IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.: 22-822

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STATE OF WEST VIRGINIA,
Respondent,

v.

DAVID LEWIS,
Petitioner.

(An appeal of the final judgment of the Circuit Court of Marion County, Case No.: 21-F-132)

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred by repeatedly overruling the objections of the Petitioner to irrelevant testimony concerning the decedent's character by State's witnesses.
2. Plain error is evident from the record in the form of the repeated, varied, blatant, and prejudicial prosecutorial misconduct of the Prosecuting Attorney during both opening and closing argument, as well as by his deliberately soliciting irrelevant and prejudicial testimony from witnesses.
3. The Circuit Court erred by ruling the Petitioner's second statement admissible after he previously invoked his right to remain silent during an earlier custodial interview half an hour before the second one.
4. The Circuit Court erred cumulatively to the Petitioner's prejudice.

STATEMENT OF THE CASE

The Defendant was indicted for First Degree Murder and Use of Firearm in the Commission of a Felony by the Marion County Grand Jury in June of 2021. (A.R., at 10-11). Prior to trial, the Circuit Court held a hearing on several pretrial motions on various evidentiary issues, including, germane to this appeal, his statements to law enforcement. (A.R., at 19-22). The suppression hearing was held on July 5, 2022. The witnesses were Ptlm. Samuel Murphy, Det. Reed Moran, and Det. Moses Perry of the Fairmont Police Department. (A.R., at 217, 225, 230). Ptlm. Murphy testified to responding to a report of shots fired, not by going to scene, nor to the hospital where the decedent was taken, but by searching for the Petitioner in Fairmont. (A.R., at 218-219). He testified to locating and identifying the Petitioner at Sheetz. (A.R., at 220). He placed the Petitioner in handcuffs. (A.R., at 220-221). The Petitioner was given an oral *Miranda*[1] warning, and the resulting interrogation was recorded on body cam. (A.R., at

1 *Miranda v. State of Arizona*, 384 U.S. 436 (1966).

221). The Petitioner asked if he had the right to remain silent. (A.R., at 221). Officers continued to question him after has asked if he had the right to remain silent. (A.R., at 221).

Det. Moran was asked about the Petitioner's invocation of his *Miranda* rights:

> Q. Did he ask any point in time to cease the exchange until he had an opportunity to discuss things with any lawyer?
>
> A. Yes, he did enact his right to remain silent. I believe his exact wording, we were talking to him and he said "I have the right to remain silent." I said, "Yes, you do." And that was the end of any field questioning.
>
> Q. Okay. So he invoked his right to remain silent. Did he ask for a lawyer at any time?
>
> A. No, he did not ask for an attorney in the field.
>
> Q. And once he was transported to the Fairmont Police Department, did you participate in any other interviews of Mr. Lewis?
>
> A. I did not, no.

(A.R., at 228).

Detective Moran also testified about the content of the interview:

> Q. Okay. Specifically, do you recall what he said in regard to questioning post-Miranda at that time?
>
> A. Most of it was a denial of the incident. I couldn't dig up his exact words. I mostly asked him about where the gun was, and he said things along the lines of, you know, "What gun?"
>
> Q. Anything else?
>
> A. Not that I recall off the top of my head.

(A.R., at 229-230).

Unlike the previous two witnesses, Det. Moses interviewed the Petitioner at the police station rather than outside Sheetz the night of the incident. He testified that he initiated

questioning of the Petitioner approximately thirty minutes[2] after he was arrested at Sheetz, and that he was not told anything by Det. Moran about the Petitioner's previous invocation of his right to silence:

> Q. Detective, to the best of your knowledge, how long was it between when he was arrested at Sheetz and when he's in your interview room?
>
> A. I can't recall. I want to say maybe 30 minutes.
>
> Q. Okay. Were you made aware by Detective Moran that he had invoked his right to remain silent at the scene where he was arrested at Sheetz?
>
> A. I don't believe Detective Moran told me anything about that.

(A.R., at 236).

After Det. Moran re-initiated questioning, the Petitioner signed a written *Miranda* waiver (A.R., at 73) and gave a recorded statement to law enforcement, answering a number of questions prior to subsequently ending the questioning. (A.R., at 231-235). At the beginning of trial, shortly after jury selection, the Circuit Court ruled as follows concerning the statements to law enforcement:

> On June 22nd the state filed a motion to determine the admissibility of evidence with respect to a few matters, some of which were agreed. We had a hearing on July 5, 2022. There's some certain issues outstanding. Number one, with respect to the state's motion to determine the admissibility of the defendant statements to police, both at the Sheetz and at the police station, following his arrest and detention. I heard evidence on that date, July 5th. I asked the defendant -- the attorneys, that if they wished to file a motion or to file a brief in support of their position. On I believe it was July 8 Mr. Shough filed the defendant's motion to suppress statements, which I reviewed. I was hoping I would get a memorandum of law, but I understand your position. I'm satisfied

2 The timestamp on the body cam footage at the beginning of the first interview reads "12/16/2020 03:09:18." The timestamp on the video of the second interview reads "12-16-2020 Wed 03:14:42" when the officer states the time as being "oh two fourteen hours." The cause of this discrepancy is uncertain, but the record appears to reflect that the Petitioner was transported directly from Sheetz to his interrogation at the Fairmont Police Department.

> with that. And even through I'm without a law clerk for the next serval weeks I was able to resolve that issue, at least in my own brain.
>
> So with respect to the interview conversation with the defendant which was recorded at the Sheetz, I'm going to rule that when the defendant -- at the point in that statement where he said he wished to remain silent, I'm not exactly sure how he said it, he invoked his right to silence. Anything subsequent to that will be excluded. So the conversation with the defendant up to the point where he says he invokes his right to remain silent, anything after that will be excluded. With respect to the statements at the police station, I'm of the opinion that -- well, the first thing that happened when he was taken to the station he was advised of his Miranda rights. He signed and initialed the Miranda rights. Signed a waiver. So I'm of the opinion that he changed his mind and he waived his right to remain silent at the police station. And so that statement at the police station will be admissible over the defendant's objections, and I suppose over the state's objections with respect to the termination of the interview upon his stating that he wanted to remain silent.
>
> I would note that neither in the statement at Sheetz nor in the statement at the police station did he invoke his right to counsel or say he wanted an attorney. So that would, in my opinion, permit them to follow up at the police station at which time he changed his position, waived his right, and that statement is admissible. Okay, so that's with respect to the statements. So the defendant's motion to suppress the statements is overruled to the extent as stated on the record here today.

