No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

Lena Marie Conaway, *Petitioner*,

v.

State of West Virginia, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Respondent, Plaintiff Below

vs.) No. 18-0851 (Lewis County 17-F-12)

L. M. C.,
Petitioner, Defendant Below

FILED
July 30, 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner L.M.C.,[1] by counsel Jeremy B. Cooper, appeals her convictions for murder of a child by parent, guardian, custodian, or other person by refusal or failure to provide necessities; death of a child by parent, guardian, custodian, or other person by child abuse; child abuse resulting in serious bodily injury; and concealment of a deceased human body. Respondent State of West Virginia, by counsel Scott Johnson, filed a response in support of petitioner's convictions. Petitioner filed a reply.[2]

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons,

[1] Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

[2] On August 26, 2019, petitioner filed a motion for leave to file a supplemental brief. Petitioner's counsel argued that after his initial consultation with petitioner, additional circumstances came to his attention that "should appropriately have been raised on direct appeal, but which were omitted" from petitioner's brief. Respondent filed an objection to petitioner's motion. Respondent argued that petitioner's motion should be denied as the additional issue that petitioner now attempts to raise on appeal was "available to petitioner prior to the filing of her initial brief." We concur with respondent and deny petitioner's motion for leave to file a supplemental brief.

a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

In September of 2011, petitioner lived in Weston, West Virginia, with her three daughters, D.C., K.C., and A.L.; two sons, T.C. and B.C.; and Ralph Lunsford, the children's father.[3] Petitioner was then eight to eight and one-half months pregnant with twins. On the evening of September 23, 2011, petitioner became angry with A.L., would not allow her to eat dinner, and forced her to stand in the corner. That same evening, D.C. observed petitioner take a piece of a broken bed slat and strike A.L. over the head with the slat.[4] Ultimately, K.C. and D.C. approached A.L. and K.C. helped the child to bed. Both K.C. and D.C. reported feeling the back of A.L.'s head after the incident and described it as "squishy." After placing A.L. in bed, K.C. and D.C. advised petitioner that A.L. was "hurt . . . really bad" to which petitioner responded that "she did not care." Thereafter, petitioner made no effort to check on the physical well-being of A.L.

During the early morning hours of September 24, 2011, D.C. woke to check on A.L., and observed that A.L. was breathing. However, the following morning, when D.C. and K.C. were directed by petitioner to check on A.L., the girls found that A.L. was not breathing and was unresponsive. Petitioner then came into A.L.'s room, shook A.L., and tried calling her name. Ultimately, petitioner scooped up A.L.'s body, put the child on the bathroom counter, raised the child's eyelids, called her name, attempted CPR, and ran A.L.'s body under cold water. A.L. remained unresponsive. Petitioner then located a clothes basket and placed A.L.'s body in the basket, along with some clothing to mask the body, and placed the basket into the family van. Petitioner then drove the van, in which K.C., B.C., and D.C. were passengers, to the Vadis, West Virginia, area and directed K.C. and D.C. "to look for a road without any signs." Once the girls noticed such a location, petitioner stopped the van and told D.C. to remain in the vehicle with B.C. Petitioner then took K.C. and the clothes basket containing the body of A.L. into the woods. K.C. testified that, eventually, she and petitioner came to a spot in the woods where petitioner told her to wait. Petitioner then took the clothes basket with A.L.'s body out of K.C.'s sight and returned after what K.C. stated felt "like quite a while" without A.L.'s body. When petitioner and K.C. returned to the van, D.C. observed that petitioner's hands and stomach were dirty.

Petitioner then drove K.C., B.C., and D.C. back to their residence and made them "promise not to tell anyone what happened." However, while on the way back to their residence, petitioner's vehicle ran out of gas. K.C. and D.C. were directed by petitioner, to "ask for gas at some houses that were around." Two women provided gas to petitioner but neither was advised that A.L. was missing or that petitioner was allegedly searching for A.L. Once they had obtained sufficient gas for the van, petitioner and the children returned to their residence where they, at the direction of

[3]Ralph Lunsford was the biological father of K.C., D.C., B.C., and was the putative father of the twins with which petitioner was pregnant in September of 2011. While Mr. Lunsford was not the biological father of A.L., the child was given his last name.

[4] K.C. described the board as being from a bunkbed in the home. K.C. stated that striking the children with the board was a common punishment used by petitioner, and that such punishment had been administered to A.L. prior to September 23, 2011.

petitioner, "cleaned the house." After they cleaned the house, petitioner called the police and reported A.L. missing. Before police arrived at petitioner's home, K.C. testified that petitioner came up with a "storyline" that K.C. and D.C. were to follow: A.L. had been sick all week, they had all gone to bed early, and when they awoke, A.L. was gone. Once A.L. was reported missing, extensive efforts began to search for the child and investigate the circumstances of her disappearance.

Sometime after A.L.'s reported disappearance, petitioner's surviving children were placed with other families and petitioner relocated to Florida. In 2016, K.C. and D.C. made disclosures that petitioner struck A.L. with a wooden bed slat in September of 2011, causing A.L.'s death. In October of 2016, K.C. and D.C. agreed to "come forward with the truth about what really happened to A.L." Both K.C. and D.C. testified that they initially lied about what happened the night of the incident because they feared that petitioner might harm them. D.C. advised that she decided to come forward and tell the truth after five years as she felt that "continuing to hide what happened to [A.L.] was interfering with [her] relationship with God." A.L.'s body was never recovered.[5]

Based upon the statements of K.C. and D.C., an arrest warrant was obtained and executed upon petitioner in Florida. Following her extradition and preliminary hearing, petitioner was indicted by the Lewis County Grand Jury on four charges: (1) murder of a child by parent, guardian, custodian, or other person by refusal or failure to provide necessities (in violation of West Virginia Code § 61-8D-2(a)); (2) death of a child by parent, guardian, custodian, or other person by child abuse (in violation of West Virginia Code § 61-8D-2(a); (3) child abuse resulting in injury (in violation of West Virginia Code § 61-8D-3(b)); and (4) concealment of a deceased human body (in violation of West Virginia Code § 61-2-5(a). Following a jury trial, at which petitioner did not testify, she was convicted on all charges.

At trial, West Virginia State Police Sgt. Shannon Loudin testified regarding A.L.'s reported injuries. Sgt. Loudin stated that:

> [w]hen I look at the possibility of whether or not a strike to the head by a board; by an adult to a three (3) year old's head; my opinion is that it's perfectly possible that that caused an internal injury; which vomiting is a symptom of. And it's - - been testified that she was vomiting. There was some orange stuff around her mouth when she was found the next morning. So yes; I would presume that striking on top of the head of a three (3) year old whose skull is not yet fused together; it doesn't take much to cause an internal injury that would not have any external bleeding that would leave any DNA evidence on the scene.

When asked if he had a physician to support his opinions, Sgt. Loudin stated that he did not claim to be a physician but had

> been part of a lot of child fatality investigations and in my experience and sixteen (16) years as a law enforcement officer I've seen a lot of injuries to children and -

[5] While A.L.'s body was never recovered, the investigating officer testified, at trial, that "cadaver dogs each independently located an area where decomposition had occurred."

> - saw what caused those injuries and had a lot of training in what happens to a child's body when - - when they're abused and in those types of cases.

Because of the nature of petitioner's convictions, following trial, a mercy phase hearing was completed. The jury did not recommend mercy for petitioner. Petitioner, then self-represented, filed a number of post-trial motions, including one alleging the insufficiency of the evidence against her, and a violation of her rights related to respondent's failure to disclose an expert witness. The circuit court denied petitioner's post-trial motions and, on July 2, 2018, sentenced petitioner to life imprisonment without mercy.[6] It is from her convictions that petitioner now appeals.

On appeal, petitioner asserts nine assignments of error, which we will address in turn. First, petitioner argues that the circuit court erred in failing to grant her judgment of acquittal based on insufficient evidence to establish that she formed criminal intent to cause the death of her child by withholding medical care, a violation of West Virginia Code § 61-8D-2(a). Petitioner further contends that there was insufficient evidence that respondent established "corpus delecti: that a death occurred at all, and that the death occurred as a result of a criminal act." Generally, petitioner argues that the questionable veracity of the trial testimony of her daughters, K.C., and D.C., provided an insufficient basis for her conviction.

This Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence. *State v. LaRock*, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996). We have explained that

> [t]he 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.

Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

[6] Petitioner was sentenced to life without mercy on her conviction for the offense of murder of a child by parent, guardian, custodian, or other person by refusal or failure to provide necessities. For her conviction on the offense of death of a child by a parent, guardian, custodian, or other person by child abuse, petitioner was sentenced to a determinate period of forty years imprisonment, which sentence was to run consecutively with her other sentences. For her conviction on the offense of child abuse resulting in serious bodily injury, petitioner was sentenced to an indeterminate term of imprisonment from two to ten years, which sentence was to run consecutively with her other sentences. Finally, for her conviction on the offense of concealment of a deceased human body, petitioner was sentenced to an indeterminate term of imprisonment from one to five years, which sentence was to run consecutively with her other sentences.

> 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.

Syl. Pt. 3, in part, *Guthrie*.

Petitioner contends that even when viewing the evidence in the light most favorable to respondent, the evidence introduced against her at trial did not show that she formed the intent required to substantiate her conviction under West Virginia Code § 61-8D-2(a). The events described by K.C. and D.C. do not describe "a plot of kill [A.L.] by not taking her to get medical care." Rather, the testimony describes "intentional physical abuse, and a failure to obtain care." We disagree and find that respondent adduced sufficient evidence at trial to sustain petitioner's convictions. Here, petitioner knew that A.L. was badly injured after being struck with the bed slat, as the child was unable to stand upright and had to be helped to her bed. Despite having such knowledge, and being specifically advised by her older children that A.L. was badly injured, petitioner "took no steps to obtain medical care" for A.L., which was sufficient evidence for the jury to have concluded that petitioner intended to cause A.L.'s death by failing to provide necessary medical care.

Petitioner further argues that respondent failed to establish the necessary elements of corpus delecti, as articulated by this Court in syllabus points 4 and 5 of *State v. Surbaugh*, 237 W. Va. 242, 786 S.E.2d 601 (2016), of (1) a death (by direct testimony or by presumptive evidence which can be sufficiently established by showing that the initial wound caused the death indirectly through a chain of natural causes); and (2) the existence of a criminal agency as a cause thereof. Petitioner contends that respondent failed to meet its burden of proof on both elements of corpus delecti, as there is no credible proof of that a death occurred and "no competent proof" as to the causation of death "even if it did occur." Again, we disagree.

Here, the death of A.L. was established by and through the testimony of K.C. and D.C. Both of the sisters testified that on the morning after being struck on the head with a bed slat by petitioner, A.L. was unresponsive and "not breathing." K.C. recounted her mother attempting CPR on A.L. to no avail.

Petitioner argues that the testimony of K.C. and D.C. must be disregarded as such testimony was inherently improbable and incredible. However, as noted by respondent, the testimony of the girls does not "contradict physical laws," which is required to find testimony inherently improbable/incredible. *See State v. Kenneth M.*, No. 12-0233, 2013 WL 2157826, at *2 (W. Va. May 17, 2013) (memorandum decision) (quoting *State v. McPherson*, 179 W. Va. 612, 617, 371 S.E.2d 333, 338 (W. Va. 1988)). As the sisters' testimony was not "inherently incredible"

it was within the province of the jury to determine whether their testimony was credible or not, and the jury chose to credit their testimony. Accordingly, we find no error.

In her second assignment of error, petitioner argues that her double jeopardy rights were violated when she was sentenced separately for death of a child by a parent by child abuse and child abuse resulting in serious bodily injury, a lesser-included offense. *See State v. Zaccagini*, 172 W. Va. 491, 308 S.E.2d 131 (1983). Based on our review of the record, we find no merit in petitioner's argument. As this Court noted in syllabus point 8 of *Zaccagini*, West Virginia follows the federal double jeopardy test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), which provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

West Virginia Code § 61-8D-1(1) defines "abuse" as "the infliction upon a minor of physical injury by other than accidental means." West Virginia Code § 61-8B-1(10) defines "serious bodily injury" as "bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ." West Virginia Code § 61-8D-2a(a) requires the parent to cause the death, which is not an element of West Virginia Code § 61-8D-3(b), which requires serious bodily injury. Because each of these statutory sections requires proof of a fact the other does not, we find no double jeopardy violation.

Next, petitioner contends that the circuit court erred in denying her motion for new trial due to alleged *Brady* violations. This Court has found that "[a] claim of a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), presents mixed questions of law and fact. Consequently, the circuit court's factual findings should be reviewed under a clearly erroneous standard, and questions of law are subject to a *de novo* review." Syl. Pt. 7, *State v. Black*, 227 W. Va. 297, 708 S.E.2d 491 (2010).

In *Brady*, the United States Supreme Court found 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." 373 U.S. at 87. Even in situations where a police investigator is aware of exculpatory evidence, but the prosecuting attorney, through no specific fault of his or her own is not aware, the omission to disclose such evidence still constitute a violation of due process.

Here, petitioner argues that Sgt. Loudin did not disclose his consultation/conversation with Dr. Mel Wright of WVU Hospitals (regarding the possible cause of A.L.'s death). Dr. Wright was not called as a trial witness for either party. It was not until after trial that petitioner's trial counsel contacted Dr. Wright, who advised that he had spoken to Sgt. Loudin prior to trial, and advised that in this case while the hypothetical cause of death (strike to the head with a bed slat) was plausible, it would be impossible to testify "to the plausibility of the theory to a reasonable degree of medical certainty." Dr. Wright opined that aspiration of vomit would also be a plausible cause of death. Petitioner argues that respondent's withholding of this information "amounts to the suppression of exculpatory evidence by [respondent], sufficient to require a new trial."

We disagree and find no *Brady* violation. In syllabus point 2 of *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007), we recognized three components of a constitutional due process violation under *Brady v. Maryland*: (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.

In *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit held that "the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources." Here, petitioner's counsel "apparently consulted" with physicians. In fact, petitioner's trial counsel noted that "these physicians had the same conclusions as Dr. Wright, that being struck on the head by a bed slat was a probable cause of death." Accordingly, we concur with the circuit court and find no *Brady* violation occurred.

In her fourth assignment of error, petitioner contends that the circuit court erred in denying her motion for a jury pool consultant and motion for a change of venue. A change of venue motion is reviewed only for abuse of discretion. Syl. Pt. 2, *State v. Gangwer*, 169 W. Va. 177, 286 S.E.2d 389 (1982). Petitioner contends that because of the nature of this crime, and with the well-known, highly publicized media coverage centered on the case and the extensive volunteer recovery efforts to locate A.L., it was impossible to empanel an unbiased jury in Lewis County, West Virginia. We disagree.

The court's decision that the voir dire process could be used to impanel a fair and impartial jury, as opposed to the $10,000 jury pool expert requested by petitioner, was not erroneous. Here, the circuit court engaged in a "lengthy, methodical, searching, and exhaustive voir dire lasting two days and covering roughly four hundred eighty-seven pages in the record." Accordingly, we find that the circuit court did not abuse its discretion in denying petitioner's motion for a jury pool consultant and change of venue.

In her fifth assignment of error, petitioner argues that the circuit court erred in denying her objection to the burden-shifting arguments made by respondent. Specifically, petitioner argues that respondent "wrongfully invited" the jury to ignore the burden of proof by making "unlawful, burden-shifting arguments" in its opening and closing statements. In both arguments, the prosecutor stated "[t]he fact that a murderer may successfully dispose of a victim does not entitle him to an acquittal." *See People v. Manson*, 139 Cal Rptr. 275, 298 (1977).

Based on our review of the record, we find no merit in petitioner's argument. The decision of a circuit court to grant or deny a mistrial is reviewed for abuse of discretion only. *See State v. Thornton*, 228 W. Va. 449, 462, 720 S.E.2d 572, 585 (2011). Here, there was no abuse of discretion. In syllabus point 6 of *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995), this Court set forth four factors to take into account in determining whether improper prosecutorial comments are 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.

In the instant case, the respondent prosecutor's comments during his opening and closing remarks did not prejudice petitioner. The offending statements made by the prosecutor did not impose any burden on petitioner, as it did not suggest that petitioner had an obligation to produce evidence or prove innocence. Rather, respondent simply noted that it is an "indisputable legal proposition that the failure of the State to produce a body is not a bar to a murder conviction." Further, at trial, the jury was instructed that the State had the burden to "prove the guilt of the defendant beyond a reasonable doubt. The defendant was not required to prove her innocence." The jury was also instructed that the burden was always on the prosecution to prove guilt beyond a reasonable doubt. Accordingly, we find no abuse of the circuit court's discretion in failing to declare a mistrial as a result of the prosecutor's statements.

Next, petitioner contends that the circuit court erred in permitting Sgt. Loudin to testify as to a previously undisclosed statement of petitioner at trial. It is undisputed that during his testimony at trial, Sgt. Loudin recalled that petitioner was surprised by his appearance, along with other officers, at her home in Florida. Upon seeing Sgt. Loudin at her Florida home, petitioner stated: "Oh my [G]od, did you find [A.L.]? Am I in trouble?" Petitioner argues that Sgt. Loudin's trial testimony was the first disclosure of this "supposed statement" of petitioner and, thus, represented "an egregious violation of petitioner's rights."

However, petitioner made no objection at trial regarding this "statement." Because her counsel made no such objection at trial, petitioner now seeks relief under the plain error doctrine. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). In syllabus point 4, in part, in *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1998), we explained that the plain error doctrine is "to be used sparingly . . ." Based on our review of the record, we find that petitioner has not demonstrated plain error as to petitioner's "statement." This Court has reasoned that "[b]y its very nature, the plain error doctrine is reserved for only the most flagrant errors." *State ex. rel. Games-Neely v. Yoder*, 237 W. Va. 301, 310, 787 S.E.2d 572, 581 (2016).

In her seventh assignment of error, petitioner argues that the circuit court erred in failing to give sufficient consideration to petitioner's post-trial motions by summarily denying the same. Petitioner fails, however, to articulate the way in which the circuit court abused its discretion in denying petitioner's the post-trial motions and petitioner does not even suggest that her post-trial motions had any merit. This Court has proclaimed that "[a]lthough we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal." *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996), *See State v. Lilly*, 194 W. Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995) (finding that cursory treatment of an issue is insufficient to raise it on appeal). See also *State, Dep't of Health and Human Res. ex rel. Robert Michael B. v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995) ("[A] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs."). Accordingly, we find no error.

In her eighth assignment of error, petitioner argues that circuit court's cumulative errors prejudiced petitioner, thus warranting the award of a new trial. As we noted in *State v. Trail*, 236 W.Va. 167, 188 n.31, 778 S.E.2d 616, 637 n.31 (2015), the cumulative error doctrine has no application when there is no error. Here, petitioner "has identified no trial error. Without error, there is no cumulative error, and, thus, no relief." *State v. Jenkins*, No. 18-0283, 2020 WL 201163, at *4 (W. Va.) (Jan. 13, 2020) (memorandum decision).

In her final assignment of error, petitioner argues that she is entitled to a new trial due to the failure of court reporting equipment. Specifically, petitioner contends that errors in the court reporting equipment at trial resulted in "numerous missing portions of the jury selection transcripts relating to issues with prospective jurors, including five jurors who actually served." Petitioner contends that she was deprived of a record concerning the voir dire of five persons who served on the jury in a highly publicized case in which the jury selection was a critical process. However, petitioner's trial counsel did not file any objection or make any motions to strike the five jurors about which petitioner now complains on appeal. Because petitioner made no objections to these jurors, "no omissions from the voir dire transcript" could prejudice petitioner as she waived any arguments or errors associated with these jurors by not objecting to the same at trial. Accordingly, we find no error.

For the foregoing reasons, we affirm the petitioner's convictions.

Affirmed.

ISSUED: July 30, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 4th day of December, 2020, the following order was made and entered **in vacation**:

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 18-0851

L.M.C.,
Defendant Below, Petitioner

ORDER

The Court, having maturely considered the petition for rehearing filed by the petitioner, L.M.C., by Jeremy B. Cooper, her attorney, is of the opinion to and does hereby refuse said petition for rehearing.

A True Copy

Attest: /s/ Edythe Nash Gaiser
Clerk of Court

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

vs.) No. 18-0851

LENA MARIE CONAWAY,
Defendant Below, Petitioner.

(An appeal from a final order of the Circuit Court of Lewis County, Case No.: 17-F-12)

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred by failing to grant a judgment of acquittal based on insufficient evidence.

2. The Circuit Court erred by violating double jeopardy by sentencing the Petitioner separately for Death of a Child by Parent by Child Abuse and its lesser-included offense, Child Abuse resulting in Serious Bodily Injury.

3. The Circuit Court erred by failing to grant the Petitioner a new trial based upon the violation of *Brady v. Maryland* by the State.

4. The Circuit Court erred by denying a jury pool consultant and a change of venue.

5. The Circuit Court erred by failing to grant the Petitioner's objection to impermissible, burden shifting argument by the State.

6. The Circuit Court plainly erred by permitting testimony by law enforcement of an undisclosed purported statement by the Petitioner at trial.

7. The Circuit Court erred by failing to give sufficient consideration to the Petitioner's pro se post-trial motions.

8. The Circuit Court erred cumulatively to the prejudice of the Petitioner.

9. The Petitioner is entitled to a new trial as a result of omissions from the jury selection and trial transcripts caused by the failure of the court reporting equipment to capture certain critical exchanges.

STATEMENT OF THE CASE

The earliest events underlying this case took place years before a court case was initiated, beginning with the disappearance of the Petitioner's daughter, A.L.in 2011 in Lewis County, West Virginia. Law enforcement received reports that A.L. was missing, and extensive efforts began both to search for the child, and to investigate the circumstances of her disappearence, including collecting numerous statements from the Petitioner. Years

passed, without any sign of A.L. In the meantime, the Petitioner's other children had been placed with other families, including her older daughers K.C., and D.C. The sisters made disclsoures, though not without certain inconsistencies, concerning the Petitioner striking A.L. with a wooden object, the effects of the apparent injuries, A.L.'s death the following morning, and the Petitioner's alleged efforts to conceal her body. Additional major efforts were then undertaken to try and locate A.L.'s remains where the sisters indicated they might be located.

These statements by the sisters were the primary basis of the State's prosecution of the Petitioner. An arrest warrant was obtained and then executed on the Petitioner where she was residing, in Florida. Following extradition and a preliminary heairng, the Petitioner was indicted by the Lewis County Grand Jury for Murder of a Child by Failure to Provide Necessities, Death of a Child by Child Abuse, Child Abuse Resulting in Serious Bodily Injury, and Concealment of a Human Body. (A.R.1., at 1-3).

Discovery in the case was extensive, consisting of numerous boxes of documentataion, and hundreds of hours of recordings which had been accumulated throughout the lengthy investigation into A.L.'s whereabouts. (A.R.1., at 94-108). Pretrial litigation focused on the unsuccessful efforts by the Petitioner to move the trial to another county as a result of the publicity and widespread public sentiment regarding the case. (A.R.1., at 59-68). The Petitioner and the State settled via wirtten stipulation on what statements and exhibits would be admissible at trial, including 404(b) evidence and instructions. (A.R.1., 109-111).

The case went to jury selection and trial in April of 2018. Jury selection lasted two days, and the guilt phase of the trial lasted six days. (A.R.1., 23-39). There was extensive testimony concerning the investigation, and various individuals who had been the subjects of the investigation; however, the bulk of the probative testimony on the alleged crimes

themselves came from the testimony of D.C. at the beginning of the State's case in chief, and the testimony of K.C., at the end of it. The Petitioner did not testify, but put on two witnesses in an effort to demonstrate alternative theories concerning A.L.'s whereabouts. (A.R.14., at 8-59).

