

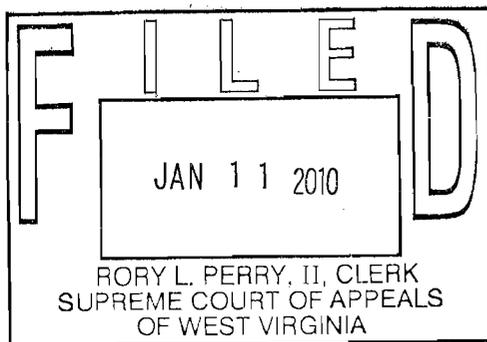
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**RICHARD ALAN POORE, Petitioner, v. STATE OF WEST VIRGINIA,
Respondent**

DOCKET NO: 35271

**Pleasants County Circuit Court
Case No: 06-F-7
The Honorable Judge Robert L. Holland, Jr.**

**APPEAL BRIEF FILED ON BEHALF OF
PETITIONER RICHARD ALAN POORE**



**William B. Summers, WVSB#7239
3301 Dudley Ave.
Parkersburg, WV 26104
(304) 420-0975
*Counsel for Richard Alan Poore***

TABLE OF CONTENTS

Table of Authorities

Nature of the Proceedings Below

Assignments of Error

Argument

Conclusion and Relief Sought

Certificate of Service

TABLE OF AUTHORITIES

1. State ex rel. Oscar Cosner v. Ernest A. See, 129 W. Va. 722; 42 S.E.2d 31; 1947 W. Va. LEXIS 7.
2. State ex rel. Owens v. Brown, 177 W. Va. 225; 351 S.E.2d 412; 1986 W. Va. LEXIS 606.
3. State v. Kilpatrick, 158 W. Va. 289; 210 S.E.2d 480; 1974 W. Va. LEXIS 272.
4. State v. Hatley, 2009 Lexis 16 (W.Va. 2009) at pg 6.
5. State v. Newcomb, 679 S.E.2d 675; ___ W.Va. ___ 2009 W. Va. LEXIS 67.
6. United States v. Wright-Barker, 784 F.2d 161, 175 (3d Cir. 1986),
7. United States v. DeRosa, 548 F.2d 464, 470 (3d Cir. 1977)
8. United States v. Brockington, 849 F.2d 872 (1988).
9. State v. Walker 207 W. Va. 415; 533 S.E.2d 48; 2000 W. Va. LEXIS 44 (2000),
10. United States v. Cotnam, 88 F3rd 48788 (7th Cir 1996).
11. Griffen v. California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965).
12. State ex rel. Caton v. Saunders, 215 W. Va. 755, 601 S.E.2d 75, 2004 W. Va. LEXIS 101 (2004).
13. State v. Ladd 210 W. Va. 413, 557 S.E.2d 820, 2003 Lexis 181 (2001).
14. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
15. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
16. State v. Hatfield, 169 W.Va. 191, 286 S.E.2nd 402 (1982).
17. State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119 (2007).
18. United States v. Anderson, 481 F.2d 685; 1973 U.S. App. LEXIS 9163 (4th Cir 1973).
19. Mooney v. Holohan, 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340, 98 ALR 406.

20. Pyle v. Kansas, 317 U.S. 213, 87 L.Ed. 214, 63 S.Ct. 177.
21. Curran v. Delaware (CA3 DEL) 259 F.2d 707.
22. New York ex rel. Whitman v. Wilson 318 U.S. 688, 87 L.Ed. 1083, 63, S.Ct. 840.
23. White v. Ragen 324 U.S. 760, 89 L.Ed. 1348, 65 S.Ct. 978.
24. Alcorda v. Texas, 355 U.S. 28, 2 L.Ed. 2d 9, 78 S.Ct. 103.
25. United States ex rel. Almeida v. Baldi (CA 3 Pa) 195 F.2d 815, 33 ALR 2d 1407.
26. United States ex rel Montgomery v. Ragen (DC 111) 86 F. Supp 382.
27. State ex rel. Leonard v. Hey, 269 S.E. 2d 394, 1980 W.Va. LEXIS 559 (W.Va. 1980);
28. State v. Beard, 194 W.Va. 740, 461 S.E. 2d 486, 1995 W.Va. LEXIS 160 (1995).
29. State v. Richey, 171 W.Va. 342, 298 S.E. 2d 879, 1982 W.Va. LEXIS 962 (1982).
30. Hundley v. Ashworth, 181 W.Va. 379, 382 S.E. 2d 573, 1989 W.Va. LEXIS 156 (1989).
31. State ex rel. Knotts v. Facemyer et al., 223 W.Va. 594, 678 S.E.2d 847, 2009 W.Va. LEXIS 50.

**APPEAL BRIEF FILED ON BEHALF OF
PETITIONER RICHARD ALAN POORE**

INTRODUCTION

NOW COMES the Defendant and Petitioner herein, RICHARD ALAN POORE, and hereby respectfully submits this brief to this honorable Court to argue why this Court should REVERSE the previous judgment of guilty and REVERSE the sentencing Order of the Pleasants County Circuit Court entered on January 13, 2009, which adjudged the Defendant and Petitioner herein as guilty and sentenced him to life in prison without mercy, for the reasons stated as follows:

KIND OF PROCEEDING AND RULING IN LOWER TRIBUNAL

The Defendant, Richard Alan Poore and his wife, Jerri Williams (then Poore), had a son, Richard Alan Poore, Jr., born on January 23, 1981. At the time of his death, Richard Jr., was an infant, nearly three months of age. According to many individuals from the investigation of the undersigned counsel, the child was not completely healthy, and had several concerning medical issues, including at least one trip to the hospital for respiratory and bowel problems eleven days after his birth. He was supposed to follow up with his family doctor after one week after this visit, but it is unknown who the attending physician was during this visit and the records were never secured by Defense Counsel or the State for this treatment. Richard was also the stepfather to four of his wife's children, stepdaughter Laura Poore, stepson Charles Hinton, who was five in 1981, stepson Leslie Allen Hinton, who was six in 1981, and stepdaughter Heather Ann Dunn, who was seven years old in 1981. At the time of Richard Jr.'s death, Richard and his wife were living separately. Richard's wife lived in a mobile home on Morgan Avenue in St. Marys, West Virginia. Richard had come to the

home of his wife to babysit and to see his child because his wife, Jeri, needed a babysitter that day.

On the morning of April 14, 1981, Richard Alan Poore had gotten the two older children off to school. Jerri Williams left for work and left the Defendant, Richard Alan Poore, at home with the all the children, including Richard Jr. At some point in time shortly after Mrs. Poore left for work, Richard Jr., stopped breathing, and was discovered by the Defendant, Richard Poore. Richard immediately directed his stepson Chuck to run next door to call for the emergency squad while he stayed with the infant and administered CPR, until the emergency squad arrived. Thereafter, his son Richard Jr., was taken to Marietta Memorial Hospital in an ambulance and placed on a respirator. Richard Jr., had to be flown to Morgantown and was placed in neonatal ICU. The Defendant, Richard Poore, and his wife both followed their son to Morgantown where they waited nervously for word of their child's condition. Richard, Jr. died after being removed form the respirator on April 16, 1981.

