

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-456

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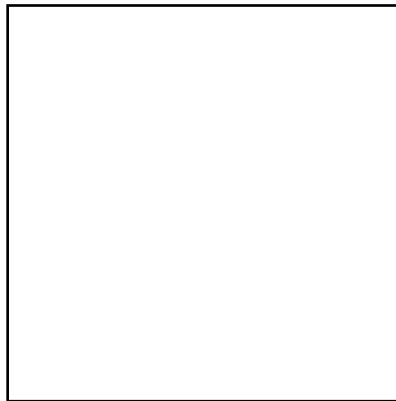
STATE OF WEST VIRGINIA,
Respondent,

v.

CARL RAY SUMMERFIELD,
Petitioner.

(An appeal of a final order
of Grant County Circuit
Court, Case No. 22-F-7)

PETITIONER'S BRIEF



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TABLE OF CONTENTS

Table of Authorities	<i>ii</i>
Assignments of Error	1
Statement of the Case	1
Summary of Argument	11
Statement Regarding Oral Argument and Decision	12
Argument	12
1. The Circuit Court erred by failing to grant a mistrial and/or new trial based upon impermissible prosecutorial comment during closing argument.	12
2. The Circuit Court erred by failing to give the Petitioner's "Missing Witness" instruction.	17
3. The Circuit Court erred by failing to grant the Petitioner's motion for judgment of acquittal based upon the State's reliance on inherently incredible testimony.	21
4. The Petitioner is entitled to a new trial due to the omission of bench conferences from the transcripts.	23
Conclusion	25
Certificate of Service	26

TABLE OF AUTHORITIES

Cases

<i>Berger v. United States</i> , 295 U.S. 78 (1935)	16
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)	16
<i>Government of Virgin Islands v. Toto</i> , 529 F.2d 278 (3rd Cir. 1976)	15
<i>Hoover v. West Virginia Bd. of Medicine</i> , 216 W.Va. 23, 602 S.E.2d 466 (2004)	20
<i>In re Assessment of Kanawha Valley Bank</i> , 144 W.Va. 346, 109 S.E.2d 649 (1959)	20
<i>McGlone v. Superior Trucking Co., Inc.</i> , 178 W. Va. 659, 363 S.E.2d 736 (1987)	6, 18
<i>Morgan v. Price</i> , 151 W.Va. 158, 150 S.E.2d 897 (1966)	18
<i>Pullin v. State</i> , 216 W.Va. 231, 605 S.E.2d 803 (2004)	20
<i>Skibo v. Shamrock Co., Ltd.</i> , 202 W.Va. 361, 504 S.E.2d 188 (1998)	13
<i>State ex rel. Grob v. Blair</i> , 158 W.Va. 647, 214 S.E.2d 330 (1975)	18
<i>State ex rel. Kisner v. Fox</i> , W.Va., 267 S.E.2d 451 (1980)	23
<i>State v. Anderson</i> , 233 W.Va. 75, 754 S.E.2d 761 (2014)	15
<i>State v. Cummings</i> , 220 W.Va. 433, 647 S.E.2d 869 (2007)	22
<i>State v. Graham</i> , 541 S.E.2d 341, 208 W.Va. 463 (2000)	25
<i>State v. Guthrie</i> , 194 W.Va. 657, 461 S.E.2d 163 (1995)	21, 22
<i>State v. Hamrick</i> , 607 S.E.2d 806, 809, 216 W.Va. 477 (2004)	13, 15
<i>State v. Hinkle</i> , 200 W.Va. 280, 489 S.E.2d 257 (1996)	17
<i>State v. Hoard</i> , No. 21-0764 (W. Va. April 28, 2023)	17, 18, 19
<i>State v. James</i> , 211 W. Va. 132, 563 S.E.2d 797 (2002)	18, 20
<i>State v. Kennedy</i> , 162 W.Va. 244, 249 S.E.2d 188 (1978)	13
<i>State v. McPherson</i> , 371 S.E.2d 333, 179 W.Va. 612 (1988)	22
<i>State v. Miller</i> , 197 W.Va. 588, 476 S.E.2d 535 (1996)	18
<i>State v. Shafer</i> , 168 W.Va. 474, 284 S.E.2d 916 (1981)	22, 25

<i>State v. Starkey</i> , 161 W.Va. 517, 244 S.E.2d 219 (1978)	22
<i>State v. Sugg</i> , 193 W.Va. 388, 456 S.E.2d 469 (1995)	12, 15, 16
<i>State v. Vance</i> , 207 W.Va. 640, 535 S.E.2d 484 (2000)	15
<i>State v. Wade</i> , 490 S.E.2d 724, 200 W.Va. 637 (1997)	13, 16
<i>State v. Wheeler</i> , 187 W.Va. 379, 419 S.E.2d 447 (1992)	13
<i>United States v. Nobari</i> , 574 F.3d 1065 (9th Cir.2009)	13, 16

Rules

Rule 19, West Virginia Rules of Appellate Procedure	12
Rule 20, West Virginia Rules of Appellate Procedure	12
Rule 804, West Virginia Rules of Evidence	18, 19

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by failing to grant a mistrial and/or new trial based upon impermissible prosecutorial comment during closing argument.
2. The Circuit Court erred by failing to give the Petitioner's "missing witness" instruction.
3. The Circuit Court erred by failing to grant the Petitioner's motion for judgment of acquittal based upon the State's reliance on inherently incredible testimony.
4. The Petitioner is entitled to a new trial due to the omission of bench conferences from the transcripts.