(A.R., at 300-301). At trial, the video recording of both statements, (presumably subject to the limitation on the Sheetz Parking Lot video), were admitted and published to the jury. (A.R., at 455, 531).

During the opening arguments, the State spoke more about the good character of the decedent than about the details of the case, including the following excerpt, in which the decedent is referred to as a "significant contributor to our community," "a terrific young man," a (figurative) "big brother," "mature already beyond his years," a "fast friend[]", "hardworking," and as an uncommonly good father:

> This case arose on December 15, 2020, when David Lewis, who's seated here at defense table, if you can all take a look, looked

quite different on December 15, 2020, but he's the right guy. And I don't want to talk a lot about him, because on that date he committed and awful, awful heinous crime. Used a firearm to kill another 20-year-old man. So I don't want to talk a lot about David. I want to talk a lot about the evil, malicious act that he committed that took this valuable life, the significant contributor to our community. This case isn't really about David. It's about what he did. And more important it should be, and I hope by the end you agree, that it should be about Dylan Harr. You'll hear from a number of witnesses who to a person will say that Dylan was a terrific young man. Dylan was 20 years old, but mature already beyond his years. He was a big brother to [G.S.], to [E.M. (another minor)]. Rapidly becoming fast friends. He was like a brother to Russell Scritchfield, who was one of the two leaseholders at the apartment on Bryant Street that we'll talk a lot about. Had become a very good friend of Russell's roommate, McKenzie McCullough, and her younger brother, who was also living at the apartment. They had a close-knit relationship in this house.

Dylan was a hardworking young man, making and delivering pizzas for Papa John. At 20 years old, doing so enough that he's supporting his young son, [decedent's child], who was just barely a year of age back in December of 2020. And I'll tell you something about the character the evidence will show of Dylan. Dylan had successfully fought and won joint custody of his young son, [decedent's child], which is unheard of for a 20-year-old male. Hard, hard to get joint, complete 50/50 custody as a father. Because you're out busy hustling and making a living and hopefully contributing to the lives of your children. But that's exactly what he did. And the folks that lived at Bryant Street had seen him, saw a whole lot more of Dyan on the weeks when he didn't have his son. But several of them worked together. He had actually help McKenzie, he and Russell, get her job at Papa John's. So these young 20-year-old kids scraping by an existence and living on their own at 20 making and delivering pizzas is to be commended. I remember those days of working hard and scratching out an existence and trying to go to school right beside where this apartment was.

It all came to a screeching halt on December 15, 2020. [The decedent's child]'s not going to know his dad. He'll never remember his daddy. He was just barely a year old when Mr. Lewis just snatched the life out of Dylan Harr by using a firearm to shoot him right in the chest.

(A.R., at 334-337).

The Petitioner's trial counsel did not object to this argument. However, it did object,

unsuccessfully, (and on other occasions, fail to object) to the numerous instances of the State eliciting similar testimony from its witnesses. During G.S.'s[3] testimony, mere minutes into the presentation of evidence, the following exchange took place:

> Q. Did you know Dylan Harr?
>
> A. Yes, sir, very well.
>
> Q. How did you know Dylan?
>
> A. I met him through a buddy.
>
> Q. And unfortunately Dylan's no longer with us; is that correct?
>
> A. Yes, sir.
>
> Q. Did he pass away in December 2020?
>
> A. Yes, sir.
>
> Q. How long before he passed had you been good friends?
>
> A. Probably two years.
>
> Q. Did you come to view Dylan as kind of your big brother?
>
> A. Yeah.
>
> Q. What sorts of brotherly and friend things did he do with you?
>
> A. Everything. Dylan was always with us. Like, he would text me, come to my house, pick me up. We would just go do things all the time.
>
> Q. So he visited you at your house?
>
> A. Yes, sir.
>
> Q. Did you go with him to his house?
>
> A. Yes, sir.
>
> Q. Did he take you other places that he may have hung out with

3 G.S. is a minor who testified on behalf of the State.

other friends and include you?

A. Yes, sir. Vise versa.

Q. What if you couldn't physically get together, did you talk often on the phone?

A. Not too much. We really hung out a lot, honestly. Like, Dylan was almost around every day.

Q. So you saw him virtually every day?

A. Pretty much, yeah.

Q. What in particular did you like about him?

A. He was a jokester. He liked to joke. And he'd always make sure you were okay.

Q. So was he thoughtful of your feelings?

A. Everybody's.

Q. What happened if you were friends for two or three years before 2020 when he passed, I bet you got to know [decedent's child]?

A. Yes, sir.

Q. Did you see any change take place with Dylan?

MR. ROGERS: Objection, Your Honor. Relevancy.

THE COURT: Overruled.

Q. Did you see any difference take place with Dylan when he became a dad?

A. Well, I mean, he always took care of his kid. He was never -- if his kid was around, he included us to go play. Like, if he wanted to hang out with us, we would go to the park and play with his kid. Like, hang out with him and his kid.

Q. So you did kid things when he had [decedent's child] in his custody?

A. Yes, sir.

(A.R., at 347-349).

During McKenzie McCollough's testimony, a similar line of questioning took place:

> A. I met Dylan -- I met Dylan through Russell at a get together with a group of friends. And Russell had brought Dylan with him. So that's the first time I had ever met him.
>
> Q. And when during that time frame of when you were becoming friends with Russell did that take place?
>
> A. Shortly after they got us sent home from Covid from Teleperformance is when I met him.
>
> Q. He also assist you in getting on at Papa John's?
>
> A. He did.
>
> Q. What were your initial thoughts of Dylan?
>
> A. He was goofy. Very funny. Loving. Helped anyone he possibly could. Just a genuine soul.
>
> Q. Were he and Russell particularly close friends?
>
> A. Yes.
>
> Q. As a result of pretty quickly becoming Russell's roommate, did you get to know his very close friend Dylan well yourself?
>
> A. Yes.
>
> Q. Happen pretty rapidly?
>
> A. Yeah, it did.
>
> Q. I know it's hard. But she's going to write down or take down everything everybody says, so you have to be able to answer out loud. And when you're having a hard time we'll wait. Okay? I know this is difficult. Anything during that rapid initial period of getting to know Dylan change your mind about him?
>
> A. Never. We had our ups and downs like any family would. That's what I refer him as, my family. We always made it through our rough patches. You know, family always has their fights. They come back to each other.