As with any death, an investigation was conducted by local law enforcement, the sheriff's department in Washington County, Ohio (the location of Marietta Memorial Hospital) and the medical personnel at West Virginia University Hospital in Morgantown. The Defendant, Richard Poore, was completely cooperative with all authorities, including the investigation done by State Police Investigator, Pete Lake. According to the investigation of Trooper Lake, who testified at the trial, a complete investigation of the case was performed and there was no basis for filing charges.

In addition, Dr. James Frost was, at the time, the Medical Examiner for the Northern District of West Virginia. Dr. Frost completed his examination and found that the death was not a homicide. Dr Frost also testified for the defense at the trial in this matter regarding his examination and evaluation of the case as not being a murder.

Two decades later, in 2003, the new Chief Medical Examiner of the State of West Virginia, Dr. James Kaplan, reopened files where reports had supposedly not been generated. Dr. Kaplan began to bring in contract workers to read over the autopsy notes and results and look at the photographs and issue reports based on the autopsies that were performed. The Prosecuting attorney, apparently in 2006, received a letter from the chief medical examiner that indicated that Richard Poore, Jr., had, essentially, died from shaken baby syndrome, and a summary report had been generated to support that by a contract employee. This report was generated, obviously, after twenty years of the case being closed without the benefit of the actual body for the autopsy, and without Kaplan or his designee being present at the examination, or without Kaplan or his contract employee reading the entire original investigative report (which is of record in this matter). Thereafter, the Prosecuting Attorney, Timothy Sweeney, sought and received indictment against the Defendant, Richard Poore for the murder of his son.

The Defendant was indicted by the Pleasants County Grand Jury on the charges of Murder in September 2006, for the death of his only son, Richard Alan Poore, Jr., who died on April 16, 1981. This case was brought for indictment despite the initial conclusions by the prosecuting attorney and the investigating officer that no wrongdoing occurred. Apparently, after reviewing what was deemed to be incomplete filings on the autopsy by the local medical examiner, Dr. Frost, Dr. Kaplan took it upon himself to change or re-write the findings of the attending pathologist and determined, without benefit of seeing the body, the investigative notes, or the report of the then investigating officer, that a murder had occurred. Dr. Kaplan deemed the death of the infant to be caused by “shaken baby syndrome” despite the fact that the investigating officer and the attending medical examiner made no findings to support such facts.

Despite being indicted some twenty-five years later, the Defendant voluntarily appeared for arraignment, coming from North Carolina, on September 26, 2006. The Pleasants County Circuit Court held a few pretrial hearings and several continuance hearings -- including a hearing where the case was continued several times because Dr. Frost had a stroke --- but the case finally went to Jury Trial on June 16, 2008. After a four day trial, the Jury found the Defendant guilty of murder. Sentencing was not bifurcated, and the jury recommended life without mercy. The Defendant requested new counsel, shortly after the verdict, for a motion for a new trial and, potentially, an appeal. The Defendant's counsel filed a motion for a new trial, and, thereafter, an amended motion for a new trial, after the Court allowed the Defendant's Counsel to obtain transcripts. The defendant contends he has still not been provided all the transcripts from all the proceedings. The Court continued the initial sentencing hearing until January 13, 2009, at which time the Court denied the motion for a new trial and sentenced the Defendant to life without mercy. The undersigned counsel filed a notice of intent to appeal on February 11, 2009. It is from the January 13, 2009, sentencing Order and the denial of the Defendant's Motion for a New Trial that the Defendant makes this appeal.

ASSIGNMENTS OF ERROR AND MANNER IN WHICH DECIDED BELOW

1. The Jury in this matter was biased, not-impartial and filled with individuals who were not properly vetted to determine whether any bias, prejudice or relationship to the parties involved caused them not to be able to perform their duties as jurors.
2. The Prosecutor's opening and closing statements were so improper that it poisoned the jury's mind against the Defendant, unfairly prejudiced the Defendant by the conduct, and violated the Defendant's Fifth Amendment right against self-incrimination.

3. The State was permitted to introduce significant amounts of 404(b) evidence, including, through the testimony of witnesses, allegations of domestic violence against various family members all of which were prior bad acts, had no relevance to the alleged murder, whose prejudicial effect far outweighed their probative value, and that had no alternative theory of admissibility (such as motive, intent, opportunity, etc.). The Defendant, thereby, was convicted in large part because the Prosecutor was able to label him as a "monster" rather than whether the Defendant actually committed the crime.

4. Counsel's performance was deficient under an objective standard of reasonableness; and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

5. The State withheld exculpatory evidence violating the Defendant's substantive due process rights under Brady v. Maryland.

6. The State knowingly used false testimony during the Grand Jury proceedings and Trial to obtain a conviction.

7. The delay and passage of time between the alleged commission of the crime herein and the arrest of the Defendant warrants a dismissal of this case.

STANDARD OF REVIEW

In this matter there exist multiple errors which have different standards of review. Each standard will be discussed in detail within each section of argument.

ARGUMENT

1. The Jury in this matter was biased, not-impartial and filled with individuals who were not properly vetted to determine whether any bias, prejudice or relationship to the parties involved caused them not to be able to perform their duties as jurors.

A defendant in a criminal trial is entitled to an impartial jury. This Court has held that:

The Sixth Amendment provides in part that, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an **impartial jury** of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . . When [the] violation of the rights enumerated in these amendments amounts to a denial of due process of law, within the meaning of the Fourteenth Amendment, conduct of that character by a state is forbidden and condemned by that amendment. Some of the rights which are protected against forbidden action of the federal government, by particular amendments to the federal Constitution, are said to be implicit in the concept of ordered liberty, and for that reason, by virtue of the Fourteenth Amendment, but not because of the individual amendments, they may not be denied or abridged by any state.

State ex rel. Oscar Cosner v. Ernest A. See, 129 W. Va. 722; 42 S.E.2d 31; 1947 W. Va. LEXIS 7.

The United States Supreme Court has held that the trial courts, in exercising their affirmative duty to ensure a fair trial, must take strong measures to ensure that the balance is never weighed against the accused. State ex rel. Owens v. Brown, 177 W. Va. 225; 351 S.E.2d 412; 1986 W. Va. LEXIS 606. The true test as to whether jurors are qualified to serve on the panel is whether without bias or prejudice the juror can render a verdict solely on the evidence under the instructions of the Court. As far as practicable the process of selecting jurors should endeavor to secure jurors who are not only free from prejudice, but who are also free from the **suspicion** of prejudice. State v. Kilpatrick, 158 W. Va. 289; 210 S.E.2d 480; 1974 W. Va. LEXIS 272.

