed. A.R. 1467-68. Mr. Moses sent her a text back saying he would be home shortly and that he was still at the bar with friends. A.R. 1467-68. Ms. Smith then went to the upstairs bedroom in Mr. Moses's home and went to sleep while her daughter slept in an adjacent bedroom. A.R. 1467-68.

Sometime later that night, Ms. Smith woke to use the restroom. A.R. 1468-69. Because Mr. Moses had still not come to bed, she walked downstairs to make sure he had made it home safely. A.R. 1469. As she walked through the kitchen, she observed someone laying on the couch covered head-to-toe with a blanket. A.R. 1469. Believing the individual to be Mr. Moses, Ms. Smith placed her hand on the individual's shoulder, causing the individual to remove the blanket from his face, revealing an African American male whom Ms. Smith had never seen before. A.R. 1469-70. At trial, Ms. Smith unequivocally identified Petitioner as the same individual she saw lying on the couch that morning on September 29, 2019. A.R. 1470.

Ms. Smith asked where Mr. Moses was, and Petitioner indicated that he was in the garage. A.R. 1470-71. Ms. Smith walked to the garage where she found Mr. Moses sitting smoking a cigarette. A.R. 1471-72. Mr. Moses explained that he was "really wasted" and that Petitioner drove him home in Mr. Moses's Dodge Ram pickup truck. A.R. 1472. Mr. Moses and Ms. Smith exchanged goodnights, and Ms. Smith returned to bed after Mr. Moses advised he would be up soon. A.R. 1473.

Sometime after she had fallen asleep, Ms. Smith awoke to find Petitioner standing in the bedroom pointing a gun at her. A.R. 1474. Ms. Smith recalled that Petitioner stated "where's your money, bitch? I know you have some." A.R. 1474. Ms. Smith got out of bed and retrieved her purse, at which time Petitioner began pulling out various items. A.R. 1475. After only finding

fifty dollars and Ms. Smith's debit cards, Petitioner appeared angry and demanded that Ms. Smith provide him the PIN numbers for the cards. A.R. 1475. Ms. Smith complied, and Petitioner threatened that he would kill her if the PIN numbers were incorrect. A.R. 1476. Ms. Smith further recalled Petitioner stating that he needed "two-grand to get out of town." A.R. 1475.

Petitioner then forced Ms. Smith at gunpoint down to the main level of the house. A.R. 1478. During this time, Petitioner told Ms. Smith that he had killed Mr. Moses, and that "he's dead in the garage, and you're going to walk out into the garage, and you're going to get his wallet out of his back pocket and hand it to me." A.R. 1478. Ms. Smith reiterated at this time that there was no one else in the house, nor had there been at any point other than herself, her daughter, Mr. Moses, and Petitioner. A.R. 1478.

After Ms. Smith retrieved Mr. Moses' wallet from his lifeless body, Petitioner became angrier after finding no cash inside. A.R. 1479-80. Petitioner then told Ms. Smith that she was going to show him where the safe was, which Ms. Smith assured him that she had no knowledge of a safe within the home. A.R. 1480. Ms. Smith explained that she was "scared to death" and believed that Petitioner would kill both she and her daughter as he did Mr. Moses. A.R. 1480.

Despite Ms. Smith's insistence that she knew nothing of a safe within the home, Petitioner forced her down into the basement where they walked around looking for the phantom safe. A.R. 1481. It was at this point that Ms. Smith began studying Petitioner's face, hoping to be able to recall his features should she survive the encounter. A.R. 1482-83. Petitioner told Ms. Smith "quit fucking looking at my face!" and punched her in the face. A.R. 1483. As Ms. Smith began to bleed from the punch, Petitioner stated "you're not going to pick me out of a lineup." A.R. 1483.

Petitioner then forced Ms. Smith back up the stairs toward the main floor of the home. A.R. 1483. Before she reached the top of the steps, however, Petitioner stated, "I'm going to hit

that," which struck fear in Ms. Smith as she realized that she was about to be raped. A.R. 1483. Petitioner forced Ms. Smith back down the stairs and had her lie on the basement floor and remove her pants. A.R. 1484-85. Petitioner then laid the gun on the ground by his leg and told Ms. Smith that she "better not try to grab the gun or he would kill" her. A.R. 1485. Petitioner then sexually assaulted Ms. Smith by engaging in penetrative sexual intercourse, and ejaculated on her left thigh. A.R. 1485.

After the sexual assault, Petitioner told Ms. Smith that she was going to go upstairs and take a shower. A.R. 1485. As Petitioner was marching her back up the stairs at gunpoint, Ms. Smith saw her daughter in bed screaming for her. A.R. 1486. She begged Petitioner not to hurt her or her daughter and to let her speak with her. A.R. 1486. Petitioner told her she "could go two steps in the door and that's it, with him standing there in the doorway with a gun on me as I'm trying to console my daughter." A.R. 1486. Petitioner then forced Ms. Smith into the bathroom—which was directly next to the same room in which her daughter was staying—and instructed to get in the shower and wash off. A.R. 1487-88. As Ms. Smith began to wash, Petitioner shot her through the glass shower door. A.R. 1487. As the glass shattered and the bullet entered her back and pierced her left lung, Ms. Smith attempted to call out for her daughter. A.R. 1487. Unable to speak due to the hole in her lung, Ms. Smith slowly fell to the ground on the shards of glass from the shower door. A.R. 1487. Ms. Smith recalled that her last memories were her "praying to God" that he not let her die for her daughters, and Petitioner firing a second bullet, striking her in the head. A.R. 1488-89.

Ms. Smith explained that the second shot went "straight through my face, across the roof of my mouth, out through my neck, back into the top of my shoulder, and then stuck protruding from by back." A.R. 1491. She also explained that medical staff initially decided to leave both

the bullet in her shoulder and the bullet in her chest in her body. A.R. 1491. However, not long before trial, Ms. Smith testified that she underwent a medical procedure to have the bullet in her shoulder removed due to the pain that it caused. A.R. 1491. The bullet that lodged in her chest still remained due to the danger of complications that would result if an attempt to remove it was made. A.R. 1491.

Ms. Smith also recalled being presented with a photo array while she was being treated at the hospital where she identified the Petitioner as her assailant. A.R. 1494. She acknowledged that she had written on the photo that she was "not 100 percent," but that her actual level of certainty that the person in the photo was, in fact, Petitioner was about "90 percent." A.R. 1494-95. Nevertheless, Ms. Smith again emphasized that she had no doubt, as she testified at trial, that Petitioner was the same individual that murdered Mr. Moses, sexually assaulted her, and shot her before leaving her for dead on September 29, 2019. A.R. 1494-96.

**B. Trial testimony of investigation leading to Petitioner's arrest.**

At approximately 8:10 a.m. on September 29, 2019, Marion County 911 dispatch received a call from a young female child advising that her mother had been shot and was having difficulty breathing. A.R. 852. Dispatch was able to trace the call to 244 Lanham Lane, and requested all available officers respond. A.R. 826.

Geno Guerrieri, Chief of Police in Whitehall, Marion County, West Virginia, was first to arrive on scene. A.R. 833. Upon arriving he noted a single vehicle—a Toyota Rav-4—parked in the driveway of the residence. A.R. 833. He proceeded to make entry by entering the garage through a man-door on the side. A.R. 833. Upon entering the garage, he immediately found Mr. Moses laying slumped over an overturned wheel-barrow with a large pool of blood under him and blood spatter through the immediate vicinity. A.R. 833. Knowing that there was at least one

additional victim inside the home, Chief Guerrieri proceeded through the garage and entered the main living area of the home. A.R. 834. Upon entering the home, he was met by Ms. Smith's daughter, who led him up to the second floor and into a bedroom where he found Ms. Smith lying in a large pool of blood. A.R. 843-45.

Shortly thereafter, Justin Efaw of the Marion County Rescue Squad arrived, and immediately observed Mr. Moses' lifeless body slumped over the wheel barrow in the garage. A.R. 141, 143. Mr. Efaw checked for a pulse to confirm Mr. Moses was deceased, and then proceeded into the home to assess Ms. Smith's condition. A.R. 843. Upon entering the bedroom, Mr. Efaw observed Ms. Smith to be lying in bed in a large pool of blood, and exhibiting signs of a collapsed lung. A.R. 845-46. He began administering emergency medical procedures, but quickly transported her to the ambulance standing by where a chest tube was inserted, and Ms. Smith was intubated while in route to Ruby Memorial Hospital in Morgantown, West Virginia. A.R. 847-48.