STATEMENT OF THE CASE

The Petitioner was arrested and subsequently indicted for murder and use of firearm during commission of a felony following an investigation into the shooting death of Wesley Rohrbaugh in Cabins, Grant County, West Virginia. (A.R., at 20-21). As indicated in the State's pretrial memorandum, the State intended to put on testimony that (among other things¹) the Petitioner had obtained a "Glock 40" from a neighbor, that another set of neighbors saw him pistol-whip Mr. Rorhbaugh, and that several witnesses, including the Petitioner's sister Caternia Mullins, were outside the garage when one or more gunshots took place. The State further indicated that it intended to put on testimony of the Petitioner's mother, Denise Shanholtz, that her subsequently-deceased husband had made utterances that were inculpatory toward the Petitioner after being in proximity to the scene. (A.R., at 23-24). The State also indicated that it was going to put on testimony from Jeremiah Dean, that he had obtained a "Glock 40" pistol from the Petitioner, and that the Petitioner had indicated it was the gun used in the instant crime.

¹ The State's full theory of the case is summarized in the pretrial memorandum, although there were some differences between the memorandum and the testimony ultimately presented at trial. (A.R., at 23-25).

(A.R., at 24).

Prior to trial, the Petitioner came across information relating to certain State's witnesses that indicated the existence of cooperation agreements with the State that had not been disclosed by the prosecution; accordingly, the Petitioner moved for the disclosure of all such inducements offered to witnesses by the State. (A.R., at 65-73). In its response, the State had the following to say about the inducement offered to the Defendant's sister, Caterina Mullins:

Caterina Mullins has a prior qualifying offense under §61-11-18, dealing with a Meth lab. She was charged in February of 2022, with Possession with Intent to Deliver Heroin, and two misdemeanor offenses of Possession of Controlled Substances. Later, while in jail, she was charged with Conspiracy, and nine Felony counts of Accessory Before the Fact to Fraud in connection with an Access Device.

She is represented by Sherman Law Firm. Her statements with regard to the evening the murder was committed, are in conflict with the statements of Jared Michael, Tammy Lofton, and her now deceased stepfather, who were all, no further than 15 ft. from her when the murder was committed. It is the State's belief that if she could provide truthful testimony consistence [sic] with what the three other witnesses said in their statements.

In an earlier telephone conversation that I had with one of her counsel, Larry Sherman, I advised that I was ready to go to trial, and would go to trial on all of her charges unless she was willing to provide truthful testimony. After a while, I was assured by Attorney Larry Sherman that she would cooperate. As a result of these representations by her counsel, I made the September 8, 2022, offer attached.

On December 7th, 2022, I was prepared to allow her to enter a plea consistence [sic] with the September 8th, offer. The Court suggested that she be debriefed before her plea.

In advance of the debriefing, I sent her counsel the attached letter about the areas where her lack of knowledge was inconsistent with the three people that were within 15 ft. of her.

After counsel received the letter and discussed it with Caterina Mullins, her counsel advised that she would not cooperate. After learning this, by letter of January 30th, I withdrew the September 9th, offer. Her cases are set for trial on February 22nd, 2023.

(A.R., at 75-76).

The State also referenced its offer made to the Petitioner's mother, Denise Shanholtz, in the form of a letter to her counsel:

Dear Jonie:

As you know, the Defendant [Ms. Shanholtz], is charged with nine felonies of Fraud in Connection with Access Devices and one count of Conspiracy, that is ten felonies.

By way of a plea offer, I would like to discuss the following.

I believe she knows a lot more about the murder at Allen's Trailer Court, than she has disclosed to the police. The evidence that day shows that her husband was in the room with her son, when her son killed Mr. Rohrbaugh. Her husband saw what happened. The evidence shows that he ran out of the garage, where Mr. Rohrbaugh was killed, ran to your client, fathered her up, got in a car and left. Certainly, her husband told her what he saw, and heard. I would like you to talk to her and see what she knows. I would also like you to do this rather quickly, since we have a trial scheduled in the murder case in early December.

Should she agree to provide truthful testimony in the murder case, with regard to the excited utterances of her husband, coming out of the garage, where Mr. Rohrbaugh was killed, I would be inclined to offer her a misdemeanor conspiracy provided full restitution is made in advance. To be clear, I am not asking her to invent testimony, or to testify untruthfully, at all. I would like her truthful cooperation. I would also like you to continue her case until after the murder trial.

Kindly talk this over with your client, and get back to me as soon as you can.

(A.R., at 85).

The case proceeded to trial on April 6, 2023. However, prior to testimony being put on, a mistrial was declared because a prospective juror blurted out that the Petitioner had used drugs in the bathroom of the convenience store that he managed, and because defense counsel overheard Mr. Rohrbaugh's sister speaking with one of the jurors during a smoke break shortly after the juror was sworn, and disputed the juror's and sister's assertion that the interaction was innocuous. The Circuit Court ruled that the combined effect of those two issues had tainted the proceedings sufficiently to justify a mistrial. (A.R., at 87-90).