The object of jury selection is to secure jurors who are not only free from improper prejudice and bias, but who are also free from the suspicion of improper prejudice or bias. The true test as to

whether a juror is qualified to serve on a panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court. Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed. State v. Hatley, 2009 Lexis 16 (W.Va. 2009) at pg 6.

In reviewing the qualifications of a jury to serve in a criminal case, a reviewing court follows a three-step process. The court's review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial court. State v. Newcomb 679 S.E.2d 675; ___ W.Va. ___ 2009 W. Va. LEXIS 67.

Apparently, in the instant case, the attorneys submitted proposed jury questions to the Court. The Court then, upon the agreement of counsel, proceeded to conduct questioning of the jury. The Judge asked the question of the jurors "have any of you served as a juror either in magistrate court, on the grand jury, petit jury, that is a trial here in circuit court in the last two years?" Trial Transcript, pg 20. However, despite the fact that several jurors said that they were on jury trials, no follow up questions were asked about what the verdict was or whether that trial biased the prospective juror for one side or the other, or whether this service would bias or prejudice them in any way in this case, nor did the Defendant's attorney follow up on this in individual voir dire.

In addition, the Judge inquired of the panel as to whether any prospective juror was an employee of the State of West Virginia. Trial Transcript, pg 21. However, **despite the fact that several jurors said that they were state employees, no questions were asked as to whether this**

employment biased the juror against the Defendant, nor did defense counsel follow up in individual voir dire.

The Judge inquired of the panel as to whether jurors were members of or related to law enforcement. Trial Transcript, pg 22. **Despite the fact that several members of the jury answered in the affirmative and explained their relationships, the Judge never inquired as to whether or not this would cause the juror bias or prejudice against the Defendant**, nor did defense counsel follow up in individual voir dire.

Perhaps most importantly, the Judge inquired as to whether any prospective jurors were related to or had hired Mr. Sweeney, the Prosecutor, or the Assistant Prosecutor, Mr. Wolfinbarger, to perform legal services. Trial Transcript, pg 23. **Nine jurors of the twenty-four jury panel indicated that they had hired either Mr. Sweeney or Mr. Wolfinbarger to perform legal services, with nearly all having hired Mr. Sweeney.** However, despite this fact, no follow up questions were asked either by the judge or counsel or the prosecutor as to whether this relationship would cause bias or prejudice or cause the juror not to be able to perform their duties, or whether any of the jurors considered Mr. Sweeney to still be his or her personal attorney.

Most of the inquiry about relationships between witnesses, the parties and jurors were conducted similarly. Although the Court inquired as to the nature of the relationships, when jurors indicated such relationships existed neither the Court nor counsel ever inquired as to whether this relationship would tend to bias or prejudice the prospective juror in the case or cause the juror not to be able to perform their prospective jurors duties. See Trial Transcript, pg 23 – 30.

The Court inquired as to whether the prospective jurors had heard anything about the case. Almost all prospective jurors had heard about or read about the case in the newspaper (22 of the 24)

or heard about it in the community or at work. The Court asked the panel whether the media exposure had caused the jurors to fix an opinion on the case. Trial Transcript, pg 32. Yet the record is silent as to any response whatsoever from the jury panel. *Id.* **The only juror even moved to be struck for cause by defense counsel said that he was made sick by the situation. Others who said they had small children, had expressed opinions, and had talked about it to family members were not struck for cause, or moved to be struck for cause by defense counsel.**

Although the Court asked whether the panel “could not convict the defendant of the crime of murder if the state proves beyond a reasonable doubt his guilt in the matter . . . [.]” the Court never asked the panel the opposite question of whether the panel could *acquit* the Defendant if the State failed to prove beyond a reasonable doubt the guilt of the Defendant. Likewise, the Court stated to the jury “there is no statute of limitation” in the State of West Virginia on murder. Transcript pg. 32-33. In addition, no questions were asked regarding being able to find the Defendant guilty or innocent of lesser charges. Furthermore, the Court said “[w]ould you hesitate to sentence the Defendant if you had found him guilty to life without mercy if the other jurors had voted unanimously for a murder conviction?” Trial Transcript, pg 33. But, the Court failed to ask the opposite question: could you grant a recommendation of mercy in this case? Further, the Court implied that if the jury found him guilty of murder, there was to be no mercy. The Court failed to bifurcate the issue of mercy and guilt in his questioning, potentially implying that there was a lack of mercy availability upon a conviction of murder. Similarly, the record remains silent as to any responses whatsoever from the jury panel, and defense counsel failed to ask any jurors of this issues in individual voir dire failing to meet his responsibility of zealous representations. Also, the Court asked the question “do any of you believe that you have a greater duty to the defendant in a criminal

case than you do the State of West Virginia . . . are all of you capable of giving both sides a fair and impartial decision based on the facts in this case [do any of you] believe you have a greater duty to one or the other?" This statement impermissibly places the Defendant on an equal ground with the State, when it is clear that the State carries the burden of proof throughout the case. This statement negated any earlier statement to the jury that the Defendant was innocent until proven guilty.

The Court asked the question of the jurors, "have you ever been convicted of a criminal offense". Trial Transcript, pg 37. But, the Court never asked the follow up questions of were they were prosecuted, by whom they were prosecuted, what the outcome of the case was, and whether any potential plea deal in their case would affect their impartiality in this case. However, interestingly, the Court does ask the question as to whether they would have a dislike or bias against law enforcement because of their prosecution. Again, defense counsel failed in his responsibility to inquire of jurors in individual voir dire what the situation was regarding their charges, pleas, trials, dismissals, by which Prosecutor, and whether even anything might still be pending in a diversionary status of sentencing. It was possible that one of the jurors could have felt obligated to the Prosecutor and would find it difficult to be fair and impartial.

Furthermore, the Court inquired of the Jurors if they were married and had children -- a crucial question given that the State's theory of the case was shaken baby syndrome (SBS) and that the case involved a death of a child. Almost all of the jurors on the panel had children and many had young children. **Yet, no follow up questions were asked about whether the fact that these prospective jurors had children – especially young children – biased or prejudiced the juror against the Defendant because the victim of the alleged murder indictment was a young child.**

One juror even pointed out she had grandchildren yet was not questioned further and was on the panel which tried this case. Trial Transcript pg 37-39.

The Court inquired of the panel whether any members of the panel or their families were the victims of a crime. Trial Transcript pg 39-40. Several jurors expressed that they or their family members had been. Indeed, two stated that children in their families were victims of sexual abuse. However, the follow-up question of whether this would cause bias or prejudice or affect their ability to remain impartial was never asked, nor did the defense counsel inquire of any of them in individual voir dire.