Back at 224 Lanham Lane, officers noticed several items were missing, most notably, Mr. Moses's white Dodge Ram 2500 pickup truck and Mr. Moses's cell phone. A.R. 951, 996. Officers were able to "ping" Mr. Moses's cell phone, and were able to observe that it was moving north near Morgantown toward the Pennsylvania border. A.R. 951. Officers issued a Be On the Lookout ("BOLO") alert for the Dodge Ram to law enforcement agencies in both West Virginia and Pennsylvania. A.R. 951. Not long thereafter, officers received notification that the pickup truck had been located in Washington County, Pennsylvania, near a motel referred to as the "Avalon Motel." A.R. 952. Officers also learned that the truck had been found burning. A.R. 995.

Because Ms. Smith was unable to communicate as a result of her injuries and medical treatment she was receiving, A.R. 851, there was some delay in getting a description of the assailant responsible for Mr. Moses' murder, and the sexual assault and attempted murder of Ms. Smith. Around the time officers learned of Mr. Moses's truck being located, they were able to obtain a general description of the assailant as an African American male. A.R. 953. Additionally, officers obtained a search warrant for Ms. Smith's bank records after they had learned of the stolen debit cards. A.R. 995. A review of Ms. Smith's bank records revealed that two cash withdrawals had been made at 8:49 a.m. and 8:50 a.m., both for $200.00, at an Exxon gas station in Weston, West Virginia, near Morgantown. A.R. 997. Officers traveled to the gas station where they were able to review security camera footage that captured a white pickup truck matching the description of Mr. Moses's pull up to the gas pumps, and a black male wearing a black sweatshirt with a Puma brand logo and a boonie hat exit the vehicle. A.R. 999. The male then entered the gas station and went to the ATM and made the two cash withdrawals. A.R. 999. Immediately following the cash withdrawals, the male could be seen holding a "wad of cash." A.R. 1003. After obtaining the video surveillance footage, and coordinating with Pennsylvania law enforcement, Petitioner was able to be identified as the suspect in the murder and sexual assault. A.R. 956.

Officers also soon discovered security camera footage from the Avalon Motel near where Mr. Moses's truck was located. A.R. 1299-1300. Security camera footage from the motel captured a male individual wearing the same clothes checking into the motel sometime after Petitioner was captured on security cameras at the Weston Exxon. A.R. 1307-08. The footage also captured the white truck driving away from the motel in the direction of the area where the truck would later be found, and the same African American male running from the area toward the motel shortly thereafter. A.R. 1307-08. In addition, the employee of the Avalon Motel who checked Petitioner

in was able to identify Petitioner at trial as the same individual captured in the security camera footage. A.R. 1288. Moreover, the motel employee testified as to additional security camera footage that captured what appeared to be the same individual—this time wearing different clothes—jumping from a window of the second floor room occupied by Petitioner as law enforcement knocked on his hotel room door. A.R. 1293.

Although the security camera footage captured a male fleeing from the hotel wearing different clothes from those observed in the security footage captured earlier in the day, any discrepancy was quickly clarified for the jury during the testimony of Amber Gray. A.R. 1293. Amber Gray testified that Petitioner was her boyfriend at the time and that he had called her on the morning of September 29, 2019 and asked that she meet him at her dad's residence with gasoline. A.R. 1349. Ms. Gray filled a coffee creamer bottle with gasoline from her dad's gas can, and waited for Petitioner to pick her up. A.R. 1250-51. Petitioner arrived driving a large, white pickup truck that she had never seen before. A.R. 1350-51. When Petitioner picked her up, he was wearing a black sweatshirt with a Puma brand logo on the front, but he later changed into different clothes that Ms. Gray had brought him. A.R. 1353, 1355. The two then drove to the Avalon Motel in Eighty-Four, Pennsylvania. A.R. 1351. Petitioner dropped Ms. Gray off at the motel, and then drove around the corner, only to return on foot a short time later. A.R. 1355. Ms. Gray was also presented with a still-frame photo of security camera footage from the Weston Exxon, and was able to identify Petitioner as the individual seen exiting Mr. Moses's truck wearing a black Puma sweatshirt. A.R. 1355.

Ms. Gray also described Petitioner's behavior at this time as suspicious, noting that after checking into their room, A.R. 1355-56, Petitioner refused her offer for sex, instead choosing to take a shower, A.R. 1356-57. She also observed that Petitioner threw the clothes that he had been

wearing when they met in the trash, and changed into the clothes she brought for him. A.R. 1356-57.

Sometime after they had been in their motel room, they heard a truck pull up and a knock at their motel room door. A.R. 1357-58. Knowing that the knock on the door was law enforcement, Petitioner initially attempted to hide under the bed in the room, only to then jump out of the window, as captured by the motel's security cameras. A.R. 1358; *see* A.R. 1293. Petitioner eventually returned, and was apprehended on October 1, 2019. A.R. 1360.

Once apprehended, law enforcement executed a search warrant for Petitioner's DNA for comparison during subsequent forensic testing of multiple items recovered from the crime scene back at 224 Lanham Lane. A.R. 981-82.

Back at the residence, officers were able to locate seven spent .380 caliber shell casings, A.R. 1040, 1057; two empty firearms boxes, one for a .380 caliber Smith & Wesson semi-automatic handgun, and the other for a .380 caliber Luger semi-automatic handgun, A.R. 1056-57; and swabs from two areas on the basement floor that contained biological fluid as well as a clump of hair consistent with that of Ms. Smith, A.R. 1062.

In addition, Ms. Smith had undergone various examinations while in the hospital. Meredith Linger, Forensic Nurse Examiner Coordinator for Ruby memorial Hospital testified as an expert in the field of sexual assault examinations, A.R. 914, 919, and offered her opinions as to Ms. Smith's injuries and their causes. Ms. Linger began her evaluation in the late evening hours of September 29, 2019, while Ms. Smith was still unable to communicate and reliant on a whiteboard in order to converse with others. A.R. 919-20. Ms. Linger described her initial impression of Ms. Smith's condition by stating that she had been "put through the ringer." A.R. 938. Ms. Linger explained that in addition to the significant injuries sustained as a result of the gunshot wounds,

Ms. Smith had shards of glass on her buttock, anus, lower back, hips, and vagina. A.R. 339. Ms. Linger also testified that she was able to identify the presence of bodily fluids on Ms. Smith's left thigh, A.R. 943-44, but explained that the ability to obtain any useful evidence from it may be severely impacted due to Ms. Smith being forced to wash after the assault, and also due to the fact that Ms. Smith required a catheter, which required the area be cleaned thoroughly prior to insertion in order to stave off the risk of infection, A.R. 925-26.

Furthermore, the jury heard from Hope Taylor, who testified as an expert witness in the field of surgical care and trauma and patient care. A.R. 1135. Ms. Taylor described Ms. Smith at the time of her treatment as being "critically ill," and that she had blood in the chest that required a chest tube to properly treat. A.R. 1136. Ms. Smith also described how close one of the bullets came to striking Ms. Smith's spinal cord and heart. A.R. 1143. She further explained that the bullet near the heart could not be removed, and will remain there for the rest of Ms. Smith's life due to the extremely high risk of complications given its location if there was an attempt to remove it. A.R. 1143.

The jury also heard from Phillip Cochran, a Forensic Analyst with the West Virginia State Police Crime Laboratory, who testified as an expert witness in the field of firearms and tool mark analysis. A.R. 1146. Mr. Cochran testified that all of the shell casings recovered from the scene were fired from the same .380 caliber, semi-automatic pistol. A.R. 1149-50. Mr. Cochran testified that while the Luger pistol was never recovered, he could only state with certainty that the bullets fired at the scene were not fired from the Smith & Wesson that was recovered. A.R. 1154. Additionally, he conducted subsequent testing of the bullet that was surgically removed from Ms. Smith's shoulder, and concluded that it had also been fired from the same firearm as the other bullets. A.R. 1158.

Although Mr. Cochran could not testify as to the specific firearm that fired the recovered bullets and shell casings, he was able to compile a list of firearms that matched the rifling patterns he observed on the items. A.R. 1157-58. One of the firearms included in that list was the Luger pistol that, although there was a box for it located at the scene, the firearm itself was never recovered. A.R. 1155-58.

Perhaps most importantly however, Joshua Hayes of the West Virginia State Police Crime Laboratory testified as an expert witness in the field of serology, biological processing, and DNA analysis that Petitioner's DNA was located at the crime scene. A.R. 1213-14. Mr. Hayes testified that Petitioner's DNA was located on a beer can recovered from the home, A.R. 1223, as well as Petitioner's seminal fluid on a paper towel found in the home, A.R. 1238. When questioned as to the reason why DNA may not be found on other items that appear to contain biological fluid, Mr. Hayes explained that washing items with soap and water could destroy any DNA evidence left behind. A.R. 1242.

After the State rested its case, Petitioner elected not to testify or call any witnesses in his defense. A.R. 1515-16.