Q. So almost like another brother?

A. Yeah.

Q. Speaking back to brothers, we'll talk about some of the funny stuff. Shortly after becoming roommates with Russell, did you kind of become roommates again with your little brother?

A. I did, yes.

MR. SHOUGH: Objection as to relevance, Your Honor.

THE COURT: Overruled.

He had an altercation with our mother. Needed a place to live, so I let him come stay with me.

Q. So kind of big sis came to his rescue?

A. Yes.

Q. That dispute and him coming to reside with you, is that basically over his best friend, Beon, basically living at your mom's house?

A. Yes.

Q. And did he bring Beon to big sis's house?

A. He did.

Q. Tell the jury how you described that to me. What did the apartment become like?

A. It was like a frat house is the best way I can explain it. Like, there was always love in our house. We tried to help anyone that needed it. Give them a place where they felt safe.

Q. You kind of sort of the only female there most of the time?

A. Yes.

Q. I feel for you. I really do.

MR. SHOUGH: Your Honor, may we approach?

THE COURT: If you have an objection, state it on the record.

MR. SHOUGH: Your Honor, this case is about a murder. And the issues that the witnesses needs to be testifying to as the issues are relevant to what happened to cause that murder. We've had a lot of testimony about how people felt about other people. I understand in establishing a background, but it's the defense position at a certain point that should stop.

THE COURT: Okay. Mr. Freeman?

MR. FREEMAN: Your Honor, I think it's only appropriate to set the stage for the jury about who lived in this household and why, and why they were all there on December 15, 2020.

THE COURT: For the reason expressed by Mr. Freeman, the defense objection is overruled.

(A.R., at 394-396).

During Russell Scritchfield's testimony, another similar exchange occurred:

Q. Let's take a step away from the apartment for a bit and talk about Dylan. Did you know Dylan Harr?

A. Yes. Yes, I did.

Q. I know how you know Dylan, but these folks don't. So can you tell the jury how it is that you became aware of Dylan?

A. I became aware of Dylan when --

MR. SHOUGH: Objection. Relevance.

THE COURT: Overruled.

Q. How did you know Dylan?

A. I knew Dylan from working and starting at Papa John's on Fairmont Avenue.

Q. He also worked with you and McKenzie at Papa John's?

A. Correct.

Q. How long did you work with Dylan?

A. I worked with him from the second week of August – October

to the December 4, 2019.

Q. Become fast friends?

A. Yes.

Q. What did you think of it?

A. That he was a pretty cool dude and he was chill and wouldn't hurt a fly unless he absolutely had to.

Q. Enjoy working with him at the workplace?

A. Yes. He was funny.

(A.R., at 596).

A second similar exchange occurred later in his testimony:

Q. Were you still at the hospital when you found out from the medical personnel that Dylan had died?

A. Yes.

Q. Hard set of events for you, is it not?

A. Yes.

Q. Were you and Dylan close friends?

A. Yes.

Q. How did you view your relationship with him?

MR. SHOUGH: Objection. Relevance.

THE COURT: Overruled. Let's make it brief, Mr. Freeman.

MR. FREEMAN: Yes, Your Honor.

A. I would say he was a brother from another mother. We were tight as could be, to the point to where he literally told me I could call his mom "mom." And he had also made me the godfather of his child.

Q. You knew his son?

A. Yes.

Q. [Decedent's child]?

A. Yeah.

MR. FREEMAN: No other questions at this point for this witness. Pass the witness.

(A.R., at 612-613).

During closing arguments, the Prosecuting Attorney said the following:

> These are difficult things to hear about. They're certainly not made any easier by the fact that we're talking abut a young 20-year-old father of a then one-year-old child who's gone, whose son, [decedent's child], will never know him. Made even more devastating by the fact that we have young adults, even two juveniles, coming here and describing what has to be the worst day of their life and that their 16 to maybe 20 years of life had clearly not prepared them for. You got to see the very real struggle with the emotions that they had to deal with on December 15 and 16, 2020, as well as coming in here and relating it to you. The anguish is real. I think you got to see a bit of that raw emotion and the devastating impact of losing their good friend.

(A.R., at 683-684).

> But this case is more about Dylan, and Dylan Harr. And I want to remember him much more than I want to give undue attention to David Lewis, who committed this wicked and evil act a year and a half, almost two years ago now. From every single witness for all intents and purposes, Dylan was a terrific young man. They all, every last one of them, [G.S.], McKenzie, Caleb, Russell, [E.M.] here this morning, spoke glowingly of Dylan Harr. He was a good friend. They loved him.
>
> And what's important to note is that those like [G.S.] who knew him for a long time loved him like a brother. That was my big brother. And that those that knew him just a little bit, maybe like McKenzie, even Russell didn't know him that long, and they'd come to think of him as a brother. And those who only knew him a brief period, like [E.M.] and Caleb, through the world of him as well. He had an instant and immediate impact on those that he met, those that he associated with and had regular contact with.

(A.R., at 684-685).

> But they [defense counsel] do have, they have a role that they're duly and legally bound to perform. They must be David Lewis's advocates. They have to zealously represent him. And they've done so, and they've done so skillfully. They questioned witnesses skillfully. But their role is very, very different from that of a prosecutor. I don't have a client. I have the duty and obligation of pursuing at all costs the truth. My client or clients are the people of Marion County, each one of you. It's not one individual officer. I don't represent Dylan Harr or his family. I'm representing each one of you and all of our friends and all of our neighbors and all of our associates, coworkers, everyone. For one purpose, the find truth and justice in this courtroom. So that role is very different. I'm not advocating for a single individual. I take that very seriously.

(A.R., at 691).

> These young people fought through a devastating event and the traumatic memories of that, and the raw, visceral emotions to get those truthful facts to you. Don't let them down, please. I wanted this case from the very beginning to be about Dylan. Don't let him down.
>
> The judge includes in those instructions that we make a lot of things difficult and complicated in the justice system, but it comes down to that common sense and your good judgment as good citizens of Marion County, West Virginia, which are the best anywhere in the world. I've lived here my whole life. That's why I love this job so much, because I get to represent you, the people that I know and love. And I trust you to do the right thing.

(A.R., at 695).

