IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-706

STATE OF WEST VIRGINIA,

Respondent,

v.

RICHARD DANE SMALL,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the August 19, 2022, Order
Circuit Court of Berkeley County
Case No. 20-F-212

PATRICK MORRISEY
ATTORNEY GENERAL

WILLIAM E. LONGWELL
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar No. 12290
Office of the Attorney General
1900 Kanawha Blvd. E.
State Capitol, Bldg. 6, Ste. 406
Charleston, WV 25305
Tel: (304) 558-5830
Fax: (304) 558-5833
Email: William.E.Longwell@wvago.gov

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Constitutions

Other Authorities

INTRODUCTION

Respondent, State of West Virginia, by counsel, William E. Longwell, Assistant Attorney General, respectfully provides its response to the appellate brief filed by Richard Dane Small, ("Petitioner") wherein he challenges his convictions of first degree murder, and conspiracy to commit first degree murder. Each of Petitioner's assignments of error fail for lack of merit. Petitioner has no due process rights with respect to properly admitted 404(b) evidence offered solely against his co-defendant, with whom he was tried. Petitioner also cannot demonstrate that he was entitled to a severance from Petitioner's trial, when both he and his co-defendant worked in concert with one another to carry out the murder, were indicted in a single indictment for the same offenses, and neither offered any testimony or statements implicating the other. Petitioner's claim that he was denied a sufficient evidentiary hearing with respect to his statement to law enforcement, or that said statement was improperly admitted at trial, is belied by the record. Finally, Petitioner forfeited any claim of error with respect to the mercy phase of his criminal trial. Even if this Court reaches the merits of his claims with respect to the mercy phase, they fail to identify any error, and should be rejected. For these reasons, Petitioner cannot demonstrate that he is entitled to the relief he seeks, and, accordingly, his convictions should be affirmed.

ASSIGNMENTS OF ERROR

Petitioner raises five assignments of error in his appellate brief, including sub-assignments of error, which allege:

I. Mr. Small's due process rights and right to counsel were violated by the State's failure to notice him on critical evidence and by his and his counsel's absence from a [sic] critical evidentiary hearings.

A. Mr. Small's constitutional rights were violated by his and his counsel's absence from critical stages of the criminal prosecution.

B. Mr. Small's right to due process and notice under the Rules of Evidence was violated when the State failed to properly notice Mr. Small of the 404(b) evidence of gang affiliation and drug trafficking of his co-defendant.

II. The 404(b) evidence entered against Mr. Mason was not relevant, was unduly prejudicial for Mr. Small, and was cumulative.

III. The circuit court erred in failing to sever the trials of Mr. Small and Mr. Mason.

IV. The court erred in failing to suppress Mr. Small's statement to law enforcement.

V. Errors at the mercy phase of the trial require this court to grant a new trial on the issue of mercy.

A. The State's improper comment on Defendant Small's right to remain silent.

B. The State's improper argument that jury should consider certain factors.

Pet'r's Br. at 1-2 (capitalization altered).

STATEMENT OF THE CASE

A. Initial Investigation Into the Murder of Taylor Hawkridge

Taylor Hawkridge, a 22-year old female, was gunned-down in the parking lot of her apartment complex in the early morning hours of June 28, 2014. A.R. 1648. When law enforcement arrived on scene, they found Ms. Hawkridge lying beside her vehicle with an apparent gunshot wound to her face. A.R. 1648. Eyewitnesses would later inform officers that they observed a black male wearing a hoodie running from the scene and entering a dark-colored Dodge Charger before it sped away from the scene. A.R. 1648. While Ms. Hawkridge was still clinging to life upon the arrival of law enforcement officer and emergency medical personnel, she was later pronounced dead at a nearby hospital. A.R. 1648.

Officers immediately began their investigation into the murder of Ms. Hawkridge. Not long into their investigation, officers identified a female by the name of Nasstashia Van Camp as

a person of interest. A.R. 1649-52. Officers also learned that Ms. Hawkridge worked as a dancer a Vixen's Gentlemen's Club in Inwood, West Virginia, and that she was returning home from work when she was shot in the parking lot of her apartment complex. A.R. 1652.

Officers received tips indicating that Ms. Van Camp was observed at Vixen's on June 28, 2014, just a short period of time before Ms. Hawkridge left the club to return home. A.R. 1653. Officers reviewed security camera footage from Vixen's and observed Ms. Van Camp entering the club at approximately 1:36 a.m. A.R. 1653. While not immediately aware of the importance at the time, officers also observed Joseph Wayne Mason enter the club at approximately 1:22 a.m. that same morning. A.R. 1653. Ms. Van Camp was also observed exiting the club just before 2:00 a.m., followed by Mr. Mason at approximately 2:24 a.m. A.R. 1653-54.

Officers reached out to Ms. Van Camp to speak with her about her actions and whereabouts the morning of June 28, 2014. A.R. 1654-61. Ms. Van Camp would provide numerous statements to law enforcement in the ensuing months and years. Although Ms. Van Camp initially denied any involvement or knowledge as to the murder of Ms. Hawkridge, she would eventually be charged, and convicted, for her involvement in the murder. A.R. 671, 681-82, 1654-61. Ms. Van Camp would later reach an agreement with the State wherein she would provide a full statement as to her knowledge of the murder, and, in exchange, the State would recommend that her sentence be reduced by fifteen years. A.R. 681-84.

Ms. Van Camp would go on to explain that Ms. Hawkridge was known by Mr. Mason to be an informant working with law enforcement and conducting controlled purchases of drugs from area drug-dealers. A.R. 1670. She stated that an individual known as "Manny" Craig had paid Mr. Mason and Petitioner $10,000.00 to murder Ms. Hawkridge in an attempt to prevent her from testifying against him in any subsequent criminal prosecution related to his illicit drug sales. A.R.

1670. Ms. Van Camp also acknowledged that she was in a relationship with Mr. Mason at the time of the murder, and that Mr. Mason had asked her to locate where Ms. Hawkridge resided. A.R. 1685. Ms. Van Camp did as she was asked, and provided the information to Mr. Mason approximately two-weeks prior to the murder. A.R. 1685. Although Ms. Van Camp stated that Manny had asked Mr. Mason to carry out the murder, he was able to employ Petitioner to carry out the plot. A.R. 1685.

Ms. Hawkridge acknowledged that she picked Petitioner up at a hotel in Hagerstown, Maryland the morning of the murder, and drove him, in her black Dodge Charger, to Ms. Hawkridge's apartment. A.R. 1686. When Ms. Hawkridge arrived and exited her vehicle, Petitioner got out of the car and shot Ms. Hawkridge. A.R. 1686-87. Petitioner then got back into the passenger-side front seat of the vehicle, and the pair drove off. A.R. 1687. Petitioner then took the firearm he used apart, and threw them in different locations as they were fleeing the scene. A.R. 1687.

After the murder, Ms. Van Camp drove Mr. Mason to meet with Manny, who gave Mr. Mason a bag containing $10,000.00 in cash. A.R. 1687. Mr. Mason counted the money in front of Ms. Van Camp, and kept $3,000.00 for himself, and placed the remaining $7,000.00 in the bag to provide to Petitioner. A.R. 1687.

B. Indictment and Pretrial Proceedings

After years of investigation, officers were finally able to obtain enough evidence to charge Petitioner and Mr. Mason with the murder of Ms. Hawkridge. In October 2022, the Berkeley County Grand Jury returned a two-count joint indictment charging Petitioner and Mr. Mason with one count of first degree murder, and one count of conspiracy to commit first degree murder. A.R. 55-56.

After the indictment was returned, Mr. Mason filed a motion to sever his trial from that of Petitioner. A.R. 61-62. Mr. Mason's motion, however, failed to articulate any particular reason why severance was necessary, and, instead, alleged broad and abstract arguments in support of his request. A.R. 61-62.