**C. Jury instructions, verdict, and sentence**

Throughout the course of trial, Petitioner was presented with copies of the proposed jury instructions no less than three times, and each time he offered no objection. A.R. 1121, 1337, 1511. The court provided the following instruction, in pertinent part, with respect to the charge of First Degree Murder contained in Count 2 of the indictment:

> Before the Defendant, Brian E. Lyon, II, can be convicted of murder in the first degree, the State of West Virginia must overcome the presumption that the defendant, Brian E. Lyon, II, is innocent and prove to the satisfaction of the jury beyond a reasonable doubt, each of the following elements:
>
> 1. That the defendant, Brian E. Lyon, II,

2. In Marion County, West Virginia,

3. On or about the 29th day of September, 2019,

4. Did willfully, intentionally, deliberately and premeditatedly with malice and intent,

5. Kill Christopher W. Moses.

A.R. 1525. The court also provided the following instruction, in pertinent part, with respect to the charge of First Degree Robbery, as contained in Count 3 of the Indictment:

> [T]he State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:
>
> 1. The defendant, Brian E. Lyon, II,
>
> 2. On the 29th day of September, 2019,
>
> 3. In Marion County, West Virginia,
>
> 4. Did,
>
> 5. Commit a robbery,
>
> 6. Against Christopher W. Moses,
>
> 7. By stealing, taking, and carrying away the 2017 Dodge RAM truck, firearms, cellular phone, and or personal property belonging to Christopher W. Moses and /or Dawn Smith
>
> 8. By Killing Christopher W. Moses by shooting him with a handgun.

A.R. 1529-30. The court also instructed the jury that: "Malice is the intentional doing of a wrongful act without just cause or excuse, with intent to inflict an injury or under circumstances that the law will imply an evil intent." A.R. 1538. It explained that malice may be "either express or implied, and includes not only anger, hatred, and revenge, but also other unjustifiable motives." 1538. In addition, the court instructed:

> Malice is not confined to ill-will toward any one or more particular persons, but malice is every evil design in general; and by evil it is meant that the fact has been attended by such circumstances as are ordinarily symptoms of wicket, depraved, and malignant spirit, and carry with them the plain indications of a heart, regardless of social duty, fatally bent upon mischief.

A.R. 1539. Finally, the court offered the following instruction, in pertinent part, with respect to the charge of First Degree Sexual Assault, as charged in Count 7 of the indictment:

> [T]he State of West Virginia must overcome the presumption that the defendant is innocent and prove to the satisfaction of the jury, beyond a reasonable doubt, each of the following elements for each of these counts of the indictment, they are:
>
> 1. The defendant, Brian E. Lyon, II,
> 2. Being fourteen years old or more,
> 3. Between, on or about the 29th day of September, 2019,
> 4. In Marion County, West Virginia,
> 5. Did engage in sexual intercourse or sexual intrusion,
> 6. With Dawn Nicole Smith,
> 7. And Inflicted Serious Bodily Injury to Dawn Nicole Smith,
> 8. And/or employed a firearm in the commission of the act.

A.R. 1535-36.

After being instructed by the court as to the various offenses and hearing closing arguments of counsel for the State and Petitioner, the jury deliberated and returned verdicts of guilty on all eight counts charged in the indictment, including a recommendation of no mercy for Petitioner's conviction of First Degree Murder. A.R. 394-99, 402-05, 1607-08.

At sentencing, the court imposed the maximum statutory penalty for each offense, including a term of life imprisonment without the possibility of parole as recommended by the jury, and also a fifty-year determinate prison sentence for each of his two First Degree Robbery

convictions. A.R. 449-50. In addition, the court ordered each offense to run consecutively to one another. A.R. 450.

It is from this judgment that Petitioner now appeals.

## IV. SUMMARY OF ARGUMENT

Petitioner has failed to demonstrate the existence of reversible error related to any of the four assignments of error he advances in his instant appeal. As a preliminary note, each of Petitioner's four assignments of error fall short of the requirements set forth in Rule 10 of the West Virginia Rules of Appellate Procedure. The bulk of Petitioner's arguments in each section rest on assertions that are derived, not from the record, but from unsupported assumptions and self-serving conclusions. From a substantive standpoint, Petitioner's first assignment of error alleging the court's First Degree Sexual Assault instruction was deficient is without merit. The instruction in question was an accurate recitation of the law, and properly instructed the jury as to each element of the offense. Petitioner also failed to object to this instruction, despite being given multiple opportunities throughout the trial to do so. Thus, Petitioner can only demonstrate his entitlement to relief in relation to this assignment by demonstrating the alleged deficient instruction amounted to "plain error." *See* Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 495 S.E.2d 114 (1995). Petitioner's argument falls well short of establishing any error occurred, let alone one that is plain, and should therefore be rejected.

Petitioner next claims that the circuit court erred in failing to instruct the jury as to felony murder. Much like his other assignments of error, Petitioner's argument is one of convenience, and not one rooted in fact or legal authority. The premise of Petitioner's allegation that the State was permitted to present a theory of felony murder is completely unsupported by the record. Moreover, Petitioner did not lodge any objections relative to this assignment during his trial. Thus,

he may only demonstrate his entitlement to relief upon his ability to prove that such alleged error falls within the plain error doctrine; a burden he cannot carry. Furthermore, Petitioner's argument rests upon his conflation of what amounts to an "element" of an offense, with the "means" by which the State proves the element. Accordingly, such assignment is without merit, and should be rejected.

Petitioner's third assignment of error asserts that he is entitled to reversal due to the prosecution's use of the term "monster" to refer to Petitioner throughout the State's opening and closing statements. While the use of such epithets may be improper, they do not, in these circumstances, warrant reversal. The evidence presented at trial was overwhelming and compelling. As a result, Petitioner cannot demonstrate that the prosecution's conduct falls within the factors outlined in *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 496 (1995), that would warrant this Court granting him the relief he seeks. Again, Petitioner also must contend with the fact that he did not object, at any time, to the prosecution's use of this phrase. Petitioner cannot demonstrate that such conduct amounts to a plain error, and therefore is not entitled to any relief.

Finally, Petitioner alleges that insufficient evidence was presented at trial to sustain his convictions for First Degree Robbery, Burglary, and First Degree Murder. Petitioner's arguments rely on misplaced interpretations of relevant statutes, as well as his conflation of the elements of various offenses with the means used by the State to prove those elements. Accordingly, Petitioner has failed to demonstrate his entitlement to relief with respect to this assignment.

## V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(4), oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and

in the record, and the decisional process would not be significantly aided by oral argument. This case is suitable for resolution by memorandum decision.

## VI. ARGUMENT

### A. Standards of Review

"[T]he question of whether a jury was properly instructed is a question of law, and the review is *de novo.*" Syl. Pt. 6, in part, *State v. Biehl*, 224 W. Va. 584, 687 S.E.2d 367 (2009). "Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law." *Id.* at Syl. Pt. 7, in part. "A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law." *Id.* Moreover, "Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion." *Id.*

Petitioner's second assignment of error appears to be a mixed bag alleging improper jury instructions along with an allegation that Petitioner's conviction for First Degree Murder and First Degree Robbery violated double jeopardy principles. To this extent, "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." *State v. Pancake*, 170 W. Va. 690, 695, 296 S.E.2d 37, 42 (1982) (internal quotations omitted) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

When reviewing claims of improper remarks made by a prosecutor, this Court has held that "[a] judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. Pt. 5, *Sugg*, 193 W. Va. 388, 456 S.E.2d 469.

Finally, with respect to claims of insufficient evidence to support convictions, this Court has explained that 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. 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. Pt. 3, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

**B. The circuit court's instruction to the jury regarding the elements of First Degree Sexual Assault was a correct recitation of the law, and did not amount to any error, let alone one that is plain.**

Petitioner alleges in his first assignment of error that the circuit court's instruction to the jury pertaining to the offense of First Degree Sexual Assault was fatally defective. Pet'r's Br. at 20. While Petitioner correctly notes that "lack of consent" is "an element of every offense defined in [Article 8B, Chapter 61 of the West Virginia Code] that the sexual act was committed without the consent of the victim," Pet'r's Br. at 20-21, the premise of Petitioner's claim is misplaced.

First, Petitioner's argument does not meet the requirements as set forth in Rule 10(c) of the West Virginia Rules of Appellate Procedure. While Petitioner acknowledges that he failed to "preserve [the] issue for appellate review, [by] articulat[ing] it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect," Syl. Pt. 1, *State v. Sites*, 241 W. Va. 430, 825 S.E.2d 758 (2019), Petitioner has also failed to present legal authority to support the

arguments he now offers on appeal. Pet'r's Br. at 22. While Petitioner does cite to legal authority relevant to the plain error doctrine, Pet'r's. Br. at 22-23, he offered no legal support for his primary contention that the circuit court's instruction to the jury as to the offense of First Degree Sexual Assault was deficient in any way. Thus, Petitioner's first assignment of error should be disregarded without further consideration.

