IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-901

STATE OF WEST VIRGINIA,

Respondent,

v.

SCOTT MICHAEL HUNDLEY,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the November 11, 2022, Order
Circuit Court of Jefferson County
Case No. 22-F-16

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

INTRODUCTION

Scott Michael Andrew Hundley ("Petitioner") cannot demonstrate that any error occurred during his underlying jury trial that would warrant this Court reversing his conviction of second degree murder. Petitioner asserts that it was error for the circuit court to not permit him to needlessly impugn the character of his victim by injecting the victim's alleged drug activities into trial that had absolutely no relationship to the offense for which Petitioner was charged. Moreover, the State did nothing improper by waiting until its rebuttal closing to discuss the most damning piece of evidence refuting Petitioner's self-defense claim. The State did not engage in prosecutorial misconduct, or deprive Petitioner of his right to compulsory process by charging one of his defense witnesses with false swearing and issuing a warrant for his arrest when the witness lied on the stand during a pretrial hearing in an attempt to help Petitioner. The State did not withhold any "exculpatory evidence," any assertions Petitioner makes in support of this claim are wholly unsupported by the record. There was no error in the circuit court's ruling on the admissibility of his statement to law enforcement; but even if there was, the claim is moot because the State did not introduce the statement at trial. Conversely, Petitioner's seemingly contradictory assignment of error alleging that the circuit court erred in failing to allow him to introduce the statement was not erroneous, as the information he sought to place before jury through the statement was presented through other avenues. Finally, the lack of any error during Petitioner's underlying criminal trial is fatal to his claim of cumulative error. Petitioner has failed to meet his burden of establishing his entitlement to relief, and this Court should, therefore, affirm the judgment of the Jefferson County Circuit Court.

ASSIGNMENTS OF ERROR

Petitioner raises eight assignments of error in his appellate brief:

1. The circuit court abused its discretion and prejudiced Mr. Hundley's due process rights by precluding Mr. Hundley from introducing evidence of the decedent's addiction history, extreme intoxication at the time of the confrontation, and toxicology results where the evidence was relevant to Mr. Hundley's self defense case.

2. The circuit court abused its discretion and prejudiced Mr. Hundley's due process rights by allowing the State to sandbag previously-prohibited argument regarding self defense in its rebuttal closing argument, foreclosing an opportunity for Mr. Hundley to address the argument.

3. The State engaged in prejudicial prosecutorial misconduct when it arrested a critical defense witness as to Mr. Hundley's claim of self defense in front of the jury during the first day of trial, interfering with Mr. Hundley's constitutional right to compulsory process.

4. The State violated Mr. Hundley's right to due process by withholding exculpatory impeachment evidence related to its own witness, Rosanna Piper.

5. The circuit court abused its discretion in ruling that Mr. Cekada's phone records showing his drug activity were inadmissible when such records showing drug trafficking between Rosanna Piper and Mr. Cekada would have impeached Ms. Piper and provided context to the simmering grudge that Mr. Cekada held against Mr. Hundley.

6. The circuit court abused its discretion in failing to find a *Miranda* violation where Mr. Hundley repeatedly requested an attorney during questioning both at the Piper residence during his arrest and at the police station.

7. The circuit court abused its discretion in denying Mr. Hundley's attempt to enter certain parts of his statement to law enforcement that were consistent with self defense into evidence to contradict the State's claim that Mr. Hundley concocted his claim of self defense months after the confrontation with Mr. Cekada.

8. The circuit court's cumulative errors prejudiced Mr. Hundley by eroding his ability to be able to present his theory of defense.

Pet'r's Br. 1-2.

STATEMENT OF THE CASE

A. Indictment and Underlying Facts

Petitioner was indicted by the Jefferson County Grand Jury in January 2022 and charged with one count of first degree murder. App. 25. The indictment alleged that the Petitioner murdered Thomas Cekada Jr. on August 7, 2021. App. 25.

On August 7, 2021, Petitioner was exiting a Dollar General Store in Charles Town, West Virginia when he observed Mr. Cekada parked nearby in his red Ford Escape, who was allegedly pointing a firearm at him. App. 691-92. Rather than attempting to flee the situation, Petitioner began to approach Mr. Cekada in his vehicle, App. 693, and yelled: "What the fuck are you going to do, bitch?" App. 718. Mr. Cekada fled the scene, while Petitioner attempted to chase after him on foot. App. 694. Although Petitioner believed that Mr. Cekada turned right out of the parking lot in the direction of Mountain Mission Road, App. 694, he actually turned left, and parked in a nearby Chinese restaurant, App. 460-61.

Petitioner got into his vehicle and left the parking lot, turned right, and drove in the direction that he believed Mr. Cekada was travelling. App. 694-95. While Petitioner denied that he was "chasing" after Mr. Cekada, he did admit that he was "looking for" him upon leaving the parking lot. App. 719.

While driving, Petitioner placed a phone call to Rosanna Piper, the grandmother of his children, and told her that he was going to kill Mr. Cekada because Mr. Cekada pulled a gun on him. App. 695. Ms. Piper recalled Petitioner's statement as "I'm going to fucking kill [Mr. Cekada]. He pulled his gun on me." App. 571.

Sometime after Petitioner left the parking lot and travelled in the direction of mountain mission road, Mr. Cekada left the parking lot he had fled to, and began traveling in the direction

of Mountain Mission Road. App. 460-61. Witnesses recalled observing a red Ford Escape passing them at a high rate of speed along the road toward Mountain Mission Road. App. 446-47, 461-63. Mr. Cekada was known to drive at a high rate of speed, and his wife advised that he was not "the best driver." App. 415, 445-46, 461-62.

Further down the road, Mr. Cekada had apparently caught up to Petitioner's vehicle, and the pair was involved in a minor traffic accident or some other occurrence that prompted both vehicles to stop along the side of the road. App. 446-47. Petitioner exited his vehicle, which he claimed was to check if there was any damage to the rear bumper of his vehicle. App. 696. Petitioner then claimed that he walked to the driver's-side door of the vehicle that allegedly hit him, and noticed that the driver was Mr. Cekada, who he claimed was, again, pointing a gun at him. App. 696. Petitioner claims that he pulled out the pocketknife he was carrying, and stabbed Mr. Cekada in the neck. App. 697. Petitioner got back into his vehicle and fled the scene, and threw his knife out the window. App. 699.

Two witnesses testified to seeking portions of the altercation between Petitioner and Mr. Cekada along the side of the road. One witness recalled that as she passed the two vehicles, she observed one male walking from the red Ford Escape to the vehicle parked in front while the driver of the Ford Escape remained seated in the driver's seat. App. 447-48. She described the driver of the Ford Escape as looking scared, and that she observed both of his hands on the steering wheel. App. 449.

The second witness recalled that she saw the same red SUV parked along the side of the road, make a u-turn, and then slammed into the side of the vehicle she was driving. App. 643. The crash forced the witness's vehicle off the road. App. 463. After the witness was able to

compose herself, she exited her vehicle and observed a man walking toward her covered in blood and holding his neck. App. 463.

Deputy William Wilhelm with the Jefferson County Sheriff's Department was stationed nearby when a witness notified him of the crash. App. 422-23. Upon arriving, Deputy Wilhelm observed the male he would later identify as Mr. Cekada on his knees holding his neck, and that he was covered in blood. App. 424. Mr. Cekada was able to tell Deputy Wilhelm that "Scott Hundley did this to me" before he lost consciousness. App. 424.