On July 12, 2021, a hearing was held upon Mr. Mason's motion to sever. A.R. 66. Neither Petitioner, nor his counsel were present at this hearing. A.R. 66. During the hearing, the Court inquired of Mr. Mason whether there was "some evidence that you think is going to come in against Mr. Small that wouldn't also come in against Mr. Mason?" A.R. 74. The circuit court eventually understood Petitioner's argument to be that he believed he would be prejudiced simply by the fact that Mr. Mason "has to be tried with someone against whom the State has a much better case." A.R. 75. The circuit court also asked Mr. Mason whether he could "direct my attention to any particular piece of evidence that would be admissible against Mr. Small that would not being [sic] admissible against Mr. Mason as a conspirator?" to which Mr. Mason advised that "I don't believe I can at this time." A.R. 79. The circuit court denied Mr. Mason's motion to sever by order entered on July 19, 2021. A.R. 83-85.

In September 2021, the State filed in Mr. Mason's case its "Notice of Intent to Admit Intrinsic Evidence or 404(b) Evidence," related solely to Mr. Mason. A.R. 101-04. In its motion, that State proffered that it "will prosecute this case under the theory that the Defendant Joseph Mason became aware that Ms. Hawkridge was an informant and decided to kill her, in part, out of fear that Ms. Hawkridge was informing on him." A.R. 101. In that regard, the State alleged that evidence regarding Mr. Mason's status as a known drug dealer in the area during the relevant periods of time was intrinsic to the presentation of the State's case. A.R. 101-02. In the event that the circuit court disagreed with the assertion that the evidence was intrinsic, the State offered the

evidence under Rule 404(b) of the West Virginia Rules of evidence as "probative of the Defendant's motive for killing [the victim], a police informant. A.R. 102.

The State's motion also offered Mr. Mason's affiliation with the Crips gang as intrinsic evidence to the charged conduct. A.R. 102. The State offered the evidence as intrinsic in that part of the culture associated with the Crips gang is one that "deplores any cooperation with law enforcement for any reason. This is integral to the State's presentation of the evidence and is intrinsic to the case. A.R. 102-03. If the circuit court disagreed that the evidence was intrinsic, the State offered the evidence under Rule 404(b) as "probative of the motive for the killing of Taylor Hawkridge." A.R. 103. In addition, the State asserted that the evidence "is relevant to the identity of [Mr. Mason] as he frequently self identifies through his gang affiliation." A.R. 103.

Finally, the State offered evidence of Petitioner's "hatred of informants," asserting that "[i]n tune with this Crip gang affiliation, the evidence shows that the Defendant exhibits both rage and disgust toward informants and believes that they should die." A.R. 103. In the alternative, the State offered the evidence as probative as to Mr. Mason's motive for killing Ms. Hawkridge. A.R. 103.

Shortly after the State's 404(b) motion, Petitioner filed a "Motion to Exclude Social media Posts of 'Craccloc.'" A.R. 110-11. "Craccloc" was the social media moniker used by Mr. Mason, and had nothing to do with Petitioner, other than his association with the moniker when posting items on Mr. Mason's public profile. A.R. 110. Nevertheless, Petitioner argued that such evidence against his co-defendant should be excluded as the "pictures, and their attendant statements are probative only that Defendant was involved in criminal activity, and do not in any way indicate any relation to the murder of Taylor Hawkridge." A.R. 110. Petitioner did not, at any point, explain how the social media posts of his co-defendant had any bearing on the jury's determination

as to his guilt or innocence regarding the murder, considering that the motion only complained of the evidence as it relates to his co-defendant, who was represented by counsel of his own.

Petitioner also filed a motion to suppress statements he made to law enforcement during the investigation into Ms. Hawkridge's murder. A.R. 113-15. Petitioner asserted that the statements were obtained after Petitioner "stated that he 'thinks he needs to talk to a lawyer,'" and that law enforcement continued to question him anyway. A.R. 113. The motion went on to state that Petitioner "again referenced needing an attorney" at a later point in the interview. A.R. 113.

Then, on January 14, 2022, Petitioner filed what was titled "Defendant's Consolidated Pretrial Motions," wherein he raised ten separate motions, some of which contained motions he had already filed. A.R. 122-33. Among the various motions were Petitioner's motion to suppress the testimony of a certain witness, or, in the alternative, to sever trials; a motion to exclude any social media posts made by Petitioner or Mr. Mason; a motion to exclude any reference to Petitioner's gang affiliation, or the gang affiliation of Mr. Mason; and a motion to exclude the ballistics report linking the murder weapon with the discarded firearm recovered years after the murder. A.R. 122.

A hearing was scheduled upon the outstanding pretrial motions for January 21, 2022. A.R. 120. Prior to the hearing, however, Petitioner filed a motion to continue that hearing with respect to his motions, noting that Petitioner's counsel's office had inadvertently failed to place the hearing on counsel's calendar. A.R. 120. While Petitioner and his counsel did not appear to the January 21, 2022 hearing, the court did take up the 404(b) motion filed by the State with respect to Mr. Mason's case. A.R. 139-41. The January 21, 2022 hearing discussed the admissibility of certain social media posts made by Mr. Mason to his public profile under the username "craccloc141."

A.R. 160. After hearing the evidence and arguments presented by both parties, the circuit court concluded that the proffered evidence was intrinsic, and not 404(b) evidence.

The pretrial hearing upon Petitioner's consolidated pretrial motions was eventually held on March 16, 2022. A.R. 261. With respect to his motion to suppress his statement to law enforcement, the evidence revealed that Petitioner did not give an unequivocal request for an attorney. As the State clarified, during the interview, Petitioner posed the question to law enforcement: "You think I might need a lawyer?" A.R. 264. The State also acknowledged that at another point in the interview, Petitioner again asked: "Do you think I need a lawyer?" A.R. 264. Petitioner was told "that's up to you" by the officer conducting the interview. A.R. 264. The State also clarified that all statements made by Petitioner were after he had been advised of, and waived, his *Miranda* rights. A.R. 264. In support of the State's position that the Statements were admissible, it directed the circuit court to Syllabus Point 6 of this Court's decision in *State v. Bradshaw*[1], in which this Court held that "[t]o assert *Miranda* rights to terminate police interrogation, the words or conduct must be explicitly clear that the suspect wishes to terminate all questioning, and not merely a desire not to comment or answer a specific question." A.R. 265.

The State also cited to the United States Supreme Court's decision in *United States v. Davis*,[2] wherein it recognized that

> [i]nvocation of the *Miranda* rights – of the *Miranda* right to counsel requires at minimum some statement that can be reasonably construed to be an expression of a desire for the assistance of an attorney. But if the suspect makes a reference to an attorney that is ambiguous or equivocal, and that a reasonable officer in light of the circumstances would have understood only that the suspect might be – might be invoking a right to counsel, our precedence [sic] do not require cessation of questioning.

[1] 193 W. Va. 519, 475 S.E.2d 456 (1995).

[2] 512 U.S. 452, 459 (1994).

A.R. 265-66. Additionally, the State noted this Court's opinion in *Bradshaw* noted that the United States Supreme Court "*Davis* refused to create a layer of prophylactics [sic] to prevent questioning a suspect when he – he might want a lawyer. . .." A.R. 266, *see also Bradshaw*, 193 W. Va. at 529, 457 S.E.2d 465.

The circuit court denied Petitioner's motion to exclude his statement, noting that the mentions of a lawyer were equivocal in nature, and pointed to numerous cases from various jurisdictions that held that persons stating that they "think" they may need a lawyer is not sufficient to establish a constitutional violation. A.R. 266-68

Next, the Court took up Petitioner's motion with respect to his claims regarding 404(b) evidence regarding Petitioner's gang affiliation. A.R. 271-72. The State responded by indicating that, while it did file a 404(b) notice in Mr. Mason's case, it intentionally did not file one in Petitioner's because it did not intend to offer any evidence that would fall under Rule 404(b) of the West Virginia Rules of Evidence. A.R. 273. Specifically, the State acknowledged that Petitioner's prior criminal history, as well as any alleged gang affiliation that he may have had, was "not a necessary part of the story for us to convey what happened, and why, to the jury." A.R. 273. The State went on to explain that it had concluded that such evidence was not relevant, and decided that it would be best to "stay away" from introducing any of that evidence as it relates to Petitioner. A.R. 273-74.