The jury convicted the Petitioner on all counts. (A.R.1., at 139-143). Following a mercy phase hearing, the jury did not recommend mercy for the Petitioner. (A.R.1., at 147-148; A.R.15., at 3-68). The Petitioner's trial counsel filed post trial motions concerning the insufficiency of the evidence, and an alleged *Brady* violation stemming from the failure of the State to disclose an expert witness that would have been helpful to the defense. (A.R.1., at 149-153) The Circuit Court denied these motions, and then denied the Petitioner's pro se post-trial motions. The Petitioner was sentenced to life without mercy, as well as consecutive maximum sentences on the other counts. (A.R.1., at 48-58). It is from her conviction and sentencing that she now appeals.

SUMMARY OF ARGUMENT

The Petitioner asserts nine assignments of error. First, she asserts that the Circuit Court should have granted a judgment of acquittal on the failure of proof of necessary criminal intent in Count One, and the failure of proof of the corpus delicti in Counts One, Two, and Four. The crux of this assignment of error is that the State misapprehended the form of intent necessary to prove Count One, and consequently failed to prove intent to cause death by means of depriving medical care, instead focusing on proving intent to withhold medical care, which is not the required form of intent. Similarly, regarding counts One, Two, and Four, the State fails to put on sufficient evidence to show that A.L. has died at all, or that, if she did die, that her cause of death was criminal activity, thereby proving the corpus delicti. In both instances, the Circuit Court has failed to understand what the State has the burden to prove, and thus wrongly denied the Petitioner's motions for judgment of

acquittal on these counts.

Second, the Petitioner argues that Child Abuse Resulting in Serious Bodily Injury is a lesser-included offense of Death of a Child by Child Abuse, and therefore that it is impermissible under double jeopardy principles for her to be punished separately for both offenses stemming from the same transaction. Third, the Petitioner asserts a *Brady* claim as a result of the State's failure to disclose an unhelpful potential expert witness to the defense, whose opinions tended to make it more difficult for the State to prove cause of death.

Fourth, the Petitioner asserts error in the failure to grant funding for an expert jury pool consultant; the failure to change venue on the basis of the information the Petitioner put on the record in the absence of the assistance of that consultant, and errors during the voir dire process, which the Court had intended as essentially a substitute for the jury study sought by the Petitioner.

Fifth, the Petitioner asserts that it was error for the Circuit Court to permit the State to make impermissible, burden-shifting statements that created an improper presumption in the minds of the jurors concerning the circumstances of the case; specifically that the jury should excuse the State for the difficulties of proof arising from the lack of a body by suggesting that the Petitioner should not benefit because she successfully disposed of the body. The burden of proving the elements of the offenses must always remains on the State irrespective of the circumstances of the case or the State's theories regarding what happened, yet the Circuit Court allowed the jury to be tainted by the State's improper argument suggesting otherwise.

Sixth, the Circuit Court plainly erred by allowing testimony by the investigating officer of a supposed inculpatory oral statement of the Petitioner, without the statement having been disclosed pre-trial, and without the Petitioner having had the opportunity to have a hearing on the voluntariness and admissibility of the statement. Seventh, the Circuit

Court erred in declining to give sufficient consideration to the Petitioner's lengthy pro se motions, many of which raised serious constitutional issues, but required greater factual development that the Circuit Court did not permit. Eighth, the Circuit Court erred cumulatively by means of various errors, which combined constitute prejudice, even if the errors on their own may have been harmless. Ninth, and finally, the Petitioner asserts that the jury selection transcript contained so many omissions (well over two-hundred missing segments ranging from single words to entire bench conferences) that she has essentially been precluded from fully assessing that proceeding for potential error, and will forever be barred from doing so not only on direct appeal but upon collateral attack.

The Petitioner asserts that she is entitled to a judgment of acquittal on Counts One, Two, and Four; that she is entitled to a new trial in the alternative; or that she is entitled to a remand for additional litigation of her pro se post-trial motions.

STATEMENT CONCERNING ORAL ARGUMENT AND DECISION

The Petitioner asserts that this matter is appropriate for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, owing to the constitutional scope of the assignments of error in this appeal. Alternatively, this matter is appropriate for oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, due to a result contrary to the evidence.

ARGUMENT

1. The Circuit Court erred by by failing to grant a judgment of acquittal based on insufficient evidence.

The Petitioner asserts that the Circuit Court erred by failing to grant the Petitioner's Motion for Judgment of acquittal based on insufficient evidence, falling into two different categories. First, the State failed to prove the correct form of criminal intent regarding Count One of the Indictment, specifically, that the Petitioner intended to cause the death of her

child by withholding medical care. Second, the State failed to prove the elements of the corpus delicti: that a death occurred at all, and that the death occurred as a result of a criminal act. This issue impacts counts One, Two and Four of the Indictment.

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.

Based upon this standard, while the Petitioner contests the veracity of the testimony against her and the accuracy of the State's version of events, *Guthrie* requires nevertheless that the evidence is viewed in the light most favorable to the prosecution. For that reason, the discussion of the evidence in this argument section will credit all factual disparities in favor of the State.

a. Failure to prove intent to cause death by withholding medical care.

The crime of "Murder of a Chld by a Parent, Guardian, or Custodian or Other Person by Refusal or Failure to Supply Necessities," pursuant to W. Va. Code §61-8D-2, requires

proof of intent to cause the death of a child, rather than proof of intent to withhold necessities.[1] The State's evidence, however, is only sufficient, at best, to show that the Petitioner intended not to obtain medical care for A.L.; not that she intended to kill A.L. by failing to obtain care.

The State made much of the evidence that the Petitioner failed to take A.L. to the hospital the morning of her alleged death. In closing argument, the prosecutor states:

> She passes the Weston Police Department. She passes the 911 center. She passes EMS. She passes the hospital. She passes two (2) fire departments after that. All the way to Vadis. Even after the girls told her to call for help. She didn't and she passes all those places.

(A.R.14., at 94). This evidence of this conduct, which stems from the accounts of the Petitioner's daughters K.C. And D.C., is obviously irrelevant to the charged crime, given the testimony and the State's theory that A.L. was already, in fact, deceased at this time. The Petitioner could not possibly have formed the intent to cause the death of a child who was already dead. Consequently, the only proof that would be sufficient to determine for the jury to find intent to cause A.L.'s death would be conduct transpiring before the Petitioner was aware that A.L. was dead. Any evidence to support this form of intent could only come from the testimony of K.C. and D.C. about the events of the preceding evening.

D.C.'s testimony took place on day one of the trial. (A.R.9., p. 34-90). K.C.'s testimony took place on day five of the trial. (A.R.13., 4-44). The facts adduced during that testimony which are relevant to the issue of intent to cause death by failure to provide medical care, are as follows: The Petitioner treated A.L. worse than the other children, with more severe punishments, including hitting her with a belt or other objects. (A.R.9., at 37). On the night in question, the Petitioner took a broken bed slat, and hit A.L. hard in the head

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1 §61-8D-2(a) If any parent, guardian or custodian shall maliciously and **intentionally cause the death** of a child under his or her care, custody or control by his or her failure or refusal to supply such child with necessary food, clothing, shelter or medical care, then such parent, guardian or custodian shall be guilty of murder in the first degree. [Emphasis added]

with the flat face of the bed slat, leading to A.L. falling down. (A.R.9., at 39-40, 69-75). A.L. had fallen over and was whining or crying. D.C. and K.C. checked on A.L., who complained that her head was in pain, and A.L.'s head had a "squishy" spot. The Petitioner returned to her own bedroom and instructed D.C. and K.C. to put her to bed. The Petitioner was told by D.C. that A.L. was hurt, but the Petitioner refused to help. (A.R.9., at 43-44; A.R.13, at 9-10). D.C. checked on A.L. during the night, at which time A.L. was "fine" and breathing. Later in the morning, D.C. and K.C. checked on A.L. again, but she would not wake up when they shook her. Then the Petitioner went into A.L.'s room, put A.L. on the bathroom counter and attempted to revive her, calling A.L.'s name, pressing on A.L.'s chest, blowing into her mouth, and raising her eyelids. When this was effort was unsuccessful, the Petitioner concealed A.L. in a laundry basket and put her and the other children in the van. (A.R.9., at 45-46; A.R.13., 12-13).

Based on these facts, the jury would have had to believe that at some point, the Petitioner formed the intent to kill A.L., not by striking her in the head, but by declining to take her for medical treatment prior to the time at which she was discovered to be dead. While the evidence is sufficient to show that the Petitioner intentionally failed to obtain any medical treatment for A.L. after striking her with the slat, that intent is not satisfactory to support the verdict on Count One.

This case is not the first in which a prosecution has conflated these forms of intent. In *State v. Wyatt*, 482 S.E.2d 147, 155, 198 W.Va. 530, 538 (1996), this Court reversed a conviction because, *inter alia*, the instruction required "only an intent to deprive the child of medical care and the resulting death of the child, falling short of the statutory requirement that the accused intend the death of the child."

It is not clear that the State itself understood that it was necessary to demonstrate that the Petitioner intended A.L.'s death. As previously described, the State focused in argument

on the failure to provide medical care when it was too late to even intend to cause a death because, by the State's own theory, A.L. was already dead. At another point in closing argument, the prosecutor said:

> Even after that, D.C. tells her; Mom, she's hurt badly. She doesn't care though. She doesn't check on her; she doesn't do anything. If that's not maliciously and intentionally to deny one medical care then I don't what is.

(A.R.14., at 93). Here, the only possibilities are that the prosecutor is wilfully trying to deceive the jury about the burden of proof, or that she has been operating under a fundamental misapprehension about the elements of the capital crime she was prosecuting.

The text of the indictment itself also shows that the State did not understand this distinction. Count One concludes "... did not obtain medical care for [A.L.] after striking [A.L.], her daughter, in the head with a solid hand-held object, which caused the death of [A.L.], against the peace and dignity of the State." (A.R.1., at 1).

Grammatically, this sentence structure shows that the State did not realize it needed to prove that the death was intentionally caused by the failure to provide medical care, as opposed to the Petitioner causing A.L.'s death by striking her, and then failing to obtain medical care.[2] But for Count One to be sustained by the evidence, the facts needed to show not simply that she failed to take A.L. to get medical care, but that she specifically intended that A.L. would die as a result of her failure to obtain medical care.

The evidence does not show the form of intent required by the statute, even taken in the light most favorable to the State. The circumstances described by A.L.'s sisters, D.C. and K.C., do not describe a plot to kill A.L. by not taking her to get medical care. The sisters describe intentional physical abuse, and a failure to obtain care. But they also describe a mother who was surprised at her child's death; there was no evidence to suggest this was the

2 Importantly, this "intent of causing death" element is not required in Count Two, and the lack of intent would not be fatal under Count Two, which only requires intent to abuse, not to kill.

intended result.

Even more importantly, it appears that the Circuit Court misapprehended the issue in the same manner as the State when denying the Petitioner's motion for judgment of acquittal at the close of the State's case. In recounting the factual basis upon which the motion for judgment of acquittal was being denied, the only mention of failure to provide medical care was the following:

> D.C. and [K.C.] testified that the next morning [A.L.] was unresponsive. The defendant tried to resuscitate [A.L.] but was unsuccessful. [A.L.] was dead. Instead of notifying authorities or attempting to take her for medical treatment, the defendant placed [A.L.'s] body in a clothes basket and covered her body with clothing. The defendant drove to Vadis with [K.C.], D.C., [B.C.] and [A.L.'s] body.

(A.R.14., at 5-6). Essentially the same circumstances were recounted by the Circuit Court in denying the Petitioner's renewed Rule 29 Motion during the Post-trial Motions hearing. (A.R.18., at 20-21).

Had the Circuit Court correctly understood the issue, it would not have found a factual basis to support a verdict based upon a failure to obtain medical treatment after A.L. was already dead, when intent to cause death is impossible. There is simply no evidence that the Petitioner, after A.L. was injured, formed the intent to cause her death by failing to provide medical treatment. Such a conclusion is wholly speculative, and does not arise from the record. Given that the State apparently did not realize what it needed to prove, it is entirely unsurprising that there is no evidence to support this form of intent.

It is also worth considering authority from other jurisdictions concerning the proof of similar forms of intent. For example, in *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005), the defendant returned home and noticed her baby was limp and unresponsive. After anonymously calling various emergency rooms for medical advice, this defendant eventually called her mother-in-law, who told her she should take the baby to the hospital. By the time

she arrived, the baby was unresponsive, all life support was discontinued, and the baby was declared brain dead.

This defendant was convicted of knowingly and intentionally failing to provide necessary medical care to a child, causing the child's death. The two physicians, who testified for the State, stated that had this defendant sought medical help earlier, the baby may have survived. This conviction was affirmed by Nebraska's intermediate court. In setting aside the conviction, the Nebraska Supreme Court, 269 Neb. at 713, 695 N.W.2d at 432, held:

> Thus, to establish that Muro's unlawful conduct was a proximate cause of Vivianna's death, the State was required to prove beyond a reasonable doubt that but for Muro's delay in seeking medical treatment, Vivianna would have survived her preexisting traumatic head injury. We agree with the dissenting judge that the State did not meet this burden. The State proved only the possibility of survival with earlier treatment. Such proof is insufficient to satisfy even the lesser civil burden of proof by a preponderance of the evidence.

Similarly, in *Johnson v. State*, 121 S.W.3d 133 (Tex.Ct.App. 2003), the defendant was convicted of causing injury to a child by failing to seek medical treatment. One of the medical experts testified that the injuries to the child probably occurred within an hour of the child being declared dead, but this doctor could not testify that the injuries were not several hours old or perhaps only minutes old. In setting aside this conviction, the Texas Court of Appeals, 121 S.W.3d at 136, held:

> While the evidence may or may not show that Appellant could have sought medical treatment faster than she did, such evidence is not sufficient to support a finding that Appellant either intentionally or knowingly caused serious bodily injury to the child by any delay in seeking medical treatment. Because the evidence fails to satisfy the causation element of the offense, the evidence is legally insufficient to support the judgment.

In *Lucas v. State*, 792 So.2d 1169 (Ala. 2000), the defendant was convicted of failing to obtain medical treatment for her son, causing his death. Neither of the State's medical

experts testified that earlier medical treatment would have prevented the child's death. In setting aside this conviction and entering a judgment of acquittal, the Alabama Supreme Court, 792 So.2d at 1173, held, "Thus the record does not contain evidence tending to prove that, but for Lucas's failure to seek prompt medical treatment for her injured son, he would have survived, or survived longer. Accordingly, the State failed to prove the essential element of causation." *See also State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006)(Trial counsel's failure to challenge sufficiency of the evidence in case involving failure to provide medical treatment, resulting in death of a child, constituted ineffective assistance of counsel because the State's medical expert could not state earlier treatment would have prevented the death).

This Court also considered a similar case relating to the Child Neglect Resulting in Death Statute, *State v. Thornton*, 228 W.Va. 449, 720 S.E.2d 572 (2011), affirming the verdict in that case only because there was actual medical testimony that the child *would have survived* if medical treatment was rendered. There is nothing approaching that level of proof in the instant case. The only appropriate remedy for the Court's error is to vacate the Petitioner's conviction on Count One and remand for entry of a judgment of acquittal.

b. Failure to prove the elements of the *corpus delicti*

West Virginia's law regarding the corpus delicti is set forth in the following two Syllabus Points from *State v. Surbaugh*, 237 W.Va. 242, 786 S.E.2d 601 (2016):

> 4. "'Under our decisions, the corpus delicti consists in cases of felonious homicide, of two fundamental facts: (1) the death; and (2) the existence of criminal agency as a cause thereof. The former must be proved either by direct testimony or by presumptive evidence of the strongest kind; but the latter may be established by circumstantial evidence or by presumptive reasoning upon the facts and circumstances of the case.' Point 6 Syllabus, *State v. Beale*, 104 W.Va. 617[, 141 S.E. 7 (1927)]." Syl. Pt. 1, *State v. Durham*, 156 W.Va. 509, 195 S.E.2d 144 (1973).
>
> 5. "In order to sustain a conviction for felonious homicide, the corpus delicti is properly proved by sufficient evidence showing that the initial wound caused the death indirectly through a chain of natural causes." Syl. Pt. 2, *State v. Durham*, 156 W.Va. 509,

195 S.E.2d 144 (1973).

In this case, the State's proof fails on both elements of the corpus delicti. There remains no credible proof that a death occured, and no competent proof whatsoever as to the causation of death even if it did occur. To date, the only evidence that A.L. is dead rather than missing is the testimony of her sisters, D.C., and K.C., who claim to have witnessed her death. But the circumstances they describe are fanciful, and fall into the realm of inherently incredible testimony, which cannot be the basis to sustain a verdict. Only if the testimony is sufficient to convince a rational trier of fact that a death occurred can the conviction be upheld.

Here, there is no presumptive evidence; i.e., a body, to demonstrate that a death took place. Despite unprecedented, extensive efforts at her recovery, which were discussed at trial, no one has ever found a trace of A.L. To believe that she is actually dead, it would be necessary to believe the accounts of D.C. and K.C. relating to the disposal of A.L.'s body. (A.R.9., at 34-90; A.R.13., at 4-44). These accounts are incredible under close examination. The trier of fact had to accept that the Petitioner, eight and a half months pregnant with twins, would be capable of traversing fifteen hundred yards (nearly a mile) (A.R.10, at 108), carrying a laundry basket with a thirty-five pound body in it, over uneven, rocky forest terrain, holding the basket out at great length in front of her protruding abdomen the entire way. And that, with a surfeit of time and tools, she concealed this body so effectively as to prevent the detection of even a trace of it by repeated efforts of a multi-agency task force. And that this was all done within the span of a few hours. (A.R.10., at 111). How many miles per hour, one wonders, did this heavily pregnant woman travel through forest terrain with a heavy, unweildy load? It is a farcical, fantastical notion, and not one that could be accepted by a reasonable trier of fact. The provenence of this story is authorship by a child whose own loving, adoptive father vouches for her exceptional skill as a liar. (A.R.9., at

105).

Credibility determinations are not, under normal circumstances, for an appellate court to decide. However, as this Court has long held:

> 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) [emphasis added].

The evidence of death in this case is manifestly inadequate. It is based upon supposed eye-witness testimony of two children who were respectively nine and eleven years at the time of the allegations. (A.R.9., 34-90; A.R.13., 4-44). The statements of these children that formed the factual basis for the verdict were contradictory with one another on numerous details. Both sisters had been consistent in their previous statements concerning A.L.'s status which were not inculpatory of the Petitioner. The sisters were actively encouraged by the State and judicially permitted to engage in a suggestive and corrupting process whereby they would share and fill in details of each other's account. (A.R.10, 80-83). When confronted with discrepencies in their accounts at trial, K.C. repeatedly referred to the fact that her memories had changed. Yet their testimony is the sole factual basis to support the lifetime incarceration of the Petitioner. What happens if A.L. is located, alive? Does the evidence then remain sufficient? If there was sufficient evidence of death to convince a *reasonable* jury *beyond a reasonable doubt,* this question would not be necessary.

The second element of the corpus delicti is that the death was caused by a criminal act. Even if crediting the notion that A.L. is dead, solely for the sake of argument, the

evidence to support criminal causation is even less satisfactory. If indeed she died, no one knows how it is that she died. No one knows if she died because of swelling in her brain caused directly and proximately by the strike with a bed slat. No one knows if she died because she had a stomach bug and aspirated on her own vomit, completely apart from being hit with a bed slat. No one knows if she died because of aspirating on vomit, with the vomit being caused by the strike with a bed slat. The State's lead investigator, Trooper Loudin, admitted he did not know, and admitted that it was possible that she died for a reason other than the Petitioner's conduct.

The State offered no witness who was capable of testifying to a reasonable degree of medical certainty that A.L. died as a result of criminal conduct. The State did not even find a witness who would testify to a reasonable degree of medical certainty that the description of events by the sisters was *consistent* with a death being caused by criminal conduct; to testify whether a blow with the broad side of a wood slat is capable of causing a mortal wound. It was not for lack of effort by the State, as Trooper Loudin disclosed (far too late for it to be a benefit to the Petitioner at trial – see argument section 3 of this brief) that he had consulted with Dr. Mel Wright of WVU Hospitals, (A.R.10., at 100) following which the State declined to offer him as an expert witness.

In contrast to the first element of corpus delicti, numerous West Virginia cases have analyzed this second element, and what constitutes sufficient evidence of criminal causation. In *State v. Durham*, 156 W.Va. 509, 195 S.E.2d 144 (1973), this Court upheld a conviction when there was some question of whether being shot, or a preexisting liver condition caused the decedent's death. In that case, there was testimony by a physician that while the gunshot would not have been fatal, the death via liver failure was accellerated by the operation necessitated by the gunshot wound. Similarly, in *Surbaugh*, *supra*, a conviction was affirmed when a medical error that would not have taken place in the absence of the

defendant's conduct, contributed to the death. *See also*, *State v. Snider*, 81 W.Va. 522, 94 S.E. 981 (1918).

In *State v. Beale*, 141 S.E. 7, 104 W.Va. 617 (1927), this Court, over two dissents, upheld a guilty verdict when a medical examination gave cause to believe a homicide had taken place, and the question of causation came down to whether it was the defendant or the decedent's husband who had killed her. In *State v. Garrett*, 466 S.E.2d 481, 195 W.Va. 630 (1995), a verdict was upheld when it was supported by a confession and a variety of corroborating circumstantial evidence. In *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983), this court found sufficient evidence of criminal causation when an autopsy demonstrated five bullet holes in the body.

The cases described above all concerned circumstances in which there was clear scientific evidence of causation by the respective defendants. More instructive to the Petitioner's situation is *State v. Roush*, 120 S.E. 304, 95 W.Va. 132 (1923). In *Roush*, a conviction was overturned because the medical evidence did not link the blow sustained by the decedent to any negative medical effects upon him, with this Court holding that "The evidence of defendant's agency in the commission of the supposed crime must be so clear and convincing as to exclude any reasonable hypothesis of other causes." Syl. Pt. 1, *Roush*. In the instant case, there are two reasonable hypothoses, and there is no medical evidence available to give any credence to one possibility over another. Because the burden of proof is upon the State, and because there is no evidence beyond pure speculation as to what the cause of death might have been, as even the State's lead investigator admits, it cannot be said that there was sufficient evidence to prove criminal causation of death, the second element of the corpus delicti.

In another case, *State v. Merrill,* 78 S.E. 699, 72 W.Va. 500 (1913), an infant's dead body was found concealed after the child's grandmother falsely told law enforcement that the

child had been taken to Baltimore by a family member. The grandmother was convicted of the baby's manslaughter; however, her conviction was reversed based upon this Court's determination that there was no proof that the child had died other than by natural causes. The facts of that case are the most analogous to the State's theory of the Petitioner's case, and the jury in *Merrill* had much stronger evidence of criminal causation, including testimony (albeit ambivalent) by a doctor, than was present in the instant case; nevertheless the corpus delicti was not proven. This Court asked: "But independently of any conflict in the evidence, the question going to the very foundation of the prosecution is, has the State established by competent proof the fact of the crime charged?" *Id.*, 72 W.Va at 504. The Court answered that question in the negative in *Merrill*, and, for the reasons set forth in this brief, should answer the same way today.