After deliberating, the jury returned a verdict of guilty on the lesser-included offense of Second Degree Murder on Count I, and a guilty verdict on Count II on July 14, 2022. (A.R., at 179-180). The Defendant filed post-trial motions on August 4, 2022, requesting a judgment of acquittal and a new trial on grounds that included the following:

> Additionally the defendant submits that the Trial Court erred in allowing the State of West Virginia to repeatedly, and over the defense's objection, elicit from various witnesses, testimony as to the character of the victim. The victim was repeatedly characterized as a good person, a good friend and a great father; all such evidence being non-relevant to any issue to be decided by the jury and without any prior argument or questioning by the defense

> such as would put the defendant's character for peacefulness into consideration. The Court's failure to exclude said evidence irredeemably tainted the jury's consideration of both the witnesses testifying as to actually viewing the incident as well as the totality of the evidence upon which their verdict should have been based.

(A.R., at 188-189).

The Circuit Court denied the Defendant's Motions, without a hearing. Although the post-trial motion was filed more than ten days after the verdict, the Circuit Court nonetheless rule on it on the merits, without relying on its untimeliness, ruling in writing as follows:

> With respect to Defendant's Post Trial Motion I, Motion for New Trial, the Court recalls the totality of the evidence presented in this matter does indeed support the verdicts returned by the jury. Further, the Court is of the opinion that evidence of the victim's good character was admissible pursuant to Rule 404(a)(2)(C) of the West Virginia Rules of Evidence.

(A.R., at 191).

At sentencing, the Circuit Court sentenced the Petitioner to a forty year determinate sentence on the Second Degree Murder conviction, and ran it concurrently with a determinate ten year sentence of Use of Firearm in the Commission of a Felony. (A.R., at 194-197). It is from the judgment of sentence that the Petitioner now appeals.

SUMMARY OF ARGUMENT

The Circuit Court, over the repeated objection of the Petitioner, allowed in testimony that had absolutely nothing to do with the proof of the offenses, and instead was calculated to create an inflammatory emotional response in the jury. The Circuit Court, over objection, allowed in testimony about the close friendship between the decedent and several individuals in his orbit, and allowed in evidence of a type specifically disdained by this Court concerning the decedent's young child, which has no possible nexus to any legitimate area of inquiry in the guilty phase of the proceedings. The Circuit Court justified its rulings after the fact on the basis of Rule 404(a)

of the Rules of Evidence, but that rule simply permits the state to offer evidence of the victim's character *in rebuttal* when it is raised by the defendant. In this case, the Prosecuting Attorney poisoned the well repeatedly, in his own opening argument, and in his own case-in-chief, by repeatedly letting know the jury know how great a person the decedent was, and how harmful it was to his family and the community generally that he had passed. Those considerations are suitable for a sentencing. They are utterly inappropriate in the guilt phase of a trial. Had the Petitioner set forth a defense of provocation or self-defense, the issue might be arguable. But the defendant did not do so. The defense was that the killing was unintentional, not that it was justified by the conduct of the victim. (A.R., at 704-705).

Beyond what was specifically objected to, the entire trial was poisoned by the Prosecuting Attorney's intentional misconduct. From lamenting over the fact that the decedent's child lost his father, to eliciting testimony about the painful loss of friendship off the decedent's friends, to personally vouching for the honesty of witnesses, to drawing a distinction between himself – defender of the truth – and defense counsel, who were merely exercising their duty to defend the Petitioner, this Prosecuting Attorney has violated the basic precepts for fair play in a trial. He has struck not merely hard blows, but foul ones. Although it is admitted that the full panoply of prosecutorial misconduct was not objected to, the record is overwhelming and plain that this trial was tainted by the State's malfeasance. The Petitioner requests that this Court exercise plain error review and grant a new trial due to the repeated, intentional, unjustified, and frankly appalling tactics of the State.

The Petitioner contends that the Circuit Court erred in its disposition of the question of whether or not his second statement to law enforcement should have been suppressed. The record demonstrates, and the Circuit Court found, that the Petitioner had successfully invoked his right to silence (but not counsel) during the first interview. Approximately thirty minutes

later, different police officers, who were apparently not aware that the Petitioner had invoked his right to silence, restarted questioning, following which the Petitioner signed a *Miranda* form, and gave a statement for several minutes prior to re-invoking his rights and terminating the interview. Had the Petitioner invoked his right to counsel in the first interview, the law would be clear that the second interview should be suppressed. However, the standard for determining when police may restart an interrogation when only the right to silence has been invoked is not as straightforward. The Petitioner contends that based on the applicable precedent of the Supreme Court of the United States on this topic, the police action in restarting the interrogation so soon after he invoked his right to remain silent ran afoul of the Fifth Amendment of the United States Constitution. Therefore, he is entitled to a new trial based upon the admission of his inadmissible second statement to law enforcement.

Finally, to the extent that this Court finds multiple of the foregoing errors to be present, but declines to find any one of them individually to be prejudicial, the Petitioner asserts the doctrine of cumulative error, and requests that the Court find the errors to be not harmless when their effect is considered in the aggregate.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner requests oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, as remedying the misconduct of the State that is evident from the record in this case represents a matter of fundamental public importance. This matter should be resolved by signed opinion.

ARGUMENT

1. The Circuit Court erred by repeatedly overruling the objections of the Petitioner to irrelevant testimony concerning the decedent's character by State's witnesses.

a. Standard of Review

This Court has set forth an abuse of discretion standard of review for evidentiary issues:

> "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).

Syl. Pt. 1, *State v. Timothy C.*, 237 W.Va. 435, 787 S.E.2d 888 (2016). This Court has also held the following:

> "A judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby." Syllabus Point 7, *Starcher v. South Penn Oil Co.*, 81 W.Va. 587, 95 S.E. 28 (1918).

Syl. Pt. 7, *Torrence v. Kusminsky*, 185 W.Va. 734, 408 S.E.2d 684 (1991).

Based on these standards, the Petitioner has the burden to demonstrate an abuse of the trial court's discretion in admitting improper evidence, and also prove that the error was not harmless.

b. The admitted evidence to which the Petitioner objected was irrelevant and prejudicial.

Although there were numerous examples of improper testimony and argument in this case, as discussed further *infra* in the next argument section, the following prejudicial testimony came in specifically over the Petitioner's objections (by means of which he preserved these issues for appellate review):

> Q. Did you see any change take place with Dylan?
>
> MR. ROGERS: Objection, Your Honor. Relevancy.
>
> THE COURT: Overruled.
>
> Q. Did you see any difference take place with Dylan when he became a dad?
>
> **A. Well, I mean, he always took care of his kid. He was never -- if his kid was around, he included us to go play. Like, if he wanted to hang out with us, we would go to the park and play with his kid. Like, hang out with him and his kid.**

(A.R., at 349).