Should this Court reach the merits of Petitioner's argument, however, he has failed to demonstrate the existence of any error in the circuit court's instruction, let alone one that is plain. Under West Virginia Code § 61-8B-3(a)(1)(i)-(ii), First Degree Sexual Assault is committed when a "person engages in sexual intercourse or sexual intrusion with another person and, in so doing: inflicts serious bodily injury upon anyone; or employs a deadly weapon in the commission of the act." Although the phrase "lack of consent" does not appear in West Virginia Code § 61-8B-3, West Virginia Code § 61-8B-2 clearly provides that "lack of consent" is an element of First Degree Sexual Assault. However, the phrase "lack of consent" is a legal term that has a specific definition. Indeed, West Virginia Code § 61-8B-2 provides that "lack of consent" results from, *inter alia*, "[f]orcible compulsion." W. Va. Code § 61-8B-2(b)(1). The phrase "forcible compulsion" is defined in West Virginia Code § 61-8B-1 as "[p]hysical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or [t]hreat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or herself or another person or in fear that he or she or another person will be kidnapped." W. Va. Code § 61-8B-1(1)(a)-(b).

In the instant case, the jury was instructed that in order to find Petitioner guilty of First Degree Sexual Assault, it must find that: "(1) The defendant, Brian E. Lyon, II, (2) Being fourteen years old or more, (3) between, on or about the 29th day of September, 2019, (4) in Marion County,

West Virginia, (5) Did engage in sexual intercourse or sexual intrusion, (6) With Dawn Nicole Smith, (7) and inflicted serious bodily injury to Dawn Nicole Smith, (8) And/or employed a firearm in the commission of the act." A.R. 1535-36. The final two elements contained in the court's instructions clearly stated elements of "forcible compulsion," which is one of the means by which the State may properly prove the element of "lack of consent." The simple omission of the phrase "lack of consent" does not render the instruction fatally deficient, especially considering the fact that, had the phrase "lack of consent" been given to the jury, the circuit court would have had to further define the phrase, which would result in the jury receiving the same instruction once the phrase was further parsed out and explained.

Trial courts have broad discretion in formulating their charge to the jury, "so long as the charge accurately reflects the law." Syl. Pt. 7, *Beihl*, 224 W. Va. 584, 687 S.E.2d 367. Moreover, there has never been a requirement acknowledged by this Court that an instruction given to a jury be perfect in every respect. Indeed, an instruction may contain imperfect language that could be "improved upon," but nonetheless be legally appropriate so long as it fairly apprises the jury of the issues before them. *See State v. Wainwright*, 119 W. Va. 34, 192 S.E. 121, 124 (1937) ("It must be admitted that the grammatical structure of the instruction could be improved upon, but we fail to see how its substance could have prejudiced the defendant. . . . [T]he substance of [the] instruction . . . is fairly covered.")

In the instant case, even if "lack of consent" is not clearly specified in the instruction, the substance of the instruction fairly apprised the jury of the issues it was tasked with deciding. In addressing what constitutes "forcible compulsion," this Court looks to whether there was any evidence adduced at trial that indicated the victim was threatened or otherwise intimidated by the perpetrator, whether the perpetrator hit, or attempted to hit, the victim, or whether any of the

perpetrator's actions "constituted forcible compulsion to overcome such earnest resistance as might reasonably be expected under the circumstances." *State v. Hartshorn*, 175 W. Va. 274, 276-77, 332 S.E.2d 574, 577 (1985).

The jury in the instant case was instructed that, in order to find Petitioner guilty of First Degree Sexual Assault, it must conclude that the state proved beyond a reasonable doubt that Petitioner either "inflicted serious bodily injury," or "employed a firearm in the commission of the act." A.R. 1536. Such a requirement necessarily requires the conclusion that either of those acts "overcome such earnest resistance as might reasonably be expected under the circumstances." W. Va. Code § 61-8B-1(1)(a). Thus, while not specifically stated, West Virginia Code § 61-8B-3(a) contains language requiring proof of what amounts to "forcible compulsion," as such phrase is defined in West Virginia Code § 61-8B-1(1), which is also a means by which the Code prescribes the State may prove "lack of consent" is shown, W. Va. Code § 61-8B-2.

The other issue with which Petitioner must contend regarding this assignment of error is that he offered no objection to any instruction proposed by the circuit court at any point throughout the proceedings. Indeed, none of Petitioner's proposed jury instructions addressed First Degree Sexual Assault, A.R. 172-78, and the record contains no written objections filed by Petitioner with respect to any of the State's proposed instructions, as required by the circuit court's arraignment order, A.R. 20. The court provided the parties with copies of the proposed instructions at the end of the day on September 9, 2021, at which point Petitioner advised, "I will indicate that, for the most part, it looks as if the instructions are accurate statements of the law from both submissions from both sides in this case." A.R. 1121-22. Petitioner went on to state, "I suppose the only issues will be what, if any, lesser includeds are going to be submitted to the jury." A.R. 1122. Then, during a break in the testimony on September 13, 2021, the court inquired of Petitioner whether

he objected to any of the State's proffered instructions—which included the instruction ultimately given to the jury as to First Degree Sexual Assault—to which he again responded that he had no objections. A.R. 1337. Finally, at the close of the State's case-in-chief, Petitioner was asked a third time if he had reviewed the proposed jury charge and whether he had any objections, to which he responded with "No sir." A.R. 1511.

It is clear that Petitioner never objected to the instruction provided to the jury as to the charge of First Degree Sexual Assault. "One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court will likely result in the imposition of a procedural bar to an appeal of that issue." *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128. "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." Syl. Pt. 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996). "'The general rule is that a party may not assign as error the giving of an instruction unless he objects, stating distinctly the matters to which he objects and the grounds of his objection.' Syl. Pt. 3, *State v. Gangwer*, 169 W. Va. 177, 286 S.E.2d 389 (1982)." Syl. Pt. 1, *State v. Rogers* 215 W. Va. 499, 600 S.E.2d 211 (2004).

Because Petitioner never raised any objection to the instruction he now complains of for the first time on appeal, he has not properly preserved the issue for appellate review. Thus, he may only obtain relief if he can establish that the instruction amounted to plain error. The plain error doctrine is a doctrine that is to be "used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result." Syl. Pt. 4, in part, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988). "To trigger application of the 'plain error' doctrine, there must be (1)

an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. Citing the United States Supreme Court's decision in *United States v. Young*, 470 U.S. 1, 15 (1985), this Court has explained that "[h]istorically, the 'plain error' doctrine 'authorizes [an appellate court] to correct only "particularly egregious errors" . . . that "substantially affect the fairness, integrity, or public reputation of judicial proceedings."'" *Id.* at 18, 459 S.E.2d at 129. "Plain error warrants reversal 'solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Id.* (quoting *United States v. Frady*, 456 U.S. 152, 163 n. 14 (1982)). "'Plain' is synonymous with 'clear' or, equivalently, 'obvious.'" *United States v. Olano*, 507 U.S. 725, 734 (1993). A "court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law." *Id.*

Even if Petitioner is able to demonstrate that the court committed some error in the giving of the First Degree Sexual Assault instruction, and that such error was "plain" as defined in *Olano*, the Petitioner must still "proceed to [the] last step and a determination is made as to whether it affects substantial rights of the Defendant." *Miller*, at 18, 459 S.E.2d at 129. This means that "the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court." *Id.* Moreover, it is Petitioner's burden to "make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." *Olano*, 507 U.S. at 735.

When addressing challenges to jury instructions, this Court has held that "we generally look first to the record of the trial court proceedings to ensure that the claimed instructional error has been properly preserved for appellate review." *State v. Allen*, 208 W. Va. 144, 150-51, 539 S.E.2d 87, 93-94 (1999). "'As a general rule, . . . errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might

have been remedied in the trial court if objected to there.' Syllabus point 17, in part, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974)." *Id.* at Syl. Pt. 1.

Here, Petitioner fails to meet any of the elements necessary to prove the existence of plain error. As noted above, the instructions provided to the jury, while not using the words "lack of consent," clearly instructed the jury that in order to find Petitioner guilty of First Degree Sexual Assault, they must conclude that the State met its burden of proof by demonstrating that the sexual assault was predicated upon the infliction of serious bodily injury, or by the brandishing of a firearm. Both of these elements fit squarely within the definition of "forcible compulsion" as defined by West Virginia Code § 61-8B-1, and "forcible compulsion" is one of the ways in which the State may properly prove "lack of consent" as defined in West Virginia Code § 61-8B-2.