When emergency medical personnel arrived and began to administer aid, they observed Mr. Cekada had a firearm in his pocket. App. 428. Deputy Wilhelm retrieved the firearm and secured it. App. 430-31. Upon inspecting the firearm, Deputy Wilhelm identified it as a 9 mm. Glock 43, with a fully-loaded magazine, but no round in the chamber. App. 430-31. Mr. Cekada was transported to Jefferson Medical Center where he later died from his injury. App. 495.

Officers later identified Petitioner as the suspect and took him into custody later that day. *See generally*, App. 485-89.

B. Pretrial Motions

During the pretrial proceedings, the State filed a motion to preclude Petitioner from presenting a self-defense argument, as well as a motion *in limine* asking the trial court to preclude the admission of certain pieces of evidence involving Mr. Cekada's drug use and alleged distribution of drugs. App. 60, 63. Regarding the motion to prohibit Petitioner from asserting self-defense, the State argued that the evidence would show that Petitioner, and not Mr. Cekada, was the aggressor, rendering his intended self-defense claim improper. App. 60-62. The State's motion *in limine* involved the findings contained in the toxicology analysis performed on Mr. Cekada as part of his autopsy, which revealed that Mr. Cekada had controlled substances in his

system at the time of his death. App. 63-65. The motion also argued that various text messages recovered from Mr. Cekada's phone which purport to discuss illicit drug transactions was not relevant at trial under Rule 403 of the West Virginia Rules of Evidence. App. 63-65.

Petitioner filed a motion to suppress any statement he made to law enforcement. App. 85-89. In support of his motion, Petitioner claimed that he invoked his *Miranda* rights, but that officers continued questioning him, and, therefore, any statement he made was inadmissible. App. 85-89. Petitioner's motion involved two separate alleged statements: the first being when law enforcement approached Petitioner at his home, before he was placed in handcuffs or under arrest; and the second occurring at the Sheriff's Department after he had been placed under arrest, and been advised of his *Miranda* warnings twice. App. 85-87.

When approached by Chief Deputy Lupis at his home, Petitioner was asked what had happened that afternoon on August 7. App. 86. Petitioner asked if he should be given his *Miranda* rights if he was going to give a statement, to which Chief Deputy Lupis advised that Petitioner was not under arrest, and was not entitled to his *Miranda* rights at that time. App. 86. Petitioner stated that "I think I may need a lawyer" before he gave any statement, which Chief Deputy Lupis honored, and ceased questioning Petitioner. App. 86.

A short time later, Petitioner was placed under arrest and handcuffed. App. 86. As he was placed under arrest, he was advised of his *Miranda* rights, but no questions were posed to him at that time. App. 86. Later at the Sheriff's Department, Petitioner was again advised of his *Miranda* rights, which he waived. App. 86. Petitioner was generally cooperative throughout the interview and gave brief answers to the questions posed by the officers. App. 90-91. When Petitioner was asked if he "c[a]me across anybody," earlier that afternoon, Petitioner state: "I can't say." App. 91. Petitioner clarified and explained that he could not "say without a lawyer present." App. 91.

Officers then asked whether Petitioner was indicated that he no longer wished to answer their questions, to which Petitioner stated that "I can, but depending on what the question is, I have to choose my words carefully." App. 91. Petitioner further stated that he was "willing to cooperate" with law enforcement. App. 91. Officers explained that if Petitioner did not want to answer a question, he could say so and "it will be fine." App. 91. Petitioner continued to answer questions after that exchange. App. 91.

As the interview progressed, Petitioner told officers that Mr. Cekada "was armed." App. 93. He also explained that Mr. Cekada had previously been told that he was no longer welcome at Petitioner's in-law's home because of "drugs," and that if Mr. Cekada showed up at the house, Petitioner was told to "politely ask him to leave."[1] App. 93. Petitioner explained that Mr. Cekada was pointing a gun at him as he walked out of the Dollar General store, and that Petitioner responded by approaching Mr. Cekada and yelled "what the hell are you doing," before chasing after Mr. Cekada as he was driving out of the parking lot. App. 94-95. Petitioner stated that he left the parking lot and proceeded to drive toward his in-laws' home, but that Mr. Cekada caught up to him and rear-ended him. App. 93-94. Petitioner acknowledged that he got out of his vehicle and approached Mr. Cekada, who was still seated in his own vehicle. App. 94. Petitioner did not elaborate on what happened when he was beside Mr. Cekada's vehicle, and refused to indicate whether he threw anything out the window as he left the scene. App. 96.

Throughout the interview, Petitioner never states that he no longer wanted to answer the officers' questions. Rather, he only alludes to his desire to not answer particular questions, and

[1] As will be discussed in greater detail below, this statement Petitioner made to law enforcement was not true.

when he was asked a question he did not want to answer, officers honored that decision and moved on to other issues. App. 91-98.

At the subsequent pretrial hearing, Petitioner argued that his allusions to possibly wanting a lawyer amounted to unequivocal invocations of his *Miranda* rights. App. 151. The circuit court found that Petitioner was not under arrest during his initial encounter with law enforcement at his home, and was, therefore, not entitled to *Miranda* warnings at that time. App. 152-54. The circuit court further noted that upon Petitioner being placed under arrest, he was advised of his *Miranda* rights, and then again prior to his interview at the sheriff's department. App. 154-55. The Court also noted that Petitioner waived his *Miranda* rights, and noted that Petitioner executed a written *Miranda* rights waiver. App. 154.

In light of the circuit court's ruling, Petitioner raised the issue of how the State would seek to introduce the substance of Petitioner's statement at trial. App. 155-56. Petitioner advised that if the State chose to admit the substance of the statement by some means other than playing the actual recording, he intended to offer the video recording himself. App. 156.

Petitioner also objected to the State's motion *in limine* regarding the evidence of Mr. Cekada's drug activities. Petitioner alleged that the toxicology results were relevant to his self-defense claim in that the presence of the controlled substances in Mr. Cekada's system demonstrated that Mr. Cekada was "displaying irrational behavior which would be consistent with drug use." App. 164-65.

The circuit court noted that the evidence and Petitioenr's claim as to its relevancy at trial failed to link the drugs found in Mr. Cekada's system with his alleged "irrational behaviors," especially in light of the fact that Petitioner had not identified any witness who could testify that Mr. Cekada's behaviors were irrational, or that his behaviors on August 7 were at all impacted by

the controlled substances found in his system. App. 170-71. Moreover, the circuit court noted that there was no evidence to support the contention that Mr. Cekada was impaired at the time of the incident, as there was no evidence to indicate when the substances were ingested, or whether Mr. Cekada was behaving in an unusual manner on August 7. App. 170-71. The circuit court also noted that whether the evidence of Mr. Cekada's drug activities were admitted at trial, the admission of that evidence would not provide a basis for Petitioner to argue any fact or inference that he could not argue without it. App. 171-72. In other words, whether Mr. Cekada brandished a firearm that prompted Petitioner to act in self-defense, or whether Mr. Cekada drove at a high rate of speed and caught up to Petitioner and rear-ended him were not dependent upon the admission of the drug evidence. App. 171-72.

After hearing argument of counsel, the circuit court granted the State's motion *in limine*, and found that the toxicology report from Mr. Cekada's autopsy was not admissible. App. 185. Petitioner withdrew his objection to the State's motion to suppress the text messages obtained from Mr. Cekada's phone indicating that he was selling controlled substances. App. 186-87.