Petitioner then moved to exclude his social media posts from trial as inadmissible 404(b) evidence. A.R. 281-83. The specific picture complained of was a photograph of Petitioner's infant child sitting with a large sum of cash strewn about him. A.R. 283-84. Petitioner also complained of a photograph posted to both his and Mr. Mason's social media account that depicted the two

together. A.R. 284. The State went on to specify that none of the social media posts were offered as 404(b) evidence, and that the evidentiary value was not in establishing some prior bad act. A.R. 284-86. Instead, the State offered the evidence in order to illuminate the various connections between the murder, Petitioner, and Mr. Mason, as well as to their conduct following the murder. A.R. 284-86.

While Petitioner continued to argue that the evidence was inadmissible hearsay, the circuit court rebuffed, explaining that

> I get this thing that simply says 404(b), like it's some kind of talisman that you can wave over evidence and make it go away. That's not the way this works. . . . You have to present me with a specific fact that you're claiming is offered solely for the purpose of showing your defendant's bad character [that] . . . is not charged in the indictment.

A.R. 287-88. Petitioner then continued to claim that regardless of whether the State was offering the evidence under 404(b), that it was still required that it provide proper notice, despite the fact that the State had provided Petitioner with an exhibit list of all trial exhibits, as well as discovery. A.R. 289.

After additional argument, the circuit court denied Petitioner's motion as to what he claimed to be inadmissible 404(b) evidence, subject to the State's ability to lay the proper evidentiary foundation for its admission. A.R. 294-95.

Petitioner then moved on to arguing that any evidence as to Mr. Mason's gang affiliation should be excluded from trial. A.R. 296-97. The circuit court responded by advising Petitioner:

> [Y]ou can't complain about the strength of a case against a co-defendant. It is part of his—it explains the moniker he gives himself. I mean, you can't—well, I have ruled on that, and you're not going to argue about Mr. Mason's case. You're going to argue about [Petitioner's] case.

A.R. 297.

The final motion addressed relevant to the instant case was Petitioner's motion to exclude the ballistics testing and report the State intended to introduce at trial. A.R. 302. Petitioner claimed that he had retained an expert, and asserted that the method by which the alleged murder weapon was tested was unsupported by the science and should be excluded. A.R. 303. Despite this claim, however, Petitioner acknowledged that his own expert made no such conclusion, and the circuit court accordingly denied Petitioner's motion. A.R. 304.

The circuit court entered its order detailing its rulings as to the pretrial motions on April 1, 2022. A.R. 359-62.

C. Trial Testimony

Petitioner and Mr. Mason's joint jury trial began on March 28, 2022. A.R. 369. The evidence presented by the State revealed that Ms. Hawkridge worked as a confidential informant with law enforcement. A.R. 536. Part of Ms. Hawkridge's duties as a confidential informant involved conducting controlled purchases of illicit drugs from local drug dealers. A.R. 542. On one occasion, in particular, Ms. Hawkridge arranged to conduct a controlled purchase of controlled substances from an area drug dealer known as "Manny" Craig. A.R. 542. Ms. Hawkridge successfully completed the controlled purchase with the aid, and under the supervision of, law enforcement. A.R. 543-44. Law enforcement and Ms. Hawkridge attempted to secure another purchase from Mr. Craig, but Mr. Craig never answered any phone calls after the initial purchase. A.R. 545. It was believed that Mr. Craig had learned of Ms. Hawkridge's work as a confidential informant, which resulted in the subsequent phone calls to set up a second controlled purchase went unanswered. A.R. 545.

Evidence was also presented through Mr. Mason's phone calls placed from jail wherein he identified himself as "craccloc" when placing outgoing phone calls. A.R. 551. The evidence also explained for the jury that "loc" is commonly understood to stand for "love of crips." A.R. 551.

The evidence also revealed that an eyewitness heard gunshots coming from the area wherein Ms. Hawkridge was shot, and that he observed an individual running from the scene and get into the front passenger seat of a dark colored vehicle before it sped off. A.R. 566.

Testimony from the various investigating officers revealed that upon arriving on scene, Ms. Hawkridge was found lying on her back with "an apparent gunshot wound to the face." A.R. 576. Ms. Hawkridge was also observed to be exhibiting "agonal breathing, which is basically your body's last attempts at—kind of like an involuntary response trying to breathe." A.R. 576. Officers also observed an exit wound on the base of Ms. Hawkridge's skull, which indicated to the responding officers, along with Ms. Hawkridge's "agonal breathing," that she was unlikely to survive her injuries. A.R. 577.

The autopsy performed on Ms. Hawkridge later revealed that she had actually been shot twice in the head. A.R. 643. While one of the bullets exited Ms. Hawkridge's head, the medical examiner was able to recover fragments from a .45 caliber bullet lodged in Ms. Hawkridge's brain. A.R. 643.

The State also elicited evidence detailing the long and arduous process that ultimately lead to Petitioner and Mr. Mason being charged with the murder of Ms. Hawkridge. The jury was advised that officers were able to identify Ms. Van Camp as a person of interest, and that it was later learned that she was in a relationship with Mr. Mason. A.R. 645, 668-69

Eventually, Ms. Van Camp was arrested and charged for her involvement in the murder of Ms. Hawkridge. A.R. 671. In the months following her arrest, Ms. Van Camp would continue to

speak with officers, providing them with bits and pieces of evidence, but never appearing to be fully forthcoming with the information she had. During one of these interviews, Ms. Van Camp identified Petitioner as the shooter. A.R. 675. Until this point, officers had not identified Petitioner as being a suspect or person of interest in the case. A.R. 675. Eventually, Ms. Van Camp would explain to officers that she and Mr. Mason were at Vixen's Gentlemen's Club the morning that Ms. Hawkridge was murdered. A.R. 675. While there, Mr. Mason texted her and told her to travel to the Clarion Hotel in Hagerstown Maryland and pick up Petitioner, and then drive back to Ms. Hawkridge's apartment and wait for her to return home. A.R. 675-76. Ms. Van Camp also identified the photograph depicting a firearm that was posted to Mr. Mason's Instagram profile as being the same firearm Petitioner used to murder Ms. Hawkridge. A.R. 676.

After learning of Petitioner's alleged involvement from Ms. Van Camp, officers schedule an interview with him while he was incarcerated at a federal facility. A.R. 680. Due to the unfamiliarity with the procedures utilized in federal facilities, officers were unable to take any recording devices with them to record the interview with Petitioner. A.R. 680. Nevertheless, during the interview, Petitioner denied having any knowledge or involvement in the murder. A.R. 680-81. When presented with copies of communications officers had obtained between him and Ms. Van Camp, he denied their veracity, and further claimed that he had never stayed in a hotel, as he had a home in the area. A.R. 680-81. Petitioner did, however, acknowledge that he knew Mr. Mason, whom he identified as "Cracc." A.R. 681.

The jury was also told that officers were able to obtain records from the Clarion Hotel that contradicted Petitioner's claim that he had never rented a room. A.R. 725-26. In fact, the records obtained revealed that Petitioner had rented a room at the Clarion Hotel in his name for five days, beginning on June 23, 2014, through June 29, 2014. A.R. 725-26.

During Ms. Van Camp's trial testimony, she confirmed that she observed Mr. Mason receive $10,000.00 cash in exchange for Ms. Hawkridge's murder, $7,000.00 of which he paid to Petitioner for his role. A.R. 862-65.

The State also presented a photograph posted to Petitioner's social media account just days after the murder wherein his infant son was sitting among a large amount of cash. A.R. 713. A subsequent witness testified to being present with Petitioner when he received the money, as well as when the photograph was taken. A.R. 995-97.

