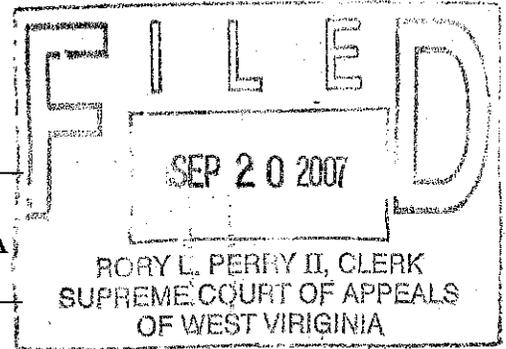


NO. _____

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

CHARLESTON, WEST VIRGINIA



RONALD W. HOLCOMB,
Petitioner,

VS.

CIRCUIT COURT OF MERCER COUNTY
CASE # 07-F-195-WS

THE HONORABLE WILLIAM SADLER,
MERCER COUNTY CIRCUIT JUDGE,
Respondent.

PETITION FOR WRIT OF PROHIBITION

Counsel for Petitioner:
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I. ISSUE PRESENTED

The Petitioner, Ronald W. Holcomb, by and through his counsel, Henry L. Harvey and Joseph T. Harvey, petitions this Honorable Court to issue a rule to show cause why a writ of prohibition should not be awarded by this Court, pursuant to West Virginia Code § 53-1-1 *et seq.* and Rule 14 of the West Virginia Rules of Appellate Procedure, to prohibit the Mercer County Circuit Court from entering an order that would approve DNA laboratory testing of the deceased's fingernail scrapings. The West Virginia Supreme Court has original jurisdiction to hear said Petition for Writ of Prohibition pursuant to W. Va. Code § 53-1-1 *et seq.* and Rule 14 of the West Virginia Rules of Appellate Procedure.

II. STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

On or about January 15, 2007, the Petitioner, Ronald W. Holcomb, was arrested for child abuse with injuries, involving his five-year-old daughter, Brooklyn Holcomb. On June 13, 2007, the Grand Jury returned an indictment against the Petitioner, charging him in Count One with First Degree Murder whereby the Petitioner was accused of "feloniously, willfully, maliciously, deliberately, intentionally and unlawfully slay[ing], kill[ing] and murder[ing] Brooklyn Holcomb. In Count Two of the indictment, the Grand Jury charged the Petitioner with Death of a Child by a Parent by Child Abuse, whereby the Petitioner was accused of "unlawfully, feloniously, maliciously and intentionally inflicting upon Brooklyn Holcomb, a child under his care, custody and control, substantial physical pain and other impairment of physical condition causing the death of such child." This case has been set for trial for September 26, 2007. A pre-trial motion hearing is set for September 10, 2007. The Honorable William Sadler, Mercer County Circuit Judge, will hear the Petitioner's (Defendant's) Motion for Change of Venue at that hearing.

On or about August 22, 2007, Scott Ash, Mercer County Assistant Prosecuting Attorney, represented to the Petitioner's counsel that the State of West Virginia intends to perform forensic DNA testing of the fingernail scrapings of Brooklyn Holcomb, the deceased, at the West Virginia State Police Crime Laboratory. Mr. Ash informed counsel for the Petitioner that said fingernail scrapings have already been forwarded to the West Virginia State Police Crime Laboratory but that the Laboratory has not begun the testing. The West Virginia State Police Crime Laboratory does not allow anyone's presence during the testing procedures. Mr. Ash further informed counsel for the Petitioner that the DNA testing of the fingernail scrapings will necessarily destroy this evidence. The Petitioner's counsel have represented to the State that they would agree to submit the fingernail scrapings to an independent forensic laboratory (neither the State's nor the Petitioner's (Defendant's)) for examination and testing. The State refused this offer, and on or about August 23, 2007, the Petitioner, timely and in good faith, filed a Motion for Injunctive Relief, seeking to prevent the State from directing the West Virginia State Police Crime Laboratory to perform the forensic DNA testing of said tangible evidence.

At the hearing held on or about August 27, 2007, the Honorable William Sadler advised the Petitioner that he would stay the issuance of an order directing the West Virginia State Police Crime Laboratory to perform the forensic examination of the deceased's fingernail scrapings pending this Petition for a Writ of Prohibition.

III. ASSIGNMENT OF ERROR

That the Respondent Judge cannot enter an order directing the West Virginia State Police to perform forensic examination and testing of the deceased's fingernail scrapings, which would inevitably be destroyed by the forensic testing, because the Petitioner has a right for an

independent testing and examination of such tangible evidence pursuant to Rule 16 of the West Virginia Rules of Civil Procedure and West Virginia common law.