The most eye-opening aspect of the Circuit Court's failure to enter a judgment of acquittal, is the Circuit Court's position that cause of death is not a necessary element for the State to prove for the first Count of the Indictment. We have, in this case, a woman imprisoned for life for *murder*, and the Circuit Court appears to have come to the conclusion that proving the cause of the alleged victim's death, whether by failure to provide medical care, as discussed *supra*, or by general criminal causation to support the corpus delicti, is not necessary. During the post-trial motions hearing, the following crucial, and frankly astonishing exchange took place:

> But as it relates to these specific charges, the cause of death issue, from my reading of the statutes, relate specifically to Court Two (2) of the indictment where it's child abuse that causes death, basically. And so cause of death is certainly an issue there; but in the mean - - in these other three (3) counts - - you know; I have trouble getting to that point.
>
> DYER: I understand that.
>
> THE COURT: So, you know; how's - - ? How do you?
>
> DYER: Well, and with the upmost respect to this Court; it - - we

> simply have a disagreement - - the application of statute and - - and the defendant's position is and will have to remain that the Court's analysis of this case in light of that statute is just a little too narrow - - and that the argument is that - - well, there is no explanation offered by the State for there being a need for the medical attention, other than that in this particular case other than that that is being offered is identical to the explanation for the alternative count - - the homicide count, Count Two (2). In other words, but for the - - the veracity of the claims made by the two (2) sisters that mommy has struck this child in the head with a bed slat, there is no evidence whatsoever of any need for medical attention of any nature. So, it all plays back into the same - - you know, all streams lead into the same river. It's - - you know, there was a denial that there were other explanations. So hence the - - the deduction of the defense that it was incumbent upon the State to prove - - that the - - the cause of death was the blow to the head. That's what ultimately leads to death. That's what - - what would have; in the interim analysis required the medical attention that wasn't provided. Otherwise there's no need to intervene and see to it superior medical attention; which may have saved her life.
>
> So, again; it's a matter of perspective and the defendant's contention would be to suggest that they didn't need to prove that - - that that was the cause of death would be too narrow of a reading and interpretation of the statute, in the context of this case; what the State's trying to prove. So, that - - and I've probably not articulated that as well as others may or could've; but that is essentially the position of the defendant; that it would be necessary for the State to prove - - . They have to; in order to convict to the statute they had to have proven that there was a need for medical attention. And that's - - that's their - - that's their evidence.
>
> THE COURT: It's still not cause - - causation of death; though. I mean, I get it. I mean, it specifically says in the death of a child by parent, guardian or custodian by child abuse. You know; it says thereby causing the death of the child. In these other statutes; it doesn't say anything about causing the death of a child. And I understand; you know, the bigger picture; there's no body; you know - - your argument. And I understand I think what you're trying to argue is because of the way the case - - the State presented its case that's the only thing that it could be. But as it relates to the statutes specifically, I don't see how you can say that there's cause of death - - causation of the death of this little girl is needed to get a conviction.

(A.R.18., at 30-33).

The Circuit Court's conception of the elements required to be proven is not consistent with the law of this state. Convictions based upon such a faulty foundation cannot stand. Proof of the corpus delicti is clearly necessary, whether the circuit court thinks so or not, to sustain a verdict on Counts One and Two, which are both criminal homicide counts. It is

also necessary for Count Four, Concealment of a Human Body (W. Va. Code §61-2-5a), which requires as an element both a death, and a death caused by criminal activity. Neither prong of the corpus delicti was proven. The absence of these elements must therefore lead to entry of a judgment of acquittal and dismissal with prejudice of Counts One, Two, and Four of the indictment.

2. The Circuit Court erred by violating double jeopardy by sentencing the Petitioner separately for Death of a Child by Parent by Child Abuse and its lesser-included offense, Child Abuse resulting in Serious Bodily Injury.

West Virginia's rule against double jeopardy was set forth in detail in the first eight Syllabus Points of *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992). There are three forms of double jeopardy, but as it pertains to this assignment of error the relevant form is the prohibition against multiple punishment for the same offense, as set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), which was essentially restated by this Court in *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983). The test to determine whether multiple punishments for a single transaction under distinct statutory provisions violates double jeopardy is "whether each provision requires proof of an additional fact which the other does not." *Id.* The standard of review for a double jeopardy claim is de novo. Syl. Pt. 1, *State v. Sears*, 196 W.Va. 71, 468 S.E.2d 324 (1996).

The two statutory provisions in the instant case arise from the second and third counts of the Indictment. The Petitioner was convicted and sentenced to consective maximum sentences for W. Va. Code §61-8D-2(a), and §61-8D-3(b). The first provision, entitled "Death of a Child by Parent, Guardian, or Custodian or Other Person by Child Abuse" requires the following elements: (1) A parent, guardian, or custodian; (2) maliciously; (3) intentionally; (4) inflicts upon a child; (5) under his or her care, custody, or control; (6) substantial physical pain, illness, or any impairment of a physical condition; (7) other than by accidental means; (8) thereby causing the death of such child.

It is the Petitioner's position that the second provision, "Child Abuse Resulting in Serious Bodily Injury," is, on its face, a lesser-included offense of §61-8D-2(a), and requires the proof of no "additional fact" per *Zaccagnini*. Its elements are: (1) A parent, guardian, or custodian; (2) abuses; (3) a child; (4) and thereby causes serious bodily injury.

The two statutes are not written in parellel language, but an examination of the meaning of "abuses" and "serious bodily injury" is instructive. W. Va. Code §61-8D-1(1) defines the term "abuse" as "the infliction upon a minor of physical injury by other than accidental means." The statute refers to W. Va. Code §61-8B-1(10) for the definition of "serious bodily injury," which is "bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ."

While §61-8D-2(a) uses the transitive verb "inflicts," and §61-8D-3(b) uses "abuses," it is clear from the definition that abuse is simply the infliction of an injury to the same class of person in each statute. It is also clear that the "substantial risk of death" is implicit in §61-8D-2(a), since death itself is an element of that crime. The question is whether "serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ" requires proof of any fact that "substantial physical pain, illness or any impairment of physical condition, which thereby causes... death" does not. The Petitioner asserts that the latter definition wholly encompasses and exceeds any and all forms of injury described by the former definition. Therefore, sentencing the Petitioner to a separate sentence for Counts Two and Counts Three violates the *Blockburger/Zaccagnini* test. The Petitioner respectfully requests that her sentence on Count Three be vacated.

3. The Circuit Court erred by failing to grant the Petitioner a new trial based upon the violation of *Brady v. Maryland* by the State.

Following trial, the Petitioner, by counsel, filed a motion to set aside the verdict and

grant a new trial based upon a *Brady* violation, which was denied by the Circuit Court. (A.R.1., at 149-153). The standard of review for an appeal of the denial of a motion for new trial is as follows:

> 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 underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syllabus Point 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

The State has a duty to disclose exculpatory evidence to a defendant prior to trial. The Supreme Court of the United States held in *Brady v. Maryland*, 373 U.S. 83 (1963) 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.*, 373 U.S. at 87. Beyond the federal due process issue, it has been held by this Court that:

> A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution.

Syllabus Point 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

Additionally, the knowledge by law enforcement of such exculpatory evidence is imputed to the prosecuting attorney whether or not he personally possesses such knowledge. In *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007), it was held that:

> 1. A police investigator's knowledge of evidence in a criminal case is imputed to the prosecutor. Therefore, a prosecutor's disclosure duty under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982) includes disclosure of evidence that is known only to a police investigator and not to the prosecutor.
>
> 2. There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W.Va. 191, 286

> S.E.2d 402 (1982):(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.

Accordingly, in circumstances in which a police investigator is aware of exculpatory evidence, but the prosecuting attorney, through no specific fault of his or her own is not aware, the omission to disclose such evidence still constitutes a violation of due process under both the United States and West Virginia constitutions.

In this case, Trooper Loudin testified concerning a conversation he had with a doctor at WVU Hospitals, Dr. Mel Wright. (A.R.10., at 100). The State, of course, did not have Dr. Wright testify at trial following this consultation with Trooper Loudin. Nor did it disclose at any time prior to Trooper Loudin's testimony that it had spoken with Dr. Wright, nor disclose the contents of that conversation. After trial, the Petitioner's trial counsel tracked down Dr. Wright and had a discussion with him. (A.R.1., at 149-153). During that discussion, Dr. Wright told trial counsel that he discussed Trooper Loudin's theory about a strike to the head with a bed slat being the cause of death. Dr. Wright told trial counsel that he had informed Trooper Loudin that while that hypothetical cause of death was plausible, it would be impossible to testify to the plausibility of the theory to a reasonable degree of medical certainty. Dr. Wright further stated that aspiration of vomit would also be a plausible cause of death. (A.R.18., 26-29).

The withholding of this information amounts to the suppression of exculpatory evidence by the State, sufficient to require a new trial. The evidence was clearly within the knowledge of the State, per *Youngblood*, as the investigating officer, Trooper Loudin, had personal knowledge of his own interaction with Dr. Wright, which is imputed to the prosecutor. The evidence was obviously exculpatory, as Dr. Wright's assessment tended to make the element of cause of death more difficult for the State to prove. This is, of course,

why the State did not have him testify.

The State is to disclose exculpatory information that is material to the defendant's guilt or punishment. This obligation, which arises under *Brady/Hatfield* and the Fourteenth Amendment, is also incorported within Rule 32.02(a) of the West Virginia Trial Court Rules. Under that rule, Prosecutors are obligated to disclose any favorable evidence *without regard to materiality.*

Even though the disclosure requirement existed without regard to materiality, the evidence was, in fact, material. As discussed in the first argument section of this brief, the causation of A.L.'s death (if indeed she died) is a necessary element of Counts One, Two and Three of the indictment. Had Dr. Wright been available to testify, as an expert, in front of the jury that under no circumstances could the cause of death be proven to a reasonable degree of medical certainty, there is a reasonable probability that the outcome of the trial would have been different (the standard under *United States v. Bagley*, 473 U.S. 667 (1985)) on three out of the four charges.

This Court has previously had the opportunity to consider suppressed expert opinions in the context of a *Brady* claim. In *State v. Farris*, 656 S.E.2d 121, 221 W.Va. 676 (W. Va., 2007) (per curiam), a new trial was granted when the State failed to turn over the written report of one of its expert witnesses. That report contained numerous forms of exculpatory evidence, including impeaching statements by other witnesses, but also provided an alternative theory to contradict the State's theory concerning certain physical evidence, which is similar to the evidence at issue re Dr. Wright. *Buffey v. Ballard*, 782 S.E.2d 204 (2015) involved the non-disclosure of a forensic expert report (DNA results) in the State's possession that tended to exculpate the defendant.

The Circuit Court, in denying the motion for new trial, rested its decision on the reasoning that Dr. Wright's opinion was neither exculpatory nor material. (A.R.18., at 57-

61). For the aforementioned reasons, the Circuit Court was in error in making that determination. The Petitioner respectfully requests that this Court grant her a new trial on remand.

4. The Circuit Court erred by denying a jury pool consultant, and a change of venue,

The Circuit Court erred in a manner that led to a biased jury. First, the Circuit Court erred by denying funds for a jury pool consultant to the Petitioner. Second, the Circuit Court erred by denying a change of venue.

The standard governing a motion for change in venue is laid out in Syllabus Point 1 of *State v. Ginanni*, 328 S.E.2d 187, 174 W.Va. 580 (1985):

> 1. " 'To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused.' Syl. pt. 2, *State v. Wooldridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946)." Syl. pt. 2, *State v. Williams*, W.Va., 305 S.E.2d 251 (1983).

One of the earliest motions argued in this case was the effort by the Petitioner to hire a jury consultant to engage in statistical sampling of the Lewis County community to determine if there was a present, hostile sentiment toward the Petitioner. Two motions were filed; one for leave to hire an expert, and a second approving payment. (A.R.1., at 59-63). A hearing was held on the motions, including testimony by one of the employees of the agency sought to be hired. (A.R.3., at 3-27). The methods to be used were described. The cost was to exceed $10,000.00. The Circuit Court denied the motion on the basis that voir dire could serve as a suitable replacement for the proposed jury study. (A.R.1., at 9-10; A.R.3., at 23-27).

Although the Court's previous error resulted in the inability of the Petitioner to

present statistically accurate information via an expert witness to the Court about the present, hostile sentiment in the community, the Petitioner nevertheless attempted to do so on a shoestring, filing a motion (A.R.1., at 64-66) and compiling and classifying statements from social media. The Petitioner utilized the testimony of a lay witness who had assembled this admittedly non-scientific information. (A.R.4., at 4-15). It was noted that out of the myriad comments, there were almost none who took the Petitioner's side, and only a small minority who even deigned to withhold judgment until after a trial had taken place.

The Circuit Court denied the motion, repeatedly taking issue with the manner in which the Petitioner had assembled information to justify the change of venue. (A.R.1., at 13-15; A.R.4., at 9-16). There is a certain irony to this since it was because of the Circuit Court's own denial fo the motion for a jury consultant that suspect methodology was necessary. Facts that were ignored by the Circuit Court include the huge number of people involved in the search and recovery efforts and investigation by law enforcement, not to mention the fact that part of the reason the Petitioner was not let out on a reasonable bail following her preliminary hearing was because the Magistrate did not believe that *she* would be safe given the sentiment of the community. (A.R.20., at 5). It is not often that the concern expressed by a court in preventing the release of an inmate is her own safety from the community.

The Petitioner asserts that the Circuit Court erred by acting to prevent the presentation of information about hostile sentiment in the community. There is no question that the case was a well-known, highly publicized, and highly polarizing one, with extensive media coverage, both in the local and national media. If this case is not suitable for the provision of a jury consultant and meaningful consideration of a change of venue motion, it is hard to fathom what case would be.

5. The Circuit Court erred by failing to grant the Petitioner's objection to impermissible, burden shifting argument by the State.

The Petitioner asserts that the Prosecuting Attorney wrongly invited the jury to ignore the burden of proof by making unlawful, burden-shifting arguments in her opening statement and closing argument. The Circuit Court erred by not instructing the jury to disregard this line of attack even when the Petitioner objected during closing argument. The law concerning inappropriate prosecutorial comment has been set forth by this Court in Syllabus Point 5 of *State v. Poore*, 226 W.Va. 727, 704 S.E.2d 727 (2010):

> 5. "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." Syllabus Point 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

The prosecutor's opening statement began in this way:

> Good morning. The fact that a murderer may successfully dispose of a victim does not entitle him to an acquittal. That's a quote that I'd like for you to consider and keep in the back of your mind during the next couple of weeks as you listen to all the evidence that's presented here.

(A.R.9., at 22). Then, at the very end of her closing argument, the following exchange took place:

> [FLANIGAN:] I only want to leave you with one thought. Remember at the beginning of this trial and I asked you to remember that quote and try to keep it in the back of your mind. And I want to read that quote again. "The fact that a murderer may successfully dispose of a victim does not entitle him to an acquittal."
>
> Thank you.
>
> T. DYER: Your Honor, can we approach?
>
> THE COURT: You may.
>
> (Counsel at bench side)
>
> T. DYER: I didn't want to say this while she was speaking, but I'm going to put an objection on the record just to preserve the record just to the extent that that could be construed as a burden shifting argument; the last quote. I'm just afraid it may be - - and I will

preserve the record. I'll move - - well, I'll move 'em to strike and I'll move a mistrial based upon that.
I need to preserve the record.
THE COURT: (Inaudible.)
T. DYER: Well, yeah.
THE COURT: (Inaudible.)
T. DYER: Has she successfully disposed of the body?
THE COURT: (Inaudible.)
T. DYER: Sure.
THE COURT: (Inaudible.)
T. DYER: That's what she said. And I - - .
THE COURT: (Inaudible.) I'll note your objection and exception for the Court's ruling (inaudible.)

(A.R.14., at 95-96).

Obviously, it is impossible to determine from the record what the Court's reasoning was in denying the Petitioner's motion, because the transcript is riddled with omissions (see argument section 10 of this brief). What is clear from the record is that the State's argument was impermissible burden-shifting, and designed to mislead the jury concerning who bears the burden of proof. It appears that the "quote" utilized by the State comes from a California case involving an infamous defendant, erstwhile West Virginian Charles Manson. *People v. Manson,* 71 Cal. App. 3D 1, 42, 139 Cal Rptr. 275, 298 (1977). Of course the legal issues in that case were not the same as those present here. And the quote was not used at trial in front of a jury; it was used in an appellate discussion. No one on behalf of the Petitioner at any time has suggested that the mere fact of an absence of a body entitles the Petitioner to be acquitted on her indictment. Instead, it is the State's failure to prove that a death happened, and that it happened through criminal means, that is at issue. In the Manson case, the corpous delicti (under California law) was established by Mr. Manson's own admissions, combined with circumstantial evidence of his motives. If the State wanted to offer this as a jury instruction, then the matter should have been litigated in that manner. Instead, the State usurped the Court's role in instructing the jury, and gave the jury a opening to find guilt where the requisite proof in the absence of a body was not nearly so strong as it had been in

Mr. Manson's prosecution.

The Poore factors are all met. The statements mislead the jury concerning the burden of proof, which is inherently prejudicial to the Petitioner, who is entitled for the State to retain the burden of proof of every element of every alleged crime. The remarks were not isolated; instead they were stragtegically inserted at two critical moments in the State's case. The State's proof of the cause of death was weak, which the State likely realized on some level; why else strategically and intentionally employ this quote? Finally, there can be no question that the comments were deliberate. It is wholly clear from the context that the State intentionally inserted this line of argument, going so far as to make it the essential theme of its prosecution by emphasizing it at the beginning of the opening statement and the end of closing argument. The Petitioner requests that this Court grant a mistrial on this basis, and remand with instructions that the comments constitute prosecutorial "sandbagging" (*See,* Syl. Pt. 3, *State v. Elswick*, 225 W.Va. 285, 693 S.E.2d 38 (2010)) such as to bar retrial on double jeopardy grounds, or alternatively grant a new trial.

6. The Circuit Court plainly erred by permitting testimony by law enforcement of an undisclosed purported statement by the Petitioner at trial.

The Petitioner asserts plain error in the admission of testimony concerning a supposed oral statement by the Petitioner to Trooper Loudin that had not been disclosed prior to trial or subject to a hearing on its voluntariness. The Petitioner asserts prejudicial discovery violations pursuant to Rule 16 of the West Virginia Rules of Criminal Procedure, as well as constitutional violations stemming from deprivation of the opportunity to seek a pretrial suppression hearing. Because there was no objection to the offending testimony during trial (despite the extensive preservation of the right to pre-trial discovery), the Petitioner asserts this assignment of error on the basis of plain error.

Invocations of plain error are governed by the four part test of Syllabus Points 7, 8,

and 9 in *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995):

> 7. To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.
>
> 8. Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right--the failure to make timely assertion of the right--does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious."
>
> 9. Assuming that an error is "plain," the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

All of these requirements are met to justify reversal under the plain error standard.

The testimony in question took place on the second day of trial at the end of direct examination of Trooper Loudin by the State:

> Q. And after you were unable to recover the body; what did you do next?
>
> A. It was at that point we - - that's when we obtained the arrest warrant and traveled to Florida. Down there we were met with some investigators and detectives on special units that they had - - ; myself and First Sergeant Wolfe and - - Joe Moran - - Deputy Joe Moran with the Lewis County Sheriff's Department traveled to Florida - - . When we approached the residence I stayed back behind. They - - just in fear that - - that [Petitioner] wouldn't have answered the door if she saw me. She hadn't seen anybody else. And she - - when she answered the door and I stepped around the corner she actually stated "Oh my god, did you find [A.L.]? Am I in trouble?" And that was a very shocking statement to me that after all this time; am I in trouble was her first question - - or second question to be asked. And at that point she of course asked to contact her attorney and we placed her under arrest and transported her back to West Virginia.

(A.R.10., at 90-91).

That testimony was the first disclosure of the Petitioner's supposed statement to Trooper Loudin in Florida. This represented an egregious violation of the Petitioner's rights. The Petitioner specifically requested notice of all oral statements of the Petitioner in the State's possession. The Petitioner had specifically requested in a written discovery motion, that the State produce: "all oral statements of the defendant." The Petitioner specifically requested all those statements "within the possession, custody, or control of the State, the existance of which is known, or by some exercise of due diligence may become known, to the attorney for the State." (A.R.1., at 70). The motion cited Rule 16(a)(1)(A) of the West Virginia Rules of Criminal Procedure, and W. Va. Code § 62-1B-2.

The State did, in fact, disclose numerous statements of the Defendant in its massive Rule 16 disclosure. (A.R.1., at 94-108). The State also, in an effort to utilize numerous of those statements against the Petitioner, moved the Court to schedule a hearing on the voluntariness of the statements to determine their constitutionality and admissibility at trial. (A.R.1., at 92-93). No suppression hearing was held, however, because the parties conferred, and entered into a stipulation concerning what statements (and other exhibits) would be admissible at trial. (A.R.1., at 109-111). The Petitioner agreed, both through counsel and in her own capacity with her own signature, to the admission of no fewer than seven statements that she made to law enforcement over the years. Not one of those statements previously disclosed and agreed to was taken in Florida.

Clearly, the process of disclosing and negotiating over the Petitioner's statements was a thorough and multi-step process. Yet none of that throroughness prevented the Petitioner from the extreme prejudice and surprise that resulted form that statement being uttered to the jury. To be clear, this was a statement made in the Petitioner's own home, after the State had obtained an arrest warrent, in a custodial situation with multiple law enforcement officers at the door. The statement, if disclosed properly, would have been subject to litigation for its

constitutionality. It is the Petitioner's position that Trooper Loudin's testimony concerning the statement was not true in the first instance. Nevertheless, to the extent that the State was going to use this supposed statement, it was required to disclose it.

Under certain circumstances, a discovery violation by the State, including a violation of Rule 16 of the West Virginia Rules of Criminal Procedure, which relates to discovery in criminal matters, can be grounds for a new trial:

> 5. "When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." Syllabus Point 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980).

Syllabus Point 5, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982). Also:

> 1. "The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case." Syllabus Point 2, *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994).

Syllabus Point 1 of *State v. Adkins*, 679 S.E.2d 670, 223 W. Va. 838 (2009).

Clearly, the Petitioner was suprised. This statement was clearly never previously disclosed. The statement was also material, given that it was portrayed by Trooper Loudin (in his typical editorial fashion) as an admission of wrongdoing. Without a doubt, the Petitioner was hampered in her case's preparation, because she was entirely deprived of her constitutional right to have the State prove the statement's voluntariness and compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966). The litigation and suppression of the Defendant's statements is a fundamental aspect of the preparation of a criminal defense. The discovery violation on its own is sufficient to justify a new trial.

However, the constitutional issues are impossible to determine based on the

information in the record. There is no information about whether and at what point the Petitioner was given her *Miranda* warnings. There is no information about what law enforcement said or didn't say to the Petitioner prior to her alleged statement. The basic facts that would have to be present in order to ascertain whether the statement was voluntary and its admission constitutionally valid are simply not present. Having this statement admitted is reversible error. Syllabus Point 5 of *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975) held that:

> 5. The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.

In *Starr*, this Court reversed a conviction and remanded for a new trial when the trial court improperly applied a prima facie standard instead of a preponderance standard in determining admissibility of a statement. Of course in the instant case, no standard was required at all, raising the violation above the threshold of what took place in *Starr*. It is also relevant that *Starr* was reversed in the context of an assertion of plain error. *Id.* at 158 W.Va 916.