In addition, the circuit court also heard evidence regarding the State's motion to admit 404(b) evidence regarding a prior incident wherein Petitioner stabbed his stepfather, Timothy Williamson. App. 187-99. The circuit court ultimately denied the State's motion, and precluded it from introducing evidence of the prior stabbing incident. App. 209. During the presentation of evidence regarding the 404(b) issue, Petitioner called Mr. Williamson to testify. App. 199-200. Mr. Williamson proceeded to offer testimony regarding the circumstances surrounding the stabbing, and in so doing, attempted to cast himself as the one at fault, and that Petitioner was essentially defending himself when he stabbed Mr. Williamson. App. 199-202. During cross-examination, however, the State pointed out various inconsistencies between Mr. Williamson's

statement to law enforcement immediately after the incident and his testimony at the hearing. App. 202-09. Mr. Williamson did not testify to any facts relevant to Petitioner's murder trial outside of the 404(b) issue.

Days after the April 28, 2022 pretrial hearing, the State filed an information charging Mr. Williamson with one misdemeanor count of false swearing, and obtained a warrant for his arrest. App. 1153-54. In the affidavit attached to the information, the State alleged that Mr. Williamson had provided a written statement to law enforcement after the stabbing incident. App. 1155. The State then alleged that Mr. Williamson "testified in direct contradiction to several points of his written statement in an effort to have the evidence of the prior stabbing excluded from the pending murder case." App. 155. Mr. Williamson later entered into a pretrial diversion agreement with the State regarding the offense. App. 1157-58.

C. Petitioner's Jury Trial

Petitioner's jury trial began on May 18, 2022. App. 248. Mr. Cekada's widow testified first, and generally offered that Mr. Cekada was known to drive fast, and that he was not a good driver. App. 415. She acknowledged that Mr. Cekada carried a firearm, and that he had been involved in selling drugs for approximately four years. App. 416-17.

Deputy Wilhelm testified to being the first officer on scene after the crash where Mr. Cekada struck and knocked a vehicle off the road. App. 423-24. Deputy Wilhelm testified to finding Mr. Cekada on his knees along the side of the road while holding his neck and covered in blood. App. 423-24. Deputy Wilhelm testified to securing the Glock handgun that was found by emergency medical personnel, and observing the loaded magazine and empty chamber. App. 428-31. Deputy Wilhelm testified that the lack of a live round in the chamber indicated that the gun

had never been fired, or even cocked, because once a round in forced into the chamber, a new round is automatically forced into it once the prior round is ejected. App. 428-31.

Dana Clutter-White testified as a witness to a portion of the altercation between Petitioner and Mr. Cekada. She testified that she was driving toward Mountain Mission Road on August 7, 2021 when a red Ford Escape passed her at a high rate of speed. App. 445-46. She later observed the same vehicle parked along the side of the road behind another vehicle, and to seeking a man walking from the red Ford Escape back to the vehicle parked in front. App. 446-47. As she passed the two vehicles, she observed the driver of the red Ford Escape in the driver seat with both hands on the steering wheel, and that he appeared to be "pale. He looked scared. He looked like he was going to be sick, you know, like a little kid that just threw up." App. 449.

Christy Maddox testified to seeking Mr. Cekada's vehicle pass her at a high rate of speed as she was travelling toward Mountain Mission Road. App. 460-61. She indicated that she later observed the same vehicle along the side of the road, and that the vehicle made a u-turn, and proceeded to drive directly at her. App. 463. She observed that it appeared that the driver "never left off the gas," and struck the side of her truck, forcing it off the road. App. 463. She also testified to observing Mr. Cekada covered in blood and holding his neck after the accident. App. 463.

Chief Deputy Lupis testified that he responded to the scene of the accident, but by the time he arrived, Mr. Cekada had already been taken to a nearby hospital. App. 484. He proceeded to assist other officers in the investigation, which ultimately led him to Petitioner's residence where he and other officers searched Petitioner's vehicle. App. 484. While looking at the exterior of Petitioner's vehicle, Chief Deputy Lupis observed no signs of blood, and that the only noticeable

damage to Petitioner's vehicle was a "scuff mark," on the right side of the rear bumper. App. 484-86.

Lieutenant Steve Holz of the Jefferson County Sheriff's Department testified that he responded directly to Jefferson Medical Center where Mr. Cekada had been transported. App. 494-95. By the time he arrived, Mr. Cekada had passed away. App. 495. Lt. Holz observed Mr. Cekada's body, and noted what appeared to be a stab wound on the left side of the neck near the collar bone. App. 495-96. Let. Holz noted no signs of defensive wounds on Mr. Cekada's body. App. 502.

Rosanna Piper testified that she received a phone call from Petitioner around 3:40 p.m. on August 7, 2021. She stated that when Petitioner called her, he stated: "I'm going to fucking kill [Mr. Cekada]. He pulled his gun on me." App. 571. Ms. Piper further admitted that she did not initially disclose this statement to law enforcement when she was initially questioned about what information she knew about the altercation. App. 571. Ms. Piper further explained that Petitioner arrived at her home at approximately 4:15 p.m. on August 7, and that she did not notice Petitioner carrying the pocketknife she knew him to always carry. App. 571-73.

David Boober testified as an expert witness in the field of digital forensics as to the forensic download of the cell phones recovered from Petitioner and Mr. Cekada. App. 572-73, 586. Mr. Boober testified to Petitioner's various stops on August 7, 2021, and the timeline for each of Petitioner's movements around the time of the altercation with Mr. Cekada. App. 586-88.

During cross-examination, Petitioner began to ask a question that was about to elicit testimony regarding Mr. Cekada's text messages. App. 589. Before the question could be fully asked, the State objected and the parties held a sidebar. App. 589. The circuit court explained that, to the extent it had previously advised Petitioner that he would be permitted to introduce

evidence of Mr. Cekada's drug activities at trial, that decision was based upon the representation made by Petitioner that Mr. Cekada was not permitted at the Piper residence because of his drug activities. App. 590. But, as the court noted, the evidence up to that point in the trial revealed that Mr. Cekada was "only using drugs," and noted that no evidence had been offered indication that he was actually selling them to anyone in the Piper residence. App. 590. The circuit court also opined that "I fail to see the relevance of the drug transaction which [Petitioner] told me I would see." App. 590. Petitioner conceded that his relevance argument was "a little bit of a stretch," but attempted to explain that it was relevant because "drug dealer's carry guns." App. 590. The circuit court reiterated that the evidence of Mr. Cekada's text messages were not relevant or admissible. App. 591.

Dr. Ashton Ennis testified as an expert witness in forensic pathology. App. 595. While the cause and manner of death were not in dispute to the extent that Petitioner did not deny stabbing and killing Mr. Cekada, on critical component of Dr. Ennis' testimony was the introduction of two photographs depicting the blood-stained hands of Mr. Cekada. App. 599. Petitioner objected to the introduction of the photographs, and without identifying a specific ground for his objection, generally asserted that the State sought to introduce the photographs so that it could "argue that [Mr. Cekada] never pulled the gun out" during the second altercation, and that "it was always in his pocket because if he did it would be blood [sic] on it." App. 600-01. The State explained that Petitioner

> knows part of the evidence in this case is there's not much blood on the gun. There's much blood on the hands and, therefore, if there's blood on the hands and not on the gun, it goes to refute the physical evidence that the defense is going to try to bring out in self-defense.

App. 600. The circuit court overruled Petitioner's objection, and found that the evidence was admissible to demonstrate that Petitioner had both hands on the steering wheel at the time of the fatal encounter as a prior witness explained during her testimony. App. 601.

After the State rested its case-in-chief, Petitioner moved for a judgment of acquittal. App. 654-55. Petitioner generally asserted that the State's case was entirely circumstantial, and that the evidence upon which it relied was "unreliable." App. 655-56. The circuit court denied his motion, and noted that the State had presented sufficient evidence for the case to go to the jury. App. 657-58.

