

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

**Docket No.: 22-822**

**SCA EFiled: Apr 24 2023**

**11:55PM EDT**

**Transaction ID 69883019**

**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)**

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**PETITIONER'S REPLY 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 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**

The Petitioner stands on the arguments presented in the Petitioner's Brief regarding the first, third, and fourth assignments of error. The Petitioner presents additional argument in this Reply Brief concerning the second assignment of error.

**There is no justification for the Prosecuting Attorney's pervasive and intentional use of improper evidence and argument to unfairly influence the jury.**

The Respondent does not even attempt to suggest a proper purpose<sup>1</sup> for the prosecutor's reference to the bereavement of the victim's child and friends during opening and closing arguments. The only justification for the statements is the argument that the improper prosecutorial comment failed to prejudice the Petitioner. (Respondent's Brief, at 15). This is because there is no conceivable, relevant purpose for the information to be presented to the jury. The Respondent similarly points out that the improper comment only takes up a small portion of the overall transcript of argument. (*Id.*). This assertion raises the question: what should be the permissible quantum of irrelevant, inflammatory information that has been specifically disdained by this Court's prior precedent in a West Virginia prosecution?

Although the Respondent doesn't make an explicit suggestion in this regard, such a quantum can be surmised from the record of this case. According to the Respondent, this Court should endorse a prosecution that contains the following features:

- a. Argument concerning the fact that the victim left behind a child. (A.R., at 335).
- b. Argument concerning how hardworking the victim was. (A.R., at 335-336).
- c. Argument characterizing the victim as a “significant contributor to the community” and a “valuable life” in contrast to the Petitioner. (A.R., at 335).
- d. Argument concerning the quality of the victim's relationship with his child. (A.R., at 335).
- e. Argument about the close friendship between the victim and the friends he left behind.

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<sup>1</sup> The Respondent apparently agrees with the Circuit Court that certain evidence was admissible via Rule 404(a) of the Rules of Evidence. (Respondent's Brief, at 12-14). This is incorrect for the reasons set forth in the Petitioner's Brief, and in any event, could only serve to excuse any character evidence suggesting the victim's character for peacefulness, as opposed to his status as a father, friend, hard worker, etc. Testimony concerning the victim's peaceful disposition (i.e., “he wouldn't hurt a fly” A.R., at 596), is only a small and tangential portion of the objected-to testimony.

(A.R., at 335).

f. Argument concerning the loss the victim's child has suffered due to the victim's death.

(A.R., at 336).

g. A witness's observation – over objection – of the positive change in the victim's life as a result of his having become a father. (A.R., at 349).

h. Witness testimony – over objection – concerning the amount of love present in the home between the victim and his roommates. (A.R., at 395-396).

i. Witness testimony – over objection – about how the friendship had formed between the witness and the victim. (A.R., at 596).

j. Elaboration by the witness – over objection – concerning the quality of the relationship between the witness and the victim, and the witness having been made the godfather of the victim's child. (A.R., at 612-613).

k. Argument concerning the “devastating impact of losing their good friend” relating to the State's witnesses. (A.R., at 683-684).

l. Argument specifically alluding to all of the times the various State's witnesses spoke positively of the how “terrific” the victim was, and what kind of positive development he had on the people around him. (A.R., at 684-685).

m. Argument contrasting the Prosecuting Attorney's own duty to pursue “the truth” in contrast to defense counsel, who are compelled to defend through mere obligation. (A.R., at 691).

n. Argument suggesting that the Prosecuting Attorney “represents” the members of the jury, and that the members of the jury are his “clients.” (A.R., at 691, 695).

o. Argument requesting that the jury “not let down” the victim's friends. (A.R., at 695).

p. Vouching the State's witnesses' emotional testimony as “truthful facts.” (A.R., at 695).

q. Vouching a specific witness as “honest to a fault[.]” (A.R., at 694).

The foregoing list catalogs seventeen separate incidents of prosecutorial misconduct. This case is egregious. The Petitioner submits that this Court should not effectively endorse this behavior by a Prosecuting Attorney – an officer of the court – by denying the Petitioner a new trial.

The Respondent suggests that the Prosecuting Attorney's irrelevant commentary was not “unrelated to the case or intended to divert attention.” (Respondent's Brief, at 16). This assertion is belied by the Prosecuting Attorney himself who explicitly and specifically states that his intention is to draw the jury's attention to the positive character of the victim.

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.

(A.R., at 334-335).

This Court should believe the Prosecuting Attorney when he expresses his intention in such a manner. The above quote is something that the Prosecuting Attorney should be familiar with from the law of evidence: a statement against interest. It is credible because it implicates the Prosecuting Attorney's impermissible intentions to the extent that he would not have said it if it was not true.

Although the Respondent has baldly asserted that the Prosecuting Attorney did not commit misconduct (Respondent's Brief, at 6, 11), his complained-of testimony and argument runs afoul of Rule 3.4 of the Rules of Professional Conduct:

Rule 3.4 Fairness to Opposing Party and Counsel  
A lawyer shall not:  
[...]

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, 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 litigant or the guilt or innocence of an accused[.]

*Id.* To the extent that the Prosecuting Attorney reasonably believed his misconduct to be permissible, then his behavior is further implicated under Rule 1.1, relating to competence. The litany of bad acts by the Prosecuting Attorney has mangled the integrity of the Petitioner's trial beyond recognition, and makes a mockery of the justice system and this Court's precedents. The error in this case is plain, and this Court should make it known to prosecutors what is beyond the pale. The Petitioner prays that this Court 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,

David Lewis, Petitioner,  
By counsel,

/s/ Jeremy B. Cooper  
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CERTIFICATE OF SERVICE

On this 24<sup>th</sup> day of April, 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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