Even though both the discovery violation and the constitutional violation stemming from Trooper Loudin's testimony are asserted as plain error, this Court has the elements necessary to support a finding of plain error before it. Applying the *Miller* test, there is clearly error stemming from the admissibility of the statement, both in the form of a discovery violation and in the deprivation of a hearing on the statement's voluntariness. The error is "plain," meaning it is clear and obvious. The error glares like the sun. It is not every day that an undisclosed statement of a defendant is admitted into the record at trial without any pretrial notice or litigation (and frankly, a highly uncommon scenario in the case law of our state). The Petitioner's "substantial rights" are very much at risk, to the extent that rights

accruing to the Petitioner under the Rules of Criminal Procedure, Trial Court Rules, West Virginia Code, and the Constitutions of the United States and West Virginia are all implicated. Finally, the fairness of the proceedings here are directly in question. The trial defense took great pains to obtain notice of the Petitioner's statements, and to work with the State to make sure the parties were on the same page about what statements would come into evidence at trial. One can only speculate as to why trial counsel did not object. However, that inquiry need never take place because the circumstances as laid out in this assignment of error straightforwardly justify a new trial for the Petitioner.

7. The Circuit Court erred by failing to give sufficient consideration to the Petitioner's pro se post-trial motions.

Apart from the post-trial motions filed by trial counsel, the Petitioner filed extensive post-trial motions, which entered the docket on the same day as the hearing on the Petitioner's counseled post-trial motions, June 21, 2018. (A.R.1., at 166-235). The Circuit Court, denied the motions at that time on the basis of untimeliness. (A.R.18., at 6-7). Thereafter, at sentencing, the motions were again addressed, and the Circuit Court again denied the motions on the basis of untimeliness, as well as on the basis that nothing set forth in the motions "shocks the conscience" of the Court so as to justify a new trial. (A.R.19., at 4-6). The standard of review for an appeal of the denial of a motion for new trial is:

> 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 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).

The Petitioner's pro se motions cover a significant number of issues, ranging from misconduct by the prosecutor and law enforcement, to suppression of evidence, to double

jeopardy. Some of the issues in those motions have been asserted in this appeal; however, some of the issues are so fact-intensive that there is not a sufficient record to raise the issues without an evidentiary hearing taking place in the Circuit Court. Accordingly, the Petitioner respectfully requests that this matter be remanded for additional development of the record on those matters.

8. The Circuit Court erred cumulatively to the prejudice of the Petitioner.

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

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

The Petitioner has set forth multiple assignments of error related to trial, pretrial, and post-trial issues. The Petitioner asserts that if this Court finds harmless error relating to two or more of those issues, that such error has accrued cumulatively to the Petitioner's prejudice, and that this Court should accordingly reverse the Petitioner's conviction and grant a new trial.

9. The Petitioner is entitled to a new trial as a result of omissions from the jury selection and trial transcripts caused by the failure of the court reporting equipment to capture certain critical exchanges.

The Petitioner alleges that there are numerous missing portions of the jury selection transcripts relating to issues with prospective jurors, including five jurors who actually served. The biased nature of the jury, and the Circuit Court's error in failing to secure an impartial jury in the face of one of the most heavily publicized cases in recent West Virginia history is key to the Petitioner's efforts to obtain relief upon appeal. Unfortunately, the record has been impaired by technological issues to such an extent that a full consideration of the Petitioner's jury-related issues by this Court is impossible. The only suitable remedy under these circumstances is a new trial.

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 portions of the record are manifest; a total of thirty-nine (39) bench conferences on a variety of subjects that are unrecorded. These include: an unrecorded conference with counsel at the bench (A.R.7., at 26); unrecorded bench conferences regarding physical or mental conditions with Jurors 109 and 165 (A.R.7., at 30); and unrecorded bench conferences with Jurors 12, 101, 136, 80, 60, 163, 203, 68, as well as Juror 169, Benjamin Cool, and Juror 187, Joseph Melton, both of whom served on the jury, on the subject of juror schedule conflicts (A.R.7., at 33-34).

Additionally, there were unrecorded bench conferences regarding juror-witness relationships with Jurors Toler, Johnson, Herrod, Blake (four times), Horn, Jeffries (two times), Stalnaker, Mullins, Brannon, Melton, Freeman, Alfred, Dotson, Taylor, Carpenter,Messenger, and Hicks. (A.R.7., at 95-138). Of that group, Juror Tammy Mullins served on the jury, and was asked about her relationship with a State's witness Mike Posey. (A.R.7., at 102).

Juror Allen Petre, who served on the jury that convicted the Petitioner, was asked about his relationship with the Assistant Prosecuting Attorney, Cody Clevenger. When asked if the relationship would interfere with being fair and impartial, Mr. Petre said "I would probably tend to - -." He then went to a bench conference, the contents of which are unknown. (A.R.7., at 149). Three more unrecorded bench conferences then took place, with Jurors Davis, Blake, and Flesher. (A.R.7., at 157; A.R.8., at 11, 149). There also appears to

be three minutes of missing discussion in the transcript concering Melisa Dawn Neely, who served on the jury on an unknown subject. (A.R.8., at 14).

This recounting does not even mention the numerous "[inaudible]" entries throughout both days of jury selection, which further hamper analysis of what happened. There are 124 "[inaudible]" entries on day one (A.R.7.), and 81 on day two (A.R.8.). Between the "[inaduible]" instances and the missing bench conferences, that is 244 distinct omissions in the transcripts of jury selection. Finally, one in camera conference during the trial itself was missing from the transcript.[3] The Petitioner is essentially deprived of a record concerning the voir dire of five persons who actually served on the jury, in a highly publicized case in which jury selection was a critical process. 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." The Petitioner asserts that the jury selection was so important, and the transcript so riddled with deficiencies, that the Petitioner's ability to ascertain appellate issues from voir dire is specifically prejudiced.

While *Shafer* indicates a reconstructed record as a possible form of relief, given the huge number of people participating in this jury selection, it seems improbable that such a record could be reassembled. Without a new trial, the Petitioner will be denied not only the ability to raise any issues that might have been pertinent on direct appeal, but could be barred from a meaningful review of her trial counsel's performance via collateral attack at a future date. It now cannot be known what information came to light in those exchanges, nor can the decision-making of the Court or counsel be assessed. Accordingly, the Petitioner

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3 This discussion concerned an issue with a juror as decribed on day one of trial. (A.R.9., at 12-14). The Court Reporter, J. Lynn Tenney, provided me with her notes from that event, and two other in camera conferences, which were successfully recorded, constitute Volume 16 of the Appendix Record. Ms. Tenney informed me that there are not any notes for the missing bench conferences during jury selection.

requests a new trial on this basis.

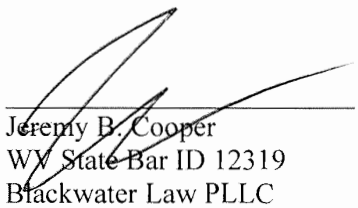
CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the Circuit Court, and remand this matter for the following relief:

1. Entry of a judgment of acquittal, or otherwise dismissing the matter with prejudice; or, in the alternative
2. A new trial;
3. Other proceedings concerning the Petitioner's pro se Post-trial motions; or
4. Any other relief the Court deems just and proper.

Respectfully submitted,

LENA MARIE CONAWAY,
Petitioner, by counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

vs.) No. 18-0851

(An appeal from a final order of the Circuit Court of Lewis County, Case No.: 17-F-12)

LENA MARIE CONAWAY,
Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

On this 7th day of January, 2019, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of this Petitioner's Brief to Scott Johnson, at 812 Quarrier Street, 6th Floor, Charleston, WV 25301, by U.S. Mail.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 18-0851

STATE OF WEST VIRGINIA,

Plaintiff below,
Respondent,

v.

LENA MARIE CONAWAY,

Defendant below,
Petitioner.

RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred by failing to grant a judgment of acquittal based on insufficient evidence.

2. The Circuit Court erred by violating double jeopardy by sentencing the Petitioner separately for Death of a Child by Parent by Child Abuse and its lesser-included offense, Child Abuse resulting in Serious Bodily Injury.

3. The Circuit Court erred by failing to grant the Petitioner a new trial based upon the violation of *Brady v. Maryland* by the State.

4. The Circuit Court erred by denying a jury pool consultant and a change of venue.

5. The Circuit Court erred by failing to grant the Petitioner's objection to impermissible, burden shifting argument by the State.

6. The Circuit Court plainly erred by permitting testimony by law enforcement of an undisclosed purported statement by the Petitioner at trial.

7. The Circuit Court erred by failing to give sufficient consideration to the Petitioner's pro se post-trial motions.

8. The Circuit Court erred cumulatively to the prejudice of the Petitioner.

9. The Petitioner is entitled to a new trial as a result of omissions from the jury selection and trial transcripts caused by the failure of the court reporting equipment to capture certain critical exchanges.

STATEMENT OF THE CASE

A. Procedural History

The Petitioner was indicted by a Lewis County, West Virginia, grand jury for (1) Murder of a Child by Parent, Guardian or Custodian or Other Person by Refusal or Failure to Provide Necessities in violation of West Virginia Code § 61-8D-2(a); (2) Death of a Child by Parent, Guardian or Custodian or Other Person by Child Abuse in violation of West Virginia Code § 61-8D-2a; (3) Child Abuse Resulting in Injury in violation of West Virginia Code § 61-8D-3(b); and, (4) Concealment of a Deceased Human Body in violation of West Virginia Code § 61-2-5a. A.R.

Vol. 1 at 1-3. She was convicted on all counts after a jury trial in Lewis County, West Virginia. A.R. Vol. I at 139-143. The petit jury returned a verdict of life without mercy on Count I. A.R. Vol. 1 at 148.

The Petitioner was sentenced to life without mercy on Count 1. A.R. Vol. 1 at 50. She was sentenced to forty years for the conviction under Count 2 of the Indictment with such sentence to run consecutively to Count 1. A.R. Vol. 1 at 51. The Petitioner was sentenced to 2 to 10 years for conviction under Count 3 of the Indictment, to run consecutively to the prior two convictions. A.R. Vol. 1 at 52. The Petitioner was finally sentenced to 1 to 5 years on Count 4 of the Indictment to run consecutively to Counts, 1, 2, and 3 of the Indictment. A.R. Vol. 1 at 53.

B. The Facts Adduced at Trial

D.C. was the Petitioner's daughter and was living in Weston, West Virginia, in September 2011, with her mother, her father (Keith), her sister K.C. and her brothers, T.C. and B.C. A.R. Vol. 9 at 35-36. D.C. was nine years old in September of 2011. A.R. Vol 9 at 36. Also living in the home was Aliayah, A.R. Vol. 9 at 36, the three year old victim in this case. A.R. Vol. 9 at 36.

The Petitioner was the disciplinarian of the children. A.R. Vol. 11 at 40; A.R. Vol. 13 at 17. The Petitioner and Aliayah did not get along. A.R. Vol. 13 at 6. The Petitioner would treat Aliayah "a lot worse" than the other children. A.R. Vol. 9 at 37. According to D.C., Aliayah would get in trouble for small things and her punishment was more severe than that inflicted on the other children, A.R. Vol. 9 at 37,[1] testimony seconded by K.C. A.R. Vol 13 at 6. Aliayah's punishments would include standing in a corner (sometimes for hours, A.R. Vol. 11 at 40) and being struck with a belt. A.R. Vol. 9 at 37. Her punishments would also include not allowing Aliayah to eat. A.R.

[1]Keith testified that the Petitioner treated Aliayah differently from the other children. A.R. Vol. 11 at 40. Keith testified this was a cause of friction between him and the Petitioner, A.R. Vol. 11 at 49, including causing the Petitioner to ask him to leave the family house on occasion. A.R. Vol. 11 at 53.

Vol. 13 at 6. There would be times where Aliayah would get in trouble for doing things that would not warrant punishment when done by the other children. A.R. Vol. 9 at 37-38. D.C. opined that the Petitioner was jealous of the relationship that Aliayah had with her grandmother. A.R. Vol. 9 at 38. She explained that Aliayah was born when the Petitioner was in prison so that Aliayah went straight to her grandmother's care. A.R. Vol. 9 at 38. Aliayah liked her grandmother a lot. A.R. Vol. 9 at 38. Aliayah, however, was returned to the Petitioner when the Petitioner was released from prison. A.R. Vol. 9 at 38.

Prior to the week of Friday September 23, 2011, the Petitioner compelled Aliayah to stand in the corner or remain in a room for hours. A.R. Vol. 9 at 38. The Petitioner also forced Aliayah to drink salt water. A.R. Vol. 9 at 38. During that week the Petitioner would sometimes not feed Aliayah and sometimes denied Aliayah the same food as the other children ate. A.R. Vol. 9 at 39. On the evening of September 23, there was a commotion in a corner between Aliayah and the Petitioner. A.R. Vol. 9 at 39. D.C. observed the Petitioner take a piece of broken bed slat and hit Aliayah over the head. A.R. Vol. 9 at 39-40, 65. The Petitioner had previously used the bed slat to hit Aliayah. A.R. Vol. 9 at 40-41. After striking Aliayah, the Petitioner became frustrated that Aliayah would not stand up then and there and eventually just let Aliayah remain in the corner. A.R. Vol. 9 at 40. K.C. and D.C. approached Aliayah and asked if she was okay. A.R. Vol. 9, at 44. Subsequently, K.C. helped Aliayah into bed and K.C. and D.C. felt the back of Aliayah's head which felt "squishy." A.R. Vol. 9 at 44. K.C. gave Aliayah some type of medicine or vitamins to make her feel better. A.R. Vol. 9 at 44. The pair then told Aliayah to go to sleep. A.R. Vol. 9 at 44. K.C. and D.C. then went to the Petitioner telling the Petitioner that she (the Petitioner) had injured Aliayah badly. A.R. Vol. 9 at 44. The Petitioner said she did not care and would not even go check on her. A.R. Vol. 9 at 44.

Sometime during the night, D.C. awoke and determined that Aliayah was still breathing because she could see Aliayah's chest rise and fall. A.R. Vol. 9 at 45. D.C. then returned to sleep. A.R. Vol. 9 at 45.

The next morning, the Petitioner directed K.C. and D.C. to check on Aliayah. A.R. Vol. 9 at 45. The pair went into the bedroom and tried to wake up Aliayah who did not respond. A.R. Vol. 9 at 45. The two went to get the Petitioner. A.R. Vol 9 at 45. The Petitioner rushed into the room and shook Aliayah and tried calling her name. A.R. Vol. 9 at 45 When this proved unsuccessful, the Petitioner scooped up Aliayah and put her on the bathroom counter where the Petitioner raised Aliayah's eyelids, called her name, pressed her chest, and blew in her mouth, all to no avail. A.R. Vol. 9 at 45. The Petitioner acted nervously and in a frenzy. A.R. Vol. 9 at 45. The Petitioner obtained a laundry basket and put some clothes in the basket along with Aliayah and then some more clothes. A.R. Vol. 9 at 45. The Petitioner made sure that Aliayah was not visible in the basket. A.R. Vol. 9 at 84. The Petitioner then directed K.C. and D.C. to follow her. A.R. Vol. 9 at 45-46. The Petitioner put the basket with Aliayah in it into a van along with K.C. and D.C. A.R. Vol. 9 at 46. They went to Vadis, West Virginia, where the Petitioner ordered K.C. and D.C. to look for a road without any signs. A.R. Vol. 9 at 46. Once they found a location meeting the Petitioner's criteria, the Petitioner pulled off and told D.C. to remain in the van with B.C. A.R. Vol. 9 at 46. The Petitioner took the basket and K.C. into the woods. A.R. Vol. 9 at 46. When they returned the Petitioner's hands were dirty and her stomach was dirty, as if she wiped her hands on her shirt. A.R. Vol. 9 at 56.

On the way home, the Petitioner made K.C. and D.C. promise to not tell anyone what happened. A.R. Vol. 9 at 46. The Petitioner said everything was going to be okay and told K.C. and D.C. to trust her. A.R. Vol. 9 at 46.

While on the way home, the van ran out of gas. A.R. Vol. 9 at 46. The Petitioner told K.C. and D.C. to ask for gas at some houses that were around where they were forced to stop. A.R. Vol. 9 at 46. Mary Arbogast provided one of the girls gas. A.R. Vol. 11 at 67. This girl did not indicate that she was looking for her little sister. A.R. Vol. 11 at 69. Also testifying as to providing gas was Brittany Helmick. A.R. Vol. 11 at 70. Ms. Helmick testified that a girl had asked for gas and that the girl, Mr. Helmick, and Ms. Helmick's brother got on a four wheeler to deliver some gas. A.R. Vol. 11 at 71. The trio got to the Petitioner's van and Ms. Helmick observed the Petitioner putting gas in the van. A.R. Vol. 11 at 71-72. Neither the girl who asked Ms. Helmick for gas nor the Petitioner told Ms. Helmick about Aliayah being missing. A.R. Vol. 11 at 72.

Once they got gas, the trio went home where the Petitioner cleaned the house where Aliayah had been. A.R. Vol. 9 at 46. Keith also testified that the drug paraphernalia in the house had been removed. A.R. Vol. 11 at 47-48.

D.C. testified that at some point she and K.C. had suggested that the Petitioner call the hospital, but the Petitioner declined. A.R. Vol. 9 at 47.

Ultimately, after cleaning the house, the Petitioner called the police. A.R. Vol. 9 at 48. D.C. testified she would give any story to the police other than what actually happened. A.R. Vol. 9, 49. D.C. explained at trial that she lied about what happened because of her promise and her fear that the Petitioner might harm her as well. A.R. Vol. 9 at 50, 90. D.C. testified the reason she decided to come forward after five years was she felt her continuing to hide what had happened to Aliayah was interfering with D.C.'s relationship with God. A.R. Vol 9 at 51.

Also testifying at trial was K.C. A.R. Vol. 13 at 4, who was 11 years old in 2011. A.R. Vol. 9 at 36. According to K.C., on the evening of September 23, 2011, the Petitioner was very angry at Aliayah. A.R. Vol. 13 at 38. K.C. was allowed to eat her dinner, which dinner was denied

to Aliayah because Aliayah was in trouble. A.R. Vol. 13 at 8.[2] Things calmed down but then Aliayah got into more trouble. A.R. Vol. 13 at 8. Aliayah was compelled to stand in the corner for a while, A.R. Vol. 13 at 8, a common punishment inflicted on her. A.R. Vol. 13 at 31.

K.C.'s next memory is hearing Aliayah get hit. A.R. Vol. 13 at 8. Although K.C. did not see Aliayah getting hit, K.C. testified, "I just heard a loud noise and then at that point I knew that she got hit. I wasn't sure what it was; but I remember the board and that was a common punishment she used." A.R. Vol. 13 at 8. K.C. testified the board was from a bunkbed that had previously broken. A.R. Vol. 13 at 9. The Petitioner had used the board on Aliayah previously. A.R. Vol. 13 at 9.

After hearing Aliayah get hit, K.C. saw Aliayah was on the floor starting to get up. A.R. Vol. 13 at 9. Aliayah was crying. A.R. Vol. 13 at 10. Aliayah was struggling to get up and the Petitioner ordered K.C. and D.C. to put Aliayah to bed, A.R. Vol. 13 at 10, D.C. and K.C. helped Aliayah into bed. A.R. Vol. 13 at 10. Aliayah said that her head felt like it was going to explode. A.R. Vol. 13 at 10. K.C. testified that she felt Aliayah's head and that the feeling was not usual. A.R. Vol. 13 at 38.

K.C. testified that she gave Aliayah Flintstone vitamins because Aliayah did not eat that night. A.R. Vol. 13 at 10-11. K.C. then watched a movie and went to bed. A.R. Vol. 13 at 11.

Once K.C. awoke, she went into the Petitioner's room and talked with the Petitioner for a while. A.R. Vol. 13 at 12. The Petitioner then told K.C. to get Aliayah up. A.R. Vol. 13 at 12. K.C. went to awake Aliayah, but discovered that Aliayah was not breathing. A.R. Vol. 13 at 12. K.C. returned and told the Petitioner that Aliayah was not breathing. A.R. Vol. 13 at 12. The Petitioner told Aliayah to wake up, and attempted CPR. A.R. Vol. 13 at 12. The Petitioner also tried running

[2] K.C. could not remember why Aliayah was in trouble. A.R. Vol. 13 at 8.

Aliayah under cold water. A.R. Vol. 13 at 12. K.C. and D.C. suggested calling for help a few times, but every time the pair brought it up, the Petitioner, "blew it off" because "[s]he didn't want to do that." A.R. Vol. 13 at 12.

The Petitioner obtained a clothes basket, put some clothes in it, put Aliayah in it, and then put some more clothes in it. A.R. Vol. 13 at 13. The Petitioner, K.C., D.C. and B.C. then all got into the van with the clothes basket. A.R. Vol. 13 at 13.[3] The Petitioner drove to Vadis, West Virginia. A.R. Vol. 13 at 13. The group drove around looking for a place to hide Aliayah's body. A.R. Vol. 13 at 14. Once stopped, the Petitioner told D.C. to remain in the van with B.C. A.R. Vol. 13 at 14. The Petitioner took the hamper and K.C. and left the van. A.R. Vol. 13 at 14. Eventually the Petitioner and K.C. came to a spot and the Petitioner told K.C. to wait there. A.R. Vol. 13 at 14-15. The Petitioner went out of K.C.'s sight and returned after what felt to K.C. "like quite a while." A.R. Vol. 13 at 15. When she returned the Petitioner no longer had Aliayah's body. A.R. Vol. 13 at 15.

When they got back in the van, the Petitioner started to drive home and started to throw the clothes out that were in the hamper surrounding Aliayah. A.R. Vol. 13 at 15. The Petitioner then made K.C. and D.C. promise not to tell anybody what had occurred. A.R. Vol. 13 at 15.

K.C. then testified that the van ran out of gas and the Petitioner told K.C. and D.C. to ask at the near-by houses for gas. A.R. Vol. 13 at 16. K.C. testified that they obtained some gas. A.R. Vol. 13 at 17.

K.C. then testified to the storyline the Petitioner came up with that the girls were to follow: that Aliayah had been sick all week, that they went to bed early, and when they awoke Aliayah was gone. A.R. Vol. 13 at 17.

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[3]T.C. was not present as he was on a visit away from home. A.R. Vol. 13 at 13.

K.C. then explained that in October of 2016, she and D.C. agreed to come forward with the truth about what had really happened. A.R. Vol. 13 at 18. K.C. explained that they had kept silent for so long because of their promise to the Petitioner and the fear they harbored if they came forward. A.R. Vol. 13 at 18.[4]

West Virginia State Police Sergeant Shannon Loudin also testified and was specifically asked about causation of death by the Petitioner's trial counsel:

> Q. . . . What – what I want to talk to you about is; we've got a little girl who describes – her mother hitting her little sister with a – a – the flat part of a piece of a broken bed slat one time somewhere around the crown of the head; a woman who's eight (8) – eight and a half (8 1/2) months pregnant. The little girl's awake for a few more hours. Goes to bed. They check on her at some point in the middle of the night; she's fine. And my question to you is; what evidence do we have that this strike to the crown of the head is a factor in this little girl's death? We're just making a presumption 'cause there's – there appears to be no other explanation?
>
> A. When I look at the possibility of whether or not a strike to the head by a board; by an adult to a three (3) year old's head; my opinion is that it's perfectly possible that that caused an internal injury; which vomiting is a symptom of. And it's – it's been testified she was vomiting. There was some orange stuff around her mouth when she was found the next morning. So yes; I would presume that striking on top of the head of a three (3) year old whose skull is not yet fused together; it doesn't take much to cause an internal injury that would not have any external bleeding that would leave any DNA evidence on the scene.
>
> Q. You've got a doctor to support these non-medical opinions? You're not a physician.
>
> A. No, sir. Don't claim to be. No, sir. Just – just been part of a lot of child fatality investigations and in my experience and sixteen (16) years as a law enforcement officer I've seen a lot of injuries to children and – and saw what caused those injuries and had a lot of training in what happens to a child's body when – when they're abused and in those types of cases.