But assuming that there was an error, the record contains nothing that would lend itself to the conclusion that it was either "plain" or prejudiced the Petitioner in any way whatsoever. Petitioner seems to quibble over a technical application of various statutes, while glossing over the fact that the evidence adduced at trial clearly demonstrated that after murdering Mr. Moses with Mr. Moses's own firearm, he then woke Ms. Smith up at gunpoint, robbed her of money and debit cards, forced her at gunpoint down into the garage where she was forced to remove the wallet from the lifeless body of her boyfriend, hand it to Petitioner, only to then be marched down into the basement where she was sexually assaulted, all the while having a firearm pointed at her, and at least throughout a portion of those events, was fully aware that this same individual had just murdered Mr. Moses. No reasonable argument can be made that advising the jury explicitly that, in order for Petitioner be found guilty of First Degree Sexual Assault, the jury must find that Petitioner did so "without consent." Such conclusion is absurd in light of the evidence contained in the record.

Finally, Petitioner's argument apparently presumes the existence of prejudice if his reliance on the plain error doctrine is accepted by this Court. Petitioner offers nothing in his argument section as to how this alleged error was in any way prejudicial. Rather, he merely states that Petitioner "certainly would not knowingly waive his right to proper jury instruction with all of the essential elements of the offense." Pet'r's Br. at 23. While Petitioner did receive a proper jury instruction in the first instance, his argument is deficient as he failed to meet his burden of making—or even attempting to make— "a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." *Olano*, 507 U.S. at 725.

For these reasons, Petitioner's conviction of First Degree Sexual Assault should be affirmed.

**C. The State never presented a theory of Felony Murder related to the charge of First Degree Murder charged in Count 2 of the Indictment, and, therefore, Petitioner's second assignment of error is completely without merit and should be disregarded.**

Petitioner alleges in his second assignment of error that it was improperly permitted to present a theory of Felony Murder, and, therefore, the court improperly allowed Petitioner to be convicted of both Felony Murder and First Degree Robbery in violation of the Double Jeopardy Clause of the United States and West Virginia Constitutions. Pet'r's Br. at 24. This error is completely unsupported by the record, or any legal authority.

Count 2 of the indictment charges Petitioner with "Murder in the First Degree," and reads as follows:

> The Grand Jurors of the State of West Virginia, in and for the citizens of Marion County, upon their oaths, charge that, on or about the 29th day of September, 2019, in the County of Marion, State of West Virginia, BRIAN E. LYON, II, committed the offense of MURDER IN THE FIRST DEGREE, by unlawfully feloniously, willfully, maliciously, intentionally, deliberately and premeditatedly slaying, killing and murdering, Christopher W. Moses, in violation of W. Va. Code §§ 61-2-1 and 61-2-2, against the peace and dignity of the State.

A.R. 2. Count 3 of the indictment charges Petitioner with "Robbery in the First Degree," and reads as follows:

> The Grand Jurors for the State of West Virginia, in and for the citizens of Marion County, upon their oaths, charge that BRIAN E. LYON, II, on or about the 29th day of September, 2019, in the county of Marion, State of West Virginia, Committed the offense of ROBBERY IN THE FIRST DEGREE (WITH A FIREARM), by knowingly, intentionally, and feloniously committing, or attempting to commit, a robbery by committing violence to the person or by the threat of deadly force by presenting a firearm or other deadly weapon, to-wit: by stealing, taking and carrying away the 2016 Dodge Ram truck, firearms, cellular phone and/or other personal property belonging to Christopher W. Moses, by Killing Christopher W. Moses by shooting him with a handgun, in violation of W. Va. Code §61-2-12(a), against the peace and dignity of the State.

A.R. 2.

At its core, Petitioner's argument amounts to little more than a false cause fallacy. Petitioner argues that, because Count 3 relies upon the murder of Mr. Moses in support of the charge of First Degree Robbery, that the Murder charge must rely upon the robbery charge in support thereof. There is simply no support for this notion in the record. Indeed, the phrase "felony murder" is not so much as uttered a single time throughout the entire 1,661-page appendix record.

Despite this lack of support from the record, Petitioner's main contention is that his convictions for both First Degree Murder as charged in Count 2, and First Degree Robbery as charged in Count 3, amount to a Double Jeopardy violation because a theory of felony murder requires the murder charge be merged with the underlying felony upon which it is based. Initially, Petitioner's assignment of error falls short of the threshold requirements set forth in Rule 10(c) of the West Virginia Rules of Criminal Procedure. While Petitioner attempts to assert that the State's reference to Mr. Moses's murder as proof of one of the elements in his charge of First Degree Robbery, he has offered absolutely no legal support for his contention that such reference creates a Double Jeopardy issue. As discussed below, such argument is a conflation of the relevant rule,

rendering the premise of his argument wholly unsupported by any legal authority. Thus, Petitioner's second assignment of error is inadequately briefed, and should be disregarded pursuant to Rule 10 of the West Virginia rules of Appellate Procedure.

As noted above, Petitioner's argument in this assignment amounts to nothing more than a conflation of the actual rule. In *State ex rel. Hall v. Strickler*, this Court stated that "Robbery is a lesser included offense of felony-murder *if a conviction for the greater offense (felony murder) could not be had without conviction for the lesser crime (robbery).*" 168 W. Va. 496, 498, 285 S.E.2d 143, 144 (1981) (emphasis added). Here, Petitioner attempts to argue that the stream flows the other direction, arguing that the State's reliance on the murder charge in proving the robbery charge automatically creates a felony murder situation. This rationale is substantially flawed for a number of reasons.

First, "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

Petitioner's argument is similar to the one advanced by the petitioner in *State v. Pancake*, 170 W. Va. 690, 694, 296 S.E.2d 37, 41 (1982), where the petitioner argued he was improperly subjected to multiple punishments for the same offense when he received separate punishments for his conviction of burglary and rape, when the prosecution alleged in support of the charge of burglary that the crime of rape was used to satisfy the "intent to commit a crime" element of burglary. This Court found that the convictions met the *Blockburger* criteria and did not violate double jeopardy protections because the crime of rape required different proof than the crime of burglary. *Id.* at 697, 296 S.E.2d at 44. Moreover, the court explicitly held that, "[a]lthough under

double jeopardy principles the proper procedure is a trial of all offenses arising out of the same 'criminal transaction' jointly, separate punishments may be imposed for separate offenses arising out of a single criminal transaction." *Id.* at Syl. Pt. 5 (citation and internal quotation marks omitted).

Petitioner's argument also fails because felony murder does not require the state prove a specific intent to kill or malice, and instead requires the State to prove "(1) the commission of, or attempt to commit, one or more of the enumerated felonies; (2) the defendant's participation in such commission or attempt; and (3) the death of the victim as a result of injuries received during the course of such commission or attempt." *State v. Williams*, 172 W. Va. 295, 311, 305 S.E.2d 251, 267 (1983).

At no point did the state so much as attempt to offer the commission of the robbery as proof of any element of the murder as charged in Count 2. And even though the State referenced the shooting and killing of Mr. Moses in charging the offense of first degree murder, there is no basis in law for Petitioner to use that in order to bootstrap the offense to the murder charge as a means of reducing his sentence. In order to find the defendant guilty of First Degree Murder in Count 2 of the indictment, the jury was clearly instructed that it must find beyond a reasonable doubt that the murder was committed with malice, premeditation, and the specific intent to kill. A.R. 1525-26. Furthermore, murder is not an element of First Degree Robbery; "(1) Committing violence to the person, . . . or (2) us[ing] the threat of deadly force by the presenting of a firearm or other deadly weapon" is. W. Va. Code § 61-2-12(a). Thus, in the context of the allegation at hand, the offering of the murder of Mr. Moses is merely a means to prove the "act of violence" or "presentation of a firearm" element necessary to obtain a conviction for First Degree Robbery. The jury was not required to believe beyond a reasonable doubt that the Petitioner murdered Mr.

Moses in order to convict him of First Degree Robbery because murder is not an element. Rather, the jury could have simply concluded that Petitioner presented a firearm, or shot Mr. Moses who died as the result of some other independent circumstance and still found Petitioner guilty of First Degree Robbery.

Petitioner has completely failed to demonstrate the existence of reversible error with respect to this assignment, and his request for relief should be refused.