In addition, the State offered various other social media posts made by Petitioner and Mr. Mason, some of which involved one posting comments to the other's profile, expressing their general hatred of informants, whom they referred to as "rats" or "snitches." *See generally,* A.R. 699-730.

Testimony revealed that officers were able to locate part of the firearm on March 13, 2019, approximately four years after the murder. A.R. 733-34, 851-52. Kent Cochran, who testified as an expert in the area of firearms and tool mark examinations, A.R. 1009, 1012, explained that the firearm was in poor condition when it arrived, and was inoperable. A.R. 1044. He also explained that the firearm contained a live round stuck in the chamber, which officers were unable to remove due to the rust present on the firearm. A.R. 1040-42. Mr. Cochran was able to eventually expel the live round from the chamber, but not without significant troubles. A.R. 1040-42.

Ultimately, Mr. Cochran concluded that the firearm presented to him in March of 2019 was the same one that fired the bullet that was recovered during Ms. Hawkridge's autopsy. A.R. 1062-63.

Petitioner did not testify or call any witnesses in his defense. A.R. 1149.

D. Instructions and Verdict

At the close of evidence, and before deliberation, the circuit court read the final instructions to the jury. A.R. 1188. Relevant to the claims raised in the instant appeal, the circuit court instructed the jury as follows:

> A separate crime is alleged against each of the defendants in each count of the indictment. You should consider each alleged offense and any evidence pertaining to it separately in respect to each defendant.
>
> The fact that you find one defendant guilty or not guilty of one of the offenses should not control your verdict as to the other offense charged against the defendant, or the other defendant. You must give separate and individual consideration to each charge against each defendant.

A.R. 1192-93. This particular instruction is identical to one of Petitioner's proposed jury instructions. A.R. 1369.

After deliberation, the jury found both Petitioner and Mr. Mason guilty of first degree murder, and conspiracy to commit first degree murder. A.R. 1298.

E. Mercy Phase

The parties proceeded immediately to the mercy phase of the trial following the jury's verdict. A.R. 1309. Petitioner called Jacqueline Hughey to testify. A.R. 1314. Ms. Hughey testified generally about meeting Petitioner while he was incarcerated, and found him to have a "positive energy." A.R. 1315. She went on to state that she had known Petitioner for approximately one year, and, during that time, she had grown to love him. A.R. 1316-17. She also agreed that during their conversations since striking up their relationship, Petitioner had expressed that "he feels remorse about the way he used to live his life, and that he wants to live it differently in the future." A.R. 1317-18. Ms. Hughey would go on to paint Petitioner in a generally

favorable light, describing him as a good person and in need of rehabilitation, which he cannot receive while in jail. A.R. 1318-23.

On cross-examination, Ms. Hughey acknowledged that she had "read all about" Petitioner's prior convictions related to "trafficking children" and "pimping children." A.R. 1326. The State then questioned her about her testimony that Petitioner is a "positive guy" by asking: "I just want to be clear. He's been convicted of trafficking children. He's been convicted of shooting a woman in the face. But your testimony is, he's a very positive fellow?" A.R. 1327. Ms. Hughes responded by indicating that Petitioner "has a great attitude. He wants to learn." A.R. 1327. Petitioner presented no other witnesses. A.R. 1330.

During the State's case-in-chief at the mercy phase, the State elicited that Petitioner was investigated in relation to "trafficking juveniles." A.R. 1335. Petitioner was charged federally, and entered a guilty plea with respect to the trafficking charges in Maryland. A.R. 1336. The State also introduced evidence indicating that Petitioner was sentenced to sixteen years in prison in relation to his conviction of human trafficking, followed by ten years of supervised release for "sex trafficking of a minor." A.R. 1336. According to the plea agreement Petitioner accepted, Petitioner was convicted of transporting a fifteen and a seventeen year-old girl from Pennsylvania to Maryland with the "intent that each minor engage in prostitution." A.R. 1336. The State further elicited that Petitioner has specifically recruited the juveniles for such purpose, and that he arranged for them to engage in sexual acts for pay at various hotels and other locations in Maryland. A.R. 1336. Petitioner received the money that the juveniles received, and continued to traffic said juveniles even after he was aware that Maryland State Police suspected him of being involved in the two juveniles' disappearances. A.R. 1336. Petitioner did not cross-examine the State's witness with respect to this evidence. A.R. 1338.

The State also called Ms. Hawkridge's mother and step-father, to provide victim impact statements. A.R. 1339, 1344. Petitioner did not cross-examine either witness, and declined the Court's offer to allocute. A.R. 1348. Mr. Mason provided his allocution to the jury, wherein he asserted that he did not believe that he deserved never getting to see his children again, and that he had already missed out on various parts of their life, such as his son's first baseball game. A.R. 1346-48.

During the State's closing argument, it explained to the jury that "[w]hen we consider whether or not mercy should attach to a sentence, when we make this argument to a jury, we generally look to two factors. We look to the defendant's criminal history. We look to the heinous nature of the crime." A.R. 1357. In response to Mr. Mason's statement during his allocution that he missed his son's first baseball game and indicated that he believed that he did not deserve to never see his children again, the State pointed out that "Taylor will never know what sports her daughter . . . gets to play." A.R. 1358. The State went on to opine: "You heard that from the defendant. But you know what you haven't heard today? Remorse. You haven't heard any remorse . . . . They are asking for a chance, but Taylor had no chance. The defendants showed no mercy when she was gunned down in front of her house." A.R. 1359.

After deliberation, the jury recommended that "no mercy attach to the sentence" imposed upon either Petitioner or Mr. Mason. A.R. 1362.

On April 9, 2022, the circuit court entered its Conviction Order setting forth the jury's verdict. A.R. 47-50. On August 19, 2022, the circuit court entered Petitioner's Sentencing Order. A.R. 51-54. The circuit court, consistent with the jury's recommendation, sentenced Petitioner to life in prison without the possibility of parole with respect to his conviction of first degree murder, and a period of not less than one, nor more than five years in prison for his conviction of conspiracy

to commit murder. A.R. 52. Both sentences were ordered to run consecutive to one another. A.R. 52.

It is from this Order that Petitioner now appeals.

SUMMARY OF THE ARGUMENT

Each of Petitioner's claims presented in his appellate brief is without merit. Petitioner's assignments of error related to the admission of what he claims to be 404(b) evidence are wholly misplaced, as the evidence in question was intrinsic to the crime, thus rendering 404(b) inapplicable. Nor can Petitioner claim that he was entitled to be present at pretrial hearings related to issues solely addressed to his co-defendant. Petitioner's absence from those pretrial hearings, however, did not prevent him from filing his own motions seeking relief, or presenting the "compelling arguments" he alludes to throughout his brief, but fails to articulate.

In addition, the circuit court fully and thoroughly addressed his motion to suppress his statement to law enforcement, and properly concluded that asking a law enforcement officer whether he "might need an attorney," is not the type of unequivocal statement sufficient to invoke one's *Miranda* right to counsel.

Petitioner's assignment of error alleging that the circuit court erred in refusing to grant a severance of his trial from that of his co-defendant is equally dubious. Petitioner's argument in support of this claim is based on little more than speculation that is entirely devoid of any factual support from the record.

Finally, Petitioner forfeited any right to claim error with respect to the mercy phase of his criminal proceedings. Petitioner did not offer a single objection during the mercy phase. Even if this Court considers the merits of Petitioner's alleged errors are considered by this Court, a review of the record completely refutes the premise upon which Petitioner's arguments are based.

Petitioner cannot demonstrate his entitlement to relief upon any claim raised in his petition, and this Court should, accordingly, affirm the judgment of the Berkeley County Circuit Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rules 18(a)(3) and (4) of the West Virginia Rules of Appellate Procedure, oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record in this case. Therefore, this appeal is appropriate for resolution by memorandum decision in accordance with Rule 21 of the West Virginia Rules of Appellate Procedure.