Petitioner called Roger Piper, Ms. Piper's husband, and grandfather to Petitioner's children. App. 673. Mr. Piper refuted Petitioner's claims that Mr. Cekada was not welcome at the Piper residence. App. 675-76. Mr. Piper testified that Mr. Cekada was close friends with his son, Andrew. App. 673. Andrew had substance abuse issues, as well as other psychological problems that he and his wife were attempting to address. App. 673-76. While Mr. Piper acknowledged that he discussed with his wife the possibility of not allowing Mr. Cekada at their home, he had never directed Petitioner to express to Mr. Cekada that he was no longer welcome at their home, and that Petitioner took it upon himself to tell Mr. Cekada. App. 675-76. Moreover, Mr. Piper stated that he knew that Andrew and Mr. Cekada used drugs together, but that he did not know where Andrew obtained his drugs. App. 676.

Petitioner took the stand and testified that his relationship with Mr. Cekada became strained when he told Mr. Cekada he was no longer welcome at the Piper residence. Petitioner also claimed that it was his belief that Mr. Cekada provided drugs to Andrew. App. 684. Petitioner testified that he hold Mr. Cekada that Mr. Piper "doesn't want you around the house anymore, could you please leave." App. 686. Petitioner stated that after he told Mr. Cekada to leave, he did so

eventually "without any confrontation between him and I." App. 686. The next time Petitioner claimed to have seen Mr. Cekada was in the Dollar General parking lot on August 7, 2021. App. 686-87.

Petitioner admitted that he began walking toward Mr. Cekada's vehicle after seeing him with a firearm. App. 693. Petitioner explained that the reason he approached Mr. Cekada despite him allegedly pointing a gun at him was because he "didn't think he was a threat at the time." App. 693. Petitioner also admitted to chasing after Mr. Cekada on foot as Mr. Cekada drove from the parking lot. App. 694.

Petitioner stated that he got into his vehicle and left the parking lot to go to the Piper residence. App. 694-95. He further acknowledged placing a call to Ms. Piper and telling her that he was going to kill Mr. Cekada. App. 695. Petitioner tried to explain the statement away by claiming that it was just an "expression" and that he did not mean what he said. App. 695. He also claimed that not long after he got off the phone, Mr. Cekada rear-ended him. App. 696. He claimed that he exited his vehicle and walked "up to the driver side of the vehicle that hit me and I notice it's [Mr. Cekada] pointing a gun at me." App. 696. Petitioner claimed that Mr. Cekada was holding the steering wheel with his left hand, and was holding the gun with his right. App. 696. Petitioner claimed that he then "panicked and reached for my pocketknife and I stabbed [Mr. Cekada]." He also admitted to fleeing the scene and to throwing the pocketknife out the window. App. 699.

D. Instructions, Closing Argument, and Verdict

The parties agreed to provide the jury with a self-defense instruction. App. 730. The parties agreed that the jury be instructed as follows:

> The defendant has raised the affirmative defense of self-defense. Under the laws of West Virginia, if the defendant was not the aggressor and had reasonable grounds

> to believe and actually did believe that he was in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant then he may use deadly force to defend himself.

App. 764. The circuit court also instructed that in order for Petitioner's action to be justified, the law requires that he "must not have provoked the assault on him or have been the aggressor." App. 746. "If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the State has not disproved self-defense, you must find the defendant not guilty." App. 746-47.

Prior to closing arguments, the State asked if it was permitted to argue "the lack of blood on the firearm based off the injury based off the condition of [Mr. Cekada's] hands. App. 733. The circuit court explained that such an argument was appropriate, and that its prior ruling as to the admissibility of the photographs did not preclude the State from addressing it during closing argument. App. 733. Petitioner offered no objection to the circuit court's answer. App. 733.

During the State's closing argument, it asserted that Mr. Cekada pulled his gun in the Dollar General Parking lot, but that he did so because Petitioner confronted him and threatened him when he yelled "what the fuck are you going to do, bitch." App. 751-52. The State further pointed out that it was Mr. Cekada, and not Petitioner, that fled the scene where the initial confrontation took place. App. 571. It argued that Petitioner exited the parking lot in the direction that he believed Mr. Cekada had travelled, and that Petitioner testified he was "looking for" Mr. Cekada. App. 752.

The state did not mention the issue regarding the blood on Mr. Cekada's hands and the lack of blood on the firearm during its first closing argument. App. 570-61. Petitioner also chose not to address the issue during his closing argument, while fully aware that such evidence was a major part of the State's case in refuting his claim of self-defense, and that it was going to address that

issue based upon its inquiry to the court prior to closing arguments. App. 761-80. While Petitioner did not specifically address the issue involving the blood on Mr. Cekada's hands, his entire closing argument was centered around his claim that the stabbing was in self-defense, and that Mr. Cekada had pulled a gun on him just before the stabbing occurred. App. 761-80.

During its rebuttal closing, the State asserted: "The next thing that we know, ladies and gentlemen, is there was not blood on the firearm." App. 781. Petitioner objected, and stated "full and fair closing. That's why I asked you, Your Honor. I didn't go there at all. It wasn't brought up in closing. That's why I asked." App. 781. The circuit court responded by advising Petitioner that "it's still in response to the self-defense argument, isn't it?" App. 782. During the ensuing sidebar, Petitioenr claimed that he did not mention it because the State did not mention it. App. 782. The circuit court reminded Petitioner that "you can go anywhere you want in yours. [The State] needs to argue what [it is] arguing because you're raising a self-defense argument that he held up a gun and pointed it." App. 782. The circuit court also explained that the State's "arguments about blood have to go with whether or not he had a gun in his hand. You argued that the gun is in his hand. He's allowed to rebut that with anything he chooses." App. 782. Petitioner then stated, "I get that, Your Honor. May I still vouch the record?" App. 783. Petitioner then argues that his "understanding of full and fair closing is you've got to lay your cards on the table, whatever it is, in the beginning." App. 783. "[S]ince [the State] didn't raise it and we knew it was going to be an issue, we knew it the whole time with the blood on the hands, when he didn't raise it, that's why I turned to the Court and said full and fair closing." App. 783.

The State proceeded with its rebuttal closing and argued that the lack of blood on the firearm, coupled with the significant amount of blood on both of Petitioner's hand, refuted

Petitioenr's claims that Mr. Cekada pointed a firearm at him immediately prior to the fatal stabbing. App. 783-84.

After deliberating upon the evidence, the jury found Petitioner guilty of second degree murder, a lesser included offense of first degree murder, as charged in the sole count of the indictment. App. 835.

Petitioner filed a post-trial motion for a new trial or judgment of acquittal notwithstanding the verdict alleging that the circuit court erred in denying his motions for judgment of acquittal made during trial, and also that the circuit court erred in it permitting the State to argue the issue involving the blood on Mr. Cekada's hands during its rebuttal closing. App. 904-07. The circuit court denied Petitioner's post-trial motions. App. 1140-43. The circuit court sentenced Petitioner to a prison term of 40 years, with an additional five years added following Petitioner's subsequent recidivist conviction. App. 1140-43. Petitioner appeals from the circuit court's sentencing order imposing an aggregate prison term of 45 years.