Again, the Court asked the question of the panel as to whether any family members were the victims of domestic violence. Trial Transcript, pg 43. But, again no follow up questions were asked by the Court or counsel as to whether the members of the panel who indicated in the affirmative would be able to remain impartial, in spite of the fact that the Prosecution presented through 404(b) evidence allegations of an on-going, abusive relationship, notwithstanding that violence was certainly an allegation in this matter. Defense counsel again failed to inquire as to any bias that might be present.

Indeed, although the Court indicated that it had not asked each and every proposed jury question, the Court gave counsel the opportunity to ask follow-up questions. Trial Transcript, pg 45. Defense counsel did not take the opportunity to clarify all of the above issues with any questioning of the panel. Trial Transcript, pg 45.

During individual questioning, several issues become apparent as to the lack of appropriate screening of jurors for impartiality. When questioning Tracy Bartrug, Defense counsel asked if she had read about the case in the newspaper, to which she responded “I read it because it was the front

page and I have children of my own.” Trial Transcript pg 46. Although Defense counsel asked if she had formed an opinion, she gave the odd answer “No. Just about the situation about oh, that is awful.” This would indicate that the prospective juror had formed an opinion that the matter was awful. Yet no question was asked about whether the fact that she felt that the situation “was awful” would taint her opinion of the Defendant in any way.

When questioning Ms. Morell, she indicated she “[ran] around with your kids” indicating the prosecutor’s children. Trial Transcript, pg 65. However, no questions were asked about impartiality by defense counsel and no motion to strike for cause was made. The prosecutor tried to imply that they no longer did associate but the juror advised that on one occasion his adult child was in St. Marys, they saw each other. (These citations are merely examples for the sake of brevity).

The cumulative effect of the failure of the Court or the defense counsel to ask follow up questions regarding jury bias had the overall effect of creating a jury panel that was not free of prejudice or bias and that was largely un-vetted on the issues that were of extreme importance to the defense of the case. **This jury was, in essence, a dream jury for the Prosecuting Attorney.** Not only were relationships with the Prosecuting Attorney’s office largely unexplored, but many crucial bias or prejudice issues were left unanswered by the Court or defense counsel.

A trial court has an obligation to empanel a fair and impartial jury. This obligation includes striking prospective jurors who have a significant past or current relationship with a party or a law firm. While an attorney-client relationship between a prospective juror and a prosecuting attorney does not *per se* disqualify that juror, such a relationship merits the closest scrutiny by a trial court, and the more prudent course may be to excuse the juror. State v. Hatley, 2009 Lexis 16 (W. Va. 2009). Here numerous jurors were represented by the Prosecuting Attorney in other matters, but

little investigation was undertaken to see if any bias or prejudice attached on the part of the jurors who indicated such a relationship. Under a Hatley analysis alone, this case should be reversed and remanded for a new trial. The Trial Court here was both clearly erroneous in not striking those jurors that had a prior relationship with the prosecuting attorney but it also abused its discretion in allowing so many jurors with potential bias on to the jury panel and not taking a more active role in ensuring the jury was free from bias or prejudice.

2. The Prosecutor's opening and closing statements were so improper that it poisoned the jury's mind against the Defendant, unfairly prejudiced the Defendant by the conduct, and violated the Defendant's Fifth Amendment right against self-incrimination.

A prosecutor's **opening** statement should be an objective summary of the evidence reasonably expected to be produced, United States v. Wright-Barker, 784 F.2d 161, 175 (3d Cir. 1986), and the prosecutor should not use the opening statement as an opportunity to "'poison the jury's mind against the defendant'" or "'to recite items of highly questionable evidence.'" United States v. DeRosa, 548 F.2d 464, 470 (3d Cir. 1977) (quoting Government of Virgin Islands v. Turner, 409 F.2d 102, 103 (3d Cir. 1969)); *see also* Hernandez, 779 F.2d at 459 (prosecutor's reference to evidence of which admissibility was seriously in question was improper). Even assuming that the prosecutor's conduct was improper, reversal is not warranted unless the Defendant has been unfairly prejudiced by the conduct. Whether the defendant has suffered prejudice in this context depends on the facts of each case and review must examine the conduct in the context of the entire proceeding. Three factors in particular have been identified as relevant: (1) whether the remarks were pronounced and persistent, creating a likelihood that the remarks would mislead the jury to the prejudice of the defendant, (2)

the strength of the properly admitted evidence against the defendant, and (3) the curative actions taken by the district court. United States v. Brockington, 849 F.2d 872 (1988).

Similarly, in State v. Walker 207 W. Va. 415; 533 S.E.2d 48; 2000 W. Va. LEXIS 44 (2000), the Supreme Court of Appeals laid out a four prong test for improper remarks by the prosecution 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.

In searching the transcript of the Prosecutor's opening statement, the record has few remarks during his opening of "the State believes that the evidence will show" or of any such import. The entire opening statement – which went un-objected to by the Defense counsel – was an argument designed not to show what the State intended to prove, but to sway jury opinion. First, the prosecutor pointed out that the victim in the case was a three month old child, and told the jury to "keep in mind" this fact through the trial. Trial Transcript pg 96-07. The prosecutor then explained "why you are here" to the jury, about why it had taken so long to prosecute the Defendant, which was practically irrelevant given the prior *voir dire* to the jury, which explained that there was no statute of limitations on murder in West Virginia,. Trial Transcript, pg 97.

Thereafter, the Prosecutor began talking about the "graveside services for Richard Alan Poore, Jr." citing the funeral home in charge of the arrangements, the surviving relatives of the deceased, showing the obituary of the deceased child to the jury, Trial Transcript, at page 98. The prosecutor stated "I submit he came into this world crying and that his how he went out."

Trial Transcript at pg 98-99. This is argument, plain and simple, designed to prejudice the jury against the Defendant.

The Prosecutor then began to argue that the Defendant was an abusive person, “so abusive to everybody.” Trial Transcript, at pg 99. (This 404(b) evidence will be argued later as inadmissible). “His violence,” the prosecutor argued “was not limited to his wife . . . [.]” *Id.* The prosecutor went on and on about abuse to various family members. Trial Transcript, at pg 99-100.

The Prosecutor also said that “Richard had a pretty violent, explosive disposition, pretty irascible person at that time.” Transcript at pg 100. He stated that the morning of the alleged murder that the Defendant “was in his usual foul disposition . . . [.]”

Then, mid-way through the opening statement, the prosecutor began showing a video presentation that included items not yet in evidence and not ever moved into evidence, nor previously determined to be admissible. It is certainly possible that the demonstration used would have been deemed not admissible and it was not a presentation that the Prosecutor himself prepared.

The Prosecutor used pictures of the trailer, pictures of the grave, the obituary, a presentation apparently downloaded from the internet on the mechanics and physiology of Shaken Baby Syndrome, presenting it in a scientific manner when he is not qualified to do. Finally, the prosecutor showed autopsy images of “baby Ricky” to the jury during his opening statement, without any previous hearing to determine admissibility and without first showing them to defense counsel and allowing defense counsel opportunity to object as to their prejudicial value versus their probative value as it was a photograph that showed no medical evidence. Trial Transcript, pg 107. This was absolutely unnecessary and highly prejudicial, as this information would have been supplied more properly by the expert during testimony.