A.R. Vol. 10 at 98-99.

[4]K.C. testified the Petitioner's favorite line was to tell the children, "I brought you into this world and I can take you out." A.R. Vol. 132 at 39.

Aliayah's body was never recovered. A.R. Vol. 10 at 13. Sergeant Loudin explained that searchers examined the area identified by D.C. and K.C. as the location where the Petitioner disposed of Aliayah's body. A.R. Vol. 10 at 86. Sergeant Loudin also explained that cadaver dogs each independently located an area where decomposition had occurred. A.R. Vol. 10 at 87. Sergeant Loudin also testified that in trying to locate the body the searchers were handicapped by the five year lapse from when the Petitioner buried the body to when the searchers were trying to locate it. A.R. Vol. 10 at 90. Sergeant Loudin explained that rodents, bears, coyotes or other animals could have disturbed the burial site and drug away Aliayah's body parts. A.R. Vol. 10 at 90. Sergeant Loudin also explained the topography of the location. A.R. Vol. 10 at 90. According to Sergeant Loudin, every time there was rain the location flooded into a pond or river and that there was only a slim chance of finding the body. A.R. Vol. 10 at 90.

The jury found the Petitioner guilty on all counts. A.R. Vol. 13 at 129-130.

SUMMARY OF ARGUMENT

The Petitioner first asserts that there was insufficient evidence of her guilt. The Petitioner faces an "uphill climb" in this assignment of error. *State v. LaRock*, 196 W. Va. 294, 303, 470 S.E.2d 613, 622 (1996). ("A convicted defendant who presses a claim of evidentiary insufficiency faces an uphill climb."). This is because:

> When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt.

Syl. Pt. 2, *State v. LaRock,* 196 W. Va. 294, 299, 470 S.E.2d 613, 618 (1996). The evidence at trial, especially that of D.C. and K.C. was more than sufficient for the State to have carried its burden of proof.

The Petitioner next claims that there was a double jeopardy violation in this case. She claims that her convictions on Count II and III violated her right to be free of multiple punishment for the same offense. The Petitioner does not show in her brief where she raised this claim before the circuit court. Consequently, this Court should not address it on appeal. Alternatively, there is no double jeopardy violation as each crime requires proof that the other does not.

The Petitioner then claims that there was a *Brady* violation in this case based upon Sergeant Loudin's testimony concerning Dr. Wright. Specifically, the Petitioner contends that it was not disclosed to her that Dr. Wright could not state to a reasonable degree of medical certainty that the Petitioner's blow to Aliayah's head caused Aliayah's death. Because this information was available to other sources, the Petitioner has failed to show a *Brady* violation. Additionally, because the Petitioner did not request a continuance nor ask to strike Sergeant Loudin's testimony concerning Dr. Wright, the Petitioner has waived any complaints she may have about Sergerant Loudin's testimony concerning Dr. Wright.

The Petitioner also alleges that the circuit court erred in denying her a jury consultant and a change of venue. These claims are reviewed only for abuse of discretion and the circuit court did not abuse its discretion in denying the Petitioner's motions. Here, the circuit court engaged in a lengthy, comprehensive, and detailed voir dire lasting two days and covering some four hundred eighty-seven record pages in the Appendix Record. The Petitioner was afforded a fair trial by a fair, impartial, and unbiased jury.

The Petitioner additionally complains that the State engaged in a burden shifting argument to the jury. In its opening statement, the State stated to the jury, "[t]he fact that a murderer may successfully dispose of the body of a victim does not entitle him to an acquittal. That's a quote that I'd like for you to consider and keep in the back of your mind [sic] during the next couple of weeks as you listen to all the evidence that's presented here." This drew no objection. In closing, the State again argued to the jury, "I only want to leave you with one thought. Remember at the beginning of this trial and I asked you to remember that quote and try to keep it in the back of your mind. And I want to read that quote again. 'The fact that a murderer does successfully dispose of the body of the victim does not entitle them to an acquittal.'" A.R. Vol. 14 at 95. The quotation is apparently taken from *People v. Manson*, 139 Cal. Rptr. 275, 298 (Ct. App. 1977) ("The fact that a murderer may successfully dispose of the body of the victim does not entitle him to an acquittal."). The quotation is not burden shifting as it does not ask the Petitioner to prove her innocence or to produce any evidence. It is a statement that simply explains to the jury that the absence of a body is no bar to a murder conviction. Further, the quotation was isolated and was not meant to distract the jury from any material issue in the case. Indeed, the argument was proper because it explained to the jury that the absence of a body was not a legitimate ground to acquit the Petitioner.

The Petitioner avers that the circuit court committed plain error regarding admission of a statement allegedly made by the Petitioner when she was arrested in Florida. The Petitioner must rely on plain error as the statement was not objected to at trial when relayed by Sergeant Loudin. The Petitioner claims she was prejudiced because her constitutional rights were violated by the admission of the statement. However, the Petitioner admits that the record in the case is not sufficient to address this claim. Plain error review presupposes that the error is sufficiently

developed to allow for intelligent review by this Court. Given that the record is not sufficiently developed to allow for intelligent review by this Court, the plain error standard does not apply and this assignment of error is waived.

The Petitioner claims that the circuit court erred in not giving sufficient consideration to her pro-se motions. However, on appeal the Petitioner does not develop the grounds to show that any of her pro-se claims had merit. The Petitioner's skeletal argument regarding her pro-se motions does not adequately allow for review by this Court. As such, this Court should not address this assignment of error.

The Petitioner also relies on a claim of cumulative error. However, cumulative error only applies when there are a multitude of errors. Cumulative error does not apply when there are no errors. Because there were no errors in this case, the cumulative error doctrine has no applicability.

Finally, the Petitioner complains about omissions from the voir dire transcript in her case. While there are an unfortunate number of such omissions, the Petitioner must show that the omissions prejudiced her case. Here, the Petitioner points to Jurors Cool, Melton, Petre, Neely, and Mullins. But at no point did the Petitioner's trial counsel object to the seating of these jurors. Consequently, the absence of any transcript material relating to them is not prejudicial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unwarranted in this case since the law, facts, and argument are adequately set forth in the parties' Briefs. This case is suitable for memorandum decision.

ARGUMENT

A. The State produced sufficient evidence of the Petitioner's guilt.

The Petitioner claims the State failed to adduce sufficient evidence against her in two regards: (1) that the State failed to produce sufficient evidence that the Petitioner intended to cause

Aliayah's death by withholding medical care; and, (2) that the State failed to produce sufficient evidence of corpus delicti., i.e, that the death occurred at all and the death was the result of criminal agency. Pet'r Br. at 5-6.

"Th[is] Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence." *State v. Juntilla*, 227 W. Va. 492, 497, 711 S.E.2d 562, 567 (2011). This Court has explained:

> 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.

Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

This court has further explained, "[a] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden." Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). "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." *Id.* "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." *Id.* "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." *Id.* Thus, "[t]he evidence need not exclude every reasonable hypothesis of innocence or be completely inconsistent with every conclusion except guilt, so long as a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *State v. Hottinger,* 194

W. Va. 716, 725, 461 S.E.2d 462, 471 (1995) (per curiam) (Cleckley, J., concurring in part and dissenting in part).

1. *The State produced sufficient evidence that the Petitioner intended to cause Aliayah's death by withholding medical care.*

The Petitioner was indicted under West Virginia Code § 61-8D-2(a), which provides:

> If any parent, guardian or custodian shall maliciously and intentionally cause the death of a child under his or her care, custody or control by his or her failure or refusal to supply such child with necessary food, clothing, shelter or medical care, then such parent, guardian or custodian shall be guilty of murder in the first degree.

The circuit court instructed the jury consistently with the statute. A.R. Vol. 14 at 80-81. The State adduced sufficient evidence at trial to prove its case against the Petitioner.

The State adduced evidence at trial that prior to the week of Friday September 23, 2011, the Petitioner compelled Aliayah to stand in the corner or remain in a room for hours. A.R. Vol. 9 at 38. The Petitioner also forced Aliayah to drink salt water. A.R. Vol. 9 at 38. During that week the Petitioner would sometimes not feed Aliayah and sometimes denied Aliayah the same food as the other children ate. A.R. Vol. 9 at 39. On the evening of September 23, there was a commotion in a corner between Aliayah and the Petitioner. A.R. Vol. 9 at 39. D.C. observed the Petitioner take a piece of broken bed board slat and hit Aliayah over the head. A.R. Vol. 9 at 39-40, 65. The Petitioner had previously used the bed slat to hit Aliayah. A.R. Vol. 9 at 40-41. After striking Aliayah, the Petitioner became frustrated that Aliayah would not stand up then and there and eventually just let Aliayah remain in the corner. A.R. Vol. 9 at 40. K.C. and D.C. approached Aliayah and asked if she was okay. A.R. Vol. 9, at 44. Subsequently, K.C. helped Aliayah into bed and K.C. and D.C. felt the back of Aliayah's head which felt "squishy." A.R. Vol. 9 at 44. K.C. gave Aliayah some type of medicine or vitamins to make her feel better. A.R. Vol. 9 at 44. The pair then told Aliayah to go to sleep. A.R. Vol. 9 at 44. K.C. and D.C. then went to the Petitioner

telling the Petitioner that she (the Petitioner) had injured Aliayah badly. A.R. Vol. 9 at 44. The Petitioner said she did not care and would not even go check on her. A.R. Vol. 9 at 44.

The Petitioner knew that she had injured three year old Aliayah badly because the Petitioner observed Aliayah's inability to stand after she had been struck on the head. Further, K.C. and D.C. told the Petitioner that she (the Petitioner) had injured Aliayah badly. Yet the Petitioner took no steps to obtain medical care for her badly injured daughter. This was sufficient evidence for the jury to have concluded the Petitioner intended to cause Aliayah's death by failing to provide necessary medical care.

2. *The State produced sufficient evidence of corpus delicti.*

"It is a fundamental and inflexible rule of legal procedure, of universal obligation, that no person shall be required to answer or be involved in the consequences of guilt without satisfactory proof of the corpus delicti either by direct evidence or by cogent and irresistible ground of presumption." Syl. Pt. 6, *State v. Flanagan*, 26 W. Va. 116 (1885). "Corpus delicti 'means proof that the crime occurred and that somebody's criminality was the source of the crime, as distinguished from noncriminal sources, e.g., accident or natural causes.'" *State v. Garrett*, 195 W. Va. 630, 640 n.14, 466 S.E.2d 481, 491 n.14 (1995) (quoting *State v. Burton*, 163 W.Va. 40, 45, 254 S.E.2d 129, 134 (1979) (citation omitted)). "A homicide becomes a criminal offense only if the corpus delicti is established just as in any other offense." *State v. Stevenson*, 147 W. Va. 211, 214, 127 S.E.2d 638, 641 (1962). Thus, "[t]o prove the corpus delicti in a case of homicide two facts must be established: (1) The death of a human being and (2) a criminal agency as its cause." Syl. Pt. 4, *State v. Hall*, 172 W. Va. 138, 304 S.E.2d 43 (1983). The State produced sufficient evidence of corpus delicti.

a. The State proved the death of Aliayah.

The testimony of D.C. and K.C. established Aliayah's death.

On Saturday morning, the Petitioner directed K.C. and D.C. to check on Aliayah. A.R. Vol. 9 at 45. The pair went into the bedroom and tried to wake up Aliayah who did not respond. A.R. Vol. 9 at 45. The two went to get the Petitioner. A.R. Vol 9 at 45. The Petitioner rushed into the room and shook Aliayah and tried calling her name. A.R. Vol. 9 at 45 When this proved unsuccessful, the Petitioner scooped Aliayah up and put her on the bathroom counter where the Petitioner raised Aliayah's eyelids, called her name, pressed her chest, and blew in her mouth, all to no avail. A.R. Vol. 9 at 45.

K.C.'s trial testimony also establishes corpus delicti. K.C. went to awake Aliayah, but discovered that Aliayah was not breathing. A.R. Vol. 13 at 12. K.C. returned and told the Petitioner that Aliayah was not breathing. A.R. Vol. 13 at 12. The Petitioner told Aliayah to wake up, and attempted CPR. A.R. Vol. 13 at 12. The Petitioner also tried running Aliayah under cold water which did not revive her. A.R. Vol. 13 at 12. Again to no avail.

The Petitioner states in her brief "[t]o believe that [Aliayah] is actually dead, it would be necessary to believe the accounts of D.C. and K.C. relating to the disposal of [Aliayah's] body." Pet'r Br. at 13. The Petitioner contends "[t]hese accounts are incredible under close examination." Pet'r Br. at 13. In invoking the inherent incredibility standard, the Petitioner faces a difficult hurdle as "the standard for establishing that witness testimony is incredible as a matter of law is exceptionally high." *Rea v. Suthers*, 402 F. App'x 329, 331 (10th Cir. 2010). And it is a standard the Petitioner has not met here.

"An appellate court will disregard testimony that the jury has found to be credible only if it is so inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds

could not differ about it." 5 Am. Jur. 2d *Appellate Review* § 597. In short, "'testimony should be found inherently incredible "only when the testimony defies physical laws.'" *State v. Kenneth M.*, No. 12-0233, 2013 WL 2157826, at *2 (W. Va. May 17, 2013) (memorandum decision) (quoting *State v. McPherson*, 179 W.Va. 612, 617, 371 S.E.2d 333, 338 (W.Va.1988)). Testimony that would be inherently incredible is a blind person relating what he or she saw or a deaf person relating what he or she heard. *People v. Ventura*, No. SX-2012-CR-076, 2014 WL 3767484, at *10 (V.I. Super. Ct. July 25, 2014), *aff'd and remanded*, No. SCTCRIM20140021, 2016 WL 2604525 (V.I. May 4, 2016)). The testimony of K.C. and D.C. does not meet this high threshold. The efforts of the Petitioner to dispose of Aliayah's body as described by D.C. and K.C. do not contradict physical laws. As such, it was within the province of the jury to determine whether their testimony was credible or not, and the jury chose to credit their testimony.

The Petitioner also points to D.C.'s adoptive father's testimony concerning D.C.'s ability to prevaricate. Pet'r Br. at 13-14 (citing A.R. Vol. 9 at 105). But, "[w]e must leave open the possibility that even a liar tells the truth once in a while, and the jury [wa]s in the best position to judge [her] credibility." *United States v. Williams*, 216 F.3d 611, 614 (7th Cir. 2000). *See also State v. Looney*, 240 S.E.2d 612, 627 (N.C. 1978) ("Even pathological liars sometimes tell the truth. It is for the jury to determine in the particular case whether the particular witness is or is not telling the truth.").

The Petitioner then contends that D.C. and K.C. are not worthy of belief because their testimony was inconsistent with previous statements they had given that were not inculpatory to the Petitioner and were inconsistent with each other's testimony. Pet'r Br. at 14. But as observed by this Court, "[t]he jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses." *State v. Bailey*, 151 W. Va. 796,

805, 155 S.E.2d 850, 856 (1967). *See also State v. Hall*, 172 W. Va. 138, 141, 304 S.E.2d 43, 46 (1983) ("credibility is the province of the jury"). "Credibility determinations are for a jury and not an appellate court." Syl. Pt. 3, in part, *State v. Guthrie*, 194 W. Va. 657, 663, 461 S.E.2d 163, 169 (1995). "It is the province of the jury to weigh evidence and resolve inconsistencies in testimony." *Graham v. Wallace*, 208 W. Va. 139, 141, 538 S.E.2d 730, 732 (2000) (per curiam) (citing *State v. Houston*, 197 W.Va. 215, 230, 475 S.E.2d 307, 322 (1996)).The Petitioner's argument would allow this Court to invade the sole and exclusive province of the jury, a result which cannot be countenanced under West Virginia law.

There was sufficient evidence to prove corpus delicti.

b. The State proved criminal agency.

The Petitioner also contends that the State failed to establish the second part of the corpus delicti test: criminal agency. The Petitioner is not correct as the State's evidence demonstrated that Aliayah's death was due to criminal agency.

The Petitioner quotes to Syllabus Point 1, in part, of *State v. Roush*, 95 W. Va. 132, 120 S.E. 304 (1923) for the proposition that "[t]he evidence of defendant's agency in the commission of the supposed crime must be so clear and convincing as to exclude any reasonable hypothesis of other causes." Pet'r Br. at 16. *Roush* is inconsistent with more modern West Virginia law which controls here.

Courts that have adopted the *Jackson v. Virginia*, 443 U.S. 307 (1979) sufficiency of the evidence test, as has West Virginia, *State v. LaRock*, 196 W. Va. 294, 303, 470 S.E.2d 613, 622 (1996), follow its dictates in addressing corpus delicti. *See, e.g., Gov't of Virgin Islands v. Harris*, 938 F.2d 401, 415 (3d Cir. 1991) (citation omitted) ("In line with our jurisprudence for reviewing the denial of a motion for a judgment of acquittal, we note that such evidence need not 'be

inconsistent with every conclusion save that of guilt if it establishes a case from which the jury can find the defendant guilty beyond a reasonable doubt.'"); *Hines v. State*, 473 A.2d 1335, 1348 (Md. Ct. Spec. App. 1984) (citation omitted) ("The sufficiency of the evidence with respect to each element of each crime of which appellant was convicted will be subjected to the same standard of appellate review that we applied to the question of appellant's criminal agency."); *People v. Goodwin*, No. D067547, 2016 WL 3254167, at *9 (Cal. Ct. App. June 7, 2016) (unpublished) ("In evaluating a sufficiency-of-the-evidence challenge to a corpus delicti or a murder finding, "the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, 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 beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317–320.").

In Syllabus Point 3, in part, of *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), this Court held, "[t]he evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt." "This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt." *State v. LaRock*, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996)

In this case, the State adduced testimony that on Friday, September 23, 2011, the Petitioner struck Aliayah on the head with a bed slat. Aliayah struggled to get up after being struck, but was unable to do so. The back of Aliayah's head felt "squishy." Aliayah told her sisters that her head felt like it was going to explode. K.C. and D.C. then went to the Petitioner telling the Petitioner that she (the Petitioner) had injured Aliayah badly. The Petitioner said she did not care and would not even go check on Aliayah. Aliayah was dead the next day. This was sufficient evidence of corpus delicti.

The Petitioner's convictions should be affirmed.

B. The Petitioner has waived any double jeopardy violation in this case. Alternatively, there is no double jeopardy violation.

The Petitioner claims that her double jeopardy rights were violated when she was convicted and sentenced under both Counts II and III of the indictment. Pet'r Br. at 19. This claim is not properly presented to this Court and should not therefore be adjudicated by this Court.

1. This claim is not properly presented to this Court.

West Virginia Rule of Appellate Procedure 10(c)(7) provides, in pertinent part, "[t]he argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal." The Petitioner's argument does not detail where the Petitioner presented her double jeopardy issue to the circuit court. For this reason, the double jeopardy issue is not properly before this Court and should not be addressed. *See, e.g., In re J.P.*, No. 18-0171, 2018 WL 6040185, at *3 (W. Va. Nov. 19, 2018) (memorandum decision); *State v. Charles B.*, No. 17-0904, 2018 WL 6015818, at *3 (W. Va. Nov. 16, 2018) (memorandum decision); *State v. Rodeheaver*, No. 14-0270, 2015 WL 2382921, at *4 (W. Va. May 18, 2015) (memorandum decision). Alternatively, the Petitioner's double jeopardy claim is without merit.

2. The Petitioner's Double Jeopardy Claim is Meritless.

The Double Jeopardy Clauses of the Fifth Amendment and West Virginia Constitution, Art. III, § 5, protect against a second prosecution for the same offense after acquittal and they protect against a second prosecution for the same offense after conviction. They also protect against multiple punishments for the same offense. *See, e g.,* Syl. Pt. 1, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992); Syl. Pt. 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977). The Petitioner here invokes the third protection, against multiple punishments for the same offense. Pet'r Br. at 19. A double jeopardy claim is reviewed de novo. Syl. Pt. 1, in part, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996).

The Petitioner contends that the third protection of double jeopardy is offended in this case, that she was punished twice for the same offense. Pet'r Br. at 19. West Virginia follows the federal double jeopardy test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), *State v. Gill,* 187 W. Va. 136, 142, 416 S.E.2d 253, 259 (1992), which was articulated by this Court in Syllabus Point 8 of *State v. Zaccagnini*, 172 W. Va. 491, 308 S.E.2d 131 (1983), "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *See State v. Rummer*, 189 W. Va. 369, 373, 432 S.E.2d 39, 43 (1993) ("We summarized the *Blockburger* test in Syllabus Point 8 of *Zaccagnini*[.]"). The Petitioner's double jeopardy rights were not violated in this case.

The Petitioner was indicted, A.R. Vol. 1 at 2, and convicted, A.R. Vol. 1 at 140, for violating West Virginia Code § 61-8D-2a(a) which provides:

> If any parent, guardian or custodian maliciously and intentionally inflicts upon a child under his or her care, custody or control substantial physical pain, illness or any impairment of physical condition by other than accidental means, thereby

> causing the death of such child, then such parent, guardian or custodian is guilty of a felony.

The Petitioner was also indicted, A.R. Vol. 1 at 2, and convicted, A.R. Vol. 1 at 141, for violating West Virginia Code § 61-8D-3(b), which provides, in pertinent part, "[i]f any parent, guardian or custodian shall abuse a child and by such abuse cause said child serious bodily injury as such term is defined in section one, article eight-b of this chapter, then such parent, guardian or custodian shall be guilty of a felony[.]" Abuse is defined as "the infliction upon a minor of physical injury by other than accidental means." W. Va. Code § 61-8D-1(1). "Serious bodily injury" is defined in West Virginia Code § 61-8B-1(10) as "bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ."

West Virginia Code § 61-8D-2a(a) requires the parent to cause the death, which is not an element of West Virginia Code § 61-8D-3(b). West Virginia Code § 61-8D-3(b) requires serious bodily injury which is not an element of West Virginia Code § 61-8D-2a(a). Because each statutory provision requires proof of a fact the other does not, there is no double jeopardy violation.

The Petitioner's sentences should be affirmed.

C. There was no *Brady* violation in this case.

The Petitioner contends that the State failed to disclose exculpatory evidence. Pet'r Br. at 20. Specifically, during Sergeant Loudin's trial testimony, Sergeant Loudin testified in response to a question from the Petitioner's counsel that:

> I actually spoke to Dr. Mel Right [sic]; who is a – he's the leading pediatric trauma physician at WVU; and described to him the board; the type of strike that was possibly occurred; that – and ask – I just asked him what his opinion would be; if that injury could be caused and what symptoms could result of it. And he and I did have a conversation about that; but he's not here to testify; no.

A.R. Vol. 10 at 100.

Post-trial, the Petitioner filed her *Motion to Set Aside Verdicts and Grant New Trial* alleging that the State's failure to disclose Dr. Wright constituted a violation of the State's obligation to disclose exculpatory evidence. A.R. Vol. I at 149. The State responded by arguing that the motion was untimely and asserting that "it did not withhold exculpatory evidence. As set forth in the Defendant's Motion, Dr. Wright confirmed that the Statement [D.C.] provided regarding the blow to the head could have caused the death of Aliayah. Obviously, Dr. Wright could not provide testimony to a degree of medical certainty without examining a body. The State asserts that exculpatory evidence would have been had Dr. Wright advised Sgt. Loudin that the blow to the head described by [D.C.] could not have been what killed her." A.R. Vol. 1 at 162. The circuit court denied the Petitioner's motion for a new trial based on failure to disclose finding that the evidence was not exculpatory and was insignificant in comparison to the remainder of the evidence presented at trial. A.R. Vol. 18 at 61; A.R. Vol 1 at 45.