SUMMARY OF THE ARGUMENT

Petitioner has failed to demonstrate his entitlement to relief with respect to any of his assignments of error. Petitioner had no right to needlessly inject Mr. Cekada's drug history into his trial when the information bore no relevance to the facts of Petitioner's trial. In addition, the State's rebuttal closing argument was a proper response to Petitioner's closing argument where he alleged that Mr. Cekada had pointed a gun at Petitioner immediately prior to the stabbing, in support of Petitioner's claim of self-defense. Petitioner's argument that the State engaged in prosecutorial misconduct by charging and arresting a defense witness who had lied during a pretrial hearing is based upon no facts from the record, and is supported only by an attorney's statements. There is nothing in the record to support Petitioner's claim that Mr. Williamson

possessed any information relevant to the facts of the case, and Petitioner's failure provide any record in support of his assignment is fatal to his claim. Moreover, Petitioner has offered no proof that the State failed to disclose exculpatory evidence. Petitioner relies significantly on unsupported statements of fact in making this claim, which is fatal to his claim for relief. Petitioner's claim that the circuit court erred in denying his motion to suppress his statements made to law enforcement are moot, as the State did not introduce those statements at trial. Petitioner then assigns as error the circuit court's refusal to allow him to introduce those same statements in order to buttress his defense. Petitioner cannot assert reversible error in this context, because he was able to place the same substantive information before the jury through another avenue. Finally, because Petitioner failed to demonstrate the existence of any reversible error, his claim of cumulative error must fail. For all these reasons, this Court should affirm the judgment of the Jefferson County Circuit Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 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

I. Standards of Review

A. Evidentiary Rulings

"A trial court's evidentiary rulings, as well as its application of the Rules of evidence, are subjection to review under an abuse of discretion standard." Syl. Pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511, S.E.2d 469 (1998).

To the extent that Petitioner contends that he was entitled to introduce evidence regarding Mr. Cekada's previous drug activities, the admissibility of such evidence is governed by Rule 404(b) of the West Virginia Rules of Evidence, which calls for a three-step analysis:

> First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second we review de novo whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial courts conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

State v. LaRock, 196 W. Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996).

B. Prosecutorial Misconduct

"The rule in West Virginia since time immemorial has been that a conviction will not be set aside because of improper remarks and conduct of the prosecution in the presence of a jury which do not clearly prejudice a defendant or result in manifest injustice." *State v. Guthrie*, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 (1995) (citations omitted). Moreover, "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 *United States v. Hastings*, 461 U.S. 499, 506 (1983)).

C. Withholding Exculpatory Evidence/Due Process

Because *Brady* claims involve "mixed questions of law and fact," this Court's review dictates that the "circuit court's factual findings should be reviewed under a clearly erroneous standard . . . and questions of law are subject to *de novo review*." *State v. Youngblood*, 221 W. Va. 20, 26, 650 S.E.2d 119, 125 (2007) (citation and internal quotation marks omitted).

II. The circuit court committed no error in restricting the extent to which Mr. Cekada's drug activity could be presented to the jury.[2]

Petitioner has failed to demonstrate how the circuit court abused its discretion by prohibiting him from introducing irrelevant evidence regarding Mr. Cekada's drug activities. Pet'r's Br. at 15. Moreover, Petitioner mischaracterizes the evidence from trial by indicating that Mr. Cekada was "extreme[ly] intoxicat[ed]" at the time of the confrontation, despite absolutely no evidence being presented to indicate as much. Pet'r's. Br. at 15.

The most fundamental consideration regarding the admissibility of any evidence presented at trial is whether the evidence is relevant. Rule 401 of the West Virginia Rules of Evidence define relevance as evidence that "has any tendency to make a fact more or less probable than it would be without the evidence" and that the fact sought to be proven "is of consequence in determining the action." W. Va. R. Evid. 401(a)-(b). "Irrelevant evidence is not admissible." W. Va. R. Evid. 402. Evidence that has been found relevant "is admissible, except as otherwise provided by the constitution of the United States, the Constitution of West Virginia, by these rules, or by other

[2] Petitioner also raises a claim involving the circuit court's ruling prohibiting the introduction of text messages obtained from Mr. Cekada's phone in Petitioner's fifth assignment of error. Given the similarity in that argument with the argument presented under Petitioner's first assignment of error, Respondent will address the evidentiary issues under a single subheading, and will address the remainder of Petitioner's fifth assignment of error under its own subheading.

rules adopted by the Supreme Court of appeals." *Jones v. Sanger*, 204 W. Va. 333, 339, 512 S.E.2d 590, 596 (1998) (quoting W. Va. R. Evid. 402).

Even if a particular piece of evidence is found to be relevant, the circuit court may nevertheless find that it is not admissible, if the evidence's "probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." W. Va. R. Evid. 403. Whether a particular piece of evidence is "probative," however, is dictated by whether it is relevant in the first instance. *Guthrie*, at 681, 461 S.E.2d at 187. Thus, in addition to showing that the evidence tends to make a fact of consequence more or less probably, other factors may include the importance of the issue the evidence seeks to prove, or the force of the evidence. *Id.* (citation omitted).

Despite Petitioner's claims to the contrary, no evidence was admitted at any point during the underlying proceedings that indicated Mr. Cekada was intoxicated. There is no dispute that the toxicology analysis performed during Mr. Cekada's autopsy revealed the presence of controlled substances in his system, the presence of controlled substances, alone, does not prove that a person is intoxicated. Addressing this in the context of blood alcohol concentration, Justice Starcher noted in his concurring opinion that "proof of the consumption of alcohol is not the same thing as proof of intoxication." *State v. Dilliner*, 212 W. Va. 135, 147, 569 S.E.2d 211, 223 (2002) (Starcher, J., concurring) (internal citation omitted). The Fourth Circuit Court of Appeals has similarly recognized that "[b]reath analysis or blood test results may constitute some proof of intoxication and further substantiate other objective symptoms . . . [but] intoxication is to be determined from all relevant evidence; evidence of blood alcohol content is only one method of proof." *Whitson v. Middleton*, 898 F.2d 950, 952 (4th Cir. 1990).

The entirety of Petitioner's argument regarding Mr. Cekada's alleged intoxication is based on pure speculation. Petitioner neither offered, nor indicated that there existed, any witness that would testify that Mr. Cekada was intoxicated on August 7, 2021, or that the substances and the amounts thereof found in his system indicated Mr. Cekada was intoxicated. Any claim that Mr. Cekada was intoxicated is self-serving and entirely without factual support.

Because there was no evidence or witness testimony that so much as implied or alluded to Mr. Cekada being intoxicated at the time of the confrontation, it is clear that the purpose for which Petitioner wanted to introduce this evidence was to paint Mr. Cekada in a negative light. There was no evidence that Mr. Cekada's behaviors, including his conduct of driving at a high rate of speed or that he carried a firearm, were at all unusual behaviors typically exhibited by Mr. Cekada. Had Petitioner been permitted to introduce evidence of Mr. Cekada's drug activity to the extent that he claims, it would do nothing make a fact of consequence more or less probable, and be more akin to enticing the jury to "ignore evidence showing guilt beyond a reasonable doubt because the victim was cast as a bad person." *State v. Zuccaro*, 239 W. Va. 128, 142, 799 S.E.2d 559, 573 (2017).

Petitioner also asserts that he should have been permitted to introduce Mr. Cekada's text messages purporting to show him engaged in discussions regarding illicit drug transactions. Pet'r's Br. at 45-46. In addressing this particular claim, it is important to note that Petitioner was permitted to present evidence to the jury regarding Mr. Cekada's drug distribution activities, and that he had been engaged in such practice for approximately four years. App. 416-17. Additionally, Rosanna Piper testified that Mr. Cekada and her son, Andrew, "participated in drug activity" together. App. 574.