Finally, the prosecutor stated that: "And this injury is a gripping injury, consistent with a gripping injury where you've got a hold of somebody like this and you've got your four fingers around their chest, much as an adult . . . [like] he were gripping a three month old child for the purpose of shaking it. I submit to you that your gripping somebody pretty hard if you are leaving marks like that from your fingers from where you are shaking it. . . . it is not CPR." Trial Transcript, at page 107, line 16. But the prosecutor knew from the report filed by Trooper Lake on April 30, 1981, that the officer talked to several nurses in the emergency room that viewed the infant. It was learned from them that there had been no bruises, cuts or marks on the child when the child was brought in. Some bruises appeared on the chest and arm area, but those were claimed by the medical staff to be from their own resuscitation efforts and intravenous needles. Trooper Lake also interviewed Dr. Foster, the attending physician, who also stated there were no signs of foul play and no indications of abuse that would have caused the child's condition.

Here, the **opening** remarks made by the Prosecutor were pronounced and persistent, even downright falsehoods, and created a likelihood that the remarks would mislead the jury to the prejudice of the Defendant. The State's case was presented in part through improperly admitted 404(b) evidence. And, because there were no objections made by Defense counsel to the argumentative nature of the Prosecutor's opening statement, no curative actions were taken by the Court to caution the jury on the improper nature of the Prosecutor's opening remarks and improperly presented evidence. These remarks led to a situation where the Jury -- which was, as stated earlier, a dream jury already for the Prosecutor -- had to have such a bad impression of the Defendant in its minds that it carried a prejudice against the Defendant throughout the proceedings.

Under a Walker analysis, one must conclude that this matter must be reversed. Here, the

Prosecutor's remarks were highly prejudicial and tended to mislead the jury as to the character of the Defendant without the Defendant ever having made character an issue in the case. The remarks made by the prosecutor were extensive and permeated his entire opening statement, which was less an evidentiary guideline than a character assault on the Defendant. Much of the case -- as will be argued later -- was presented through 404(b) evidence. The original autopsy report and investigation report by the officer determined that there was **no culpability** on the part of the Defendant. So, it is almost certain that the comments were deliberately placed before the jury to divert attention to extraneous matters. Richard Poore was so maligned by the Prosecutor in this opening statement that the jury could not have seen him any any positive light. **Making things even worse, his own counsel failed to get up and give an opening statement to contradict anything said by the prosecuting attorney.** Clearly, this case should be overturned on this ground alone and remanded for a new trial, if not reversed altogether. Criminal Defendants are supposed to be treated fairly by our justice system. The reason why we have rules about evidence and rules about opening statements is to prevent cases from being about character and emotion and focus in on the evidence and the facts. Allowing this case to stand with this type of opening statement would be a travesty of justice.

In addition, in a prosecutor's closing statement, the rule for ascertaining when the argument of government counsel represents improper comment on a defendant's failure to testify should be was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify? *See United States v. Cotnam* 88 F.3d 48788 (7th Cir. 1996) and *Griffen v. California* 380 US 609, 14 L.Ed 2d 106, 85 S. Ct. 1229 (1965).

In his closing argument, the Prosecuting Attorney made numerous comments about the

"undisputed" evidence at the trial, the design of which was to infer that the Defendant failed to testify in his own defense. For example:

"Evil design in general is the Defendant, Richard Alan Poore, Sr. seated over there at the counsel table and that has been **undisputed** in this trial . . ." Trial Transcript Page 423 Line 20-22

"... during that period of time it's **undisputed** what happened to Ricky at the hands of the defendant... *Id.*, Page 424 line 9

"The acts of violence that he committed are **uncontradicted**." *Id.*, Page 424 line 11

"They are well-established here before you in this court of law that he was violent to his wife." *Id.*, Page 424 line 12

"Now, let me just touch briefly upon the **only thing that has been disputed** at all, I would submit it is very, very weak, if at all, and that is the conclusion of the doctor who came in here and testified as what appears to be from a medical stand point of view of brain swelling and everything else." *Id.*, Page 434 line 10-15

"You've got to decide, based on their evidence that has been presented in this court room. Again, the evidence, I would submit, is **uncontradicted**. And fortunately that is the way it works." *Id.*, Page 454 line 10-13

"He was not performing CPR. This is **uncontradicted**." *Id.*, Page 455 line 19

"This is another one of are you going to believe the witness or believe **the hearsay statement of the defendant**..." *Id.*, Page 455 line 20-21

"This is **uncontradicted** that Chuckie came out and maybe he did not characterize it exactly that way but he knows what he saw and he testified and it's **uncontradicted** what he testified, what he did say." *Id.*, Page 456 line 17-20. (Again, this was absolutely false, as Trooper Lake in his report

stated that he felt that the child misinterpreted what he saw as Richard, the Defendant, trying to revive the infant).

What is clear is that in his **closing** the prosecutor here constantly referred to the “**uncontradicted**” testimony about matters only the Defendant could have testified about, particularly due to the passage of time that occurred pre-indictment. The Defendant here exercised his right not to testify, and there were so few witnesses available to the Defense because of the passage of time that the testimony of the few fact witnesses the State had at its disposal would only have been able to be contradicted by the Defendant. Here the prosecutor used the Defendant’s choice not to testify coupled with the passage of time to, in effect, cast disparagement on the Defendant for not testifying. He was not, as the prosecutor was clearly arguing in his closing statement, getting up to contradict what the State’s witnesses said so, in essence, the prosecution would argue, he had to be guilty. Such argument warrants a reversal of this case.

3. The State was permitted to introduce significant amounts of 404(b) evidence, including, through the testimony of witnesses, allegations of domestic violence against various family members all of which are prior bad acts, have no relevance to the alleged murder, whose prejudicial effect far outweighed their probative value, and that have no alternative theory of admissibility (such as motive, intent, opportunity, etc.). The Defendant, thereby, was convicted in large part because the Prosecutor was able to label him as a "monster" rather than whether the Defendant actually committed the crime.

Rule 404(b) of the West Virginia Rules of Evidence mandates that character evidence is not admissible for the purpose of proving that a Defendant acted in conformity therewith. The obvious

import of this rule is to prevent character assassination from being the driving force behind a conviction. Upon review, the Court undertakes a three step analysis. First, an appellate court must review for clear error that the trial court's factual finding that there is sufficient evidence to show that other acts occurred. Second, an appellate court review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, an appellate court reviews for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under W. Va. Rule of Evidence 403. State ex rel. Caton v. Saunders, 215 W. Va. 755, 601 S.E.2d 75, 2004 W. Va. LEXIS 101 (2004).