This Court has acknowledged "that the prosecutor has a duty to disclose favorable exculpatory evidence, as well as favorable impeachment evidence, pursuant to *Brady* [*v. Maryland*, 373 U.S. 83 (1963)]." *Lee v. Ballard*, No. 13-1314, 2014 WL 4662517, at *10 (W. Va. Sept. 19, 2014) (memorandum decision). *See also* Syl. Pt. 4, *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982) ("A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution."). This Court has held:

> There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield,* 169 W.Va. 191, 286 S.E.2d 402 (1982): (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, *State v. Youngblood,* 221 W. Va. 20, 650 S.E.2d 119 (2007).

> A police investigator's knowledge of evidence in a criminal case is imputed to the prosecutor. Therefore, a prosecutor's disclosure duty under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963) and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982) includes disclosure of evidence that is known only to a police investigator and not to the prosecutor.

Syl. Pt. 1, *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007).

"A claim of a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), presents mixed questions of law and fact. Consequently, the circuit court's factual findings should be reviewed under a clearly erroneous standard, and questions of law are subject to a de novo review." Syl. Pt. 7, *State v. Black*, 227 W. Va. 297, 708 S.E.2d 491 (2010).

Here, the circuit court properly concluded that Sergeant Loudin's testimony concerning Dr. Wright was not *Brady* material. As found by the circuit court:

> The defense acknowledges that Dr. Wright confirmed that the statement [D.C.] provided regarding the blow to the head could have caused the death of Aliayah Lunsford, and that nothing he heard regarding the testimony in the case would cause him to believe that there was anything inconsistent to a blow to the head causing Aliayah's death.

A.R. Vol. 1 at 45.

"Furthermore, 'the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources.'" *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (quoting *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986)). "In evaluating the probable materiality and favorability of the requested information, the [trial] court may consider, among other things, whether the material may be available from other sources[.]" *United States v. Trevino*, 89 F.3d 187, 193 n.6 (4th Cir. 1996). Here, the Petitioner's counsel apparently consulted with his own physicians. A.R. Vol. 18 at 19, 41. The Petitioner's trial counsel conceded that these physicians had the same conclusions as Dr. Wright, that being struck on the head by a bed slate

was a possible cause of death. A.R. Vol. 18 at 19. The circuit court therefore properly concluded that there was no *Brady* violation.

Moreover, as argued by the prosecuting attorney, when Sergeant Loudin first mentioned Dr. Wright, the Petitioner could have sought to continue the trial to further explore Dr. Wright's opinions or moved to strike any reference to Dr. Wright from the record. A.R. Vol. 18 at 41. In failing to ask for either remedy, he has waived any claim before this Court.

The Petitioner's convictions should be affirmed.

D. The Circuit Court did not err by denying a jury pool consultant and in denying a change of venue.

The Petitioner contends that the circuit court erred in denying a jury pool consultant and in denying a change of venue. Pet'r Br. at 24. "The refusal of the trial court to grant a motion for a public opinion survey rests within the sound discretion of the trial court." *State v. Weatherford*, 416 N.W.2d 47, 52 (S.D. 1987). *See also State v. Boppre*, 453 N.W.2d 406, 421 (Neb. 1990) ("The refusal of a trial court to grant a motion for a public opinion poll rests within the court's discretion."). Likewise, a change of venue motion is reviewed only for abuse of discretion. Syl. Pt. 2, *State v. Gangwer*, 169 W. Va. 177, 286 S.E.2d 389 (1982) ("Whether a change of venue is warranted rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed, unless it clearly appears that such discretion has been abused.").

The Petitioner filed a motion to hire a jury consultant and an additional motion for payment thereof. A.R. Vol. 1 at 59, 61. After a hearing on the motions, A.R. 3, the circuit court denied the motions finding "that the voir dire process during jury selection can be used to determine if a fair and impartial jury can be selected in this County for this case." A.R. Vol. 1 at 9. This was not erroneous. As other courts have recognized, "voir dire examination is the better, more probative forum for ascertaining the existence of community and individual prejudice or hostility toward the

accused." *State v. Boppre*, 453 N.W.2d 406, 422 (Neb. 1990). *See also State v. McKnight*, 837 N.E.2d 315, 333 (Ohio 2005) (a "comprehensive voir dire examination of the seated jurors about pretrial publicity negated any need for a scientific jury survey of public opinion within Vinton County."); *Travis v. State*, 776 So. 2d 819, 872 (Ala. Crim. App. 1997) ("As to his request for funds for a pollster to assist him in his motion for a change of venue, the proper method to determine whether a prospective juror is biased is through voir dire, not through opinion polls."), *aff'd sub nom. Ex parte Travis*, 776 So. 2d 874 (Ala. 2000); *State v. Green*, 457 N.W.2d 20, 23 (Iowa Ct. App. 1990) ("We find no error on the part of the trial court in overruling defendant's motion for a public opinion survey. Intensive voir dire is the better approach for showing actual prejudice on the part of the jury toward the accused."); *United States v. Mandel,* 431 F. Supp. 90, 101 (D. Md. 1977) ("a public opinion poll is no substitute for voir dire examination."). In the present case, the circuit court engaged in a lengthy, methodical, searching, and exhaustive voir dire lasting two days and covering roughly four hundred eighty-seven pages in the record A.R. Vols. 7, 8.

Furthermore, the Petitioner contends the circuit court ignored the huge number of people involved in the search and recovery efforts and investigation by law enforcement. Pet'r Br. at 25. He also contends that the circuit court failed to consider that the magistrate expressed concern with the Petitioner's safety in setting bond. A.R. Vol. 20 at 5. However, the search for Aliayah had occurred some five years before trial and the preliminary hearing occurred on November 16, 2016, A.R. Vol. 20 at 1, again well before trial. The events to which the Petitioner points were concluded well before trial and have no bearing on a change of venue.

For the foregoing reasons, the Petitioner's conviction should be affirmed.

E. The State did not engage in any burden shifting argument.

In its opening statement, the State stated to the jury, "[t]he fact that a murderer may successfully dispose of the body of a victim does not entitle him to an acquittal. That's a quote that I'd like for you to consider and keep in the back of your mind [sic] during the next couple of weeks as you listen to all the evidence that's presented here." A.R. Vol. 9 at 22.[5] This drew no objection.

In closing, the State again argued to the jury, "I only want to leave you with one thought. Remember at the beginning of this trial and I asked you to remember that quote and try to keep it in the back of your mind. And I want to read that quote again. 'The fact that a murderer does successfully dispose of the body of the victim does not entitle them to an acquittal.'" A.R. Vol. 14 at 95. The following then ensued:

> T. DYER: Your Honor, can we approach?
>
> THE COURT: You may.
>
> (Counsel at bench side.)
>
> T. DYER: I didn't want to say this while she was speaking; but I'm going to put an objection on the record just to preserve the record just to the extent that that could be construed as a burden shifting argument; the last quote. I'm just afraid it may be - - and I will preserve the record. I'll move - - well, I'll move 'em to strike and I'll move a mistrial based upon that.
>
> I need to preserve the record.
>
> THE COURT: (Inaudible.)
>
> T. DYER: Well, yeah.
>
> THE COURT: (Inaudible).
>
> T. DYER: Has she successfully disposed of the body?
>
> THE COURT: (Inaudible.)

[5]The quotation is apparently taken from *People v. Manson,* 139 Cal. Rptr. 275, 298 (Ct. App. 1977) ("The fact that a murderer may successfully dispose of the body of the victim does not entitle him to an acquittal.").

T. DYER: Sure.

THE COURT: Inaudible.

T. DYER: That's what she said. And I - - .

THE COURT: (Inaudible.) I'll note your objection and exception for [sic] the Court's ruling (inaudible.)

A.R. Vol. 14 at 95-96.

The decision of a circuit court to grant or deny a mistrial is reviewed for abuse of discretion only. *State v. Thornton*, 228 W. Va. 449, 462, 720 S.E.2d 572, 585 (2011) (per curiam) ("We review the trial court's decision to not grant a mistrial under an abuse of discretion standard."); *State v. Lowery*, 222 W. Va. 284, 288, 664 S.E.2d 169, 173 (2008) (per curiam) ("The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard."). There was no abuse of discretion in this case.

Under Syllabus point 4 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.

1. *The State's argument did not mislead the jury nor prejudice the Petitioner.*

Here, the State's quotation was not burden shifting so the jury was not misled nor the Petitioner prejudiced. "It is well established that 'prosecutors must refrain from making burden-shifting arguments which suggest that the defendant has an obligation to produce any evidence or to prove innocence.'" *United States v. Saint Louis*, 889 F.3d 145, 156 (4th Cir. 2018) (quoting *United States v. Simon*, 964 F.2d 1082, 1086 (11th Cir. 1992)). The State's quotation did not,

however, impose any burden on the Petitioner, as it did not suggest the Petitioner had an obligation to produce evidence or prove innocence; it merely pointed out an almost nigh indisputable legal proposition that the failure of the State to produce a body is not a bar to a murder conviction. "It is well-established that murder can be proven in the absence of a body." *State v. Nicely*, 529 N.E.2d 1236, 1239 (Ohio 1988). *See also State v. Edwards*, 767 N.W.2d 784, 796 (Neb. 2009) ("it is well recognized that the body of a missing person is not required to prove the corpus delicti for homicide.). "Historically, the production of the body of a missing person was generally not required under the common law in order to establish the corpus delicti for homicide." *Gov't of Virgin Islands v. Harris*, 938 F.2d 401, 411 (3d Cir. 1991). "One rationale provided for the 'no-body-required' rule is that a murderer should not be entitled to acquittal simply because he successfully disposes of a victim's body. *Id.* at 415. *See also Edwards*, 767 N.W.2d at 796 ("To require that the victim's body be discovered would be unreasonable; it would mean that a murderer could escape punishment by successfully disposing of the body, no matter how complete and convincing the other evidence of guilt."); *State v. Lung*, 423 P.2d 72, 76 (Wash, 1967) ("To require direct proof of the killing or the production of the body of the alleged victim in all cases of homicide would be manifestly unreasonable and would lead to absurdity and injustice.").

Moreover, the circuit court instructed the jury, "[t]he burden is on the State of West Virginia to prove the guilt of the defendant beyond a reasonable doubt. The defendant is not required to prove her innocence." A.R. Vol. 14 at 74. The circuit court further instructed the jury, "The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts - - shifts to a defendant for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence." A.R. Vol. 14 at 75. Jurors are presumed to follow their instructions, *United States v. Johnson,* 587 F.3d 625, 631 (4th Cir.

2009), so the circuit court's instructions mitigated any prejudice that could have conceivably arisen. The State's quotation does not satisfy *Sugg*.

2. The remarks by the State were relatively isolated.

The State's quotation was employed once in the State's opening (where it was not objected to), A.R. Vol. 9 at 22, and once in the State's closing. A.R. Vol 14 at 95-96. The State's opening statement comprises roughly seven pages, A.R. Vol. 9 at 22-28, and nine pages of closing. Vol 14 at 87-96. The remarks were relatively isolated. *See, e.g., United States v. Reed*, 925 F.2d 1458 (4th Cir. 1991) (Table) (Text available at 1991 WL 18454) (finding that two remarks in seventeen pages of closing argument "were therefore isolated and not extensive"); *United States v. Villanueva*, 746 F. App'x 840, 848 (11th Cir. 2018) ("The statement was isolated and minimal—only two sentences in eight pages of the government's closing argument during a four day trial."). The State's quotation does not satisfy *Sugg*.

3. *The State's case against the Petitioner.*

The State produced eyewitness testimony from D.C. and K.C. as to the Petitioner striking Aliayah and disposing of the body. The Fourth factor in *Sugg* is not satisfied.

4. The State's quotation did not divert the jury's attention to extraneous matters.

Finally, the State's quotation did not divert the jury's attention to extraneous matters. In the present case, the Petitioner was charged with murdering Aliayah. The State did not have a body. That was also irrelevant as the State need not produce a body to sustain a criminal conviction. *See, e.g., Edwards v. Commonwealth*, 808 S.E.2d 211, 217 & n.4 (Va. Ct. App. 2017) (recognizing the majority rule that the prosecution need not produce a victim's dead body to obtain a murder conviction). The State's quotation did not serve to divert the jury to extraneous matters, but was

consistent with the law and dealt with a crucial issue in the case—explaining to the jury that the absence of a body is not a bar to a prosecution or conviction.

The Petitioner's conviction should be affirmed.

F. The Petitioner has not demonstrated plain error regarding the Petitioner's statement.

During his testimony, Sergeant Loudin testified on direct examination:

> Q. And after you were unable to recover the body; what did you do next?
>
> A. It was at that point we - - that's when we obtained the arrest warrant and traveled to Florida. Down there we were met with some investigators and detectives on special units that they had - -; myself and First Sergeant Wolfe and - - Joe Moran - - Deputy Joe Moran with the Lewis County Sheriff's Department traveled to Florida - -. When we approached the residence I stayed back behind. They - - just in fear that - - that [the Petitioner] wouldn't have answered the door if she saw me. She hadn't seen anybody else. And she - - when she answered the door and I stepped around the corner she actually stated "Oh my God, did you find Aliayah? Am I in trouble?" And that was a very shocking statement to me that after all this time; am I in trouble was her first question - - or second question to be asked. And at that point she of course asked to contact her attorney and we placed her under arrest and transported her back to West Virginia.

A.R. Vol. 10 at 90-91.

The Petitioner acknowledges that her trial counsel did not object to this testimony. Pet'r Br. at 28. She, therefore, relies on plain error. This case is not suitable for plain error review.

In order "[t]o trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). "The exercise of the power to reverse under plain error is permissive, not mandatory." *State v. Marple*, 197 W. Va. 47, 54, 475 S.E.2d 47, 54 (1996). "By its very nature, the plain error doctrine is reserved for only the most flagrant errors." *State ex rel. Games-Neely v. Yoder*, 237 W. Va. 301, 310, 787 S.E.2d 572, 581 (2016). Therefore, the "plain error doctrine

should be used 'sparingly[.]'" *State v. Woodson*, 222 W. Va. 607, 614, 671 S.E.2d 438, 445 (2008) (per curiam) (quoting Syl. Pt. 2, in part, *State v. Thompson,* 220 W.Va. 398, 647 S.E.2d 834 (2007)).

The Petitioner claims both rules based and constitutional violations. Pet'r Br. at 31. Her claims, though, are interrelated. Specifically, she cites this Court's "traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal procedure" which is "(1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case." Pet'r Br. at 31 (quoting Syl. Pt. 1, *State v. Adkins*, 223 W. Va. 838, 679 S.E.2d 670 (2009) (internal citation omitted)). The Petitioner then claims she was hampered in her case preparation "because she was entirely deprived of her constitutional right to have the State prove the statement's voluntariness and compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966). Pet'r Br. at 31. The Petitioner's argument is without merit.

The Petitioner concedes "the constitutional issues are impossible to determine based on the information in the record." Pet'r Br. at 31-32. This admission is fatal to her plain error claim. "The plain error rule presupposes that the record is sufficiently developed to discern the error." Syl. Pt. 7, in part, *State v. Spence,* 182 W. Va. 472, 388 S.E.2d 498 (1989). Because the Petitioner admits the record is insufficiently developed to address her claims, this Court should not address her claims.

The Petitioner's convictions should be affirmed.

G. The Petitioner's pro-se motions were untimely and the circuit court did not abuse its discretion in refusing to address them.

After verdict, the Petitioner filed a number of post-verdict motions with the circuit court. A.R. Vol. 1 at 166-235. These motions were filed by the Petitioner herself and not by her counsel. The

circuit court found the motions to be untimely and declined to consider them. A.R. Vol. 18 at 6-7. The circuit court reaffirmed its timeliness ruling and additionally concluded that there was nothing in the motions which "shocks the conscience of the Court[.]" A.R. Vol. 19 at 5. "The question of whether a new trial should be granted is within the discretion of the trial court and is reviewable only in the case of abuse." *State v. Crouch*, 191 W. Va. 272, 275, 445 S.E.2d 213, 216 (1994)

West Virginia Rule of Criminal Procedure 33 provides, in pertinent part, "[a] motion for a new trial based on any other grounds shall be made within ten days after verdict or finding of guilty or within such further time as the court may fix during the ten-day period." The circuit court did not abuse its discretion in finding the Petitioner's uncounseled motions untimely.

Moreover, the Petitioner's entire argument regarding her pro-se motions in her appeals brief is:

> The Petitioner's pro se motions cover a significant number of issues, ranging from misconduct by the prosecutor and law enforcement, to suppression of evidence, to double jeopardy. Some of the issues in those motions have been asserted in this appeal; however, some of the issues are so fact-intensive that there is not a sufficient record to raise the issues without an evidentiary hearing taking place in circuit court. Accordingly, the Petitioner respectfully requests that this matter be remanded for additional development of the record on those matters.

Pet'r Br. at 33-34. Such an "argument" does not preserve the issue for review before this Court.

"An appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment." Syl. Pt. 5, *Morgan v. Price*, 151 W. Va. 158, 150 S.E.2d 897 (1966). Thus, this Court has "said many times that '[a] skeletal argument, really nothing more than an assertion, does not preserve a claim. . . Judges are not like pigs, hunting for truffles buried in briefs.'" *State v. Ladd*, 210 W. Va. 413, 424 n.1, 557 S.E.2d 820, 831 n.1 (2001) (citation omitted).

The Petitioner's appeal brief fails to argue how the circuit court abused its discretion in denying a new trial. Indeed, the Petitioner's appeal brief does not argue in any way that the Petitioner's pro-se motions had any merit at all. As such, the Petitioner has waived appellate review of her pro-se motions.

The Petitioner's convictions should be affirmed.

H. There is no error in this case so there is no cumulative error.

The Petitioner claims she is entitled to relief based upon cumulative error. Where, as in the present case, there is no error, the cumulative error doctrine has no applicability. "[C]umulative error doctrine has no application when there is no error." *Foster v. Ballard*, No. 16-1000, 2017 WL 4570571, at *4 (W. Va. Oct. 13, 2017) (memorandum decision) (citing *State v. Trail*, 236 W.Va. 167, 188 n.31, 778 S.E.2d 616, 637 n.31 (2015)).

The Petitioner's convictions should be affirmed.

I. The omissions in the voir dire transcript did not prejudice the Petitioner.

This Court has held, "[o]missions from a trial transcript warrant a new trial only if the missing portion of the transcript specifically prejudices a defendant's appeal." Syl. Pt. 5, *State v. Graham*, 208 W. Va. 463, 466, 541 S.E.2d 341, 344 (2000). The Petitioner contends that she was denied an adequate voir dire transcript due to omissions of bench conferences from the transcript that occurred during voir dire. The Petitioner asserts in her brief that she "is essentially deprived of a record concerning the voir dire of five persons who actually served on the jury, in a highly publicized case in which jury selection was a critical process." Pet'r Br. at 36. However, the Petitioner's trial counsel never filed any objections or made any motions to strike the five jurors about which the Petitioner now complains on appeal. The five Jurors were Cool, Melton, Petre, Neely, and Mullins. Pet'r Br. at 34-35. The Petitioner never offered any objection to Juror Cool

A.R. Vol. 7 at 110; Vol. 8 at 149. Likewise, the Petitioner offered no objection to Juror Melton. A.R. Vol. 7 at 131; A.R. 8 at 197-98. Similarly, the Petitioner's trial counsel offered no objection to Juror Petre. A.R. Vol 7 at 190. Likewise, the Petitioner offered no objection to Ms. Neely. A.R. Vol. 7 at 151; Vol. 8 at 29. Finally, the Petitioner's trial counsel offered no objection to Juror Mullins. A.R. Vol. 8 at 265.[6]

"When a defendant has knowledge of grounds or reason for a challenge for cause, but fails to challenge a prospective juror for cause or fails to timely assert such a challenge prior to the jury being sworn, the defendant may not raise the issue of a trial court's failure to strike the juror for cause on direct appeal." Syl. Pt. 5, *State v. Tommy Y.*, 219 W. Va. 530, 637 S.E.2d 628 (2006). Had the Petitioner timely objected to Jurors Cool, Melton, Petre, Neely, or Mullins and such objection was denied by the circuit court, the Petitioner could conceivably have a point. The absence of a record would prejudice her case. Instead, she did not object to any of the named jurors prior to the jury being sworn and has, therefore, waived any objection to these jurors sitting on her case. As such, any omissions from the voir dire transcript could not prejudice her because the Petitioner has waived any argument that the jurors should have been struck by not objecting at the time of trial.

The Petitioner's convictions should be affirmed.[7]

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[6]Juror Mullins was actually an alternate Juror. A.R. Vol. 8 at 268. Juror Mullins was excused at the end of the trial and did not deliberate. A.R. Vol. 14 at 122-123.

[7]The Petitioner also contends that her right to file for collateral review could be impacted by the omissions in the voir dire transcript. Pet'r Br. at 36. However, as noted in Syllabus Point 8 of *Graham*, "[o]missions from a trial transcript warrant a new trial only if the missing portion of the transcript specifically prejudices a defendant's appeal." *Graham* says nothing about prejudice to post-conviction collateral attacks, only to direct appeals. Moreover, since the Petitioner has not sought collateral relief, any speculation on his part about what a future collateral attack might hold is just that—speculation. As such, the claim is not yet ripe, *see, e.g., Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997) ("The ripeness doctrine protects federal courts from engaging in speculation . . . ."), and this Court may not address unripe

CONCLUSION

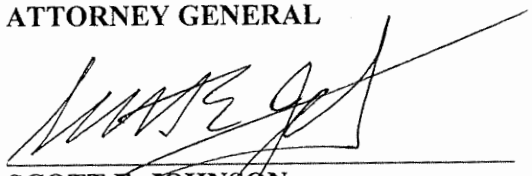
For the foregoing reasons, the Petitioner's convictions should be affirmed.

Respectfully submitted,

State of West Virginia,
Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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claims. *See* Syl. Pt. 3, *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 801 S.E.2d 216 (2017) ("Subject matter jurisdiction does not exist over claims that are not ripe for adjudication.").

CERTIFICATE OF SERVICE

I, Scott E. Johnson, Assistant Attorney General and counsel for the Respondent, State of West Virginia, do hereby certify that I served the foregoing *Respondent's Brief* upon counsel for the Petitioner on this 18th day of March, 2019, by depositing a true and correct copy thereof in the United States Mail, first class postage prepaid, addressed as follows:

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SCOTT E. JOHNSON
ASSISTANT ATTORNEY GENERAL

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

vs.) No. 18-0851

LENA MARIE CONAWAY,
Defendant Below, Petitioner.

(An appeal from a final order of the Circuit Court of Lewis County, Case No.: 17-F-12)

PETITIONER'S REPLY BRIEF

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7. The Circuit Court erred by failing to give sufficient consideration to the Petitioner's pro se post-trial motions.

8. The Circuit Court erred cumulatively to the prejudice of the Petitioner.

9. The Petitioner is entitled to a new trial as a result of omissions from the jury selection and trial transcripts caused by the failure of the court reporting equipment to capture certain critical exchanges.