IV. ARGUMENT

A. WRIT OF PROHIBITION IS THE ONLY REMEDY AVAILABLE TO THE PETITIONER

Pursuant to West Virginia Code § 53-1-1 *et seq.*, “[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter and controversy, or, having such jurisdiction, exceeds its legitimate powers.” A Writ of Prohibition is not premature and is the only remedy available to the Petitioner because if the Mercer County Circuit Court enters an order directing the West Virginia State Police Laboratory to perform forensic DNA testing and examination of the deceased’s fingernail scrapings, that tangible evidence will be irretrievably destroyed through the process of such testing, and will not be available to the Petitioner for an independent examination.

B. THE PETITIONER IS ENTITLED TO AN INDEPENDENT EXAMINATION OF TANGIBLE EVIDENCE

Rule 32.02(a) of the West Virginia Trial Court Rules mandates the production of any exculpatory evidence by the State to the defendant, within the scope of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Rule 16(a)(1)(C) of the West Virginia Rules of Criminal Procedure provides that “[u]pon request of the defendant, the state shall permit the defendant to inspect . . . tangible objects . . . which are material to the preparation of the defense[.]” Pursuant to this Court’s holding in State v. Crabtree, 198 W. Va. 620, 631, 482 S.E.2d 605, 616 (1996) and State v. Adkins, 167 W. Va. 626, 280 S.E.2d 293 (1981)(per curiam), a criminal defendant has a right to have his or her own expert examine the State’s tangible evidence. Indeed,

“[f]undamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert examine the State’s tangible evidence.” Crabtree, 198 W. Va. at 631, 428 S.E.2d at 616. (Citing U.S. v. Gaultney, 606 F.2d 540, 545 (5th Cir. 1979), internal citation marks omitted).

In Crabtree, the victim was found severely beaten at the Guyan boat docks in Huntington, West Virginia. *Id.* at 623, 608. A bloody stick with pubic hair believed to be that of the victim was found lying beside her. *Id.* Following the victim’s identification of the perpetrator, the defendant was arrested and charged with malicious wounding and two counts of sexual assault. *Id.* Before the trial, and then again at the trial, the defense counsel made a motion for an independent forensic examination of the stick. *Id.* at 625, 631, 610, 616. The trial court denied said motion prior to trial and at the trial, after being advised that the forensic testing of the stick performed by the West Virginia State Police Crime Laboratory revealed that the pubic hairs found on the stick matched the victim’s. *Id.* On appeal, the defendant alleged that the trial court erred in refusing to allow his experts to independently examine the State’s critical piece of evidence. *Id.* at 631, 616. The State argued that the stick would not reveal any exculpatory evidence and that it would serve a limited purpose in connecting the assailant’s weapon to the victim. *Id.* While the West Virginia Supreme Court agreed with the State that the stick would serve a limited purpose, it could not conclude, based on inadequate record, whether this evidence would have been exculpatory. *Id.* Accordingly, the West Virginia Supreme Court held that the defendant was entitled to an independent examination of the stick that was used to perpetrate the crime of sexual assault. *Id.* (Referring to Rule 16(a)(1)(C) of the West Virginia Rules of Criminal Procedure; United States v. Armstrong, 517 U.S. 456, 116 S.Ct. 1480, 1485, 134 L.Ed.2d 687, 697 (1996); United States v. Vaughn, 736 F.2d 665, 666 (11th Cir. 1984), *cert.*

denied 490 U.S. 1065, 109 S.Ct. 2064, 104 L.Ed.2d 629 (1989); Gaultney, 606 F.2d at 545; Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); United States v. Sullivan, 578 F.2d 121, 124 (5th Cir. 1978)). Moreover, the West Virginia Supreme Court held that a motion for an independent examination should only be denied if made in bad faith or if it is not timely. *Id.* at 632, 617. The Court further recognized that defense counsel has no way of knowing whether the evidence is exculpatory without a forensic examination. *Id.*

In Adkins, 167 W. Va. at 629, 280 S.E.2d at 296-297, the West Virginia Supreme Court held that the denial of the defendant's motion for an independent examination and testing of a sample of marijuana was reversible error. In that case, the Grand Jury indicted the defendant with delivery of marijuana. *Id.* at 627, 296-297. Following a jury trial, the defendant was found guilty of said charge and sentenced to one to five years in the penitentiary. *Id.* On appeal, the defendant claimed that it was reversible error for the trial court to deny his motion for an independent examination and testing of a sample of marijuana that he allegedly sold. *Id.* at 629, 296-297. The West Virginia Supreme Court stated that "[a] person charged with possession of an illegal drug should be permitted to examine the alleged drug under proper supervision and control." *Id.* (Citing *Syl. pt. 4, State v. Harr*, 156 W. Va. 492, 194 S.E.2d 652 (1973), and referring to State v. McArdle, 156 W. Va. 409, 194 S.E.2d 174 (1973)).