Here, although a 404(b) hearing was held, on April 11, 2008, it is unclear from the record whether the Court took a close, careful, case by case analysis of each item of 404(b) evidence to determine its relevance, admissibility, or used the balancing test under 404(b). In addition, the evidence presented was highly prejudicial to the Defendant, Richard Poore, and in no way would fit under any of the exceptions under 404(b). Plain and simple, the introduction of this evidence before the jury was nothing more than a character assassination of the Defendant, casting him in a bad light before the jury, and making it impossible for the Defendant to get a fair trial. Much of this evidence was, through the testimony of witnesses, allegations of domestic violence against various family members, all of which are clearly prior bad acts for which the Defendant was never convicted of or even charged with or that there was even any contemporaneous documentation to support, that have no relevance to the alleged murder, whose prejudicial effect far outweighed their probative value, and that have no alternative theory of admissibility (such as motive, intent, opportunity, etc.). In addition, many of the witnesses that would have been able to refute or disprove allegations by the State **were not available due to the passage of time.** (It is also important to note that there was no

instruction given by the Trial Court on 404(b) evidence until **the day after** the witnesses had testified).

The Defendant, thereby, was convicted in large part because the Prosecutor was able to label him as a "monster" rather than whether the Defendant actually committed the crime.

During the trial, the Defendant's ex-wife, Jeri Williams was allowed to testify as follows:

Q. Now how would you characterize the defendant's disposition?

A. Very cruel.

Q. Was he ever violent?

A. Quite often.

Q. And was he ever violent toward you before baby Ricky was born?

A. Yes, sir.

Q. Could you just relate to the jury some of the acts of violence your recall receiving at any time anywhere with regard to the Defendant?

A. There was one time that he got angry and he choked me to the point of unconsciousness. He thought he already ---. He thought I already passed away. I guess, so he tossed me in the closet. When I needed up, when he threw me in the closet my head cracked back on the wood and it caused me to catch my breath and he had taken off in the meantime so I had a chance to get away. Trial Transcript Pgs. 110-111.

Q. Do you remember any other occasions when you ran and hid from the defendant, you and your children ran and hid because of your fear for him?

A. There were so many times Mr. Sweeney, that I really -- the only time I can remember we lived in an apartment in New Matamoros. I had the kids and they were all really little and we ran

into this field and we laid in the high grass until he had left and I knew he was out of the area. It was just all the time having to run, hide, you know, because that is the way our life had become.

Q. Do you recall an incident involving when he wanted money or food stamps from you?

A. Yes. Him and one of his buddies came to our home. He was not living there then. He was staying with a friend.

Q. Where was your home at that time?

A. It was on Morgan Avenue here in St. Mary's. I would not give him what he wanted so he knocked my two bottom teeth through my lip, and of course, the kids were just petrified all the time. But there was another occasion he kicked me one time with combat boots on. I ended up in Marietta Memorial Hospital for a week with a blood clot in my leg. So, you know, it was not one incident, it was just several.

Q. Was there a time that you can recall that involved your children going to church?

A. Yes. One Sunday morning my two boys asked me if they could go to church. I told them sure. You know. I had Ricky and I had the other kids. I said sure, you can go. He woke up and he asked me where the boys were. I said I let them go to church. And he said when they get back they are getting a beating. I said no, they are not. I said if anybody is going to take a beating, it will be me. So he beat me with a belt because I let them go to church. Trial Transcript Pgs. 112-113

The Defendant's stepdaughter, Heather Dunn, was permitted to testify as follows:

Q. Did you ever see him act violently toward anyone in your family?

A. Yes. He was violent to my mother. He was violent to both of my brothers, not the baby. Ricky was not born yet when we lived in Ohio. Both of my baby brothers he was very mean

and my baby sister especially. On many occasions I watched him beat on my mother. My baby brother, Chuck has a – he was only two at the time. I think, and he had a speech problem and he thought that was funny. He would lay him on his stomach on the floor and sit on him and try to make him say words like red or purple which he could not pronounce right. Every time Chuckie would say it wrong, he would punch him in the back until finally Chuckie would either have an accident in his pants or then he would put him in a corner. He did the same thing to my brother Allen. He would try to make him say swear words like bastard and Allen would say, I am no saying that and he would hit him. Finally Allen would say it and he would let him up. Chuckie would have accidents in his pants and one time Rick threw him into a closet door so hard he hit the closet door and cut Chuckie's back and he laid in the closet and cried himself to sleep. Trial Transcript Pgs. 126-127.

The Defendant's stepson, Charles Hinton, was allowed to testify as follows:

Q. Based on your recollection at the time you lived in the same house as the defendant how would you characterize his disposition?

A. A monster. I remember him doing stuff to all my family including myself. I remember using the bathroom in my pants once. He just forcefully threw me through the doors and left me there until my mother got back from work. He pulled my brother's hair out in tufts. He laid me and my brother both between his, under his legs as he sat in a chair like this and I had a speech impediment and I could not say things right. I mispronounced words and he laid me down there and whenever I would say the word wrong he would punch me in my back until I got it right. My brother did not have an impediment. And he would pick which one he was going to get. If it was my brother, he would want him to say curse words. My brother would not say them and he would punch

him and when he would say them, he would punch him. So it was always the end of the game was just getting punched in your back. I remember him doing many things to my little sister Laura. Stupid things. She would be starting to cry and just different things; he would just get violent. There was many different things he did. He would kick her. He would --- There is multiple times of that. He'd slap her and you are talking about baby, baby, not a toddler at least.

I can remember my mom took quite a few beatings for us. Once whenever my mother sent us to a church right down the road here, me and my brother, we got back and Rick was mad because it was not a Jehovah Witness church and he was going to beat us with a belt, but my mother would not allow it. So she took the beating with the belt.

I remember another time he punched her in her mouth. He sent her teeth through her lip. My sister had to help her pull her teeth out -- pull her lips off her teeth. He was just a torturous person.

Trial Transcript Pgs. 134-136

Q. This area here?

A. Yes. And she said, I don't want to go back to bed. At that moment he just started kicking her and kicked her from the living room to the bed and I helped her back into bed. I did not say anything. I knew it would be worse if I did.

Q. How old was your sister Laura at this time?

A. Between two and three, two and a half maybe.

Q. So the defendant kicked your sister from this area where the couch and everything was down the trailer into this area where you guys had beds?

A. The trailer was not all that --. He may have kicked her two or three times but, I mean, any time you kick somebody --. He kicked her until he kicked her to the bed. I helped her get in the

What is clear from the Trial Transcript is that, although a 404(b) hearing was held, many of these allegations were not objected to by the Defendant's counsel and were, subsequently, allowed into evidence by the Court. Of perhaps most significance is the fact that the Defendant's counsel either did not introduce available impeachment evidence to nearly every prejudicial statement made, **or such evidence was unavailable due to the passage of time because witnesses that could have testified to undermine the credibility of the State's witnesses or outright refuted the State's allegations were deceased or unable to be located by defense counsel.** He failed to cross examine, in an attempt to impeach witnesses such as Jeri Poore Williams, or Chuckie Hinton based on public statements they had made in the media that contradicted their trial testimony. Further, there was evidence contained within the original investigative report, and the current report prepared by Officer Bauso, that refuted certain pieces of testimony. Yet, the prosecutor did not maintain his responsibility in ensuring that only truthful, consistent evidence is presented -- as is apparent from the previously unreleased, previously un-redacted police report (which is now of record) -- and the defense counsel failed grossly in his job to cross examine witnesses and impeach their testimony when possible.