The second trial commenced on May 11, and continued through May 15. During this trial, the jurors heard the testimony of the various State's witnesses who had been proffered pretrial; however neither the Petitioner's Mother, Denise Shanholtz, nor the Petitioner's sister, Caternia Mullins, were called by the State. Additionally, the testimony of several other State's witnesses was rendered unnecessary by means of stipulations. (A.R., at 92-93). The jury heard from both parties' firearm/toolmark experts: Theodore Chavez from the FBI for the State, and Todd Neumyer, a retired member of the Pennsylvania State Police, for the Defendant. The reports and testimony of both experts were in essential agreement that the firearm used to kill Mr. Rohrbaugh was a Glock Generation 5, 40 caliber pistol, either model 22, model 23, or model 27. (A.R., at 148-158, 163-187, 455-485, 690-728).

Notably, in the State's case, Jeremiah Dean, who allegedly received the murder weapon in a trade with the Petitioner, testified that he received a "Glock 40 I think 2nd Gen pistol." (A.R., at 412, 420-421). He also testified that "it had an extra lock that locked the slide from coming back" and that the grip was metal. (A.R., at 421-423). He testified that the Petitioner told him it was the weapon used to kill Mr. Rohrbaugh. (A.R., at 415). During Mr. Chavez's subsequent testimony, he ruled out the possibility that a Gen 2 Glock could have fired the shots that killed Mr. Rohrbaugh. (A.R., at 478-479). Mr. Neumyer likewise testified that the firearm possessing the physical features described by Mr. Dean could not have been within the class of firearms (Glock Gen 5) that caused Mr. Rohrbaugh's death. (A.R., at 726-727).

During the testimony of the investigating officer, Kirk Thorne, the following testimony took place:

Q. Alright. On that day were statements taken of all of the witnesses that have testified today?

A. Yes.

Q. Basically, was their testimony consistent with their statement?

A. Yes.

Q. Did you interview Caterina Mullins?

A. Yes, I did.

Q. Was her statement helpful in our case?

A. No.

[Bench conference omitted]

Q. Kirk, the last question was, did you take a statement from Caterina Mullins, and you said yes.

A. Yes, correct.

Q. And I believe the next question I asked you was it helpful and you said no, is that correct?

A. Correct. I mean nothing that we were going to use.

Q. Alrighty. Did you take a statement of Greg Shanholtz?

A. Yes.

Q. Mr. Shanholtz died of natural causes in November of last year, so we're not allowed to talk about that.

A. Correct.

Q. Did you take a statement from Denise Shanholtz?

A. Yes.

Q. Was it your decision she wasn't helpful?

A. Correct.

(A.R., at 609-610).

Later during trial, the Petitioner submitted "Defendant's Jury Instruction 'A'", which read

as follows:

MISSING WITNESS:

The Court instructs the jury that the failure of the State to call available material witnesses gives rise to the inference that had those witnesses testified, their testimony would have been adverse to the State's case.

[Source: *McGlone v. Superior Trucking Co., Inc.*, 178 W. Va. 659, 363 S.E.2d 736 (1987); F. Cleckley, Handbook on Evidence for West Virginia Lawyers, Section 3-1(c)(J) (3rd Ed. 1994); Russell S. Cook, West Virginia Criminal Jury Instructions, p. 52 (6th Ed. 2003).]

(A.R., at 95).

After the close of the State's case, the Petitioner moved for a judgment of acquittal.

(A.R., at 670-671). During discussion on jury instructions, the following exchange took place

out of the hearing of the jury regarding the proposed instruction:

MR. EASTON: Mr. Cooper filed a Motion to add an Instruction after we had heard some testimony we were not necessarily expecting.

THE COURT: Okay. Can I see it?

MR. EASTON: It was e-filed.

MR. COOPER: I e-filed it yesterday morning Your Honor.

THE COURT: Well, you might as well have wrapped it up in an envelope and thrown it out in the yard for me. Can I get a copy of it?

MR. COOPER: I don't have one printed out Your Honor, I apologize.

THE COURT: That's alright. What's it for?

MR. COOPER: So, it's Defense Instruction A. It's an Instruction about missing witness where the State had the opportunity to call an available witness and did not. That leads to an inference that the testimony would have been adverse to the State's case.

THE COURT: Who'd they fail to call?

MR. COOPER: There was Caterina Mullins who was in the custody of the DOC who the State could have called as an eyewitness at the time or ear witness.

THE COURT: She has reviewed [sic] to cooperate with the State in any way.

MR. OURS: Your Honor. You don't have the Discovery, but her statement is I don't believe that my brother would do that and maintains that she wasn't there.

THE COURT: Okay.

MR. COOPER: And the other is Denise Shanholtz who also was present and supposedly heard a confession at the time.

THE COURT: Who?

MR. COOPER: Denise Shanholtz.

THE COURT: His mother?

MR. COOPER: Yes. Who was present at the scene when this supposedly happened and whose been present at the courthouse throughout these proceedings that was available to the State that they did not call. And in fact...

THE COURT: Why didn't you?

MR. COOPER: Well, we don't have the burden to produce evidence.

THE COURT: Okay. I'm not giving that Instruction.