ARGUMENT[3]

I. There was no error with respect to the notice, proceedings, or admission of potential 404(b) evidence at Petitioner's joint criminal trial which related solely to his co-defendant.

A. Petitioner was not entitled to pretrial notice of the State's intent to offer intrinsic 404(b) evidence against his co-defendant during their joint trial.

Petitioner asserts that his due process rights were violated by the State's failure to provide him proper notice of its intent to introduce evidence of his co-defendant's gang affiliations and prior drug trafficking activities. Pet'r's Br. at 21. Although Petitioner's argument in support of this claim relies heavily on this Court's decision in *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), his argument provides no support for the specific claim that he is entitled to notice of 404(b) evidence relating entirely to another person, simply because he is that person's co-defendant. Moreover, the circuit court's conclusion that the evidence in question was intrinsic

[3] Because Petitioner raises various claims that call for differing standards of review, Respondent will identify the appropriate standard when addressing each claim advanced by Petitioner.

renders any claim that Petitioner was not provided proper notice moot, as intrinsic evidence is not governed by Rule 404(b) of the West Virginia Rules of Evidence.

In reviewing claims as to the admission of evidence, this Court has held that: "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. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998). Regarding the trial court's decision to admit the evidence, "[A]n appellate court reviews *de novo* the legal analysis underlying a trial court's decision." *State v. Guthrie*, 194 W. Va. 657, 680, 461 S.E.2d 163, 186 (1995).

The purpose behind Rule 404(b) of the West Virginia Rules of Evidence is to:

> prevent the conviction of an accused for one crime by the use of evidence that he has committed other crimes, and to preclude the inference that because he had committed other crimes previously, he was more liable to commit the crime for which he is presently indicted and being tried.

State v. McDaniel, 211 W. Va. 9, 12, 560 S.E.2d 484, 487 (2001) (quoting *State v. Thomas*, 157 W. Va. 640, 654, 203 S.E.2d 445, 455 (1974)). In other words, Rule 404(b) exists to prevent the State from improperly arguing to a jury that because a particular defendant engaged in some criminal conduct or other similar act in the past, that he or she is more likely to commit the crime for which he or she is charged. The admission of crimes, wrongs, or other bad acts, however, is admissible if offered to prove something other than a defendant's propensity to commit a particular crime, such as the defendant's motive, intent, opportunity, identity, or any other number of factors. W. Va. R. Evid. 404(b)(2). When a party intends to offer evidence pursuant to Rule 404(b), they most provide the opposing party with "reasonable notice" of such intent, as well as the specific purpose for which it will be offered. W. Va. R. Evid. 404(b)(2)(A). This notice provision is not, however, a hard-line rule, as Rule 404(b)(2)(B) specifically contemplates that disclosure may be

appropriately made at trial upon the offering party's ability to demonstrate good cause for the lack of pretrial notice.

The facts presented in the instant case, however, do not call for this Court to conduct its typical 404(b) analysis because the evidence in question was not offered by the State for any purpose related to Petitioner. Indeed, the evidence dealt entirely with Petitioner's co-defendant, with whom Petitioner was tried jointly. A.R. 101-04.

Petitioner's claim that he was entitled to pretrial notice of the State's intent to offer the purported 404(b) evidence is misplaced for two primary reasons: (1) the evidence was not 404(b) evidence, as the circuit court concluded, thus rendering 404(b) inapplicable to such evidence; and (2) the evidence contained no proof of any fact relevant to Petitioner's guilt of the charged offense. "This Court has consistently held that evidence which is 'intrinsic' to the indicted charge is not governed by Rule 404(b)." *State v. Harris*, 230 W. Va. 717, 722, 742 S.E.2d 133, 138 (2013). This Court also recognized "that evidence of criminal activity committed by the defendant . . . explaining the context of the crime charged, is not the type of evidence contemplated by Rule 404(b), and should therefore be admissible without regard to the limitations of the more stringent admission standards attached to Rule 404(b) evidence." *Id.* (internal quotation marks and citation omitted).

Because the court determined that the evidence was not 404(b) evidence, the Rule necessarily does not apply, thus removing any notice requirement, even assuming that Petitioner had a right to notice in the first instance.

Moreover, a review of this Court's guidance to circuit courts addressing issues as to the admissibility of 404(b) evidence establishes that Petitioner had no right to notice. This Court has explained that, after a trial court has heard the evidence with respect to the admissibility of

potential 404(b) evidence, it must "be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts." Syl. Pt. 6, in part, *State v. Rollins,* 233 W. Va. 715, 760 S.E.2d 529 (2014). With this in mind, Petitioner has not identified any information that he had which would be relevant to the circuit court's ability to make that determination.

Thus, if the evidence in question does not relate to any fact relevant to proving Petitioner's guilt, and Petitioner cannot identify any information or evidence he possessed that would have any relevance to the circuit court's determination as to the admissibility of the evidence, there can be no reasonable contention that Petitioner had a right to notice of the evidence. To be sure, Petitioner certainly has not identified any legal authority supporting his assertion that he was entitled to notice, and this Court's precedent clearly demonstrates that the circuit court's conclusion that the evidence was intrinsic removes it from the parameters of Rule 404(b). As such, Petitioner's claim that he was entitled to notice is wholly unsupported by the relevant legal authorities, and should be rejected by this Court.

B. The hearing upon the State's notice of intent to admit intrinsic or 404(b) evidence was not a "critical stage" as it relates to Petitioner's case, and, therefore, he was not entitled to be present. If his absence constituted error, it was harmless beyond a reasonable doubt.[4]

Petitioner also complains that his due process rights were violated when he and his counsel were absent from what he claims was a "critical stage of the criminal prosecution." Pet'r's Br. at 15. While there is no dispute as to the absence of Petitioner and his attorney from the hearing

[4] Petitioner also makes a similar claim as to his absence at a hearing with respect to his co-defendant's motion to sever their criminal trials. Respondent will address such claim in the section addressing Petitioner's assignment regarding the circuit court's failure to grant a severance.

related to the State's notice as to the admission of intrinsic evidence, Petitioner's claim that such hearing was a "critical stage" as to his case is misplaced.

"The general right of a criminal defendant to be present during courtroom proceedings is addressed through the interpretation of the state constitution, a Court rule and statute. Consequently, our review of the issue raised in this case is plenary." *State v. Sites*, 241 W. Va. 430, 443, 825 S.E.2d 758, 771 (2019) (citing *Richmond v. Levin*, 219 W. Va. 512, 515, 637 S.E.2d 610, 613 (2006)).

As this Court has noted, "there are two defenses available when it is claimed that the accused's absence creates reversible error. The first is that the absence occurred at a non-critical stage of the criminal proceeding. The second is that even if at a critical stage, it was harmless error." *State v. Boyd*, 160 W. Va. 234, 247, 233 S.E.2d 710, 719 (1977).

"A critical stage of a criminal proceeding is where the defendant's right to a fair trial will be affected." Syl. Pt. 5, *State v. Brown*, 210 W. Va. 14, 552 S.E.2d 390 (2001) (citation and internal quotation marks omitted). Rule 43(c)(3) of the West Virginia Rules of Criminal Procedure provides that a defendant's presence is not required "at a conference or argument upon a technical question of law not depending upon facts within the personal knowledge of the defendant." This Court has also stated that "[a] defendant is constitutionally guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome, if his or her presence would contribute to the fairness of the procedure." *State v. Tex B.S.* 236 W. Va. 261, 264, 778 S.E.2d 710, 713 (2015).

Respondent asserts that the hearing upon the State's notice of intent to introduce intrinsic evidence was not a "critical stage" of the criminal prosecution of Petitioner. The purported evidence dealt entirely with evidence related to his co-defendant, and contained nothing that could

be remotely construed as 404(b) evidence or evidence related to Petitioner's guilt. There is nothing in the record, nor does Petitioner identify, any personal knowledge he had that would have been relevant in the circuit court's decision.