A case may be subject to reversal where the trial court fails to comply with its gate-keeping requirement for the admissibility of prior bad acts under 404(b). State v. Ladd, 210 W. Va. 413, 557 S.E.2d 820, 2003 Lexis 181 (2001). A prosecutor, to introduce such evidence must elicit a proper reason under 404(b) for its admissibility. Here the Trial Court held a 404(b) hearing on April 11, 2008, in which some testimony of the parties was elicited. But from the record, the Trial Court's analysis is unclear as to why the evidence was admitted and under what theory it was introduced.

Consequently, under a Ladd analysis, this case must be dismissed, or at the very least, remanded for further hearing on the admissibility of this evidence and a new trial.

4. Counsel's performance was deficient under an objective standard of reasonableness; and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

West Virginia adheres to the two prong test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), namely that in order to prove ineffective assistance of counsel, one must establish that (1) Counsel's performance was deficient under an objective standard of reasonableness and (2) and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

This case is so full of errors on the part of defense counsel that it difficult to find a place to begin. The errors were not just tactical decisions, they were errors that were -- under an objective standard of reasonableness -- so numerous and pervasive for a murder case that one cannot help but conclude that counsel's performance was deficient. In addition, but for all of these errors, it would be highly likely that the Defendant would not have been convicted.

Already mentioned previously was the defense counsel's decision not to give an opening statement. How can one objectively believe that NOT giving an opening statement would be beneficial to the Defendant where so much 404(b) evidence was referred to in the opening and the Defendant was cast as a monster? Defense counsel further failed to make any objections to the improper statements made by the Prosecutor during the opening. In addition, defense counsel failed to properly question the jurors during the *voir dire* phase of the trial, failed to ask crucial follow up questions, failed to make appropriate motions to strike jurors who had relationships with the state or

were actually clients of the prosecuting attorney. Defense counsel failed to even raise or address the issue of passage of time in the matter, which will be discussed shortly.

The numerous additional errors made by Defense counsel include, but are not limited to the following -- all of which have the cumulative effect of making counsel's assistance ineffective: The Defendant's counsel failed to make any motion to exclude or retain an expert regarding the veracity or trustworthiness of the eyewitness testimony of two witnesses, Heather Dunn and Chuck Hinton, who were seven years old and five years old, respectively, at the time of the incident and upon whose testimony the jury was expected to rely for eyewitness accounts of both 404(b) evidence and eyewitness testimony of the incident where the Defendant was alleged to have committed the crime at issue. Further, the defense failed to use such expert at the 404(b) hearing to determine whether these children had the ability at all to remember events they testify to that would have happened when they were as young as *two years old*. This evidence certainly was damaging to the defendant's case and most certainly weighed heavily in the jurors conclusions. With the age of these witnesses, and their devastating impact on the case, it is clear that counsel should have addressed this issue.

Counsel for the Defendant failed to move to suppress the Defendant's statement made in 1981 where he gave a statement to Deputy Stevens at the hospital in Marietta, Ohio. It was a handwritten statement and the defendant was not properly Mirandized. Given that the Defendant did not testify, it was crucial to suppress any statement that the Defendant would have made that could have been misconstrued by the prosecutor, or even the jurors. Yet here no attempt was made to even try--despite the fact that the prosecutor used the "hearsay statement" of the defendant in his closing. Recall that the prosecutor argued, in essence, are you going to believe the testimony of the witnesses or the hearsay statement of the defendant.

Counsel for the Defendant failed to move to compel the Prosecutor to provide a copy of the statement the Defendant gave to Trooper Henry who gave him his polygraph, which the Defendant passed. That statement was not even given in discovery and would have shown prior consistent testimony. The Defendant also gave a statement to a social worker in Morgantown which was never produced in discovery that could possibly have proven to be prior *consistent* statements made by the Defendant and which may have impacted the Defendant's decision about whether to testify..

Counsel for the Defendant failed to make an interlocutory appeal to the Supreme Court of Appeals for the denial of the Defendant's motion for a change of venue, or for the admissions ruled on in the 404(b) matter. While it is clear from *voir dire* that everybody knew about the case, no record has yet been found in the Defendant's file as to the results of the survey conducted by the expert retained to perform said survey, despite the approval of an \$ 8000 fee for such expert, nor has there been any ruling found determining what the ruling was on any motion.

Apparently, there was a letter from Dr. Kaplan that was not provided but was referenced in testimony by Dr. Kaplan. The Prosecuting Attorney had not provided it to the Defendant when the Judge ordered he provide it. Counsel for Defendant only had ½ hour to review information provided which might have been helpful if it could have been investigated as it contained the information that Dr. Kaplan was going to refute from Dr. Frost's testimony which, had it been provided as it should have been, would have allowed defense counsel time to find an expert to refute Dr. Kaplan's testimony. It is unclear why the Defendant's counsel made no motion to exclude the testimony of this witness on the Prosecutor's failure to provide prior statements despite the fact that the statements were known to the State prior to the witnesses' testimony.

The Defendant's counsel failed to properly secure evidence that might have been extremely

helpful to defendant, ie: photos or video of alleged crime scene, the files that were lost, destroyed, or missing police reports and medical records containing statements about the poor health of the child victim were not provided for review prior to trial, and to what extent they were provided, defense counsel failed to use them for impeachment on any level.

Jurors and Grand Jurors were allowed to hear, as it was introduced into evidence, non-scientific information from the internet about SBS by the State trooper. The Trooper also testified to non-factual information (e.g. that baby would have to have been dropped from 4 stories). In addition, there were questions asked by the Grand Jury on the record about the babies' health and it was reported he was healthy when he had not been since birth (comparing the un-redacted police report to the Grand Jury Transcript). It had been a horribly complicated pregnancy and delivery, none of which information was presented or raised by defense counsel, in spite of the fact that records existed that showed exactly those facts. The Defendant's counsel failed to use any of this information during his cross examination of the State's witnesses. He simply failed to bring any of this conflicting testimony to the light of the jury.

The Defendant's counsel did not find the social worker, Susan Wilson, who questioned both the Defendant and Jerri Williams and noted in records that she believed that neither the father nor mother had anything to do with the child's death in her expert opinion. The Defendant's counsel failed to attempt to introduce this statement which could have been admissible under hearsay exceptions to the inability to locate the witness because of passage of time and due diligence in attempting to locate said witness. Consequently, because of these failures of Defense counsel, a crucial conclusion could have been presented to the Jury regarding the Defendant's innocence.