MR. COOPER: In the alternative, can I have an Instruction that they may draw an adverse inference from a missing witness? Lieutenant Thorne testified that they gave statements that were unhelpful to the State's case so it's not even consistent with what the States testimony reflected.

THE COURT: Get it printed out and let me look at it. Wait here it is. Hold on.

THE COURT: You want it to say what?

MR. COOPER: That the Court instructs the jury that States failure to call an available witness in this case Denise Shanholtz and Caterina Mullins leads to an adverse inference that the testimony would have been adverse to the State's case or something along those lines is what I put in the...

THE COURT: I'm going to deny that.

MR. COOPER: Please note my objection.

THE COURT: So, noted. These people failed to cooperate in any way. Alright. We ready? Bring them in.

(A.R., at 735-737).

During closing argument, the Petitioner made two objections to the State's commentary, both of which were sustained. First, during the State's initial argument, the argument closed as follows:

Don't be hesitant, it's your sworn duty to do your job. You all know what your job is. None of you wanted it, none of you relish it but you know what it is. It's your duty as a United States citizen. As a citizen of West Virginia and particularly of Grant County. You will send a message with your verdict. And your message will be, this is what's permitted in Grant County.

MR. COOPER: Objection Your Honor. You're not allowed to instruct the jury to send a message to the community...

THE COURT: Alright. Move on Mr. Ours. Sustained. You have twenty minutes left sir.

MR. OURS: I have twenty minutes left? You mean total? With that I will sit down. I want you to think about what you just heard. The Defense is going to get up and argue their best that they can to create reasonable doubt. Listen to them fairly. I will address you again in a little while.

(A.R., at 768-769).

During the State's rebuttal, the Prosecuting Attorney attempted to introduce the jury to

Mr. Rohrbaugh's family members who were seated in the courtroom, to which the Petitioner immediately objected:

Ladies and Gentlemen, I could talk longer, and the Judge will tell you this will probably be the first time John didn't use all of his time. You've heard enough. I told you earlier, when you look at the verdict the first one is the one, you'll be looking for. It says Guilty of Murder in the First Degree. Then you come to the mercy part of it. I want to introduce you to Wes's father...

MR. COOPER: Objection Your Honor. I have to approach.

THE COURT: Hold on. Come on. Everybody come up.

(COUNSEL BENCH SIDE)²

THE COURT: Ladies and Gentlemen, do not consider the last remarks the Prosecuting Attorney made where he introduced the family. Certainly, everybody has a family and I imagine both families are very upset about this situation but do not take into account what the Prosecutor just said.

(A.R., at 794).

The Petitioner elected to have a unitary trial without a separate mercy phase. Thus, the matter was submitted to the jury on the question of guilt, and if the verdict was guilty of murder in the first degree, the question of mercy as well. A jury question was submitted, asking if the jury was able to extend the period of parole eligibility beyond fifteen years. The parties agreed that the jury had to be instructed that it would be up to the parole board. (A.R., at 796-797).

The jury returned a verdict of guilty on first degree murder without a recommendation of mercy, and guilty of use of a firearm during commission of a felony. (A.R., at 797-798). After the verdict, the Prosecuting Attorney stated the following concerning the objection to his argument:

² Disturbingly, the bench conferences throughout the trial were omitted from the transcript, as discussed further in Assignment of Error number four. The nature of the objection is evident from the surrounding context of the transcript and the trial orders that the Petitioner moved for a mistrial and took the position that a curative instruction was insufficient to ameliorate the error. (A.R., at 112, 794). That oral motion for mistrial and assertion of the insufficiency of a curative instruction was also alluded to in the written post-trial motions that followed the verdict. (A.R., at 119).

MR. OURS: Yes, Your Honor. There was an objection made during closing argument and I want the Court to know, and I want the record to reflect. I was introducing the victim's family and the objection came in before I was able to introduce the Defendant's family. That was my intention to do so. My intention was to say that both families want the correct verdict.

(A.R., at 799).

The Petitioner filed timely post-trial motions, in which he requested a judgment of acquittal on the basis that the State's case was predicated on inherently incredible testimony about the firearm. He also requested a new trial based upon the State's two instances of improper closing argument, and due to the denial of the "missing witness" instruction. (A.R., at 116-120). At the post-trial motion hearing, immediately prior to sentencing, the Circuit Court denied the Petitioner's Motion for New Trial based on the missing witness jury instruction, holding that "the Defense was free to have called both Catrenia Mullins and Denise Shanholtz as witnesses if they so desired, but didn't[.]" (A.R., at 127). The Circuit Court denied the Motion for New Trial based upon improper prosecutorial comment by holding that "the reference to the Prosecutor's remark in closing argument, to sending a message to Grant County was mentioned only once, and corrected by the Courts' instruction to disregard that remark, on the motion of the State, and the State beginning to introduce the victim's family during argument, was ended by the Defense's objection before anyone knew what the purpose could have been." (A.R., at 127). The Circuit Court also denied the motion for judgment of acquittal based on inherently incredible testimony, holding that "the Court remembered, at trial, that the Defendant testified that he wasn't a gun guy, and also pointed out that there were three different confessions made by the Defendant, also heard by the jury." (A.R., at 127). The Circuit Court sentenced the Petitioner to life without mercy in accordance with the jury verdict, and it is from this judgment of sentence that the Petitioner now appeals. (A.R., at 130-132).