Petitioner also attempted to place a great deal of emphasis on his claim that the Pipers had decided that Mr. Cekada was no longer welcome at their home due to his drug distribution. Both Ms. Piper and Mr. Piper refuted this claim. Ms. Piper indicated that, although she and Mr. Piper discussed possibly not allowing Mr. Cekada around their house, that it was not because of something Mr. Cekada had done, but was because of the problems that their son, Andrew, was having at the time. App. 580. Mr. Piper testified that there was never an agreement to prohibit Mr. Cekada from coming to their house, but acknowledged that it was discussed. App. 675. He also confirmed that the reason for the discussion was not due to anything Mr. Cekada had done. App. 675-76. When asked whether Mr. Piper believed if Mr. Cekada was a "facilitator" of his son's drug use, Mr. Piper indicated that Andrew "had a drug problem before [Mr. Cekada]." App. 676. He also denied knowing where Andrew obtained his drugs, stating: "I don't know where he would get his stuff from or if they just used together. That's all I can answer on that one." App. 676-77.

Any claim raised by Petitioner regarding Mr. Cekada's drug distribution and its relevance to the murder are refuted by the testimony contained in the record. While it is certainly true that while a criminal defendant is guaranteed "a meaningful opportunity to present a complete defense," a defendant is not entitled to "an unlimited right to ride roughshod over reasonable evidentiary restrictions." *Zuccaro*, at 144, 799 S.E.2d at 575. (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Rockwell v. Yukins*, 341 F.3d 507, 512 (6th Cir. 2003)) (internal quotation marks omitted). Moreover, a defendant's "right to present a complete defense . . . does not mean that a defendant may introduce whatever evidence he wishes, only that any state-law evidentiary restrictions cannot be 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* (citation and internal quotation marks omitted).

More directly, Petitioner did not assert, nor was there any evidence to indicate, that the altercation between him and Mr. Cekada was in any way related to Mr. Cekada's drug activities. The evidence presented demonstrates that Petitioner took it upon himself to tell Mr. Cekada to stop visiting the Piper residence. App. 675. The evidence also demonstrated that the discussions at the Piper residence were not tied to prohibiting Mr. Cekada from coming to the house because of his drug dealing; rather, it was because of their son's own problems that they were attempting to address. App. 580, 675. In fact, both Mr. and Ms. Piper stated that the conversation that Petitioner overheard and used as a basis to tell Mr. Cekada to stop going to the Piper residence had nothing to do with Mr. Cekada. App. 675.

As a result, the evidence Petitioner now claims he was erroneously prevented from introducing at trial was extrinsic to the offenses charged, and the admissibility of that evidence was governed by Rule 404(b) of the West Virginia Rules of Evidence. To be sure, this Court has recognized that Rule 404(b) does not only apply solely to the State's attempt at eliciting evidence of alleged prior bad acts committed by a defendant, but that it applies to the defendant seeking to offer similar evidence regarding a victim or witness. *Zuccaro* at 142, 799 S.E.2d at 573.

As this Court noted in *Zuccaro,* there is a need for the evidence sought to be admitted under Rule 403 have some "connection between the victim's alleged bad conduct and the crime." *Id.* Whether Petitioner believes or argues that Mr. Cekada's drug trafficking activity had any bearing on the circumstances of his crime, he failed to demonstrate that connection. Petitioner never sought to introduce the evidence as relevant to one of the exceptions under Rule 404(b), an instead only objected to the State's motion to prohibit the introduction of that testimony.

III. The State's rebuttal closing argument was proper in that it was responsive to Petitioner's closing argument asserting self-defense and that Mr. Cekada pointed a gun at him immediately prior to the stabbing.

The State's rebuttal closing argument was responsive to the arguments Petitioner made during his closing argument, in that Petitioner argued that he stabbed Mr. Cekada in self-defense and that Mr. Cekada was pointing a gun at him immediately before the stabbing. This contention is entirely belied by the record. First, Petitioner was not surprised by the State discussing this evidence in its rebuttal closing. The record demonstrates that the State's argument was permitted by the Court, and Petitioner offered no objection to it when the State mentioned it. Second, Petitioner's closing argument was entirely centered around his claim that the stabbing of Mr. Cekada was an act in self -defense. When Petitioner attempted to object, he offered no clear reason why it was improper, other than to say that he chose not to address the claim during his closing because the State did not bring it up. This decision was made while Petitioner was fully aware of the evidence, and aware of the State's intention to discuss it during closing arguments. Petitioner's objection was a thinly veiled attempt at a "gotcha" moment, and in no way indicates any impropriety on the State's part, or that the circuit court permitting the argument was erroneous.

This Court has recognized that "[a] proper closing argument in a criminal case involves the summation of evidence, any reasonable inferences from the evidence, responses to the opposing party's argument, and pleas for law enforcement generally." *State ex rel. Games-Neely v. Yoder*, 237 W. Va. 301, 310, 787 S.E.2d 572, 581 (2016) (quoting *Guthrie*, at 678 n. 27, 461 S.E.2d at 184 n. 27. (citation omitted)).

During Petitioner's closing argument, he argued to the jury that: "[Mr. Cekada] got one hand on the steering wheel. He's got the gun out . . . ." App. 774. This, in addition to Petitioner

spending the entirety of his closing argument arguing that he stabbed Mr. Cekada in self-defense must allow the State to refer to the evidence admitted during trial that directly refutes that claim.

Petitioner attempts to support his argument by relying almost entirely on precedent from other jurisdictions, but in doing so, he has failed to demonstrate how the facts of the case rendered the State's rebuttal an unfair argument, or how the State prevented him from fully responding to the State's theory of the case. Indeed, when Petitioner objected to the State's initial attempt at discussing the evidence, he made it clear that his objection was not based upon some unfair surprise that the State presented the argument in the first instance.

Petitioner has presented no authority in support of his claim that the prosecution cannot make a strategic choice to argue certain pieces of evidence during its rebuttal closing rather than its first closing. The State's opportunity for rebuttal closing argument is its chance to respond to the arguments presented by the defendant, and to point the jury in the direction of any evidence that might refute the arguments the defendant made. In the instant case, the State's decision to argue the blood evidence during rebuttal closing was appropriate, as the State knew that Petitioner was going to argue that the stabbing was in self-defense because Mr. Cekada was pointing a gun at him. When Petitioner argued that precise theory, the State had the right to rebut it by pointing to evidence properly admitted at trial that directly refuted the argument.

To the extent that Petitioner claims that the State's rebuttal closing argument amounted to improper remarks to the jury, this Court has held that there are four factors to consider when determining whether improper remarks warrant reversal:

> (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995). Here, there can be no reasonable argument that the State's comments were "misleading," in that the remarks regarding the blood on Mr. Cekada's hand and the lack of blood on the gun were properly admitted into evidence. Thus, the remarks were not improper in the first instance. The remaining factors also do not help Petitioner here. The State addressed the claims and moved on to the rest of its rebuttal argument. In addition, the remarks regarding this evidence was part of the "competent proof" introduced during trial, but even if it was not present, the remaining evidence was more than sufficient to establish Petitioner's guilt beyond a reasonable doubt. Finally, because the prosecutions remarks were based upon evidence properly admitted at trial, there can be no argument that the comments on that evidence were placed before the jury "to divert attention to extraneous matters," especially when Petitioner relied on a self-defense theory.

Petitioner was afforded an adequate opportunity to address all the evidence introduced at trial. His decision to leave one of the most damning pieces of evidence unaddressed is not an indication of any improper conduct by the State, or any erroneous ruling by the Court; it simply demonstrates that Petitioner took a risk that did not yield him any benefits. In addition, the State's choice to address the blood evidence during its rebuttal argument was not improper, and cannot be the basis for a finding of prosecutorial misconduct. Petitioner's claim in this regard should be rejected.