**D. The prosecutor's remarks during opening and closing arguments referring to Petitioner as "Evil" and a "Monster" did not rise to the level so as to violate the precedent in *Sugg*, and, therefore, do not warrant reversal.**

Petitioner's third assignment of error alleges that the prosecution's use of the words "Monster" and "Evil" to refer to petitioner at various times throughout his opening and closing remarks amount to prejudicial error pursuant to this Court's decision in *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995). Pet'r's Br. at 29-31. Petitioner also alleges that there were religious undertones to the prosecutions use of such terms, resulting in an unfair injection of religious themes into the trial. Pet'r's Br. at 30-31. While Petitioner's statement that the prosecutor used the term "Monster" to refer to petitioner twenty-two times throughout the course of its opening statement and closing and rebuttal arguments is true, this assignment also falls short of the requirements set forth in Rule 10 of the West Virginia Rules of Appellate Procedure, and should be disregarded. Moreover, the use of such phrase or terms do not violate the *Sugg* standard. Finally, because Petitioner failed to lodge *any* objections to the prosecution's use of such terms at any point throughout the trial, Petitioner may only obtain relief upon his ability to meet the high threshold of showing such conduct amounted to plain error. Petitioner cannot meet this standard, and his conviction should be affirmed.

Petitioner's claims in this assignment are also deficient under Rule 10(c) of the West Virginia Rules of Criminal Procedure. Petitioner merely asserts in his brief that the Prosecution used these phrases with the intent to inject religion into his trial. *See* Pet'r's Br. at 30 (claiming that the prosecution's use of such phrases were part of their advancement of their "pseudo-religious" theme). Petitioner also refers to these phrases as "inappropriate . . . religious imagery," without specifying how, either explicitly or when considered in context, such terms had any religious significance at all. To be sure, the terms "monster," "evil," and "miracle" have definitions completely apart from any religious connotation. Petitioner's argument to the contrary has no support in law or from the record. Petitioner's argument, therefore, amounts to nothing more than an assertion completely detached from any fact derived from the record. As a result, any argument with respect to this issue should be completely disregarded. *See P.A. v. T.A.*, 238 W. Va. 216, 229, 793 S.E.2d 866, 879 (2016) (declining to inadequately briefed issues as "[t]he parties [sic] arguments on this issue are comprised primarily of conclusory statements."

Before addressing the plain error analysis, this Court has set forth a clear standard for determining whether alleged prosecutorial misconduct warrants reversal. This Court has explained:

> Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pt. 6, *Sugg*, 193 W.Va. 388, 456 S.E.2d 469. This Court further explained that "[a] judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." *Id.* at 405, 456

S.E.2d at 486. It "is not enough the prosecutor's remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation marks and citation omitted). "The test is whether the remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Sugg*, 193 W. Va. at 405, 458 S.E.2d at 486 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *see also Darden*, 477 U.S. at 181 n.13 (recognizing that, although every court deciding a particular case may condemn remarks made by the prosecution during trial, the question hinges on whether the "*fairness*" of the trial was impacted, and if the fairness is not impacted by the alleged misconduct, there is no basis for relief as the core of the rule is to protect ones right to a fundamentally fair trial).

Moreover, with regard to Petitioner's assertion that the prosecution improperly inserted religion into the trial, this Court concluded that statements made to the jury claiming that the victim was afraid to go home as a result of the crimes to which she fell victim and were before the jury did not amount to reversible error as the statement was supported by the evidence adduced at trial. *State v. Rexrode*, 243 W. Va. 302, 315, 844 S.E.2d 73, 86 (2020). In *Rexrode*, this Court noted that the victim testified at trial that she had been "scared to death this whole time because of the mess I've made. It's not only ruined my life, I haven't been home. I'm sorry." *Id.* In light of this testimony, this Court concluding that the victim had "expressly stated her fear of returning home," and as a result, the State's reference to such fear during closing "was neither misleading nor unfairly prejudicial to Petitioner." *Id.*

Petitioner's assertion that the prosecution improperly inserted religious tenants into the trial is without merit. The notion that referring to someone as "evil" or a "monster," or the fact that she lived was a "miracle" does not lead to such conclusion, especially in light of the testimony offered at trial. Ms. Smith explicitly testify that as she was lying on the ground of the bathroom after

having been shot in the back, she was "praying to God" that she would survive. A.R. 1489. The reference that Ms. Smith's ability to survive her attack was a "miracle" is equally as dubious in light of the testimony from multiple witnesses who indicated that they believed she would die as a result of her injuries. *See* A.R. 858 (EMS worker describing certain medical procedures performed on Ms. Smith at the scene may "very well have saved her life"); A.R. 1026 (Detective Pigott explaining that he "thought she was going to die" when referring to Ms. Smith upon noticing the extent of her injuries); A.R. 1136 (Amanda Palmer testifying that Ms. Smith was a "multisystem trauma patient" with a gunshot wound to the face, back, and lung as well as "a lot of complications" that resulted therefrom); A.R. 1138-39 (Amanda Palmer testifying that Ms. Smith was "critically ill" and describing the invasive procedures that were necessary in order to save Ms. Smith's life); A.R. 1143 (testimony regarding how close the first bullet was to striking Ms. Smith's spinal cord and her heart). The prosecution's reference to Ms. Smith's survival as a "miracle" or that she was pleading to God during the events is a fair assessment based upon the evidence introduced at trial. Under the *Sugg* standard, in particular, it did not mislead the jury, misstate evidence, or amount to any other impermissible act on the prosecution's part.

Regarding the prosecution's use of the word "Monster" to describe Petitioner, while it is true that a prosecutor walks a fine line anytime epithets are used to describe a defendant, the present case does not present an example of the type of conduct that rises to such a level that it impacted the fairness of Petitioner's trial, and, therefore, does not warrant a reversal.

The evidence adduced at trial was undeniably horrific. Not only did the State prove that Petitioner took advantage of a complete stranger in need of a ride home in order to score a quick payday so he could "get out of town," A.R. 1142-47, the means by which he chose to secure the money exhibited Petitioner's true depravity. Petitioner shot Mr. Moses four times with Mr.

Moses's own firearm, resulting in his death, A.R. 1415, 1478; robbed Ms. Smith at gunpoint, 1575-76; forced Ms. Smith down stairs were he admitted to her that he had just murdered her boyfriend, A.R. 1478; forced her to remove Mr. Moses's wallet from his deceased body, 1479-80; forced her into the basement where he punched her in the face and raped her, A.R. 1483-85; marched her back up the stairs to force her to wash off evidence of his actions, A.R. 1485; only to then shoot Ms. Smith in the back, and again in the face and leave her for dead, all the while Ms. Smith's eight-year-old daughter was in an adjacent room, A.R. 1486-89.

Although this Court does not appear to have addressed this specific issue in the past, other jurisdictions provide helpful guidance as to how this Court should address this issue. The California Supreme Court concluded that the prosecution's reference to the defendant as "'the monster that is sitting before us,'" did not amount to any prejudice in light of the record as a whole. *People v. Sanders*, 905 P.2d 420, 448 (Cal. 1995). The California Supreme Court explained that:

> A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury.

*Id.* (citation omitted). With this in mind, the California Supreme Court concluded that "even assuming that the reference to a defendant as a 'monster' 'exceeded the bounds of "vigorous yet fair argument,"'" no prejudice resulted therefrom. *Id.* Similarly, in *Com v. Bois*, 62 N.E.3d 513, 531-32 (Mass. Sup. Ct. 2016), the Massachusetts Supreme Court concluded that a prosecutor's tearful presentation and numerous references to the defendant as a "monster" during closing arguments, while improper, did not constitute prejudicial error.

The Seventh Circuit Court of Appeals concluded that references to a petitioner during the government's closing argument as a "'sub-human man' with a 'rancid, rotten mind,' a 'true monster,'" did not constitute reversible error. *United States v. Cook*, 432 F.2d 1093 (7th Cir.