SUMMARY OF ARGUMENT

The Circuit Court erred by denying relief on the three issues raised in the Petitioner's post-trial motions, each of which related to prior motions made at trial. First, the Prosecuting Attorney engaged in impermissible closing arguments on two occasions, both of which were timely objected to. The first impermissible argument was a request that the jury use its verdict to send a message to Grant County. The second was an attempt to introduce the jury to the family of the decedent. Although the Petitioner immediately objected to both acts of the Prosecutor, the State's misconduct succeeded in bringing these inappropriate matters to the jury's attention.

Second, following testimony by the investigating officer that the interviews taken of the Petitioner's mother and sister were not helpful, and the State's decision not to call those two witnesses despite their availability, the Petitioner sought a "Missing Witness" instruction from the Circuit Court. Although the instruction requested by the Petitioner was a correct statement of the law, the Circuit Court declined to instruct the jury in accordance with the proposed instruction.

Third, the Petitioner moved for a judgment of acquittal based on the State's reliance upon inherently incredible evidence. The expert testimony in this case was clear that only a Generation 5 Glock of certain models could have been the weapon that killed the decedent. Yet the State produced a witness who claimed to have received a Generation 2 Glock from the Petitioner, and claimed to have heard the Petitioner identify the weapon as the one used in the killing. It is physically impossible that the weapon described by the State's witness could have been the one used to kill the decedent, yet the State relied on this testimony and referred to it in closing arguments.

Finally, the Petitioner raises a claim that various missing bench conferences throughout the trial transcript operated to prejudice him in his ability to comprehensively appeal his conviction and life sentence. Although the contents of several bench conferences can be ascertained by a review of the record, there are several that remain uncertain. It cannot now be known whether an objection was preserved in any of these missing transcript segments. Consequently, the Petitioner should receive a new trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asserts that this matter is suitable for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure because it raises an issue of the constitutionality of a court ruling. Alternatively, this matter should be scheduled for Rule 19 argument as it involves an unsustainable exercise of discretion by the lower court. This matter should be disposed of by signed opinion.

ARGUMENT

1. The Circuit Court erred by failing to grant a mistrial and/or new trial based upon impermissible prosecutorial comment during closing argument.

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).

The Prosecuting Attorney violated basic precepts of permissible closing argument on two occasions, both of which were objected to, and sustained. The first was the Prosecuting Attorney's invitation to send a message to Grant County with its verdict. The second was the Prosecuting Attorney's reference to the decedent's surviving family members in the gallery.

This Court has held that:

We stated in syllabus point two of *State v. Kennedy*, 162 W.Va. 244, 249 S.E.2d 188 (1978) that "[g]reat 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."...

Skibo v. Shamrock Co., Ltd., 202 W.Va. 361, 504 S.E.2d 188 (1998).

The Ninth Circuit has noted that "[P]rosecutors may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence." *United States v. Nobari*, 574 F.3d 1065, 1076 (9th Cir.2009). This Court has held that:

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).

It must first be considered that the Circuit Court's reasoning in denying relief on the post-trial motion on this subject is not supported by the record. The Circuit Court inaccurately found

that the jury had been instructed, at the request of the State, to disregard the “sending a message” comments. (A.R., at 127). The transcript reveals no such instruction, at the prosecutor's behest or otherwise.³ Additionally, regarding the introduction of the decedent's family members, the Circuit Court found that “the State beginning to introduce the victim’s family during argument, was ended by the Defense’s objection before anyone knew what the purpose could have been.” (A.R., at 127). The transcript reveals that this is not what happened.

The operative section of the transcript (minus the omitted bench conference) is as follows:

[MR. OURS: ...] I want to introduce you to Wes’s father...

MR. COOPER: Objection Your Honor. I have to approach.

THE COURT: Hold on. Come on. Everybody come up.

(COUNSEL BENCH SIDE)

THE COURT: Ladies and Gentlemen, do not consider the last remarks the Prosecuting Attorney made where he introduced the family. Certainly, everybody has a family and I imagine both families are very upset about this situation but do not take into account what the Prosecutor just said.

(A.R., at 794).

Contrary to the Circuit Court's findings, the jury clearly would have been aware of the invocation of the decedent's family, despite the Petitioner's instantaneous objection. The Circuit Court's factual findings in denying the motion for new trial are clearly erroneous:

1. “In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's

³ It is possible the Circuit Court was thinking of an incident during the first trial, in which the Prosecuting Attorney did ask for and receive a curative instruction relating to a derogatory comment regarding the Petitioner blurted out by a venireman. (A.R., at 250).

underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.” Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

Syl. Pt. 1, *State v. Anderson*, 233 W.Va. 75, 754 S.E.2d 761 (2014).

While the Circuit Court instructed the jury to disregard the comments, the Petitioner asserts, as he asserted at trial (A.R., at 119),⁴ that a curative instruction is an insufficient remedy for the State's transgressions. “A drop of ink cannot be removed from a glass of milk.” *Government of Virgin Islands v. Toto*, 529 F.2d 278 (3rd Cir. 1976). The State's invitation to send a message, and its reference to the factually irrelevant matter of the bereaved family members of the decedent, were successfully communicated to the jury.