In the case at bar, the State of West Virginia intends to obtain forensic DNA examination and testing of the deceased's fingernail scrapings at the West Virginia State Police Crime Laboratory. The fingernail scrapings of Brooklyn Holcomb may contain exculpatory evidence that would help him in preparing his defense, but the Petitioner will be denied an opportunity to obtain that exculpatory evidence if the Mercer County Circuit Court enters an order allowing the West Virginia State Police Crime Laboratory to proceed with forensic testing and examination of

said fingernail scrapings. As previously mentioned, the State concedes that the laboratory testing will inevitably destroy the fingernail scrapings, making them unavailable for further examination. The policy of the West Virginia State Police Crime Laboratory provides that no one is allowed to be present during the forensic procedure, thus the Petitioner will even be denied an opportunity to observe and supervise the testing. Nevertheless, pursuant to Rules 16 of the West Virginia Rules of Criminal Procedure and this Court's holding in Crabtree and Adkins, the Petitioner is entitled to an independent examination of Brooklyn Holcomb's fingernail scrapings to be performed by his own forensic expert. Moreover, the Petitioner's Motion for Injunctive Relief was timely and filed in good faith.

The case at bar is distinguishable from State v. Jarvis, 199 W. Va. 38, 483 S.E.2d 38 (1996), where the West Virginia Supreme Court held that "[w]hen the government performs a complicated test on evidence that is important to the determination of guilt, and in so doing destroys the possibility of an independent replication of the test, the government must preserve as much documentation of the test as is reasonably possible to allow for a full and fair examination of the results by a defendant and his experts." (Citing Syl. pt. 4, State v. Thomas, 187 W.Va. 686, 421 S.E.2d 227 (1992), internal citation marks omitted). In Jarvis and its progeny, the government had already performed the testing of tangible evidence, e.g. blood stains, without first informing the defendant of its intention to perform the test and that such laboratory work would destroy the evidence. *Id.* at 46-47, 46-47. In contrast, in the case at bar, the State informed the Petitioner's counsel of its intention to forensically examine the fingernail scrapings of the deceased at the West Virginia State Police Crime Laboratory. Moreover, the State has informed the Petitioner and his counsel that the testing would destroy this tangible evidence. Therefore, if the Mercer County Circuit Court enters an order allowing the fingernail

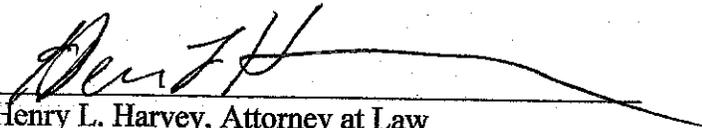
scrapings to be tested, which will be destroyed as a result of such testing, the Petitioner will be denied his right to independently inspect this evidence pursuant to Rule 16 of the West Virginia Rules of Criminal Procedure, and the holdings in Crabtree, 198 W. Va. 620, 482 S.E.2d 605 and Adkins, 167 W. Va. 626, 280 S.E.2d 293. Therefore, the Petitioner wishes to reach an agreement with the State where the parties would choose an independent forensic laboratory to perform the testing and examination of the fingernail scrapings.

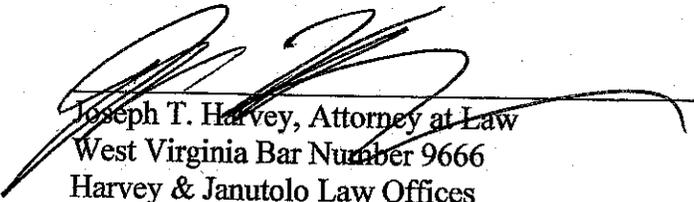
V. CONCLUSION AND PRAYER FOR RELIEF

In the case at bar, a Writ of Prohibition is not premature and is the sole remedy to the Petitioner because a forensic examination on the fingernail scrapings of Brooklyn Holcomb, the deceased, at the West Virginia State Police Crime Laboratory would deny the Petitioner his right to independently examine said tangible evidence.

WHEREFORE, for the foregoing reasons, the Petitioner respectfully requests that this Honorable Court issue a rule to show cause, stay the testing and examination of the fingernail scrapings at the West Virginia State Police Crime Laboratory pending this Court's ruling herein pursuant to West Virginia Code § 53-1-1 *et seq.*, and grant a Writ of Prohibition to prohibit the Respondent, The Honorable William Sadler, from issuing an order that would direct the West Virginia State Police Crime Laboratory to perform a forensic DNA examination of Brooklyn Holcomb's fingernail scrapings.