In the alternative, should this Court construe the hearing as a "critical stage" of Petitioner's proceedings and that his absence was in error, such error was harmless beyond a reasonable doubt. For more than forty-years, this Court has recognized that "the critical stage requirement is . . . subject to the harmless error test." *Boyd*, 160 W. Va. at 247, 233 S.E.2d 710 at 719. This Court has recognized "that given 'the reality of human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and the Constitution does not guarantee such a trial.'" *Guthrie*, 194 W. Va. at 684, 461 S.E.2d at 190. (quoting *United States v. Hasting*, 461 U.S. 499, 508-09 (1983)). This Court went on to note that "an appellate court should not exercise its '[s]upervisory power to reverse a conviction . . . when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." *Id.* (quoting *Hastings*, 461 U.S. at 506). "The harmless error doctrine requires this Court to consider the error in light of the record as a whole." *Id.* In order to prevail on a theory that a defendant's absence from a critical stage of the proceedings is harmless,, this Court has held that the State "must take the responsibility of preserving a record of such critical stage, in order that it can be shown beyond a reasonable doubt" that the defendant's absence was harmless. *Boyd*, 160 W. Va. at 247, 233 S.E.2d 710 at 719.

The record as a whole reveals that Petitioner suffered no prejudice as a result of his absence from the 404(b) hearing. As noted above, the circuit court found that the evidence was intrinsic to the charged offenses, and related solely to Petitioner's co-defendant. The evidence discussed in the 404(b) hearing was not such that Petitioner could have reasonably argued that it would not be

admissible in the course of a joint trial. It was not prior bad act evidence, and was relevant to establish Mr. Mason's involvement in the crime, since he was not present during the murder, nor did he pull the trigger. Indeed, the evidence the State possessed in support of Petitioner's guilt was direct evidence from an eyewitness who was present when Petitioner murdered Ms. Hawkridge, and assisted Petitioner in fleeing the scene. For good measure, the circuit court granted Petitioner's motion for a jury instruction explaining that the jury was to consider the charges against each defendant individually. A.R. 1369, 1387.

The evidence presented at trial specifically related to Petitioner's guilt was overwhelming. The State elicited testimony from a co-conspirator who testified that Petitioner was the person who shot and killed Ms. Hawkridge. A.R. 683, 858-59. The State further elicited various cell phone records containing communications between Petitioner, Mr. Mason, and Ms. Van Camp regarding the murder. *See generally*, A.R. 664-66, 671-72, 676-79. Petitioner was caught in a lie with respect to whether he had ever stayed at the Clarion Hotel, A.R. 725-26, and evidence, presented from multiple witnesses, revealed that Petitioner was paid $7,000.00 just hours after the murder. A.R. 729, 865, 995. Finally, Petitioner posted a photograph on his social media account depicting his child sitting alongside a large sum of cash, which a witness testified was shortly after he received payment from his co-defendant. A.R. 996, 1459.

The record reveals that the Petitioner's absence from a hearing wherein his co-defendant's gang affiliation, past drug dealing, and social media posts could not have reasonably resulted in any prejudice to him. The evidence in support of Petitioner's guilt was clear, and was easily discernible, and recognizable as entirely separate from the evidence as to Mr. Mason's guilt. Thus, to the extent that Petitioner's absence was error, it was harmless beyond a reasonable doubt.

C. Petitioner's claim that the evidence as to his co-defendant's drug trafficking and gang affiliation violates Rule 10 of the West Virginia Rules of Appellate Procedure. Even if this Court reaches the merits, Petitioner still cannot demonstrate he is entitled to relief.

The final issue Petitioner raises with respect to the admission of the intrinsic evidence against his co-defendant is that it was not relevant and that it was unfairly prejudicial to Petitioner, and that it was cumulative. Pet'r's Br. at 24. Petitioner's claim, however, relies on a case from the Fourth Circuit Court of Appeals that is not applicable to the facts of the instant case, as well as a Louisiana Appellate Court case. Pet'r's Br. at 25-26. Petitioner provides no citation from this Court, nor does he provide any citation to the record in support of his claim. Therefore, this Court should refuse to consider this insufficiently briefed claim pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure.

The Rules of Appellate Procedure "are not mere procedural niceties; they set forth a structured method to permit litigants and this Court to carefully review each case." Administrative Order, *Filings That Do Not Comply With the Rules of Appellate Procedure* (W. Va. Supreme Court, Dec. 10, 2012). The Rules of Appellate Procedure require that "[t]he brief . . . contain an argument exhibiting clearly the points of fact and law presented." W. Va. R. App. P. 10(c)(7). In *State v. LaRock*, this Court refused to consider "half-hearted assignments that were not fully developed and argued in [the Petitioner's] brief." 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996); *see also, State v. Lilly*, 194 W. Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995) ("[C]asual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal." (internal quotation and citation omitted)); *In re S.L.*, No. 19-0789, 2020 WL 1231716, at *2 n.3 (W. Va. Supreme Court, Mar. 13, 2020) (memorandum decision) (declining to address various claims raised by petitioner on appeal because they were "unsupported" and petitioner "fail[ed] to cite to any authority," in violation of Rule 10(c)(7)); *State, Dep't of Health & Hum.*

Res. ex rel. Robert Michael B. v. Robert Morris N., 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995) ("[A] skeletal argument, really nothing more than an assertion, does not preserve a claim . . . . Judges are not like pigs, hunting for truffles buried in briefs." (internal quotation and citation omitted)).

While this particular claim should be rejected due to its failure to comply with Rule 10, the merits of Petitioner's claim are entirely unsupported. Petitioner offers nothing but abstract and speculative arguments in support of his claim that the evidence was irrelevant or unduly prejudicial to him. Thus, in line with his failure to comply with Rule 10, Petitioner has failed to offer any support, legal or factual, that could reasonably be construed to support his claims. Thus, Petitioner has failed to meet his burden of proof, and his claim should be rejected.

II. The circuit court did not err in refusing to grant a severance of Petitioner's trial, nor was Petitioner's absence from the hearing addressing his co-defendant's motion to sever improper. To the extent that Petitioner's absence from the hearing was erroneous, it was harmless beyond a reasonable doubt.

Petitioner asserts that the circuit court's failure to sever his trial from that of his co-defendant was in error. Pet'r's Br. at 27-28. Petitioner's argument in support of this relies on his misplaced presumption that the evidence introduced of his co-defendant's gang affiliation and drug trafficking was admitted as 404(b) evidence. Pet'r's Br. at 27-28. Respondent has already refuted that. Moreover, Petitioner asserts that his absence from a hearing addressing a motion to sever filed by his co-defendant constituted reversible error. Neither of Petitioner's claims possess any merit, and Petitioner cannot demonstrate he is entitled to relief for either.

"This Court will not reverse a denial of a motion to sever properly joined defendants unless the petitioner demonstrates an abuse of discretion resulting in clear prejudice." Syl. Pt. 3, *State v. Boyd*, 238 W. Va. 420, 796 S.E.2d 207 (2017).

Rule 8(b) of the West Virginia Rules of Criminal Procedure sets forth that:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

Rule 14(b) of the West Virginia Rules of Criminal Procedure further provides, in part, that: "If the joinder of defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the State, the Court may sever the defendants' trials, or provide whatever other relief that justice requires." The decision as to whether a severance should be granted is "within the sound discretion of the trial court." Syl. Pt. 3, in part, *State v. Hatfield,* 181 W. Va. 106, 380 S.E.2d 670 (1988).