> Q. Were you and Dylan close friends?
>
> A. Yes.
>
> Q. How did you view your relationship with him?
>
> MR. SHOUGH: Objection. Relevance.
>
> THE COURT: Overruled. Let's make it brief, Mr. Freeman.
>
> MR. FREEMAN: Yes, Your Honor.
>
> **A. I would say he was a brother from another mother. We were tight as could be, to the point to where he literally told me I could call his mom "mom." And he had also made me the godfather of his child.**

(A.R., at 613).

This is not relevant evidence, and only relevant evidence is permitted, via W.Va.R.E. 401, to be admitted into evidence. The various witness' discussion of their close friendships with the decedent is inflammatory enough, but this Court has repeatedly admonished that it is wholly inappropriate to admit evidence of a victim's surviving family members.

> 10. "Evidence that a homicide victim was survived by a spouse or children is generally considered inadmissible in a homicide prosecution where it is irrelevant to any issue in the case and is presented for the sole purpose of gaining sympathy from the jury." Syllabus point 5, in part, *State v. Wheeler*, 187 W.Va. 379, 419 S.E.2d 447 (1992).

Syl. Pt. 10, *State v. Wade*, 490 S.E.2d 724, 200 W.Va. 637 (1997).

In *Wade*, this Court considered whether it was appropriate to admit evidence of a victim's child, when the fact that he had a child had no factual relevance to proof of the State's case:

> However, even though the relevancy standard is a liberal one, we are disturbed by the admission of Roy Rankin's testimony that the victim had a twelve-year-old son, a fact which bore absolutely no relation to the issues involved in this case. We have held that

> "[e]vidence that a homicide victim was survived by a spouse or children is generally considered inadmissible in a homicide prosecution where it is irrelevant to any issue in the case and is presented for the sole purpose of gaining sympathy from the jury." Syl. pt. 5, in part, *State v. Wheeler*, 187 W.Va. 379, 419 S.E.2d 447 (1992). We find that this evidence was not relevant to any fact of consequence to this case, and was admitted in error.

Wade, 490 S.E.2d at 739, 200 W.Va. at 652.

In *Wade*, this Court determined that the admission of the evidence of the victim leaving behind a child was incidental, and not made a focus by the prosecutor.

> While the prosecutor in this case elicited improper testimony from Roy Rankin, he did not dwell on that testimony. Roy Rankin stated that the victim had a twelve-year-old son, but gave no further testimony in that regard. In light of the substantial eye witness testimony presented at trial, we believe that the jury would have reached the same verdict in the absence of Roy Rankin's testimony. Consequently, we find this error was harmless. However, we feel that we should once again caution prosecutors that, while " '[g]reat latitude is allowed counsel in argument of cases, ... counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury.' " *Wheeler*, 187 W.Va. at 389, 419 S.E.2d at 457.

Wade, 490 S.E.2d at 740, 200 W.Va. at 653.

The same cannot be said of this case. The Prosecuting Attorney went back to the well of talking about the decedent's child over, and over again, twice specifically over the Petitioner's objection as cited above. The remarks were not isolated. The Prosecuting Attorney repeatedly brought up the child's plight, in a manner specifically designed to emotionally inflame the jury.

> Dylan was a hardworking young man, making and delivering pizzas for Papa John. At 20 years old, doing so enough that **he's supporting his young son, [decedent's child], who was just barely a year of age back in December of 2020**. And I'll tell you something about the character the evidence will show of Dylan. **Dylan had successfully fought and won joint custody of his young son, [decedent's child], which is unheard of for a 20-year-old male. Hard, hard to get joint, complete 50/50 custody**

> **as a father. Because you're out busy hustling and making a living and hopefully contributing to the lives of your children.** But that's exactly what he did. And the folks that lived at Bryant Street had seen him, **saw a whole lot more of Dyan [sic] on the weeks when he didn't have his son.** But several of them worked together. He had actually help McKenzie, he and Russell, get her job at Papa John's. So these young 20-year-old kids scraping by an existence and living on their own at 20 making and delivering pizzas is to be commended. I remember those days of working hard and scratching out an existence and trying to go to school right beside where this apartment was.
>
> It all came to a screeching halt on December 15, 2020. **[The decedent's child]'s not going to know his dad. He'll never remember his daddy. He was just barely a year old** when Mr. Lewis just snatched the life out of Dylan Harr by using a firearm to shoot him right in the chest.

(A.R., at 335-337) (emphasis added).

The State is not even trying to hide or mask its intent here. The Prosecuting Attorney literally says "And I'll tell you something **about the character** the evidence will show of Dylan." (A.R., at 335) (emphasis added). This Court, however, has determined that there are only certain circumstances in which the admission of character evidence of a victim is appropriate.

c. The Circuit Court's purported justification for admitting the irrelevant testimony was clearly erroneous.

The Circuit Court's justification, in denying post-trial motions, for allowing in the prejudicial character evidence about the decedent was that it was permitted under Rule 404(a)(2):

> Further, the Court is of the opinion that evidence of the victim's good character was admissible pursuant to Rule 404(a)(2)(C) of the West Virginia Rules of Evidence.

(A.R., at 191).

This Court has previously examined the standard for allowing in evidence of a victim's character under Rule 404(a)(2):

> 2. "Rule 404(a)(2) of the West Virginia Rules of Evidence essentially codifies the common law rules on the admission of character evidence of the victim of a crime. In particular, under our traditional rule, a defendant in a homicide, malicious wounding, or assault case who relies on self-defense or provocation, may introduce evidence concerning the violent or turbulent character of the victim including prior threats or attacks on the defendant. This is reflected by *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596 (1983): 'In a prosecution for murder, where self-defense is relied upon to excuse the homicide, and there is evidence showing, or tending to show, that the deceased was at the time of the killing, making a murderous attack upon the defendant, it is competent for the defense to prove the character or reputation of the deceased as a dangerous and quarrelsome man, and also to prove prior attacks made by the deceased upon him, as well as threats made to other parties against him; and, if the defendant has knowledge of specific acts of violence by the deceased against other parties, he should be allowed to give evidence thereof.' (Citations omitted)." Syl. pt. 2, *State v. Woodson*, 181 W.Va. 325, 382 S.E.2d 519 (1989).
>
> 3. In a homicide case, malicious wounding, or assault where the defendant relies on self-defense or provocation, under Rule 404(a)(2) and Rule 405(a) of the West Virginia Rules of Evidence, character evidence in the form of opinion testimony may be admitted to show that the victim was the aggressor if the probative value of such evidence is not outweighed by the concerns set forth in the balancing test of Rule 403.