1970). The Court recognized that a "district attorney is quite as free to comment legitimately and speak fully although harshly, upon the action and conduct of the accused, if the evidence supports his comments." *Id.* The Court also explained that "[e]ven though the prosecuting attorney's remarks out of context might seem on the intemperate side, we are not dealing here with an income tax evasion case, nor a mail fraud case." *Id.* The Court noted that the case involved the petitioner's "plot to kill his wife by having bomb explode on an airplane" in which she was travelling. *Id.*

Similar to the facts in the present case, the District of Columbia Circuit Court of Appeals concluded that the prosecution's use of the term "monster" to describe the petitioner during closing arguments did not warrant a mistrial, as "the context in which the comment was made [ ] does not appear to have been improper." *United States v. James*, 466 F.2d 475, 477 (D.C. Cir. 1972). The Court also noted that "[i]n any case, trial counsel made no objection at the time and it was clearly not so inflammatory as to amount to plain error under Fed. R. Crim P. 52(b)." *Id.*

Taking into account the evidence that was introduced at trial, and applying the facts of the present case to the *Sugg* factors, Petitioner cannot demonstrate that he has met the threshold that warrants relief due to prosecutorial misconduct. Indeed, while the use of the epithets may have been improper and not isolated, that alone is not sufficient to warrant reversal under *Sugg*. Petitioner has not offered any evidence for how the prosecution's use of the term "monster" during closing argument had any tendency to mislead the jury or to prejudice him. *See* Syl. Pt. 6, *Sugg* 193 W. Va. 388, 456 S.E.2d 496. In a similar vein, removing the remarks from the record does nothing to impact the strength of the competent proof introduced at trial in support of Petitioner's guilt. *See id.* As noted above, the State presented a plethora of evidence, including eyewitness testimony, DNA evidence, security camera footage, and various other forms of physical and testimonial evidence that clearly and beyond a reasonable doubt proved Petitioner was guilty of

the offenses. Simply calling Petitioner a "monster" during opening and closing argument has nothing to do with the impact or the compelling nature of the evidence presented to the jury. Moreover, there can be no reasonable dispute that the use of such term to refer to Petitioner had any tendency to move the jury's decision in any way. Calling names, at least in this circumstance, and even if ill-advised, cannot overcome the evidence.

Finally, there is no evidence offered by Petitioner that would indicate that the use of the term to refer to Petitioner was deliberately placed before the jury to divert its attention to extraneous matters. *See id.* Indeed, the likely basis of the prosecution's motivation for using such a phrase was directly derived from the heinous conduct of Petitioner as clearly demonstrated by the evidence.

Any allegation by petitioner that the use of the term "evil" was inappropriate is confounding. As this Court has held, "malice," a material element of first degree murder, is defined as:

> Every evil design in general, and by that is meant that the fact has been attended by such circumstances as are ordinary symptoms of a wicket, depraved and malignant spirit and carry with them the plain indications of a heart, regardless of social duty and fatally bent upon mischief.

*State v. Mullins*, 193 W. Va. 315, 322, 456 S.E.2d 43, 49 (1995). Thus, if the definition of malice involves an "evil design," the prosecution cannot err by invoking this Court's own precedent in using the word "evil" to argue Petitioner acted with malice, especially when the term "evil" is explicitly used by this Court to define "malice." Such a conclusion strains credulity and is completely unsupported by any legal authority or the facts from the record.

More generally, despite Petitioner's constant refrain that such terms had some form of religious significance to them, such is completely refuted by a careful reading of the record. To be sure, the prosecution's remarks during its opening statement were that "our evidence will prove

to you beyond a reasonable doubt that evil exists in this world. It truly does. Monsters are real. They aren't just in books or movies or on Netflix." A.R. 805. The use of these terms are clearly harkening to the fictional realm of monsters and evil, and not to some unstated or assumed religious tenant. Throughout Petitioner's brief, he continuously cites to the prosecution's arguments offered at trial, and molds them into religious themes in support of his argument, even though such arguments are rooted only in Petitioner's imagination, and not in the facts elicited at trial. Petitioner goes so far as to allege that some of the prosecutor's arguments were paraphrased Bible passages, *See* Pet'r's Br. at 34 (claiming the prosecution's argument was similar to Matthew 5:16 of the King James Version). Indeed, the prosecution did nothing, either directly or indirectly, to inject religion into Petitioner's trial. Petitioner's argument rests on his own belief bias that certain terms were used for an improper purpose, based on nothing more than his own self-serving interpretations that belie the record.

Much like with his other assignments of error presently before this Court, Petitioner failed to offer a single objection at any point to the State's use of the term throughout the trial. While Petitioner points to the fact that the prosecution used the term on twenty-two occasions throughout its opening and closing arguments, Pet'r's Br. at 37, there remains the inescapable fact that had Petitioner objected during the first few times the phrase was used, his current assignment could reasonably be construed as frivolous. Instead, Petitioner allowed the prosecution to continue to go back to that proverbial well time and time again without objection, obviously failing to notice what he now alleges—for the first time on appeal—to be the highly prejudicial nature of the terms.

Because of the lack of any objections, Petitioner must again contend with the high bar of proving that the prosecution's use of these terms amounted to plain error. Even assuming, *arguendo*, that the prosecution's use of the terms amounts to errors that are plain, there is

absolutely no support for the conclusion that they affected Petitioner's "substantial rights," or "seriously affect[ed] the fairness, integrity, or public reputation of the judicial proceedings." *See* Syl. Pt. 7, in part, *Miller*, 194 W. Va. 3, 495 S.E.2d 114 (1995).

Regardless of whether the prosecution's use of the terms "monster" and "evil" to refer to Petitioner were improper or not, to conclude that such words during an opening and closing statement—a portion of the trial in which the jury was explicitly instructed was not to be considered as evidence, A.R. 797—had any impact on the jury's verdict would completely disregard the competent and compelling proof presented at trial in support of Petitioner's guilt. As a result, Petitioner cannot demonstrate that the conduct complained of amounted to reversible error due to prosecutorial misconduct, nor can he demonstrate that his assertions meet the threshold for this Court to find that plain error exists. As a result, Petitioner's convictions should be affirmed.

**E. The state presented substantial and compelling evidence in support of the jury's verdict for each count of the indictment.**

Petitioner asserts in his fourth and final assignment of error that there was insufficient evidence to support his convictions of First Degree Robbery as charged in Count 3, Burglary as charged in Count 1, and First Degree Murder as charged in Count 2. Pet'r's Br. at 40. Each of Petitioner's arguments are without merit.

When reviewing a sufficiency of the evidence challenge, this Court employs the following standard of review:

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

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

"[A] defendant faces an 'uphill climb' when he challenges the sufficiency of the evidence[.]" *State v. Scott*, 206 W. Va. 158, 167, 522 S.E.2d 626, 635 (1999) (quoting *State v. LaRock*, 196 W. Va. 294, 303, 470 S.E.2d 613, 622 (1996)). This Court has "adopted, both generally and in cases with circumstantial evidence, the standard set forth by the United States Supreme Court in *Jackson v. Virginia*, 43 U.S. 307 (1979)." *LaRock*, 196 W. Va. at 303, 470 S.E.2d at 622 (parallel citations omitted). "This standard is a strict one; a defendant must meet a heavy burden to gain reversal because a jury verdict will not be overturned lightly." *Guthrie*, 194 W. Va. at 667-68, 461 S.E.2d at 173-74. A petitioner "must prove there is *no* evidence from which the jury could find guilt beyond a reasonable doubt." *State v. Zuccaro*, 239 W. Va. 128, 145, 799 S.E.2d 559, 576 (2017) (emphasis in original). "When considering sufficiency-of-evidence claims, this Court's review is highly deferential to the jury's verdict." *State v. Thompson*, 240 W. Va. 406, 414, 813 S.E.2d 59, 67 (2018). "[I]t is for the jury to determine the weight to be attached to the reasonable inferences that can be drawn from all the facts and circumstances in evidence, and their verdict will not be set aside by the appellate court unless plainly wrong." Syl. Pt. 9, *State v. Hickman*, 175 W. Va. 709, 338 S.E.2d 188 (1985) (internal quotations and citations omitted). "[C]ircumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned[.]" *Guthrie*, 194 W. Va. at 669, 461 S.E.2d at 175.

Moreover, Petitioner's fourth assignment of error presents perhaps the most obvious violation of Rule 10(c) of the West Virginia Rules of Appellate Procedure. First, Petitioner offers no legal support for his argument in support of his claim that the State failed to present sufficient evidence to support his conviction of First Degree Robbery. In fact, Petitioner offers no argument as to the evidence at all, and instead focuses on the phrasing of the indictment and that it "presupposes intent." Pet'r's Br. at 40. Petitioner's argument offers nothing as to how the state

failed to prove intent, or any other deficiency with respect to the evidence presented. Similarly, as it relates to Petitioner's burglary conviction, he cites to only one case, which he incorrectly interprets to say that authorized entry, when not coupled with fraud or threat of force, precludes one from being found guilty of the offense. Pet'r's. Br. at 41-42. Finally, Petitioner's argument as to the sufficiency of the evidence to support his First Degree Murder conviction contains nothing but self-serving, conclusory statements, and contains no citation to any legal authority in support of his specific claims. Thus, each of these claims should be disregarded as inadequately briefed. Should this court disagree, however, Petitioner's fourth assignment of error should be rejected for he has failed to demonstrate the existence of reversible error.