IV. The arrest of Timothy Williamson did not amount to prosecutorial misconduct, nor did it violate Petitioner's right to compulsory process.

Petitioner claims, without support, that the State's decision to charge and arrest Timothy Williamson after he provided false testimony during a pretrial hearing amounted to prosecutorial misconduct, and violated his right to compulsory process. Pet'r's Br. at 41. While the record does not support Petitioner contention that Mr. Williamson was a critical defense witness, the legal

authority upon which he relies are not applicable to the facts of the instant case. Because of this failure, Petitioner cannot show prosecutorial misconduct, or that his right to compulsory process was violated.

With respect to Petitioner's claim of prosecutorial misconduct, this Court has recognized that "a conviction will not be set aside because of improper remarks and conduct of the prosecuting in the presence of the jury which do not clearly prejudice a defendant or result in manifest injustice. *Guthrie*, at 684, 461 S.E.2d at 190. (citations omitted).

Petitioner cannot demonstrate the exacting standard set forth in *Guthrie.* Petitioner asserts in his brief that Mr. Williamson "was going to offer crucial testimony regarding his first hand observation of Mr. Cekada's threatening and erratic behavior in the past . . ." Pet'r's Br. at 44. Petitioner provides no citation to the record in support of this contention, likely because there is nothing in the record to support it. Thus, Petitioner's statement in support of the "crucial testimony" Mr. Williamson planned to offer at trial, such statement must be complete disregarded because "[a] party cannot establish facts in a case by asserting them in a brief. Those are nothing more than an attorney's statements, which are not evidence." *State v. Benny W.*, 242 W. Va. 618, 629, 837 S.E.2d 679, 690 (2019). This is also true with respect to Petitioner's claim that Mr. Williamson was arrested "during the first day of trial in the presence of the jury and other witnesses." Petitioner does not provide a citation to the record in support of this claim, and the record does not support it.

Thus, any claim that the prosecution engaged in misconduct in charging and arresting Mr. Williamson is based upon conjecture, and not evidence.

Petitioner's failure to establish that Mr. Williamson was going to be a crucial defense witness is also fatal to his compulsory process claim. This Court has recognized that that "[t]o

establish the denial of the right to compulsory process afforded to criminal defendants pursuant to article III, section 14 of the West Virginia Constitution, there must be a showing that the witness' testimony would have been both material and favorable to the defense. Syl. Pt. 3, *State v. Whitt*, 220 W. Va. 685, 649 S.E.2d 258 (2007). Petitioner has provided no showing that Mr. Williamson's testimony would have been material, or favorable to his defense. Instead, Petitioner merely relies on assertions without pointing to any portion of the transcript that would support those claims. This Court's precedent in *Benny W.* is fatal to Petitioner's ability to obtain relief on this ground, as the entirety of his argument rests upon information that is not evidence.

Additionally, to the extent that Petitioner cites to various cases dealing with the issue of violating one's right to compulsory process, none of them apply here. Indeed, this Court's decision in *State v. Goad*, 177 W. Va. 582, 355 S.E.2d 371 (1987) involve veiled threats made to witnesses before testifying where they were told that if they lied, they would potentially face prosecution. Here, there was no such occurrence. Mr. Williamson was never threatened with prosecution; he was only prosecuted after he had taken the stand at a pretrial hearing and chose to lie in an attempt to benefit Petitioner. Thus, not only has Petitioner failed to present any facts in support of his claim, the legal authority upon which he relies is entirely inapplicable to the facts presented here. For these reasons, Petitioner's third assignment of error should be rejected.

V. The State did not withhold exculpatory evidence.

The State did not withhold exculpatory or impeachment evidence in violation of Petitioner's due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner asserts, without support, that the State withheld information regarding Rosanna Piper's role as a confidential informant for the State, along with her alleged criminal history involving drugs. Pet'r's Br. at 45-46. None of Petitioner's statements as to Ms. Piper's role as a confidential

informant, or her drug history is contained in the record. Accordingly, none of Petitioner's statements as to this information are coupled with a citation to the record. In addition, to the extent that Petitioner claims that there was some exculpatory evidence contained in the text messages related to his criminal trial, he waived any claim to raise it on appeal when he affirmatively withdrew his objection to the State's motion *in limine* seeking to prohibit the introduction of the text messages at trial.

To establish a due process violation under *Brady*, the following three factors must be established: "(1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial." Syl. Pt. 2, in part, *Youngblood*, 221 W. Va. 20, 650 S.E.2d 119. This Court has recognized that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 27-28, 650 S.E.2d at 126-27.

As to the second prong, this Court has explained that:

> [E]vidence is considered suppressed when "the existence of the evidence was known, or reasonably should have been known, to the government, the evidence was not otherwise available to the defendant through the exercise of reasonable diligence, and the government either willfully or inadvertently withheld the evidence until it was too late for the defense to make use of it."

State v. Peterson, 239 W. Va. 21, 29, 799 S.E.2d 98, 106 (2017) (citations omitted). Finally, a defendant must show that the allegedly undisclosed evidence was material, meaning that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Fortner*, 182 W. Va. 345, 353, 387 S.E.2d 812,

820 (1989) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Thus, Petitioner must demonstrate that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). It is also important to note that a determination as to the alleged prejudice one may have suffered is "evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112 (1976).

With respect to Petitioner's claim that the State failed to disclose Ms. Piper's criminal history, it is important to note that such claims are completely devoid of any support from the record. *See* Pet'r's Br. at 46-47. Indeed, if this were true, one would expect to see an objection to Ms. Piper's testimony had the State failed to provide defendant with a copy of her criminal history. But because this does not appear in the record, there is no support for this contention and it warrants no further consideration by this Court.

Similar to Petitioner's assignment of error involving the arrest of Mr. Williamson, Petitioner's claims regarding Ms. Piper's criminal history or role as a confidential informant, or her alleged arrest at the time of trial falls under the *Benny W.* prohibition regarding this Court's consideration of statements made by attorneys in briefs that find no support from the record. Thus, without any factual support indicating that these statements are true, Petitioner cannot demonstrate his entitlement to relief simply because he claims that the information existed, but failed to provide any proof in support.

Addressing Petitioner's claims regarding the text messages between Mr. Cekada and Ms. Piper involving drug activity, Petitioner has completely failed to show how this evidence was suppressed by the State. What the record does show is that Petitioner was notified of the text messages obtained from Mr. Cekada's phone that revealed what appears to be discussions

involving drug transactions. App. 37-57, 63-65. Thus, to the extent that Petitioner now asserts that the State withheld evidence of Ms. Piper's alleged drug activity, such contention is entirely belied by the record.

Assuming, *arguendo*, that Petitioner's claims possess even a scintilla of merit, they do not meet the *Brady* standard. First, Petitioner has failed to demonstrate how this evidence is exculpatory or impeachment evidence. Whether Ms. Piper purchased or used drugs has no relation to whether Petitioner stabbed Mr. Cekada on August 7, 2021. The same can be said regarding whether Ms. Piper worked as a confidential informant, or whether she was under arrest at the time of her testimony.

The evidence would not have been admissible impeachment evidence under Rules 608 or 609, either. Rule 608(a) provides that a witness's credibility may be attacked "by testimony about the witness's reputation for having a character for truthfulness or untruthfulness." It goes on to provide that a witness's credibility may be attacked in the "form of an opinion about that character." W. Va. R. Evid. 608(a). The evidence, however, "is admissible only after the witness's character for truthfulness has been attacked." W. Va. R. Evid. 608(a). Rule 608(b) provides that "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." W. Va. R. Evid. 608(b). Rule 609 provides only two circumstances in which a witness, who is not the accused, may have their credibility attacked by evidence of a prior conviction, which are: (1) crimes punishable by death or imprisonment in excess of one year; and (2) convictions of crimes "involv[ing] dishonesty or false statement, regardless of the punishment." W. Va. R. Evid. 609(a)(2)(A)-(B).