Syl. Pts. 2 & 3, *Dietz v. Legursky*, 188 W.Va. 526, 425 S.E.2d 202 (1992).

At no point does the Petitioner offer a defense of self-defense, nor rely on a defense of provocation. The Petitioner's defense, as described in closing, was accident; that he lacked the intention altogether to kill the victim. “Dylan's death was unintentional. It was unplanned.” (A.R., at 704). Nowhere in the transcript of the trial is the phrase “self-defense” uttered. The jury was not instructed on self-defense, nor was the jury instructed on imperfect self-defense, or provocation. (A.R., at 665-683). The Court's reliance on this rule is clearly an error of law. Even if admission of the victim's character was permissible under the rule described in *Dietz*, that would not justify the admission of the testimony about the decedent's child, as the fact that he was a father has no possible bearing on his character for peacefulness or lack thereof. Twice,

over the Petitioner's objection, the victim's bereft child was discussed. It was transparently elicited to arouse the sympathy of the jury. This is prejudicial error, and requires the grant of a new trial.

> To authorize the reversal of a judgment, for the reason that irrelevant evidence has been admitted, the evidence must not only be irrelevant, but it must be of such a nature, that its admission may have prejudiced the prisoner.

Syl Pt. 1, *State v. William Kinney*, 26 W.Va. 141 (W. Va. 1885).

The basic physical facts of this case were not in dispute. It is clear that the Petitioner fired a shot that resulted in the death of the decedent. The question for the jury came down to the Petitioner's mental state. The State had to prove the element of malice, and it is clear that it relied upon improper, irrelevant, inflammatory, and sympathetic depictions of the decedent to generate negative feelings towards the Petitioner. This case is quite unlike other cases in which this Court has found harmless error, such as the following case where the irrelevant testimony related to a gun that was acknowledged by State's witnesses not to have anything to do with the killing:

> Here, it appears the circuit court abused its discretion in admitting the .22-250 rifle over petitioner's objection given that it had no connection to the crime at issue in this case and, therefore, failed to satisfy Rule 401 of the Rules of Evidence. However, we have also held that "'[a] judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby.' Syllabus Point 7, *Starcher v. South Penn Oil Co.*, 81 W.Va. 587, 95 S.E. 28 (1918)." Syl. Pt. 7, *Torrence v. Kusminsky*, 185 W.Va. 734, 738, 408 S.E.2d 684, 688 (1991). Here, the verdict of the jury could not have been negatively affected by the admission of the . 22-250 rifle given that, on both direct examination and cross-examination, the State's forensic expert testified that he could not tie the .22-250 rifle with the .22 bullet that killed the victim or with any of the other evidence contained within the box. For these same reasons, we find that any error the circuit court may have made in allowing the jury to take the .22-250 rifle into the jury room was not so prejudicial as to influence the outcome at trial.

Consequently, we deny relief on this ground.

State v. Putnam, No. 16-0557, at *7 (W.Va. April 7, 2017) (memorandum decision).

In another case, harmless error was found appropriate when, in sharp contrast to this case, the prosecutor avoided dwelling on the evidence about the victim's family:

> [T]he prosecutor made no attempt to dwell upon or draw out the testimony regarding the deceased's family. No attempt was made to present it as an issue in the case or a matter proper to be proven and considered. Its materiality was in no way suggested. Its presentation was incidental to the matter of identification of deceased and its effect upon the outcome of the trial minimal.
>
> *Id*. at 245-46. Thus, the Court did not find reversible error on this point...

State v. Wheeler, 419 S.E.2d 447, 456-57, 187 W.Va. 379, 388-89 (1992), quoting *People v. Hyde*, 1 Ill.App.3d 831, 275 N.E.2d 239 (1971).

The Prosecuting Attorney willfully, and over the Petitioner's repeated objections, brought in this type of evidence, and focused on it in both opening and closing argument. The Circuit Court permitted this evidence to be admitted. In doing so, it erred prejudicially, and this Court should grant a new trial.

2. Plain error is evident from the record in the form of the repeated, varied, blatant, and prejudicial prosecutorial misconduct of the Prosecuting Attorney during both opening and closing argument, as well as by his deliberately soliciting irrelevant and prejudicial testimony from witnesses.

a. Standard of Review

In this assignment of error, the Petitioner is requesting that this Court review the improper argument and improperly admitted testimony that, in contrast to the preceding assignment of error, was not objected-to by the Petitioner's trial counsel. The standard for plain error review is as follows:

> 7. 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.
>
> 8. Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right--the failure to make timely assertion of the right--does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious."
>
> 9. Assuming that an error is "plain," the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. Pts. 7, 8, and 9, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Concerning claims of prosecutorial misconduct, this Court has set forth the following standard:

> In evaluating an Appellant's claim of prosecutorial misconduct, we are guided by the principles enunciated in syllabus point six of *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995):
>
> 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.

State v. Hamrick, 607 S.E.2d 806, 809, 216 W.Va. 477 (2004).

Concerning the admission of improper evidence:

> 10. "Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury." Syl. Pt. 2, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979), cert. denied, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

Syl. Pt. 10, *State v. Mills*, 631 S.E.2d 586, 219 W.Va. 28 (2005).

b. The State's improper argument and elicitation of improper testimony was plainly impermissible, and deeply prejudicial to the Petitioner.

In addition to the improper testimony documented in the preceding section of this Brief, the Prosecuting Attorney engaged in a variety of egregious misconduct that satisfies the plain error standard. The Petitioner asserts that the opening argument, already twice-quoted in this brief, concerning the decedent's good character, and concerning his child, constitutes plainly unfair conduct, which actively deprived the Petitioner of his constitutional right to a new trial. (A.R., at 335-337). The Petitioner asserts that the discussion of the relationship between the decedent and his friends, and the sense of loss they have endured, as quoted in the statement of the case, also constitute irrelevant matters that were improperly and erroneously admitted. (A.R., at 347-349, 394-396, 596, 612-613) The Petitioner further asserts that the same set of topics, discussed in closing argument, constitutes plain error for the same reason:

> These are difficult things to hear about. They're certainly not made any easier by the fact that we're talking abut a young 20-year-old father of a then one-year-old child who's gone, whose son, [decedent's child], will never know him. Made even more devastating by the fact that we have young adults, even two juveniles, coming here and describing what has to be the worst day of their life and that their 16 to maybe 20 years of life had clearly not prepared them for. You got to see the very real struggle with the emotions that they had to deal with on December 15 and 16,

> 2020, as well as coming in here and relating it to you. The anguish is real. I think you got to see a bit of that raw emotion and the devastating impact of losing their good friend.