Respectfully submitted,
RONALD W. HOLCOMB
Petitioner
By Counsel

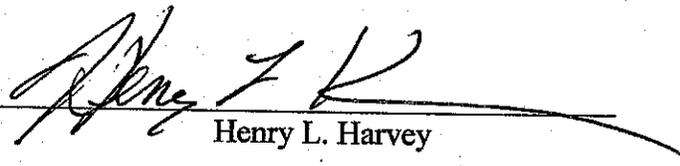

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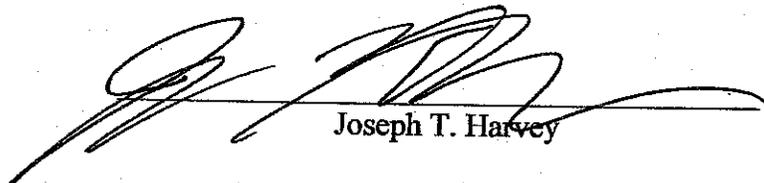

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VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF MERCER, to-wit

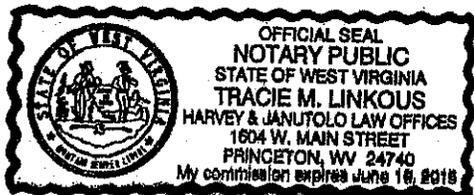
We, Henry L. Harvey and Joseph T. Harvey, counsel for the Petitioner, Ronald W. Holcomb, in the foregoing Petition for Writ of Prohibition, after being duly sworn according to law, depose and say that the facts and allegations contained in the foregoing Petition for Writ of Prohibition are true, so far as they therein stated to be upon information and belief, we believe them to be true.

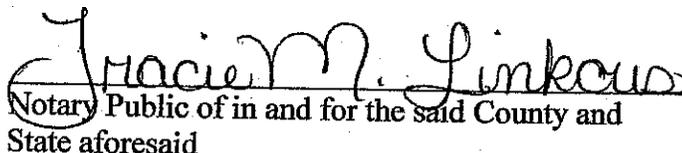

Henry L. Harvey


Joseph T. Harvey

Taken, sworn to and subscribed before me this 31st day of August, 2007,
by Henry L. Harvey and Joseph T. Harvey.

My Commission Expires: June 16, 2015

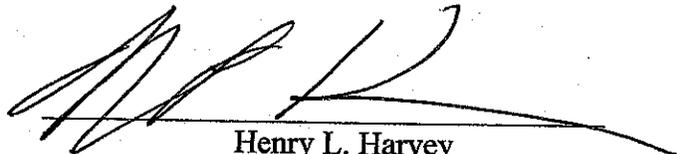



Notary Public of in and for the said County and
State aforesaid

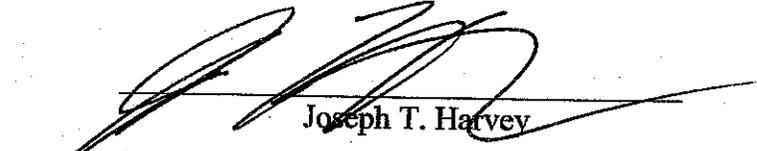
MEMORANDUM OF PERSONS TO BE SERVED

The persons to be served the rule to show cause should this Court grant the relief requested by this Petition for Writ of Prohibition are as follows, to-wit:

1. The Honorable William Sadler, Mercer County Circuit Judge
Mercer County Courthouse
1501 W. Main Street
Princeton, West Virginia 24740
2. Timothy D. Boggess, Mercer County Prosecuting Attorney
Mercer County Courthouse
1501 W. Main Street
Princeton, West Virginia 24740
3. The West Virginia State Police Crime Laboratory
725 Jefferson Road
South Charleston, West Virginia 25309



Henry L. Harvey



Joseph T. Harvey

CERTIFICATE OF SERVICE

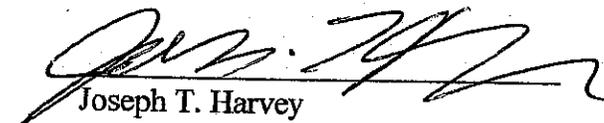
We, HENRY L. HARVEY and JOSEPH T. HARVEY, Attorneys for the Petitioner, Ronald W. Holcomb, hereby certify that we served a true copy of the Petitioner's PETITION FOR WRIT OF PROHIBITION on the 19th day of September, 2007, by first-class mailing to last-known address, postage prepaid to the following:

The Honorable William Sadler
Mercer County courthouse
1501 W. Main Street
Princeton, WV 24740

Timothy D. Boggess, Mercer County Prosecuting Attorney
Mercer County Courthouse
1501 W. Main Street
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