STATEMENT CONCERNING ORAL ARGUMENT AND DECISION

The Petitioner asserts that this matter is appropriate for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, owing to the constitutional scope of the assignments of error in this appeal. Alternatively, this matter is appropriate for oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, due to a result contrary to the evidence.

ARGUMENT

In this Reply Brief, the Petitioner stands on the argument previously asserted regarding the Fourth, Fifth, Seventh, and Eighth assignments of error. The Petitioner asserts additional argument on the First, Second, Third, Sixth, and Ninth assignments of error as set forth below.

1. There was insufficient evidence to sustain Counts One, Two, and Four of the Indictment. (First Assignment of Error)

A. There was insufficient evidence of the necessary intent and causation on Count One.

Without explicitly conceding the issue, the Respondent does not appear to contest that a significant portion of the evidence actually adduced and argued by the State in support of its theory of the case – that the Petitioner failed to obtain medical care for A.L. after allegedly finding her dead in the morning – actually has no bearing on the Petitioner's guilt for Count One. Instead, the Respondent refers to certain trial testimony in support of the proposition that there was sufficient evidence of the Petitioner's intent to kill A.L. by withholding medical care. The only portion of the testimony that could possibly be relevant to whether she could have formed this intent is the testimony surrounding her mental state after the point in time that A.L. began to require medical care, i.e., after the Petitioner supposedly hit her with the bed slat.

The entirety of the what the Respondent cites concerning the Petitioner's conduct following hitting A.L. with the bed slat, and A.L.'s resulting injuries, is contained on pages 39-44 of the first day of trial (A.R.9.), during the testimony of D.C.[1] Respondent's Brief, at 14-15. The first relevent excerpt is as follows:

> [D.C]: Well, I remember sometime in the evening, we were in the living room - - my older sister and I and there was commotion in the corner with our mom and [A.L.] and - - she'd get in trouble and

1 The Respondent also cites to p. 38 concerning the Petitioner's alleged disciplinary practices, and to p. 65, which contains duplicative testimony by D.C. about the Petitioner striking A.L.

> [A.L.] was crying and whatnot and so I ran to the hallway where you could see the corner - - both [A.L.] and our mom standing there and - - she was getting in trouble and our mom took a piece of a broken bed board slat and hit her over the head. And [A.L.] fell.
> Q. So [A.L.] was in the corner?
> A. Yes.
> Q. And you actually saw your mom pick this object up?
> A. Yes.
> Q. And where did she hit [A.L.]?
> A. On the top of the head. Like right here.
> Q. In the back? And what happened to [A.L.] after she got hit?
> A. She fell and - - mom got really frustrated that she wouldn't stand up right then and there. And she kept telling her to get up; but she wouldn't. And eventually she said fine, just stay there.

A.R.9., at 39-40. After this exchange, there was discussion concerning the bed slat itself and the layout of the house. Thereafter, the following testimony took place:

> Q. Do you remember what your mom did after she left Aliayah in the corner?
> A. I think she just went into her bedroom. Not really.
> Q. Did your or Kiara approach Aliayah to see - - ?
> A. We - - we asked her hey, are you okay, baby? You know. But then later on whenever she went to bed, our older sister, Kiara, she helped her into her room. And we asked her if she was okay and everything. And we felt the back of her head and it felt squishy - - like she had hurt it. And - - she was complaining and then she said that her head felt like it was going to explode. So my older sister, she gave her some type of medicine or vitamins to make her feel better. And - - then we - - you know, got her situated in bed and we said just go to sleep. You'll - - you know. And then we went to our mom and said that she hurt her really bad and she said that she didn't care.
> Q. So she wouldn't even go check on her?
> A. Yeah.

A.R.9., at 43-44.

Thus, the Respondent's position seems to be that the intent to kill A.L. by deprivation of medical care, and the related criminal causation of her death, is manifested by the above-described testimony. That is simply not enough to support a conviction. The State's evidence was that the Petitioner routinely struck A.L. with this slat, and that she attempted to resuscitate A.L. upon finding her in the morning. (A.R.9., at 40-41, 45). Only taken in isolation does even a single portion of the sisters' testimony suggest, in the most speculative manner, that the Petitioner devised an intent to kill A.L. not when she struck her, but after

she struck her. There is also no evidence that the Petitioner would have possessed information that A.L. was on death's door as opposed to suffering a non-fatal injury. The reason that the State's case hangs on so thin a thread is, of course, that the State focused its rhetorical case on the failure of the Petitioner to obtain medical care after she had allegedly found A.L. dead, fully misapprehending the case it had to prove.

Moreover, as the Petitioner demonstrated in the Petitioner's Brief, pages 10-12, the State must prove not only that the Petitioner intended to cause the death, but that the intent was paired with proof of causation that the intended course of conduct *actually resulted in the death*. There was no competent evidence put forth to support that prospect; in fact there was no medical evidence offered, to any degree of proof, about whether or not getting medical care faster would have made a difference. This is, of course, tied to the proof of the second element of corpus delicti – that the death must have actually been caused by criminal conduct. The State did not and cannot prove, to the applicable legal standard, that the criminal conduct of deprivation of necessities actually caused A.L.'s death.

In *State v. Thornton*, 228 W.Va. 449, 720 S.E.2d 572 (2011), which was cited in the Petitioner's brief and involved the child neglect resulting in death statute, this Court upheld a verdict against a challenge of insufficiency relating to whether getting medical treatment sooner would have saved an injured child. In that case, there were four conflicting medical experts, and this Court determined that there was sufficient evidence despite the conflicts to uphold the verdict. Compare that to the instant case, in which there was no one whatsoever to testify about cause of death in the first place, let alone whether bringing the child to the hospital at the earliest opportunity would have actually made a difference.

This Court discussed *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005) in *Thornton*. This court apparently distinguished *Muro* (which the Petitioner cited in the Petitioner's Brief at p. 10), in which the medical evidence was that there was a "reasonable

likelihood" that a child would have survived with earlier medical intervention (resulting in a reversal due to insufficiency), from the facts in *Thornton,* in which this Court upheld the conviction. The instant case, however, does not even come close to the level of proof adduced in either of those cases. Nowhere did the Respondent address the lack of medical testimony to support that the causation of A.L.'s death was via criminal agency in general, or failure to provide medical care in particular.

The Respondent does discuss Trooper Loudin's testimony regarding his own lay theories (A.R.10., at 98-99). Respondent's Brief, at 8. However, in addition to what was cited by the Respondent, Trooper Loudin acknowledged that there was no evidence of cause of death beyond the narrative told by A.L.'s sisters. (A.R.10., at 97-98). He testified that it was not possible to ascertain the force of the strike or the severity of the injury from the bed slat. (A.R.10., at 101-02). He further testified that there was no way to account for the actions of the Petitioner's ex-husband during the evening. (A.R.10., at 102). Trooper Loudin further admits that there is no way to rule out whether A.L. was simply sick (as reported by K.C.) and aspirated on her own vomit. (A.R.10., at 102-03, 105). He acknowledges that because there would be no way of knowing at what point in the night the aspiration of vomit would have taken place, that there was no way of knowing whether seeking medical care would have made a difference. (A.R.10., 104). He does not dispute the characterization that relying on the sisters' stories to determine the cause of death is a "leap of faith". (A.R.10., 107).

Simply put, the case against the Petitioner lacks any competent medical testimony concerning causation of death, and even the lay testimony that the State attempted to substitute is equivocal to the point that it cannot support the verdict on Count One.

B. The evidence surrounding the first element of the corpus delicti, that A.L. is dead, is physically impossible and qualifies as inherently incredible.

The Respondent contends that the evidence at trial concerning the disposal of A.L.'s body does not defy physical laws, and is therefore not subject to analysis as "inherently incredible." Respondent's Brief, at 17. The Petitioner asserts that the events described by K.C. and D.C. on the morning during which the State alleges that the Petitioner disposed of A.L.'s body cannot possibly have happened.

Trooper Loudin testified that video evidence indicated that the Petitioner's van left the neighborhood of the Petitioner's home at 9:17 A.M. (A.R.10., at 37). He also does not dispute that K.C. claimed to accompany the Petitioner, who was eight and a half months pregnant with twins, for 1,500 yards through the woods before the Petitioner disposed of the body herself a little ways further in. (A.R.10., at 108). Witness Mary Arbogast testified that she gave gas to the Petitioner at 9:30-10:00 A.M. (A.R.11., at 69). Witness Brittany Helmick testified that she saw the Petitioner putting gas in her van. (A.R.11., at 71). K.C. and D.C. both testified that the Petitioner's van ran out of gas *on the way back* from from disposing of the body.[2] (A.R.9., at 46; A.R.13., at 15). Thus, based upon the testimony propounded at trial, the Petitioner would have had between 13 and 43 minutes to travel from Bendale to Vadis, to walk a total of over 3,000 yards, half of it with a basket containing a child's body, conceal the body in some manner, and then travel back from Vadis to back near her home when she ran out of gas.

This proposition is absolutely preposterous. Yet those are the facts. Another sequence in the State's narrative is similarly bogus. K.C. and D.C. both testified that the Petitioner cleaned up the house after returning home, and before calling 911. (A.R.9., at 46, 48; A.R.13., at 17). K.C. also testified that the Petitioner stopped to talk to her ex-husband

2 The Circuit Court specifically found that the Petitioner obtained gas on the way back from Vadis in denying the Petitioner's motion for judgment of acquittal. (A.R.14, at 6).

on the way home. (A.R.13., at 16-17). Witness Kenneth Stout testified that he saw the Petitioner talking to her ex-husband, from his shop across from the DOH building. (A.R.11., at 64-65). The Petitioner's ex-husband testified that the Petitioner pulled up to talk with him. (A.R.11., at 46). Trooper Loudin testified that video evidence showed the Petitioner speaking with her ex-husband near the DOH building at 11:27 A.M. (A.R.10., at 46). The Petitioner called 911 at 11:31 A.M. (A.R.2., at 10). Thus, according to K.C. and D.C., the Petitioner would have had four minutes to go back to the house, get the baby and the kids out of the car, unlock the door (A.R.11., at 45), enter the house, bleach the bed, and clean up the counter with such vigor that no fornesic evidence was located, before concocting a false narrative to K.C. and D.C. so they could keep their stories straight, and then, only then, calling 911. (A.R.9., at 46). Again, the accounts of the sisters simply do not correspond to verifiable reality. Their testimony is, indeed, inherently incredible, and should fail as proof of the death of A.L. For this reason, the Petitioner's convictions should be reversed on Counts One, Two and Four.

2. The Petitioner's double jeopardy claim was properly preserved and asserted, and is valid on the merits. (Second Assignment of Error)

The Respondent contends that the Petitioner waived this argument by failing to raise it below, stating that "[t]he Petitioner does not show in her brief where she raised this claim before the circuit court". Respondent's Brief, at 10. However, the Petitioner did reference where double jeopardy was raised in the trial court. It was raised in the Petitioner's pro se post-trial motions (A.R.1., at 201-208), as discussed in the Petitioner's Brief:

> The Petitioner's pro se motions cover a significant number of issues, ranging from misconduct by the prosecutor and law enforcement, to suppression of evidence, to double jeopardy. Some of the issues in those motions have been asserted in this appeal[.]

Petitioner's Brief, at 33-34. Thus, the requirements of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure are satisfied, and this Court may consider the claim on the

merits.

The Respondent further contends that the double jeopardy claim is meritless because of the existence of two respective elements, which the Respondent characterizes as requiring proof of a fact that another does not:

> West Virginia Code § 61-8D-2a(a) requires the parent to cause the death, which is not an element of West Virginia Code § 61-8D-3(b). West Virginia Code § 61-8D-3(b) requires serious bodily injury which is not an element of West Virginia Code § 61-8D-2a(a). Because each statutory provision requires proof of a fact the other does not, there is no double jeopardy violation.

Respondent's Brief, at 22.

There are several major problems with the Respondent's analysis on this issue. Both statutes clearly require parental causation, so that cannot be what the Respondent objects to. The question comes down to whether proof of "serious bodily injury" is wholly contained within "death". The Petitioner maintains that there is no scenario in which "bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ," as defined in W. Va. Code § 61-8B-1(10) is not contained wholly within proof of death. "Bodily injury" itself is defined in W. Va. Code § 61-8B-1(9) as "substantial physical pain, illness or any impairment of physical condition."

"Death" is nothing if not a "bodily injury" (impairment of physical condition), which creates a "substantial risk of death" (a 100% risk being a substantial risk), "serious or prolonged disfigurement" (the total disfigurement of decomposition), "prolonged impairment of health" (eternal impairment of health), or "prolonged loss or impairment of the function of any bodily organ" (total and irrevocable loss of the function of all bodily organs). To hold that "serious bodily injury" or other forms of bodily injury are not contained within the definition of death would be an absurd result.

The closest case on this issue is *State v. McDaniel*, 238 W.Va. 61, 792 S.E.2d 72 (2016), which is clearly distinguishable to this instant case. In *McDaniel,* the appellant complained that child neglect creating risk of serious bodily injury[3] should be deemed a lesser included offense of child neglect resulting in death.[4] This Court denied relief in that case. While on its face this would seem a strong analogy to this instant case, *McDaniel* turned on a factor not present in the Petitioner's claim: the fact that the alleged lesser-included offense had "gross neglect" as an element, while the alleged greater offense merely required "neglect". When viewing the syntax of the two statutes in the instant case, it is clear that there is no gradation of levels of abuse, as there was in *McDaniel*. Consequently, the Petitioner's double jeopardy claim should succeed where *McDaniel*'s failed.

3. Dr. Wright's opinion was exculpatory, was not available to the Petitioner through other sources, and was not waived. (Third Assignment of Error)

The Respondent contends that this court should deny relief on the Petitioner's claim of suppressed exculpatory evidence, pursuant to *Brady v. Maryland*, 373 U.S. 83, for three reasons. Respondent's Brief, at 24-25. First, it is claimed that Dr. Wright's opinion was not exculpatory. Second, it is claimed that the Petitioner could have obtained the evidence from another source. Third, it is claimed that the Petitioner waived the error by failing to request a continuance or limiting instruction during trial. Each of these reasons is inapplicable.

First, the evidence is clearly exculpatory. It was incumbant upon the State to prove cause of death. Dr. Wright informed the Petitioner's trial counsel, upon inquiry after the trial, that it would be impossible to testify to a reasonable degree of medical certainty about the cause of death, which tends to make it less likely that the State could prove its case against the Petitioner. Dr. Wright also stated that an alternative theory of death, aspiration of vomit, was plausible. (A.R.18, at 26-29). The State justified its non-disclosure by opining that

3 W. Va. Code §61-8D-4(c)
4 W. Va. Code §61-8D-4a

because Dr. Wright did not deem it outright impossible for a blow to the head to cause A.L.'s death, the material was not exclupatory. Respondent's Brief at 23.

It is not up to the State to determine when exculpatory evidence becomes exculpatory enough. The State's position would seem to be that only evidence that unequivocally exonerates a defendant is subject to disclosure. This is clearly not the law. In *Buffey v. Ballard*, 782 S.E.2d 204 (2015), the State attempted to justify its non-disclosure of evidence helpful to Mr. Buffey[5] on that precise basis, and this Court rejected that line of reasoning:

> In response, the State contends the DNA testing results were inconclusive and therefore not actually favorable to the Petitioner. However, the State's "argument ... confuses the weight of the evidence with its favorable tendency." *Kyles*, 514 U.S. at 451, 115 S.Ct. 1555. Indeed, the State could have adopted a trial strategy focusing upon the inconclusiveness of the DNA results and/or the possibility that the Petitioner was present even if someone else committed the sexual assault. Such potential trial strategy, however, does not negate the critical nature of the fact that the Petitioner could have utilized the DNA evidence to support a theory of innocence. Because we find the DNA evidence was favorable, the first element of a Brady violation is established.

Buffey v. Ballard, 782 S.E.2d 204, 219 (W. Va., 2015). This evidence was clearly of an exculpatory nature, and it was misconduct by the State for it not to have been disclosed pretrial.

The Respondent's second line of reasoning regarding the availability of evidence by other means is also meritless. At the outset, the Respondent has cited to no West Virginia case in support of this proposition that availability of evidence by other sources defeats the State's duty to disclose. *United States v. Wilson*, 901 F.2d 378 (4th Cir. 1990), which the Respondent cites at p. 24 of his brief, involves a case in which a defendant had the opportunity to interview a witness pretrial, but neglected to do so. The Fourth Circuit denied relief because the defendant knew of the identity of the witness in question and was entirely free to learn the information in the witness's possession. *Id.*, at 381. That is clearly not the

5 Represented, incidentally, by the same trial counsel as the Petitioner in the case below.

case in the instant case, in which the Petitioner was not given any information about the State having consulted with Dr. Wright whatsoever prior to trial, and no information concerning the nature of his opinions until after trial. If the State had informed the Petitioner that it had consulted Dr. Wright, and invited the Petitioner to do the same, then the situation would be analogous to *Wilson*. Clearly it is not. In *United States v. Trevino*, 89 F.3d 187 (4th Cir. 1996) this rule was stated in the context of whether or not a defendant should be entitled to unseal a witness's presentence investigation report. The point of the 4th Circuit's use of that rule in *Trevino* was to limit the circumstances in which exculpatory material could be requested from an otherwise confidential document as opposed to other sources. It is wholly inapposite to this case.

The reasoning relied on by the Respondent is that because the Petitioner had consulted her own physician, who had produced a similar opinion, the State's suppression of similar information may therefore be excused. However, this reasoning ignores that there would be enhanced persuasive value to being able to cross-exmaine Trooper Loudin about the nature of his inquiry with Dr. Wright, which would not exist for the Petitioner's own witness. The non-disclosure of Dr. Wright's report, unlike any similar report that was within the Petitioner's possession, clearly prevented the Petitoner from being able to extract an admission from Trooper Loudin that his own preferred physician could not scientifically opine in support of the cause of death, which the burden was upon the State to prove.[6]

Finally, the Respondent, without citing to any authority other than the prosecutor's own argument below, suggests that the Petitioner should have sought to continue the trial or moved to strike the testimony concerning Dr. Wright, and by not doing so waived this ground. This argument ignores the fact that the Petitioner had no information suggesting that there had been a *Brady* violation until after trial, when trial counsel personally interviewed

6 It should be noted Trooper Loudin's practice of suprising the defense with undisclosed information at trial is the basis for not one, but two assignments of error in this appeal. See also the Sixth Assignment of Error.

Dr. Wright. The Petitioner thereafter sought relief for the violation. (A.R.1., 149-154). Instead of requiring the State to fulfill its constitutional obligations, the Respondent would have this Court set waiver traps whereby a defendant could give up the right to appeal an issue of government misconduct before the misconduct was even made apparent to the defendant.[7] The Petitioner has established a clear *Brady* violation, and is entitled to relief on this basis.

4. The Petitioner has satisfied the requirements for plain error review of State's use of an undisclosed alleged statement by the Petitioner. (Sixth Assignment of Error)

The Respondent's primary apparent opposition to the Petitioner's sixth assignment of error is that the Petitioner has failed to establish the elements for plain error review. It is telling that the Respondent offers essentially no rebuttal to this assignment of error on the merits. It is even more telling that the primary authority offered by the Respondent in support of denying plain error review is manifestly inapplicable to the facts of this case. The Respondent has latched onto the Petitioner's supposed concession that "the constitutional issues are impossible to determine based on the information in the record" as justifying the denial of plain error review on the basis of the principle stated in Syl. Pt. 7, in part, *State v. Spence,* 182 W. Va. 472, 388 S.E.2d 498 (1989), that "The plain error rule presupposes that the record is sufficiently developed to discern the error." Respondent's Brief, at 32.

The Respondent is engaging in rhetorical sleight of hand here. The record is entirely clear about what happened. Once again, Trooper Loudin suprised the Petitioner, for the first time at trial, with information that the Petitioner was entitled to be given in pre-trial discovery. (A.R.10., at 90-91). All statements were requested by the Petitioner. (A.R.1., at

7 The State would not have been under the obligation to disclose an inculpatory expert opinion it did not plan to use. Rule 16(a)(1)(E), Rules of Criminal Procedure; Rule 32.03(a)(11), Trial Court Rules. By suggesting that the Petitioner should have sought to continue the trial when Dr. Wright was mentioned, the Respondent is essentially suggesting that trial counsel waives a *Brady* claim when operating under the assumption that the State is actually complying with the law rather than hiding exculpatory evidence.

70). The statement was not disclosed pretrial. (A.R.1., at 94-108). It was not disclosed during the discussions between the parties on stipulated evidence. (A.R.1., at 109-11). The only thing that the Petitioner can't prove from the record is what would have happened at a suppression hearing, her right to which the Petitioner was entirely deprived. The reason there is no suppression hearing in the record, or any knowing waiver thereof, is because the State violated the rules regarding discovery[8], and induced the Petitioner to enter into an evidentiary stipulation based on information that was not, as it turned out, complete and accurate.

It is instructive to see what Syllabus Point 7 of *Spence*, upon which the Respondent's opposition to plain error review is based, actually says in totality, rather than being quoted in part [emphasis added]:

> 7. Where assignments of error are asserted on appeal, *but are not discussed*, in the absence of plain error, we will decline to address them. The plain error rule presupposes that the record is sufficiently developed to discern the error.

Id., Syl. Pt. 7.

The following is the context in which that rule was applied in *Spence* [footnotes omitted]:

> Similarly, the record does not contain a copy of the indictment which would enable us to address the defendant's claims of a defective indictment and a fatal variance between the indictment and the proof. We have in the past stated that where assignments of error are

8 Rule 32.03(a)(2) states:

> (a) Discovery from the State. Unless otherwise limited by the defendant, upon request by counsel for the defendant and at the discovery conference, the attorney for the State shall comply with the S tate's obligations under W.Va. R.Crim.P. 16, including, but not limited to, the following:
> [...]
> (2) with respect to oral statements made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a State or government agent:
> (a)provide that portion of any written record containing the substance of any such relevant oral statement made by the defendant; and
> (b)provide the substance of any other such relevant oral statement made by the defendant which the State intends to offer in evidence at the trial[.]

Clearly, the State failed to "provide the substance of any other such relevant oral statement made by the defendant wich the State intends to offer in evidence at the trial."

> asserted on appeal, but are not discussed, in the absence of plain error, we will decline to address them. The plain error rule presupposes that the record is sufficiently developed to discern the error.

Id., at 481.

This case has nothing in common with *Spence*. The Petitioner made five separate specific citations to the Appendix Record regarding the Sixth Assignment of Error, and eight distinct citations to authority. Petitioner's Brief at 28-33. In *Spence*, the appellant did not even include a copy of the indictment to support a claim of a defective indictment.

The Respondent notes that the "Petitioner claims both rules based and constitutional violations." Respondent's Brief, at 32. The Respondent states that the Petitioner's complaint of the deprivation of a suppression hearing is "without merit" but does not explain why. The Respondent does not discuss the clear violation of the applicable discovery rules at all. The Respondent does not discuss the fact that the State entered into a stipulation with the Petitioner regarding the admissibility of pretrial statements, which did not foresee or include the Petitioner's alleged Florida statement propounded at trial by Trooper Loudin. The Petitioner is entitled to a new trial on the basis of this assignment of error.

5. The Petitioner was prejudiced by the 244 distinct omissions in the jury selection transcript. (Ninth Assignment of Error)

The Respondent asserts that there could be no prejudice from the missing portions of the jury selection transcript because there were no objections or motions to strike made to any of the five jurors described in the Petitioner's Brief who participated in the unrecorded bench conferences. Respondent's Brief, at 34-35. The Respondent concedes that there would be prejudice if there had been an objection by trial counsel that was denied by the Circuit Court.