(A.R., at 683-684).

> But this case is more about Dylan, and Dylan Harr. And I want to remember him much more than I want to give undue attention to David Lewis, who committed this wicked and evil act a year and a half, almost two years ago now. From every single witness for all intents and purposes, Dylan was a terrific young man. They all, every last one of them, [G.S.], McKenzie, Caleb, Russell, [E.M.] here this morning, spoke glowingly of Dylan Harr. He was a good friend. They loved him.
>
> And what's important to note is that those like [G.S.] who knew him for a long time loved him like a brother. That was my big brother. And that those that knew him just a little bit, maybe like McKenzie, even Russell didn't know him that long, and they'd come to think of him as a brother. And those who only knew him a brief period, like [E.M.] and Caleb, through the world of him as well. He had an instant and immediate impact on those that he met, those that he associated with and had regular contact with.

(A.R., at 684-685).

The Petitioner asserts that in addition to the repeated, blatant focus on the character and family of the decedent, which is improper for the reasons set forth in the previous section of this Brief, the Prosecuting Attorney also engaged in misconduct by arguing to the jury that he, in contrast to defense counsel, had a duty to find the "truth," and moreover, that he *represented the jury:*

> But they [defense counsel] do have, they have a role that they're duly and legally bound to perform. They must be David Lewis's advocates. They have to zealously represent him. And they've done so, and they've done so skillfully. They questioned witnesses skillfully. **But their role is very, very different from that of a prosecutor. I don't have a client. I have the duty and obligation of pursuing at all costs the truth. My client or clients are the people of Marion County, each one of you.** It's not one individual officer. I don't represent Dylan Harr or his family. **I'm representing each one of you and all of our friends and all of our neighbors and all of our associates, coworkers, everyone.**

> **For one purpose, the find truth and justice in this courtroom.** So that role is very different. I'm not advocating for a single individual. I take that very seriously.

(A.R., at 691) (emphasis added).

> These young people fought through a devastating event and the traumatic memories of that, and the raw, visceral emotions **to get those truthful facts to you. Don't let them down, please.** I wanted this case from the very beginning to be about Dylan. Don't let him down.
>
> The judge includes in those instructions that we make a lot of things difficult and complicated in the justice system, but it comes down to that common sense and your good judgment as good citizens of Marion County, West Virginia, which are the best anywhere in the world. I've lived here my whole life. **That's why I love this job so much, because I get to represent you, the people that I know and love. And I trust you to do the right thing.**

(A.R., at 695) (emphasis added).

The Prosecuting Attorney also said of one of his own witnesses: "That young boy was honest to a fault, and he was so emotional." (A.R., at 694). This Court has addressed the question of impermissible prosecutorial vouching.

> Rule 3.4(e) of the West Virginia Rules of Professional Conduct states, in pertinent part, that a lawyer shall not "in trial... assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil judgment or the guilt or innocence of an accused." This principle was encompassed within this Court's statement in syllabus point three of *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981), as follows: "It is improper for a prosecutor in this State to `[A]ssert his personal opinion as to the justness of a cause, as to the credibility of a witness ... or as to the guilt or innocence of the accused....' ABA Code DR 7-106(C)(4) in part." See also Syl. Pt. 3, *State v. Grubbs*, 178 W.Va. 811, 364 S.E.2d 824 (1987). In *Critzer*, this Court reversed a conviction, reasoning that the prosecutor had acted improperly by comparing the accused to a "vulture" and by asserting the prosecutor's own personal "belief in the honesty, sincerity, truthfulness, and good motives of his witnesses...." 167 W.Va. at 660-61, 280 S.E.2d at 292.

State v. Hamrick, 607 S.E.2d 806, 216 W.Va. 477 (2004) (per curiam).

This Court has also held that:

> 2. "Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury." Syl. Pt. 2, *State v. Kennedy*, 162 W.Va. 244, 249 S.E.2d 188 (1978).

Syl. Pt. 2, *Jones v. Setser*, 686 S.E.2d 623, 224 W.Va. 483 (2009).

The *Hamrick* Court also observed that a prosecuter should not rely on his influence of his office to unduly sway the jury.

> In Justice Starcher's concurrence to *State v. Swafford*, 206 W.Va. 390, 524 S.E.2d 906 (1999), he fittingly observed that "[a] prosecuting attorney is not just an officer of the court, like every attorney, but is also a high public officer charged with representing the people of the State." 206 W.Va. at 398, 524 S.E.2d at 914. Justice Starcher continued as follows:
>
> > Wearing the cloak of the office, a prosecutor can therefore usually exercise great influence upon jurors. Because of this, the conduct and language of the prosecutor in a trial in which the accused's liberty is at stake should be forceful but fair, based upon the evidence, and not directed towards gaining a conviction through the aid of passion, prejudice or resentment.
>
> *Id*., 524 S.E.2d at 914.

State v. Hamrick, 607 S.E.2d 806, 216 W.Va. 477 (2004).

The Supreme Court of the United States said, in *Berger v. United States*, 295 U.S. 78, 88 (1935), that the prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Id. Berger* goes on to state: "He may prosecute with earnestness and vigor – indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every

legitimate means to bring about a just one." *Id.*, at 88. "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Id*. The Syllabus of the decision sets forth the relevant rules as follows:

> 5. Misconduct of a United States Attorney in his cross-examination of witnesses and address to the jury, in a criminal case, may be so gross and persistent as to call for stern rebuke and repression – even for the granting of a mistrial – by the trial judge; and, when not so counteracted, it may require the reversal of a conviction, particularly when weakness of the case accentuates the probability of prejudice to the accused. P. 84.
>
> 6. It is as much the duty of the United States Attorney to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. P. 88.

Id., at 79.