The prejudice is especially deepened because the Petitioner specifically declined to ask for a bifurcated mercy phase. The purpose of declining to ask for a separate mercy phase was to prevent the jury's consideration of issues that might be relevant to punishment, but not to guilt. The Petitioner gave up the opportunity to put on testimony in mitigation of punishment, precisely to avoid having the grief of Mr. Rohrbaugh's survivors considered during a potential penalty phase, a motivation presented to the Court in the post-trial motion. (A.R., at 119). Because of the misconduct of the State, the Defendant was not only robbed of the benefit of this strategic tradeoff relating to the mercy issue, but the State was allowed to invite the jury to consider this utterly irrelevant, improper, and inflammatory information during deliberations on *guilt* as well.

Regarding the *Sugg/Hamrick* factors, it is clear that the various factors are satisfied by

⁴ A request for mistrial, and an assertion that a curative instruction was an insufficient remedy, were contained in the missing bench conference that followed the objection. (A.R., at 794). The request for mistrial is, however, memorialized in the Circuit Court's trial order: “At 11:17 a.m., the State began introducing the family of the victim and the Defendant objected and asked for a bench conference. The Defendant moved for a mistrial for prosecutorial misconduct for introducing family members. The State requested a curative instruction for the jurors to disregard. The Defendant continued his objection to the action of the State. The Court overruled the objection and gave the instruction to the jurors. The Defendant's objections are saved and the matter may be appealed.” (A.R., at 112).

the broad variety of misconduct on display in this case. The Prosecuting Attorney clearly calculated his conduct to present improper matters to the jury. Courts, including this Court, have specifically found the precise kind of misconduct done by the Prosecuting Attorney in this case to be improper in other cases. See, *Wade*, and *Nobari*. The remarks were not isolated, but occurred in both the State's initial argument and its rebuttal. Absent the improper argument, it is hardly clear that the jury would have come down the same way, especially on the question of mercy, given the apparent implication of the jury question that the Petitioner might have been granted mercy even under the existing record had the minimum period until parole been longer than fifteen years. (A.R., at 796). Concerning the final *Sugg* factor, it is apparent that the Prosecuting Attorney's comments were deliberate and calculated to divert the jury's attention to issues that had nothing to do with the Petitioner's guilt or innocence. Indeed, in his own defense, the Prosecuting Attorney stated that his intention was to next introduce the Petitioner's own family members, which is equivalently irrelevant, even if perhaps less prejudicial. (A.R., at 799).

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. The closing argument of this case was manifestly unfair, as a result of the clear misconduct of the State. The Petitioner, who gave up the right to put on mitigating evidence in the mercy phase, was deprived of the primary benefit of a unitary trial: the exclusion of matters that are irrelevant to guilt in the consideration of punishment. The State benefited handsomely from the Prosecutor's misconduct by taking away the only upside emanating from the strategic decision to have a unitary trial.

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. The State struck two foul blows during closing argument, and deprived the Petitioner of his right to a fair trial. The only appropriate remedy is a new trial.

2. The Circuit Court erred by failing to give the Petitioner's “Missing Witness” instruction.

This Court has described the following standard of review relating to challenges to jury instructions:

2. "As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is de novo." Syllabus Point 1, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996).

Syl. Pt. 2, *State v. Hoard*, No. 21-0764 (W. Va. April 28, 2023).

This Court has also recently restated that:

In general, the question on review of the sufficiency of jury instructions is whether the instructions as a whole were sufficient to inform the jury correctly of the particular law and the theory of defense. We ask whether: (1) the instructions adequately stated the law and provided the jury with an ample understanding of the law, (2) the instructions as a whole fairly and adequately treated the evidentiary issues and defenses raised by the parties, (3) the instructions were a correct statement of the law regarding the elements of the offense, and (4) the instructions meaningfully conveyed to the jury the correct burdens of proof. Thus, a jury instruction is erroneous if it has a reasonable potential to mislead

the jury as to the correct legal principle or does not adequately inform the jury on the law. An erroneous instruction requires a new trial unless the error is harmless. See *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

State v. Miller, 197 W.Va. 588, 607, 476 S.E.2d 535, 554 (1996).

Hoard, at *33.

This Court has also held:

8. "It is not error to refuse to give an instruction to the jury, though it states a correct and applicable principle of law, if the principle stated in the instruction refused is adequately covered by another instruction or other instructions given." Syllabus Point 3, *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966).

Syl. Pt. 8, *Hoard*.

The Petitioner asserts that the Court erred by denying the "missing witness" instruction offered as Defense Instruction "A." This issue was preserved by the filing of the requested jury instruction, the argument and preserved objection on the record, and the raising of the issue in post-trial motions. (A.R., at 95, 116-121, 735-737). The source in our law of this instruction is *McGlone v. Superior Trucking Co., Inc.*, 178 W.Va. 659, 363 S.E.2d 736 (1987). Although this Court has discouraged the use of such an instruction against a criminal defendant due to constitutional concerns relating to the burden of proof and the right to remain silent,⁵ the same considerations do not exist relative to the State.

The two complained-of witnesses (the Defendant's mother and sister), were both available, as the sister Caternia Mullens was in DOCR custody, and the mother Denise Shanholtz was in the courtroom throughout the entire trial. (A.R., at 735-737). They were also both available within the meaning of Rule 804 of the West Virginia Rules of Evidence.⁶

⁵ See, *State v. James*, 211 W. Va. 132, 563 S.E.2d 797 (2002).