**1. First Degree Robbery**

Petitioner asserts that the State's reliance on Mr. Moses's murder in charging the offense of First Degree Robbery in Count 2 of the indictment "presupposes intent, in that it assumes that the Petitioner chose to shoot and kill Mr. Moses specifically for the purpose of taking his personal property." Pet'r's Br. at 40. At first blush, Petitioner's argument appears to be based upon his disagreement with the indictment, and not about the sufficiency of the evidence presented at trial in support of the charge. Nevertheless, Petitioner's argument conflates an element the State must prove to obtain a conviction for First Degree Robbery with the means by which such element is proven. Robbery does not require that one shoot and kill the victim. "W. Va. Code 61-2-12 does not define 'robbery.' Rather, the statute merely differentiates between the two classes of robbery and prescribes the penalty for each class." *England*, 180 W. Va. at 347, 376 S.E.2d at 553. "At common law, the definition of robbery was (1) the unlawful taking and carrying away, (2) of money or goods, (3) from the person of another or in his presence, (4) by force or putting him in fear, (5) with the intent to steal the money or goods." Syl. Pt. 1, *State v. Harless*, 168 W. Va. 707,

285 S.E.2d 461 (1981). Petitioner was charged with First Degree Robbery, which requires proof that the robbery was committed by "committing violence to the person" or by the use of "the threat of deadly force by the presenting of a firearm or other deadly weapon." W. Va. Code § 61-2-12(a). Thus, whether Petitioner intended to kill Mr. Moses when he first pointed the firearm at him is completely irrelevant to the charge of First Degree Robbery. What is relevant is whether the jury, having heard evidence that Petitioner shot and killed Mr. Moses, satisfied that element of "committing violence to the person" or amounted to a "threat of deadly force by the presenting of a firearm." Clearly, if the jury believed that Petitioner presented a firearm to shoot Mr. Moses, it may find Petitioner guilty of First Degree Murder regardless of whether Petitioner shot a single round, so long as it believed that he presented the firearm with the intent to steal Mr. Moses's money or goods. Moreover, Dawn Smith's trial testimony clearly indicates that Petitioner's primary motivation for what he did on September 29, 2019, was to obtain money to apparently "leave town." A.R. 1475-76. Thus, there was ample evidence that would allow a reasonable jury to convict Petitioner of First Degree Murder, regardless of whether Mr. Moses was intentionally shot and killed for any particular reason. Therefore, Petitioner has failed to meet his burden of proof and his argument should be rejected.

**2. Burglary**

Petitioner next contends that his conviction for Burglary as charged in Count 1 was unsupported by sufficient evidence because Petitioner was an "invited guest" and that there was "no tangible evidence" that Petitioner intended to commit a crime inside the home. Pet'r's Br. at 41. Again, Petitioner's allegation is completely misplaced.

"Unauthorized entry is not a required element of the crime of . . . burglary . . . ." Syl. Pt. 4, *State v. Slater*, 222 W. Va. 499, 665 S.E.2d 674 (2008). Any contention made by Petitioner that

he was "invited" into Mr. Moses home is completely irrelevant to whether he is guilty of the offense of Burglary.

Moreover, Petitioner's contention that there was "no tangible evidence" that Petitioner intended to commit a crime inside the home is belied by the record. Pet'r's Br. at 41. As discussed in detail above, Petitioner's conduct as demonstrated by the evidence at trial is not of the type that happens on a whim without some significant reflection. Indeed, the idea that "intent" may—and often times *is*—proven based upon inferences derived from the evidence is not a novel concept. This Court has recognized that "[t]he . . . usual situation is where intention must be inferred from a person's conduct." *State v. Bull*, 204 W. Va. 255, 266, 204 W. Va. 255, 188 (1998) (citation and internal quotation marks omitted). "The link between the conduct and the resulting harm is not only a causative inquiry, but includes another factor by which the conduct is judged—the seriousness of harm. Conduct which carries a high probability that serious harm will result is high on the scale of intentional conduct." *Id.*

The evidence presented at trial gave the jury substantial evidence with which it could make a reasonable inference that Petitioner intended to commit a crime at the time he entered Mr. Moses's home. Petitioner's apparent contention that his subjective intent may only be shown by "tangible evidence" has never been recognized as the standard for proving intent. Indeed, this Court, as well as courts throughout the country, has explicitly rejected such notions as impractical, as proving intent "must in most cases, be inferred from the facts." *State v. Walker*, 109 W. Va. 351, 154 S.E. 866, 867 (1930).

Petitioner's argument lacks merit and should be rejected.

### 3. First Degree Murder

Finally, Petitioner alleges that the State presented insufficient evidence to support his conviction of First Degree Murder. Pet'r's Br. at 42-43. Petitioner points to trial counsel's argument that no eyewitness testimony was presented directly linking Petitioner to Mr. Moses's murder, that the firearm used in the murder and attempted murder was never recovered, and that there was generally no proof that Petitioner intended to kill Mr. Moses. Pet'r's Br. at 42. Petitioner even asserts that there was "no definitive forensic evidence linking the Petitioner to the shooting of Mr. Moses or Ms. Smith." Pet'r's Br. at 43.

Petitioner's argument, in addition to being completely unsupported by the record, appears to argue that the true burden of proof applicable in the instant case is proof beyond *all* doubt. Contrary to Petitioner's claims in his brief, there was absolutely definitive forensic evidence linking Petitioner to the murder of Mr. Moses and Ms. Smith. Petitioner's DNA was found on a beer can located within Mr. Moses's home, A.R. 1223, as well as in seminal fluid that was found on a paper towel located within the home, A.R. 1238. Ms. Smith testified that after the sexual assault in the basement of the home, he ejaculated on her leg. A.R. 1485. Medical experts and law enforcement alike testified to finding evidence of biological fluids, both on Ms. Smith's leg, 943-44, as well as on the floor in the basement where she stated the assault occurred, A.R. 1062.

In addition, Ms. Smith unequivocally identified Petitioner during her trial testimony as her assailant, A.R. 1470, 1495. Also, contrary to Petitioner's assertions in his brief, no one testified that Ms. Smith found Petitioner "sleeping" on the couch. In fact, Ms. Smith only testified that she found Petitioner "laying on the couch" covered "head to toe" with a blanket. A.R. 1469. Any assertion that Petitioner was "sleeping" is bald speculation and completely unsupported by the record.

Also, Ms. Smith testified numerous times throughout her testimony that she, her daughter, Mr. Moses, and Petitioner were the only people that were at the house on the morning in question. A.R. 1471-70, 1481, 1486. Moreover, perhaps the most damning indication of Petitioner's intentional, premeditated, and malicious killing of Mr. Moses is the fact that his DNA was located within the home on a beer can and in seminal fluid, despite Petitioner having no apparent connection whatsoever to Mr. Moses or the home, A.R. 1223, 1238, as well as Ms. Smith's testimony that Petitioner explicitly told her that he had killed Mr. Moses before forcing her to retrieve the wallet from Mr. Moses's body. A.R. 1478-80. Simply stated, the notion that some other person could have been responsible for the criminal acts for which Petitioner was convicted is completely unsupported by any fact in the record.

Regarding intent, Petitioner's argument is equally as flawed. As this Court explained:

> In the absence of statements by the accused which indicate the killing was by prior calculation and design, a jury must consider the circumstances in which the killing occurred to determine whether it fits into the first degree category. Relevant factors include the relationship of the accused and victim and its condition at the time of the homicide; whether plan or preparation existed either in terms of the type of weapon utilized at the place where the killing occurred; and the presence of a reason or motive to deliberately take life. No one factor is controlling. Any one or all taken together may indicate actual reflection on the decision to kill. This is what our statute means by "willful, deliberate and premeditated killing."

*Guthrie*, 194 W. Va. at 675 n.23, 461 S.E.2d at 181 n.23.

The prosecution presented ample evidence to prove beyond a reasonable doubt that Petitioner willfully, intentionally, premeditatedly, and maliciously murdered Mr. Moses by shooting him four times. Forensic evidence directly placed petitioner at Mr. Moses's home, and also revealed that Petitioner actively searched for, located, and used a firearm that was in Mr. Moses's home. A.R. 1056-57. In addition, security camera footage and cell phone tracking places Petitioner in the area of not only where the murder occurred, but also illustrated chain of events

that lead to Mr. Moses's stolen truck being located burning along the road in Pennsylvania only a short distance from the motel where Petitioner was then staying.

The evidence presented at Petitioner's trial was overwhelming. His contention that his murder conviction was not supported with sufficient evidence is wholly without merit, and should be rejected. Thus, Petitioner's conviction should be affirmed.

## VII. CONCLUSION

Based on the foregoing, the judgement of the Marion County Circuit Court in Case Number 21-F-145 should be affirmed.

Respectfully Submitted,

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 22-0042**

**STATE OF WEST VIRGINIA,**

***Respondent,***

**v.**

**BRIAN E. LYON, II,**

***Petitioner.***

## CERTIFICATE OF SERVICE

I, William E. Longwell, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, July 5, 2022, and addressed as follows:

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