Regarding the *Sugg* factors, it is clear that the various factors are satisfied by the broad variety of misconduct on display in this case. The Prosecuting Attorney clearly calculated his conduct to present improper matters to the jury. This Court has specifically found the precise kind of misconduct done by the Prosecuting Attorney in this case to be improper in other cases. The remarks were not isolated, but were repeated, intentional, and the farthest thing from incidental. As argued above, the evidence in this case came down to how the jury interpreted the Petitioner's mental state in light of the confusing sequence of events that resulted in the shooting. The jury had to determine whether the Petitioner possessed intent, and malice, and the Prosecuting Attorney clearly, in his argument, attempted to invite the jury to infer malice based on how good of a person the decedent was, and the sad secondary effects of his death on his

loved ones. Absent the improper evidence and argument, it is hardly clear that the jury would have come down the same way. The evidence also clearly was not overwhelming concerning the Petitioner's culpability given that the jury declined to make a finding of premeditation and deliberation. Concerning the final *Sugg* factor, it cannot seriously be argued that the Prosecuting Attorney's comments were not deliberate and calculated to divert the jury's attention to issues that had nothing to do with the Petitioner's guilt or innocence. As this Court noted in *Sugg*, quoting the Supreme Court of the United States: "The test is whether the remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868 1871, 40 L.Ed.2d 431, 437 (1974)." *Sugg*, 456 S.E.2d at 486, 193 W.Va. at 405. It is difficult to fathom what a prosecutor would have to do if the conduct in this case would be deemed insufficient to justify reversal.

Regarding the factors to establish plain error, it is clear beyond question that the improper testimony and argument was admitted. It is clear, and obvious that what the Prosecuting Attorney did in this trial constituted misconduct, which seriously implicated the Petitioner's right to a fair trial, and likely affected the outcome of his trial. The Prosecuting Attorney's misconduct brings disrepute upon the legal system. This Court should find plain error and grant a new trial.

3. The Circuit Court erred by ruling the Petitioner's second statement admissible after he previously invoked his right to remain silent during an earlier custodial interview half an hour before the second one.

a. Standard of Review

The standard of review for an appeal of a trial court's ruling on a suppression issue has been previously described by this Court:

> 3. On appeal, legal conclusions made with regard to suppression determinations are reviewed de novo. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded

great deference.

Syl. Pt. 3, *State v. Stuart*, 452 S.E.2d 886, 192 W.Va. 428 (1994).

b. The second statement should have been suppressed because it was obtained by the police only a very short time after the Petitioner had invoked his right to silence.

As quoted in the Statement of Facts, the Circuit Court set forth its reasoning on the suppression issue on the record at the outset of trial (and specifically noted the Petitioner's objections to adverse rulings). (A.R., at 300-301). The Court allowed a truncated video of the initial interrogation at Sheetz (A.R. Volume II), and a video of the subsequent interrogation at the police department (A.R. Volume III). The second interview showed the Petitioner denying various law enforcement inquiries in a manner that is fairly clearly damaging to the Petitioner in light of the facts of the case. The Petitioner assigns error to playing the second video to the jury, or discussing the interview's contents, as the second interview was initiated in violation of the Petitioner's *Miranda* right to remain silent.

The legal question in this case concerning suppression is fairly narrow, although there is not a great deal of clarity in either the law of this state, or in federal law, concerning how the matter should be decided. There does not appear to be any controversy that the Petitioner was in custody. The Petitioner does not contest that he failed to invoke his right to counsel at the conclusion of the first interview, and only invoked his right to silence. The operative question is whether the approximate half-hour period between the Petitioner's successful invocation of his right to remain silent, and the re-starting of the interrogation by new police officers, runs afoul of *Miranda* and its progeny. The closest case to this subject from the Supreme Court of the United States is *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

> The issue in this case, rather, is whether the conduct of the Detroit police that led to Mosley's incriminating statement did in fact violate the *Miranda* "guidelines," so as to render the statement

> inadmissible in evidence against Mosley at his trial. Resolution of the question turns almost entirely on the interpretation of a single passage in the *Miranda* opinion, upon which the Michigan appellate court relied in finding a per se violation of Miranda:
>
> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." 384 U.S., at 473-474, 86 S.Ct., at 1627.7
>
> This passage states that "the interrogation must cease" when the person in custody indicates that "he wishes to remain silent." It does not state under what circumstances, if any, a resumption of questioning is permissible. The passage could be literally read to mean that a person who has invoked his "right to silence" can never again be subjected to custodial interrogation by any police officer at any time or place on any subject. Another possible construction of the passage would characterize "any statement taken after the person invokes his privilege" as "the product of compulsion" and would therefore mandate its exclusion from evidence, even if it were volunteered by the person in custody without any further interrogation whatever. **Or the passage could be interpreted to require only the immediate cessation of questioning, and to permit a resumption of interrogation after a momentary respite.**
>
> **It is evident that any of these possible literal interpretations would lead to absurd and unintended results. To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned.**

Mosley, 423 U.S. at 100-103 (footnotes and page numbers omitted) (emphasis added).

The most pertinent case from this Court's jurisprudence is *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980), in which it was held that the remedy for a police officer's failure to "scrupulously honor" (quoting *Mosley*) the privilege against self-incrimination is the exclusion

of the statement, and found prejudicial error when a trial court ruled incorrectly on that issue. *Id*, 270 S.E.2d at 784. However, the facts of *Rissler* are not directly analogous to this case.

Mosley itself allowed the police to restart interrogation a few hours after the right to silence (as distinct from the right to counsel) was first invoked, but in that case, a distinguishing fact was that the interrogation involved a separate alleged crime. Here, apparently a half-hour passed, and law enforcement tried (and succeeded) to elicit a statement following an assertion of the right to remain silent. The Petitioner asserts that under *Mosley* the facts of this case amount to the sort of "resumption of interrogation after a momentary respite" that was found to be unacceptable in *Mosley*, and should have been found to justify suppression of the second interview. The Petitioner requests that this Court find prejudicial error by the Circuit Court in admitting the second statement, and grant a new trial.

4. The Circuit Court erred cumulatively to the Petitioner's prejudice.

Syllabus Point 5 of *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972) states that:

> Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.

Id.

The Petitioner has identified numerous errors in the preceding argument sections. In the event that this Court would find harmless error relating to multiple of those issues, the Petitioner would argue that such error has accrued cumulatively to the Petitioner's prejudice, and that this Court should accordingly reverse the Petitioner's conviction and grant a new trial.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that this Court vacate his conviction and sentence, grant a new trial to the Petitioner, or grant any other relief the Court

deems just and proper.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.: 22-822

STATE OF WEST VIRGINIA,
Respondent,

v.

(An appeal of the final judgment of the Circuit Court of Marion County, Case No.: 21-F-132)

DAVID LEWIS,
Petitioner.

CERTIFICATE OF SERVICE

On this 15th day of February, 2023, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Petition's Brief to Mary Beth Niday, by e-service via File&ServeXpress.

/s/ Jeremy B. Cooper

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