⁶ The criteria of Rule 804, none of which are present in this case, are as follows:

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

Moreover, it was the testimony of other State's witnesses that these two missing individuals were eye and/or ear witnesses relating to the alleged shooting in the garage, which clearly renders them material witnesses. For instance, Jared Michael testified that Ms. Shanholtz came running toward the scene after the gunshots were fired, and that Ms. Mullens was present near the scene after having dropped a box of food shortly before the gunshots. (A.R., at 344-346). Tammy Lofton testified that Ms. Mullens was near the garage when the Petitioner emerged, and confessed something to Ms. Mullens. (A.R., at 384). Lt. Thorne, the investigating officer, clearly stated that his interviews with Ms. Shanholtz and Ms. Mullen were not helpful to the State. (A.R., at 609-610).

It would have been a correct statement of the law for the jury to have been instructed that it was permitted to take an adverse inference against the State relative to what those witnesses would have said as a result of the State not calling them. “[A] jury instruction is erroneous if it has a reasonable potential to mislead the jury as to the correct legal principle or does not adequately inform the jury on the law. An erroneous instruction requires a new trial unless the error is harmless.” *State v. Hoard*, No. 21-0764 at *33 (W. Va. April 28, 2023). The Petitioner specifically requested permissive language concerning the inference discussed in *McGlone* when the Circuit Court initially declined to offer the instruction. It was thus error for the Circuit Court to deny a lawful instruction requested by the Defendant and justified by the factual circumstances of the case. It cannot be said that the error was harmless, because the missing

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- (2) refuses to testify about the subject matter despite a court order to do so;
 - (3) testifies to not remembering the subject matter;
 - (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
 - (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
 - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

witness testimony related to the precise events that allegedly established that the Defendant was the one that shot the decedent.

Admittedly, the holding of *Pullin v. State*, 216 W.Va. 231, 605 S.E.2d 803 (2004) supports the Circuit Court's ruling. *Pullin*, citing precedent from numerous other jurisdictions, came to the conclusion that a trial court in a criminal case could refuse a criminal defendant's requested "Missing Witness" instruction in circumstances in which the witness was equally available to be called by the defendant. *Id.*, 605 S.E.2d at 808-09. The Petitioner acknowledges that it is straightforwardly the case that he could have called his mother and/or sister to testify in this matter. However, this Court should reject the *Pullin* rationale for two reasons. First, the discussion of the "Missing Witness" instruction in *Pullin* was *dicta*, as reversal had already been granted on another issue, and the "Missing Witness" issue had no bearing on the disposition of the appeal. *Id.*, 605 S.E.2d at 807-08. This Court has recognized that "[o]biter dicta or strong expressions in an opinion, where such language was not necessary to a decision of the case, will not establish a precedent." *In re Assessment of Kanawha Valley Bank*, 144 W.Va. 346, 382-83, 109 S.E.2d 649, 669 (1959). See also, *Hoover v. West Virginia Bd. of Medicine*, 216 W.Va. 23, 602 S.E.2d 466 (2004).

The second reason is that the rationale for denial (that the defendant could have and should have called the missing witnesses), improperly dilutes the State's burden of proof and the Petitioner's right to refrain from putting on evidence. When confronted with a similar instruction offered on behalf of the State, this Court noted that "the instruction tends to suggest that Appellant had some obligation to produce witnesses to prove or tend to prove her innocence." *State v. James*, 211 W. Va. 132, 563 S.E.2d 797 (2002). The Petitioner had no obligation to call these witnesses. Eligibility for an otherwise lawful instruction should not be at

the expense of the right of a defendant to silently test the State's evidence. This Court should reverse and remand for a new trial in which the instruction is given.

3. The Circuit Court erred by failing to grant the Petitioner's motion for judgment of acquittal based upon the State's reliance on inherently incredible testimony.

The standard by which this Court will judge a challenge to the sufficiency of the evidence has been set forth in Syllabus Points 2 and 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), as follows:

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

3. A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Id.

This Court has also held that:

3. "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant

interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978), overruled on other grounds by *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 3, *State v. Cummings*, 220 W.Va. 433, 647 S.E.2d 869 (2007).

The Petitioner asserts that he is entitled to a judgment of acquittal because of insufficient competent evidence to sustain the elements of the offenses. The Petitioner preserved this issue in post-trial motions. (A.R., at 116-121). Specifically, the verdict is unsustainable because the State relied on *inherently incredible evidence*. "[W]hen a trial court is asked to grant a motion for acquittal based on insufficient evidence due to inherently incredible testimony, it should do so only when the testimony defies physical laws." *State v. McPherson*, 371 S.E.2d 333, 338, 179 W.Va. 612, 617 (1988). In this case, because the State's narrative was rendered physically impossible by the testimony of Jeremiah Dean, no "rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." See, Syl. Pt. 1., *State v. Guthrie*, 461 S.E.2d 163, 194 W.Va. 657 (1995).