This Court has noted that "[w]hen defendants are properly joined, there is a strong presumption for their joint trial, as it gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome." *Boyd,* 238 W. Va. at 432, 796 S.E.2d at 219 (quoting *United States v. Lewis,* 557 F.3d 601, 609 (8th Cir. 2009)). "This presumption can only be overcome if the prejudice is severe or compelling." *Id.*

Petitioner bears the burden of establishing that his joint criminal trial presented such "a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at Syl. Pt. 5, in part. *See also Zafiro v. United States,* 506 U.S. 534, 539 (1993) (recognizing the general rule regarding joint trials, and noting that "less drastic measures, such as limiting instructions, will often suffice to cure any risk of prejudice" that results from a joint trial.) This should be considered alongside "the general rule that defendants 'indicted together are tried together to prevent inconsistent verdicts and to conserve judicial and prosecutorial resources." *Boyd,* 238 W. Va. at

432, 769 S.E.2d at 219 (quoting *United States v. DeCologero*, 530 F.3d 36, 52 (1st Cir. 2008) (citation omitted)).

It is important to note that Petitioner does not dispute that he and his co-defendant were properly joined in a single indictment. Because of this, the "general rule" applies, which requires that defendants "indicted together are tried together," unless there exists some "severe or compelling" prejudice that results therefrom. *Boyd*, 238 W. Va. at 432, 769 S.E.2d at 219. Petitioner cannot meet this threshold by relying on broad, and conclusory statements that are not supported by the record or legal authority.

Petitioner also asserts that his absence from the severance hearing prevented him from offering objections or seeking some other form of relief. Pet'r's Br. at 28. While it is certainly true that Petitioner was not present at the hearing, nothing prevented him from filing his *own* motion seeking a severance. Petitioner's claim that he had compelling arguments to make in favor of severance at his co-defendant's severance hearing carry no value when Petitioner never took the opportunity to present the court with such arguments directly.

Petitioner points to the fact that the circuit court was unwilling to allow Petitioner to relitigate those issues at a subsequent hearing, but neglects to mention that he never placed the issue squarely before the circuit court in the first instance. Whether the circuit court was willing to entertain an *ad hoc* motion to sever in the midst of a pretrial hearing wherein the court was addressing nine other pretrial motions raised by Petitioner is not an indication of some inappropriate conduct by the circuit court. Indeed, Rule 12(b)(5) of the West Virginia Rules of Criminal Procedure specifically vests the trial court with the discretion to entertain motions, whether written or oral, with respect to severance motions. While Petitioner may claim that he presented an oral motion to the court for severance, the court was well within its discretion to

refuse to consider it, especially given the fact that there was no written motion filed by Petitioner. Moreover, Petitioner never noticed any intent to present such a motion.

Petitioner has failed to point to any particular facts that warranted a severance. His vague allusions to the "spillover prejudice" that may have resulted from the admission of his co-defendant's gang affiliation and drug trafficking is entirely speculative, and is completely devoid of any factual or legal support. Therefore, Petitioner cannot demonstrate he was entitled to severance in the first instance, let alone that the circuit court's failure to grant such severance was erroneous.

While the overall conspiracy equally involved Mr. Mason and Petitioner, their respective roles in furtherance of the conspiracy were conspicuously separate. The evidence revealed that Mr. Mason's involvement was largely in making the arrangements necessary to carry out the murder, while Petitioner's was the act of actually committing the murder. Thus, the evidence presented as to each respective individual's guilt was compartmentalized and clearly attributable to each individuals respective roles. From a macro standpoint, Petitioner and Mr. Mason's involvement is inextricably intertwined. But when viewing the evidence at a micro level, both Mr. Mason and Petitioner's respective acts and involvement are clearly identifiable, and the proof of their respective conduct does not rely on the evidence presented in support of the other's guilt. While the totality of the evidence explaining both Mr. Mason's and Petitioner's involvement was critical to the jury's full and complete understanding of the necessary facts, that is not to say that all the evidence presented could not easily be compartmentalized into evidence pertinent to Mr. Mason, and evidence pertinent to Petitioner. Thus, to the extent that Petitioner's absence from the severance hearing was erroneous, the record proves that any error was harmless beyond a reasonable doubt.

III. The circuit court held a hearing upon Petitioner's motion to suppress his statement to law enforcement, and correctly determined that Petitioner did not invoke his *Miranda* right to counsel.

Petitioner asserts that the circuit court erred in denying his motion to suppress the statements he provided to law enforcement. Pet'r's Br. at 29. Petitioner's contention in this regard is entirely without merit, and should be rejected.

First it is important to note that, to the extent that Petitioner asserts on appeal that his statement was involuntary, such contention was never raised before the circuit court. *See* A.R. 261-62; Pet'r's Br. at 29. The only issue presented to the circuit court involved the question of whether Petitioner's queries to law enforcement during his interview—after he had been advised of, and waived, his *Miranda* rights—constituted an invocation of his *Miranda* right to counsel. *Id.* In particular, the dispute at the proceedings below was whether Petitioner's question to law enforcement asking: "You think I might need a lawyer," amounted to an unequivocal invocation of his right to counsel. A.R. 264.

Because Petitioner did not dispute the voluntariness of his statement to law enforcement outside of what he claimed to be an invocation of his right to counsel through his questions to law enforcement, the only question for this Court to answer in this respect is whether the questions did, in fact, sufficiently invoke his right to counsel. Based upon this Court's precedent, as well as that of the United States Supreme Court, the answer to that question must be resolved in favor of the State.

This Court has recognized that "Once a person under interrogation has exercised the right to remain silent guaranteed by *W. Va. Const.,* art. III, § 5, and *U.S. Const.* amend. V, the police must scrupulously honor that privilege. The failure to do so renders subsequent statements inadmissible at trial." Syl. Pt. 5, *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995)

(citations omitted). In order to assert this right and "terminate police interrogation, the words or conduct must be explicitly clear that the suspect wishes to terminate all questioning and not merely a desire not to comment on or answer a particular question." *Id.* at Syl. Pt. 6, in part (citation omitted).

Recognizing the inherent flaw in construing one's ambiguous comments with respect to whether they want a lawyer, the United States Supreme Court opined that such "a rule requiring the immediate cessation of questioning 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.'" *Davis v. United States*, 512 U.S. 452, 460 (1994) (quoting *Michigan v. Mosley*, 423 U.S. 96, 102 (1975)). The United States Supreme Court went on to explain that this standard "would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present." *Id.* The Court in *Davis* continued by noting that its holding in *Miranda* did not require that "each police station have a station house lawyer present at all times to advise prisoners," nor did it support the notion that "if a suspect is indecisive in his request for counsel, the officers need not always cease questioning." *Id.* (internal citation and quotation marks omitted).

In discussing the *Davis* opinion, this Court stated:

> We believe that under *Davis* insubstantial and trivial doubt, reasonably caused by the defendant's ambiguous statements as to whether he wants the interrogation to end, should be resolved in favor of the police and that under these circumstances, further interrogation by the police does not offend the West Virginia Constitution.

State v. Farley, 192 W. Va. 247, 256, 452 S.E.2d 50, 59 (1994).

The record below reveals that Petitioner's question to law enforcement did not rise to the level that this Court, or the United States Supreme Court, has ever construed to constitute an invocation of one's *Miranda* right to counsel. Petitioner's question to law enforcement was nothing more than an equivocal question, that in no way clearly indicated his desire to cease

answering questions and to speak with his lawyer. Thus, Petitioner's claims should be rejected, as he cannot meet his burden of establishing that the circuit court's denial of his motion amounted to an abuse of discretion.

IV. Petitioner forfeited any right to raise error from the mercy phase of his criminal trial. Alternatively, Petitioner's claims that the prosecutions remarks were improper is wholly without merit, and should be rejected.

A. Petitioner offered no objection at trial to the statements he claimed were improper, and, therefore, they are forfeited.

Petitioner did not, at any point during the mercy phase of his criminal proceedings, offer any objection to any remark or comment made by the prosecution. Not only that, Petitioner never raised a claim as to any alleged error at the mercy phase of his trial in his post-trial motions. Thus, Petitioner's assignments of error regarding alleged errors at the mercy phase of his trial have been forfeited, and this Court should refuse to consider them.