Thus, because none of the evidence Petitioner alleges the State suppressed is neither exculpatory, nor falls under the permissible guidelines contained in Rules 608 and 609 of the West Virginia Rules of Criminal Procedure, he cannot meet the first *Brady* prong.

Second, Petitioner cannot demonstrate that the evidence was withheld by the State. It is clear that Petitioner was aware of the substance of the text messages recovered from Mr. Cekada's phone that purported to show Mr. Cekada and Ms. Piper discussing drug transactions. App. 37-57, 63-65. Petitioner does not allege he was unaware that the State planned to call Ms. Piper as a witness. Petitioner has utterly failed to demonstrate that the State withheld any evidence that he was entitled to have, and, therefore, cannot meet the second *Brady* prong.

With respect to the prejudice prong of the *Brady* analysis, Petitioner cannot demonstrate that the evidence was such that the outcome of the trial is drawn into question. To the extent that Petitioner claims that the evidence was relevant to impeach Ms. Piper's testimony with respect to her testimony as to Petitioner's statement that he was going to kill Mr. Cekada, Petitioner was able to sufficiently impeach that statement. Petitioner pointed out during cross examination that, despite her testimony that Petitioner told her he was going to kill Mr. Cekada prior to the stabbing, she did not disclose that information to law enforcement when she provided her first statement. App. 577-78. Petitioner fails to make any connection, however, of Ms. Piper's alleged drug activity with any relevant aspect of his trial, especially in light of the fact that Petitioner admitted making the statement during his own trial testimony. App. 695. Petitioner attempted to lessen the impact of that testimony by claiming that he did not "mean it," and that it was simply an expression of his anger at the time. App. 695.

Moreover, the evidence elicited at trial, both direct and circumstantial, demonstrate that whether the jury would have been advised of Ms. Piper's drug activities would not have had any

impact on the ultimate outcome. Ms. Piper, while important, was hardly the most important witness for the State. Petitioner cannot demonstrate that, if it is presumed the State suppressed the evidence in the first place, that his possession of evidence regarding Ms. Piper's drug activity would have had any impact on the jury's verdict. Thus, Petitioner cannot demonstrate the third *Brady* prong, and his assignment of error should be rejected.

VI. Petitioner's claim that the circuit court erred in denying his motion to suppress is moot, as the State did not introduce the statement into evidence.

Petitioner claims that the circuit court erred in denying his motion to suppress statements Petitioner provided to law enforcement. This claim does not warrant any consideration by this Court because the State did not introduce the statement at trial, and it is, therefore, moot. *See State v. Kennedy*, No. 19-0499, 2020 WL 4360071, at 2 n. 4 (W. Va. Supreme Court, July 30, 2020) (memorandum decision) (concluding petitioner's claim that the circuit court erred in refusing to suppress his statement to law enforcement was mooted by the State's decision to not introduce it into evidence, and, therefore, warranted no consideration on appeal).

While Petitioner cites to numerous cases in support of his position, his argument fails to acknowledge that Petitioner's statement to law enforcement was never introduced into evidence. Thus, Petitioner cannot claim error for the circuit court's failure to suppress a piece of evidence that was never admitted at trial. This claim should be rejected without further consideration.

VII. The circuit court did not err by prohibiting Petitioner from offering his own out-of-court statement into evidence

After assigning as error the circuit court's failure to suppress Petitioner's statement to law enforcement, Petitioner now assigns as error the circuit court's refusal to allow him to introduce that very same statement. Thus, it appears that Petitioner's argument with respect to his statement to law enforcement is that the State should have been prevented from using it, but not himself.

First, the evidence regarding Petitioner's statement to law enforcement, when offered by Petitioner, is hearsay. Hearsay is defined as a statement that "the declarant does not make while testifying at the current trial or hearing" and is offered "in evidence to prove the truth of the matter asserted in the statement." W. Va. R. Evid. 801(c)(1)-(2).

A criminal defendant "ordinarily cannot introduce his own extrajudicial exculpatory statements. They are generally thought to be too self-serving." *State v. Frazier*, 162 W. Va. 602, 614, 252 S.E.2d 39, 46 (1979). While it is true that the circuit court did not permit Petitioner to introduce the entire statement he provided to law enforcement, the circuit court permitted Petitioner to inquire of the officer whether Petitioner's statements upon being arrested and interrogated were consistent with his self-defense claim. App. 511-12, 565-66. The trial testimony demonstrates that the jury was provided the substance of the information that Petitioner sought to elicit from playing the video of his interrogation. App. 565-66.

Petitioner's assignment of error in this respect involved the State's admission of a phone call Petitioner placed to his mother, wherein his mother makes a statement that could be construed as Petitioner and his mother concocting a self-defense claim with respect to the stabbing. App. 510-11. Petitioner sought to introduce his statement to law enforcement in order to rebut any inference that Petitioner and his mother concocted his self-defense claim, particularly because the phone call with his mother took place sometime after Petitioner was arrested. App. 510-12. To the extent that Petitioner sought to inform the jury that he advised law enforcement that he acted in self-defense the night of his arrest, he was able to elicit that testimony, despite not having the opportunity to actually present the actual recording. App. 565-66.

Petitioner's argument in this respect completely discounts the fact that he was permitted to present to the jury the precise information he sought to present through playing his recorded

statement to law enforcement. Thus, Petitioner cannot demonstrate how the circuit court's ruling with respect to this issue was at all erroneous or was unfair to him in any way. Petitioner has failed to demonstrate that the circuit court committed reversible error in this respect, and this Court should reject the claim.

VIII. Petitioner's failure to demonstrate the existence of reversible error is fatal to his claim of cumulative error.

In his final assignment of error, Petitioner claims that he is entitled to relief based upon the cumulative effect of multiple errors. Pet'r's Br. at 54. Because Petitioner has failed to demonstrate the existence of any error in his jury trial, Petitioner cannot succeed on his claim of cumulative error.

"[T]he cumulative error doctrine is applicable only when 'numerous' errors have been found." *State v. Tyler G.*, 236 W. Va. 152, 165, 778 S.E.2d 601, 614 (2015) (citations omitted). But even if "numerous" errors are found, if they "are insignificant or inconsequential, the case should not be reversed under the doctrine." *Id.* (citation and internal quotation marks omitted). Thus, there must be "more than one harmless error" in order to succeed in a claim of cumulative error. *State v. McKinley*, 234 W.Va. 143, 167 n. 22, 764 S.E.2d 303, 327 n. 22 (2014).

Because Petitioner has failed to identify "numerous" error that are not harmless, this Court should reject his claim of cumulative error.

CONCLUSION

For the forgoing reasons, the State respectfully requests this Honorable Court affirm the judgment of the Jefferson County Circuit Court in case number 22-F-16.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-901

STATE OF WEST VIRGINIA,

Respondent,

v.

SCOTT MICHAEL HUNDLEY,

Petitioner.

CERTIFICATE OF SERVICE

I, William E. Longwell do hereby certify that on the 30th day of May, 2023, I served a true and accurate copy of the foregoing **RESPONDENT'S BRIEF** upon the below-listed counsel for respondent via the West Virginia Supreme Court of Appeals' E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure:

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