Mr. Dean testified that he received a Glock "Generation 2" handgun from the Petitioner with metal grips and a locking mechanism. (A.R., at 412, 420-423). The testimony of both firearms experts established that only certain models of a Generation 5 Glock were capable of firing the shots that killed the decedent. (A.R., at 478-479, 690-728). Further, it was the testimony of the defense expert Neumyer that the firearm that killed the decedent could not have had a metal grip nor a locking mechanism. (A.R., at 726-727). Mr. Dean specifically testified that the Petitioner stated that this firearm was the murder weapon. (A.R., at 415). The State openly and willingly relied on this incredible testimony, accentuating it repeatedly in argument, despite the fact that it was obviously impossible that the testimony was an accurate reflection of

events: “Who went to see Jeremiah Dean to get rid of the murder weapon? Who went back to Jeremiah Dean to make sure the murder weapon was disposed of after the police showed up? Who told Jeremiah Dean that’s the gun I used to kill Wes?” (A.R., at 765). The Prosecutor returned to the subject during rebuttal. (A.R., at 793).

It is physically impossible for the firearm described by Mr. Dean to have been the murder weapon; therefore the State's theory of the Petitioner's criminal liability – that he killed Wesley Rohrbaugh with a gun that was subsequently transacted to Jeremiah Dean – is predicated on testimony that violates physical laws and cannot be the basis for the verdict. Because the State's case was built upon inherently incredible testimony, this Court should enter a judgment of acquittal on both counts of the indictment.

4, The Petitioner is entitled to a new trial due to the omission of bench conferences from the transcripts.

Syllabus Point One of *State v. Shafer*, 168 W.Va. 474, 284 S.E.2d 916 (1981) holds that:

"The failure of the State to provide a transcript of a criminal proceeding for the purpose of appeal, absent extraordinary dereliction on the part of the State, will not result in the release of the defendant; however, the defendant will have the option of appealing on the basis of a reconstructed record or of receiving a new trial." Syl. pt. 2, *State ex rel. Kisner v. Fox*, W.Va., 267 S.E.2d 451 (1980).

The missing bench conferences in this case are extensive in scope. In addition to the bench conference during the State's rebuttal (which is not central to this assignment of error because the remaining record more or less reveals what happened during that particular bench conference), seven bench conferences were omitted from the record.⁷

During voir dire, defense counsel asked to approach, and it is unclear what transpired. (A.R., at 276). Defense counsel asked to approach during the testimony of Jared Michael,

⁷ Correspondence between the court reporter and the undersigned counsel about the bench conferences was submitted to this Court on January 19, 2024.

during a description of the firearm, with no further discussion of what occurred. (A.R., at 341). Defense counsel asked to approach during the testimony of Jerry Campbell, when it appeared that the witness was about to disclose a different crime with which the Petitioner had previously been charged. It appears from the record that that bench conference successfully forestalled Mr. Campbell from improperly discussing the Petitioner's collateral conduct. (A.R., at 577).

Defense counsel sought to approach again during Lt. Thorne's testimony about interviewing Caternia Mullens and Denise Shanholtz. (A.R., at 609). It is unclear what the purpose or result of the bench conference was in this circumstance. However, this exchange is clearly relevant to the Petitioner's second assignment of error. Later during Lt. Thorne's testimony, the Circuit Court summoned the parties to the bench, and it is apparent from the Day Two Trial Order that the parties were discussing the potential conflict that a juror had disclosed; an issue that did not lead to objections by either party. (A.R., at 645, 106-107).

The Circuit Court again convened a bench conference relating to text messages found on the decedents phone that the Petitioner was seeking to admit, and which were apparently trying the Circuit Court's patience. The details of the bench conference are uncertain from the context of the remaining record, although the text messages were permitted to come into evidence. (A.R., at 656). Another bench conference resulted from the State's effort to compel the Petitioner to exhibit his arm so that the jury could look at his tattoo. (A.R., at 734). This missing bench conference would have been extremely important had the Circuit Court ruled the other way, but because the Petitioner was not compelled to show his tattoo, it is unlikely any error transpired during that particular exchange either.

Thus, the bench conferences referred to in the Appendix Record at 276, 341, and 609 are the ones at issue. It cannot be known whether any objection was made and/or preserved, and

thus the Petitioner is deprived of his right to full appellate review. This Court held in Syllabus Point 8 of *State v. Graham*, 541 S.E.2d 341, 208 W.Va. 463 (2000), that: “Omissions from a trial transcript warrant a new trial only if the missing portion of the transcript specifically prejudices a defendant's appeal.” There is no way to know from the existing record what objections were made at the bench conferences, and what rulings resulted, and what objections were preserved. The rest of a man's life being spent in prison is at stake. The inability of the court reporter to transcribe the bench conferences is fatal, prejudicial error. Under *Shafer*, a new trial is justified.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that this Court grant the following relief:

1. That the judgment be reversed and remanded for entry of a judgment of acquittal;
2. That the judgment be reversed and remanded for a new trial;
3. That the Court 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. 23-456

STATE OF WEST VIRGINIA,
Respondent,

v.

CARL RAY SUMMERFIELD,
Petitioner.

**(An appeal of a final order
of Grant County Circuit
Court, Case No. 22-F-7)**

CERTIFICATE OF SERVICE

On this 22nd day of January, 2024, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Brief to the Office of the Attorney General, Appellate Division, by e-service via File&ServExpress.

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