"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." *State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995) (internal quotations and citations omitted). "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). "This practice is founded upon the considerations of fairness to the court and to the parties and of the public interest in brining litigation to an end after a fair opportunity has been afforded to present all issues of law and fact." *United States v. Atkinson*, 297 U.S. 157, 159 (1936).

Forfeiture has been defined by this Court as "the failure to make a timely assertion of [a] right." *Miller*, 194 W. Va. at 18, 549 S.E.2d at 129. In order for one to obtain relief from a forfeited error, however, it is the petitioner's burden to demonstrate that the error itself was "plain."

Id. For the "plain error" doctrine to apply, a petitioner must show that there was "(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." *Id.* at Syl. Pt. 7.

Although the plain error doctrine "enables this Court to take notice of error . . . during the proceedings, even though such error was not brought to the attention of the trial court . . . the doctrine is to be used sparingly," Syl. Pt. 4, in part, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988), and is reserved "to correct only 'particularly egregious errors' . . . that 'seriously affect the fairness, integrity or public reputation of the judicial proceedings[,]'" *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129 (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)).

For reasons discussed in more detail below, Petitioner cannot demonstrate that either of the remarks he complains of were erroneous in the context of a mercy trial. Petitioner's forfeiture of his claim to any allegedly inappropriate remarks made at the mercy phase of his criminal trial is fatal, and this Court should reject this claim in its entirety.

B. The remarks complained of by Petitioner were wholly appropriate in the mercy phase of a criminal trial.

This Court has recognized 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, *State v. Sugg*, 193 W. Va. 388, 465 S.E.2d 469 (1995).

It is important to note, when considering the propriety of remarks made by the prosecution to the jury in the mercy phase of a criminal trial, that Petitioner no longer enjoys the presumption of innocence during that proceeding. "In the trial of a criminal offense, the presumption of innocence existing in favor of a defendant continues through every stage of the trial until a finding of guilty by the jury." Syl. Pt. 11, *State v. Pietranton*, 140 W. Va. 444, 84 S.E.2d 774 (1954).

"Once a defendant has been afforded a fair trial and convicted of the offense for which is was charged, the presumption of innocence disappears." *Herrera v. Collins,* 506 U.S. 390, 399 (1993). To be sure, "[t]he purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt." *Ross v. Moffitt,* 417 U.S. 600, 610 (1974).

Petitioner's assertion that the State improperly commented on his silence is rooted in his misplaced attribution of a statement which was a direct response to statements made by his co-defendant's allocution to the jury. A.R. 1347-48. While Petitioner elected not to allocate, his co-defendant did. A.R. 1347-48. During his co-defendant's allocution, in an apparent attempt to appeal to the jury's sympathies, invoked his children by stating "I don't think I deserve to never see my children again." A.R. 1347. The State responded to this statement during its closing argument by stating:

> There's a comment made by Mr. Mason that he missed his son's first baseball came today. What I want you to think about is that Taylor will never know what sports her daughter [J] even gets to play. She will never know. She will never get to see her daughter as you saw her in the photos that were passed around.
>
> You heard that from the defendant. But you know what you haven't heard today? Remorse. You haven't heard any remorse.

A.R. 1358-59. Thus, when the comment is viewed in context, it is clear that the statement was a direct response to Petitioner's co-defendant's invocation of his children as a basis for the jury to recommend he receive mercy. The State's response appropriately pointed out that while Petitioner invoked his status as a father, his statement contained nothing to indicate any remorse for his part in senselessly removing a child's mother from her life.

Whether Petitioner argues that the remark was directed at him, however, is completely irrelevant. While the record reveals that it was not, Petitioner's right to remain silent disappeared along with his presumption of innocence:

> The basis for the rule prohibiting the use of the defendant's silence against him is that it runs counter to the presumption of innocence that follows the defendant throughout the trial. *It is this presumption of innocence which blocks any attempt of the State to infer from the silence of the defendant that such silence is motivated by guilt rather than innocence which the law presumes.*

Boyd, 160 W. Va. at 240, 233 S.E.2d at 716. (emphasis added). Whether Petitioner's silence was motivated by guilt or innocence during his mercy phase was completely irrelevant, as his guilt had already been established by the jury's verdict.

The second statement Petitioner challenges is where the State explains to the jury that it "generally look[s] to two factors" when making arguments to the jury during the mercy phase of criminal trials. A.R. 1357. The particular statement is clearly not one wherein the State is attempting to direct the jury to consider any particular factors; instead, it is telling the jury the factors that the State considers when making arguments relating to mercy.

Both of the cases Petitioner cites in support of this specific argument are entirely inapplicable to the facts of this case, as both involved issues prior to the jury's verdict. Pet'r's. Br. at 39-40. Petitioner relies on this Court's decision in *State v. Miller*, 178 W. Va. 618, 620-22, 363 S.E.2d 504, 506-08 (1987), which involved instructions directing certain factors a jury should consider in determining whether to recommend mercy in a *unitary trial*. Indeed, when there is no bifurcation of the guilt and punishment phase of a criminal trial, it is clear why such an instruction is inherently problematic. As this Court recognized, such instructions in a unitary trial, "the jury in its deliberations could be deflected from deciding the merits of a defense issue and treat it as part of the mercy recommendation." *Id.* at 622, 363 S.E.2d at 508. In the present case, however,

no such risk was present, as the jury had already found Petitioner and his co-defendant guilty. This, of course, is only relevant if this Court construes the State's remarks as advising the jury as to the factors that it should consider in deliberating on the issue of mercy. The State asserts that the record clearly reveals that was not the purpose of the Statement, and it did not amount to any error.

Petitioner also relies on this Court's decision in *State v. Hatcher,* 211 W. Va. 738, 741-42, 568 S.E.2d 45, 48-49 (2002), which involved allegedly improper remarks made by the prosecutor during closing arguments at the guilt phase of a criminal trial. Again, these facts are irrelevant to those presented in the instant case, as the comments arose during the bifurcated mercy phase of a criminal trial.

Moreover, the instructions provided to the jury at the mercy phase clearly inform the jury that the court is not permitted to guild the jury as to what factors would support a recommendation of mercy or no mercy:

> You may want to know what the legal definition of "mercy" is; however, I am unable to give you one. The issue of mercy is committed to your discretion and I am not permitted to guide you further on what facts or reasons justify mercy. I am allowed only to tell you what the effect of your finding is and that your finding must be unanimous.

A.R. 1552.

Simply stated, there is not a scintilla of information contained in the record that suggests any error occurred at the mercy phase of Petitioner's trial. The record reveals that Petitioner did not object to either statement. But even if the failure to preserve the issues is overlooked by this Court, the record belies the very premise upon which his arguments are built. But even if one is to give Petitioner the benefit of the doubt as to all of those issues, there is simply no support from

relevant legal authority that supports his arguments. Thus, Petitioner's claim should be rejected as being wholly without merit, and this Court should affirm the judgment of the circuit court.

CONCLUSION

Based upon the foregoing, this Court should affirm the judgment of the Berkeley County Circuit Court as contained in Action Number 20-F-212.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

/s/ William E. Longwell
WILLIAM E. LONGWELL
ASSISTANT ATTORNEY GENERAL
W. Va. State Bar No.: 12290
State Capitol Complex
1900 Kanawha Blvd. E.
Building 6, Ste. 406
Charleston, WV 25305
Telephone: (304) 558-5830
W. Va. State Bar No.: 12290
E-mail: William.E.Longwell@wvago.gov
Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-706

STATE OF WEST VIRGINIA,

Respondent,

v.

RICHARD DANE SMALL,

***Petitioner*.**

CERTIFICATE OF SERVICE

I, William E. Longwell, counsel for the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed counsel for Petitioner, through the West Virginia Supreme Court's E-Filing system, in accordance with Rule 38A of the West Virginia Rules of Appellate Procedure on this day, February 2, 2023.

Kevin Mills, Esq.
Criminal Law Center
1800 West King St.
Martinsburg, WV 25401

/s/ William E. Longwell
William E. Longwell (State Bar No. 12290)
Assistant Attorney General