The Respondent's position understates the scope of the problem. First, it cannot be known for sure whether any objections were made to any potential jurors during the bench

conferences, as there is no way to know what was discussed. There may be objections contained in those missing bench conferences of which there is no record whatsoever. Additionally, even if there were no objections by trial counsel contained in the missing portions of the transcript, the Petitioner has the ability to request plain error review of decisions by the Circuit Court that were not properly preserved by trial counsel. This right is set forth in Rule 52(b) of the West Virginia Rules of Criminal Procedure, and accrues to appellants in the context of issues of a constitutional scope:

> 4. Although it is a well-settled policy that the Supreme Court of Appeals normally will not rule upon unassigned or imperfectly assigned errors, this Court will take cognizance of plain error involving a fundamental right of an accused which is protected by the Constitution.

Syl. Pt. 4, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975). The right to a trial by an impartial jury is clearly a constitutional right, under both the Sixth and Fourteenth Amendments of the United States Constitution, and Article III, Section 14 of the West Virginia Constitution. Irrespective of whether trial counsel properly preserved objections to any jurors who sat on the jury, the Circuit Court's conduct in jury selection is still subject to the scrutiny of this Court, and it is not now possible, nor will it ever be possible for any assessment to take place of the Circuit Court's decisions in those missing bench conferences.

Additionally, the Respondent asserts in Footnote 7 on page 35 of the Respondent's Brief that any claim concerning collateral review is not yet ripe in the context of this appeal, and therefore the fact that any future potential post-conviction habeas proceeding may be impaired by the incomplete transcript should not affect this Court's decision making at this juncture. Again, the Respondent underestimates the scope of review on direct appeal that the Petitioner has been prevented from exercising. Claims of ineffective assistance of counsel are a form of collateral attack which may be raised in the context of a direct appeal in narrow circumstances, when the ineffectiveness is clearly apparent from the record. Such claims

are, of course, strongly disfavored on direct appeal because of the absence of the sort of record that can be obtained in a post-conviction habeas proceeding. *See*, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992). Nevertheless, because such a claim is not wholly barred at this stage of the proceedings, it would not violate the ripeness doctrine, nor would it be otherwise procedurally inappropriate for this Court to weigh the impact that the impaired record has on the Petitioner's ability to make such a claim. The Petitioner is clearly entitled to a new trial based on the 244 distinct omissions from the jury selection transcript.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the Circuit Court, and remand this matter for the following relief:

1. Entry of a judgment of acquittal, or otherwise dismissing the matter with prejudice; or, in the alternative
2. A new trial;
3. Other proceedings concerning the Petitioner's pro se Post-trial motions; or
4. Any other relief the Court deems just and proper.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

vs.) No. 18-0851

(An appeal from a final order of the Circuit Court of Lewis County, Case No.: 17-F-12)

LENA MARIE CONAWAY,
Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

On this 8th day of April, 2019, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of this Petitioner's Brief to Scott Johnson, at 812 Quarrier Street, 6th Floor, Charleston, WV 25301, by U.S. Mail.

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vs.) No. 18-0851

L.M.C.,
Defendant Below, Petitioner.

(An appeal from a final order of the Circuit Court of Lewis County, Case No.: 17-F-12)

PETITION FOR REHEARING

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vs.) No. 18-0851

(An appeal from a final order of the Circuit Court of Lewis County, Case No.: 17-F-12)

L.M.C.,
Defendant Below, Petitioner.

PETITION FOR REHEARING

The Petitioner, L.M.C., by counsel, Jeremy B. Cooper, sets forth the following as her Petition for Rehearing, pursuant to Rule 25 of the West Virginia Rules of Appellate Procedure. Without waiving objection to this Court's denial of relief on any ground, the Petitioner asserts that this Court overlooked a critical issue pertaining to the first assignment of error in this matter.

A Petition for Rehearing may be granted in this Court's discretion, per Rule 25, when a party demonstrates that this Court has overlooked or misapprehended a point of fact or law. In this case the Petitioner asserts that the Court has overlooked the law cited in the briefs below regarding causation under the first count of the indictment, and omitted to render an opinion on the merits of that question, which is contained within the first assignment of error.

In her first assignment of error, the Petitioner asserted that there was insufficient evidence relating to the homicide counts in two different categories. First, the Petitioner asserted a failure of proof of the elements of the first count of the indictment: that the Petitioner intended to cause A.L.'s death by deprivation of medical care (Petitioner's Brief, at 6-11), and that her death was actually caused by the deprivation of medical care (*id.*, at 10-12). Second, the Petitioner challenged the evidence of the *corpus delicti:* that a death occurred at all (*id.*, at 12-

14), and that the death occurred as a result of a criminal transaction (*id.*, at 14-19).

In its memorandum opinion, this Court addressed three of those theories: the intent to cause death by withholding medical care, and both prongs of *corpus delicti* as established through the sisters' account of the circumstanaces surrounding A.L.'s death. However, this Court did not address the issue of whether there was sufficient evidence of causation that the death would not have occurred had the Petitioner not withheld medical care. The Petitioner believes that question remains unresolved in the memorandum opinion, and that she has been prejudiced by this Court having overlooked that particular issue, which would be dispositive in requiring her acquittal on the first count of the indictment.

As described in the Petitioner's Brief, on pages 10-12, and on pages 4-5 of the Petitioner's Reply Brief, unless it can be shown that A.L. would have survived had she actually been given medical care, then there is no way to uphold the conviction under the first count of the indictment. There was no evidence in the record whatsoever that actually providing medical care to A.L. would have prevented her death. The Petitioner asserts that this Court has simply overlooked this issue of causation under the first assignment of error, and that rehearing is the appropriate remedy so that the Court may suitably consider this issue, especially in light of its holding in *State v. Thornton*, 228 W.Va. 449, 720 S.E.2d 572 (2011), and the persuasive authority from other jurisdictions cited by the Petitioner, including *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005), which was distinguished in *Thornton*.

WHEREFORE, the Petitioner respectfully requests that this Court grant rehearing, schedule oral argument, grant the Petitioner relief on the first assignment of error, and grant any other relief the Court deems just and proper.

Respectfully submitted,

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Petitioner, by counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
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vs.) No. 18-0851

(An appeal from a final order of the Circuit Court of Lewis County, Case No.: 17-F-12)

L.M.C.,
Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

On this 27th day of August, 2020, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of this Petition for Rehearing to Scott Johnson, at 812 Quarrier Street, 6th Floor, Charleston, WV 25301, by U.S. Mail.

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IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

Case No. 17-F-12
Judge Jacob E. Reger

LENA MARIE LUNSFORD CONAWAY,

Defendant.

DEFENDANT'S MOTION TO SET ASIDE VERDICTS AND GRANT NEW TRIAL

Comes now the defendant, Lena Lunsford Conaway, by counsel and respectfully moves this Court to set aside the verdicts herein and to grant her a new trial on the grounds that the State suppressed or withheld exculpatory evidence from the defense in violation of *Brady v. Maryland,* 373 U.S. 83 (1963.)

In support of the foregoing motion, the defendant would offer the following:

At trial, Trooper Shannon Loudin testified that he had consulted with a pediatric trauma specialist, Dr. Mel Wright M.D., at WVU/Ruby Hospital regarding the cause-of-death issue in this case. Neither the identity nor any opinions or reports regarding Dr. Wright or the Trooper's meeting with Dr. Wright were ever provided or disclosed to the defense. Information regarding expert witnesses had previously and formally been requested from the State by the defense.

Soon following the trial, defense counsel tracked down Dr. Wright and met with him personally. The following was learned from that meeting:

1. Approximately one year ago, Dr. Wright was approached by Trooper Loudin and asked if he could possibly help in this case;
2. Dr. Wright indicated to Trooper Loudin that he would be happy to try;
3. Dr. Wright believes that there may have been another meeting/conversation or two with Trooper Loudin regarding the case but can not now be certain;
4. Trooper Loudin shared with Dr. Wright the State's theory regarding cause-of-death which was simply the story that had been recently shared with the investigators by the defendant's daughter, DL;
5. Dr. Wright has little, if any, memory of the details shared with him by Trooper Loudin. Dr Wright was not asked nor subpoenaed by anyone on behalf of the State to testify at trial.
6. Dr. Wright's testimony would have been that the story related by DL regarding the blow to AL's head by the defendant may have represented a plausible explanation for AL's cause-of-death but that it would be impossible to offer that opinion with any degree of medical certainty/reliability in the absence of having AL's body available to examine in order to determine the extent of the injuries she sustained by the blow to her head.
7. The doctor further shared with defense counsel that it was only fair of Trooper Loudin to have testified that "the aspiration of her own vomit" could not be ruled out as a possible cause of death.
8. Dr. Wright also shared with defense counsel that the fact that there was no loss of consciousness by AL would not affect his opinion regarding the potential plausibility of DL's story respecting cause-of-death. The same

would go for the lack of observation of blood, as well as the fact that she remained awake for a few hours and also appeared to be fine while sleeping in the middle of the night.

It is well-settled law in West Virginia that:

> "A prosecution that withholds evidence which if made available would tend to exculpate an accused ***206** by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution." *State v. Hatfield,* W.Va., 286 S.E.2d 402 (1982).

Brady v. Maryland sets the standard for the State in its disclosure obligations to criminal defendants. *State v. Youngblood* implements a three-part test when determining whether the State has violated *Brady* and has not met its disclosure obligations. First, the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence. Syllabus 2, *Youngblood,* 650 S.E.2d at 121. Second, the evidence must have been suppressed by the State, either willfully or inadvertently. *Id.* Third, the evidence must have been material. *Id.*

There was no doubt in this case that in order to convict the defendant for Counts 1, 2, or 4 of the indictment, it was necessary for the State to prove that the cause-of-death was the blow to the head of AL as described by the defendant's daughter DL. As a result, the testimony of Dr. Wright would have clearly been favorable to the defendant as he would have described to the jury that in the absence of a body it would be impossible to determine the cause-of-death. In fact, it is hard to imagine evidence or testimony that could have been more exculpatory.

The second prong of the test requires that the State willfully or inadvertently suppressed the evidence at issue. While the defense certainly does not contend that the State willfully suppressed this evidence, it cannot be argued that the identity or opinions of Dr. Wright were

not provided to defense counsel ----- ever. It is presumed that Trooper Loudin undertook the investigative efforts on his own to contact Dr. Wright and thereafter shared none of that information with the prosecutor. These facts, however, would be of no consequence respecting any *Brady* violation analysis.

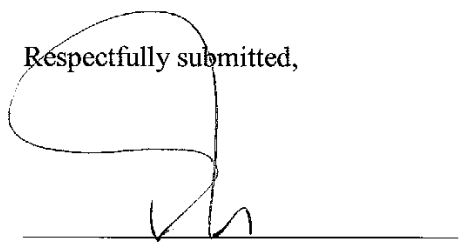
The third and final component of the test requires that in order for there to have been a *Brady* violation, the evidence at issue must have been material. Evidence is material if it prejudiced the defense at trial. See *Brady.* First of all, the inability to cross-examine Trooper Loudin and/or argue to the jury that the doctor's opinion in and of itself represented reasonable doubt renders without question this evidence to be material.

In this case, Trooper Loudin did not share with the jury any opinions of Dr. Wright. However, when asked by defense counsel about the evidence available to the State to prove cause-of-death in this case, Trooper Loudin gratuitously mentioned his consultation with Dr. Wright. By his non-verbal demeanor and body language, Trooper Loudin created the inference and led the jury to believe that if Dr. Wright were present to testify at the trial, his opinion would be supportive and/or sufficient to prove the State's case. The mere fact that the State Trooper mentioned the doctor's name in response to that question would inevitably lead to inference that the doctor must have had something favorable to say on behalf of the State if he were to testify. As it turned out, however, this is not true. And since the defense did not have the opportunity to prepare for nor rebut this false inference, Ms. Lunsford Conaway was prejudiced in a most significant fashion. Specifically, had Dr. Wright's identity been revealed to the defense prior to trial the defendant could have elicited from Trooper Loudin, or subpoenaed Dr. Wright himself, to the stand to offer the doctor's opinion that the cause-of-death would be impossible to determine without a body. It would seem self-evident from that point

that the jury's opinion would in all likelihood have been impacted in a very favorable fashion for Ms. Lunsford Conaway.

WHEREFORE, and for all of the foregoing reasons, the defendant respectfully requests that the jury's verdicts be set aside and that she be granted a new trial.

Respectfully submitted,



Thomas G. Dyer, WVSB# 4579
Zachary S. Dyer, WVSB# 11960
Dyer Law
P. O. Box 1332
Clarksburg, WV 26302

IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v. Case No. 17-F-12

LENA LUNSFORD CONAWAY,

Defendant.

DEFENDANT'S RENEWED RULE 29(c) MOTION

Comes now the defendant, Lena Marie Lunsford Conaway, by and through her counsel, Thomas G. Dyer and Zachary S. Dyer, and pursuant to Rule 29(c) of the West Virginia Rules of Criminal Procedure hereby renews her motion for judgment of acquittal after the discharge of the jury.

Counsel will file with this Court as soon as possible a memorandum in support of this motion.

Respectfully submitted,

/s/ Thomas G. Dyer
Thomas G. Dyer, WVSB# 4579
Zachary S. Dyer, WVSB# 11960
Dyer Law
P. O. Box 1332
Clarksburg, WV 26302

IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v. Case No. 17-F-12

LENA LUNSFORD CONAWAY,

Defendant.

CERTIFICATE OF SERVICE

I do hereby certify that on the 4th day of May, 2017, I served the foregoing *Defendant's Renewed Rule 29(c) Motion* upon the Prosecuting Attorney's Office for Lewis County by facsimile at 304-269-8250.

/s/ Thomas G. Dyer
Thomas G. Dyer, WVSB# 4579
Zachary S. Dyer, WVSB# 11960
Dyer Law
P. O. Box 1332
Clarksburg, WV 26302

IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

Case No. 17-F-12
Judge Jacob E. Reger

LENA MARIE LUNSFORD CONAWAY,

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT
OF POST VERDICT RULE 29(c) MOTION

The defendant has heretofore filed a *Renewed Rule 29(c) Motion* seeking to have the verdicts set aside following the discharge of the jury. The defendant's contention has consistently been that there was insufficient evidence to sustain said verdicts.

> "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." *State v. Starkey, W.Va., 244 S.E.2d 291 (1978)*

The defendant's argument that there is insufficient evidence to support her convictions in this case is simple and straightforward.

In order for the defendant to have been convicted of Counts 1, 2, or 4 in the indictment the State needed to prove to the jury beyond a reasonable doubt that the cause of death of the defendant's four-year-old daughter, AL, was the blow/strike to the head of AL by the defendant,

as described by the defendant's then nine-year-old daughter, DL. This prerequisite to convictions for these three counts of the indictment has never been in dispute. At trial this was the State's only theory regarding cause of death. Furthermore, it is the only theory consistent with the defendant's guilt for Counts 1, 2, and 4.

Thus, the sole issue raised by this motion is whether or not there was sufficient evidence in this case to support the State's theory that the cause of death was the "blow to the head." Here's what we saw and heard at trial (in a light not favorable to the prosecution):

1. On or about 23rd day of September 2011, in the early evening hours, the defendant struck her four-year-old daughter, AL, on or near the crown of AL's head with the flat side of a small, hard object believed by DL to have been a broken piece of a bed slat;

2. DL was the only eyewitness to this event. She testified that her mother struck AL only one time. She provided a brief and simple demonstration of the strike to the jury;

3. AL did not lose consciousness as a result of this strike. AL fell to the ground as a result of the strike and struggled to get back to her feet. AL either stood up or sat in the corner thereafter for an unspecified period of time;

4. There was no blood observed by either DL or her older sister, KL, as a result of this strike;

5. AL remained awake for at least a few more hours after the strike and before going to bed;

6. At approximately 1:00 a.m. (in the early morning hours following the evening during which AL was struck by the defendant), DL and/or KL checked on their younger sister AL and she was fine or "perfect";

7. DL and KL both observed some-type of orangish fluid coming out of the sides of AL's mouth when they found AL unresponsive (and presumably deceased) several hours later that same morning;

8. KL testified at trial or provided a statement previously that was introduced at trial indicating that AL had been sick and vomiting for some period of time prior to the evening that the defendant struck her in the head;

9. Trooper Shannon Loudin testified at trial that a possible cause of death for AL was that she aspirated on her own vomit. Specifically, his testimony was that such a theory "could not be ruled out."

10. DL and KL testified that they witnessed their mother take AL's body somewhere into the woods near Vadis, Lewis County, West Virginia and left her there;

11. AL is still missing.

12. The State presented no forensic, scientific nor medical evidence respecting AL's cause of death.;

13. Trooper Loudin testified at trial that he met and spoke with a doctor at WVU/Ruby prior to trial regarding cause of death. The doctor's name is Mel Wright, MD. Trooper Loudin testified that the doctor specialized in pediatric trauma. He also testified that Dr. Wright would not be testifying at trial. Further testimony regarding either Dr. Wright or his opinions was precluded by ruling of the Court.

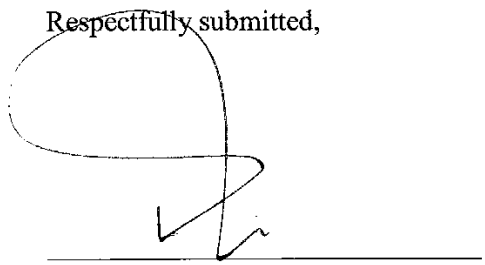
Clearly, the State believed that it would be beneficial, if not essential, to their case that they seek out and obtain an expert medical opinion regarding cause of death. This idea is further evidenced by the remarks of the prosecutor in her closing that "The defendant should not be rewarded because of her success in hiding the body" (paraphrased by the writer). These closing remarks, which represented a cornerstone to the last words shared by the State with the jury, implicitly but very clearly indicated to the jury that the State lacked evidence respecting cause of

death --- but through no fault of its own, and also that the jury may feel free to convict the defendant if they shared that same belief.

In this case, the evidence respecting cause of death is so manifestly inadequate that justice can not be served short of vacating the verdicts which have been rendered by the jury. What we have here --- in the absence of a body --- is the presentation of evidence at trial by the State of a theory or explanation as to what *may have or might have* been the cause of death. This is precisely why prosecutorial agencies almost never move forward with murder charges in a case where no body has been found. The safety-nets in our system of justice are designed for cases just as this. We simply can not permit a jury to speculate, connect the dots, or make the type of leaps of faith from evidence like that presented in this trial to convictions for murder without completely undermining the integrity and creditability of a system that requires proof as its cornerstone. The only thing we know for sure in this case based upon the evidence presented in trial is that a little girl named AL was struck in some fashion near the top of her head with a small wooden board and she is now missing. Obviously, a pediatric trauma specialist would not opine on behalf of the State that this information alone would be sufficient to establish cause of death in the absence of a body to confirm the extent of any injuries that may have been caused by said blow to the head.

To this date, we have no proof by any standard, let alone "beyond a reasonable doubt", as to the cause of death for AL, (assuming of course, for the sake of this motion, that AL is in fact deceased). Consequently, these verdicts can not now stand.

Respectfully submitted,



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IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

MARCH 2017 TERM

STATE OF WEST VIRGINIA,

VS. CASE NO. 17-F-12

LENA MARIE LUNSFORD CONAWAY,
Defendant.

1 Count	Murder of a Child by Parent, Guardian or Custodian or Other person by Refusal or Failure to Provide Necessities, a felony
1 Count	Death of a Child by Parent, Guardian or Custodian or Other Person by Child Abuse, a felony
1 Count	Child Abuse Resulting in Injury, a felony
1 Count	Concealment of Deceased Human Body, a felony

INDICTMENT

STATE OF WEST VIRGINIA, COUNTY OF LEWIS, TO WIT: THE GRAND JURORS OF THE STATE OF WEST VIRGINIA IN AND FOR THE BODY OF THE COUNTY OF LEWIS, UPON THEIR OATHS PRESENT AS FOLLOWS:

COUNT I

West Virginia Code: 61-8D-2(a)

THE GRAND JURY CHARGES:

That between the 23rd day of September, 2011, and the 24th day of September, 2011, in Lewis County, West Virginia, LENA MARIE LUNSFORD CONAWAY, committed the offense of "Murder of a Child by a Parent, Guardian or Custodian or Other Person by Refusal or Failure to Supply Necessities" by causing the death of Aliayah Paige Lunsford, whose date of birth was 07/29/08, by unlawfully, knowingly, maliciously, intentionally, and feloniously causing the death of a child under her care, custody or control by her failure or refusal to supply such child with necessary food, clothing, shelter or medical care, while Aliayah Paige Lunsford was a child under her care, custody, and control, to-wit: LENA MARIE LUNSFORD CONAWAY, did not obtain medical care for Aliayah Paige Lunsford after striking Aliayah Paige Lunsford, her daughter, in the head with a solid hand-held object, which caused the death of Aliayah Paige Lunsford, against the peace and dignity of the State.

COUNT II

West Virginia Code: 61-8D-2a

THE GRAND JURY FURTHER CHARGES:

That between the 23rd day of September, 2011, and the 24th day of September, 2011, in Lewis County, West Virginia, LENA MARIE LUNSFORD CONAWAY, committed the offense of "Death of a Child by Parent, Guardian or Custodian or Other Person by Child Abuse" by unlawfully, maliciously, intentionally, and feloniously inflicting upon a child under her care, custody and control substantial physical pain, illness or any impairment of physical condition by other than accidental means, thereby causing the death of such child, to-wit: by striking Aliayah Paige Lunsford, her daughter, whose date of birth was 07/29/08, in the head with a solid hand-held object, which caused the death of Aliayah Paige Lunsford, against the peace and dignity of the State.

COUNT III

West Virginia Code: 61-8D-3(b)

THE GRAND JURY FURTHER CHARGES:

That between the 23rd day of September, 2011, and the 24th day of September, 2011, in Lewis County, West Virginia, LENA MARIE LUNSFORD CONAWAY, committed the offense of "Child Abuse Resulting in Injury" by unlawfully, and feloniously, while being a parent, guardian or custodian of a child, abusing said child and by such abuse causing said child serious bodily injury, to-wit: by striking Aliayah Paige Lunsford, her daughter, whose date of birth was 07/29/08, in the head with a solid hand-held object, causing a head injury to Aliayah Paige Lunsford, against the peace and dignity of the State.

COUNT IV

West Virginia Code: 61-2-5a

THE GRAND JURY FURTHER CHARGES:

That between the 24th day of September, 2011, in Lewis County, West Virginia, LENA MARIE LUNSFORD CONAWAY, committed the offense of "Concealment of Deceased Human Body" by knowingly, willfully, and feloniously, concealing a deceased human body where death occurred as a result of criminal activity, to-wit: LENA MARIE LUNSFORD CONAWAY did conceal the deceased body of Aliayah Paige Lunsford, her daughter, by driving the body of Aliayah Paige Lunsford away from the place of her death and

concealing the body in a wooded area when Aliayah Paige Lunsford's death occurred as a result of being struck in the head with a solid hand-held object by LENA MARIE LUNSFORD CONAWAY, against the peace and dignity of the State.

A TRUE BILL

Christina C. Flanigan
Prosecuting Attorney

Grand Jury Foreperson

Found upon the testimony of A.S. Loudin, WVSP, duly sworn in open Court to testify the truth and sent before the Grand Jury this the 13th day of March, 2017.