The Defendant's counsel did not subpoena or attempt to bring to trial or take a statement

from the Defendant's babysitter from South Carolina, whose child was reported by Jeri Poore to have dropped this baby and kicked him in the head 4 days prior to his death, which would have been consistent with an injury that could have caused this child's death. Given that the Defendant did not testify, there was little presented by the Defense counsel regarding an alternative explanation of the death of the child. This crucial witness would have added one more piece to the puzzle for the jury as to why the child died and could have been used to foster reasonable doubt.

The Defendant's counsel failed to use transcripts or minutes of the presentation of the case before the Grand Jury which did contain contradictory statements and prevented the Defendant from exploring any arguments regarding either the composition of the Grand Jury or the evidence presented before the Grand Jury. Further, the Prosecutor allowed false testimony to be given at the Grand Jury proceedings, especially in view of the unredacted police report now in the defendant's possession, wherein the trooper testified that this was an otherwise healthy child, which was not true, and the Prosecutor was in possession of records that indicated this. He also testified there was no possible other explanation for this "trauma" when in fact their records from Dr. Frost indicate that Jeri Poore told Dr. Frost at the time about the injury to the head of this child four days prior to his death and about his behavior during those four days which would have been consistent with the gradual decline of functioning often seen in SBS. Again, Defense counsel's lack of research and preparation for trial regarding prior statements cost the Defendant dearly in his ability to effectively counter many of the State's witnesses.

The Defendant, **because of the passage of time**, lacked the ability to confront his accusers in a timely manner while any viable memory was in tact. This diminished the credibility of the witnesses, and had the defense counsel asked for proper instructions for the jury to that effect, surely

one would have been given. One must remember at this point that the original investigating officer says that "it became apparent that the five year old had been coached by members of the family". The Defendant's counsel failed to secure an expert to present evidence regarding "created memories" despite the Defendant's and the defendant's investigator, Dave Deak's, request for him to do so and failed to secure services of an expert radiologist, neurologist, or pathologist to testify to findings consistent with Dr. Frost who was the pathologist who conducted the autopsy.

The Defendant's counsel did not have evidence independently examined and failed to raise issue of the inability to do so because of passage of time.

The Defendant's counsel failed to make a motion to sever the mercy phase and did not discuss with the Defendant whether he could even do this or not -- nor did the Court. Likewise, the Defendant's counsel did not put on any evidence in support of mercy recommendation by calling witnesses to testify to character in spite of the fact the 404b evidence had already been admitted that might have been used imputing character.

The Defendant's counsel did not attempt to suppress or challenge the legality or accuracy of the current medical examiner altering the autopsy reports or changing the cause of death. Why this whole process was never examined or explored we will never know.

The Defendant's counsel failed to introduce or use evidence from many published sources wherein detrimental witnesses were quoted with stating things that were not consistent with their testimony or the physical evidence, i.e.: several newspapers wherein Charles Hinton was quoted as saying he saw the Defendant bash his brother's head into the wall, which was not true. This would have been absolutely essential for the cross examination of these witnesses, especially given that so much of the State's case was presented by way of 404(b) evidence.

Defense counsel failed to file a motion to dismiss Indictment based on the fact that the current investigating officer misled grand jurors when they asked direct questions of him. Further, this officer and prosecutor offered statements to the media, which might have been viewed by the Grand Jurors, that this baby had a fractured skull and that Shaken Baby Syndrome was not something that medical professionals were trained to look for at the time of this child's death, and neither of those pieces of information were true. The officer testified to certain "grip or finger marks" which were said to have no other source when in fact the officer would have had investigating officer Pete Lake's report wherein he indicates he verified with Marietta Memorial Hospital, which originally treated this child upon presentation that they created those marks. Lastly, regarding the Grand Jury proceedings, the Defense Counsel failed to move to dismiss the indictment based on the use of unscientific evidence being presented to the Grand Jury without the benefit of a medical expert to explain.

Defense counsel failed to properly protect the Defendant's interest when counsel provided the Prosecutor with medical records upon the Defendant's waiver of the preliminary hearing that had been secured by the Defendant's sister on his behalf, which allowed ultimately for the State's witnesses to potentially modify their testimony to fit that evidence. Prior to the surrender of this evidence to the State, the witnesses made many statements in the media which then were not testified to at trial as they were not consistent with the physical evidence provided by the Defendant's counsel, ie: baby's head being bashed against the wall. Yet, as argued earlier, the Defense Counsel failed to use this as impeachment fodder. There was no obligation to provide this information to the State until the State provided information to the Defendant.

Defense counsel was ineffective in his assistance to the Defendant in that he waived the

preliminary hearing when he could have required testimony from certain of the State's witnesses which would have allowed a sworn statement of fact to be secured, while giving this evidence to the State to prevent them from erring in allowing testimony which would then be impeachable with these records. These records were not believed to still be in existence and may not have been gotten by the State of their own volition.

Defense Counsel failed to be effective when he failed to object to the repeated and consistent use of the phrase "grip marks" or "finger marks" when the Prosecutor knew those to have been made by medical treatment as was documented in Pete Lake's original report. Defense counsel knew that this information existed but did not impeach this testimony.

Defense counsel failed to effectively represent the Defendant when he failed to secure co-counsel in spite of the fact that the Defendant requested the same. An attorney in Fairmont had offered to fill that position for free, and -- in spite of the fact that this was a capital murder case with voluminous issues to be researched and presented -- his assistance was not sought or accepted. It is common in murder cases to request co-counsel to assist in trial given the large amount of discovery, pretrial motions, and witnesses. However, in spite of this practice, and in spite of the fact that an attorney with knowledge and experience in defending Shaken Baby Syndrome cases, volunteered to help, Defense counsel failed to seek it.

Defense Counsel failed to effectively represent the Defendant when he failed to cross examine Officer Bauso on the issue of why there was such a stark difference in the degree of culpability for this crime between the original criminal complaint filed which said the Defendant shook the child to "stop the crying" and what was ultimately testified to at trial. Certainly, involuntary manslaughter would have been a consideration for a jury to weigh if the motive alleged

was to stop the crying versus the voluminous information presented to establish his motive as simply being mean and abusive, when there had been no new evidence gathered.

Defense counsel failed to protect the record by failing to file motions for production of the original investigative report in its entirety using statements made by witnesses in the media as being inconsistent with what they testified to at 404(b) proceedings, thereby indicating a likelihood of exculpatory evidence being contained in this report. Further, defense counsel failed to file a motion to produce the statement of the Defendant to Trooper Henry prior to his polygraph which Trooper Henry conducted and Dr. Frost's records indicate Pete Lake reported the Defendant to have passed this test.

Defense counsel failed to move for dismissal of this case because of loss of evidence and passage of time's effect unfairly impeding the defense in that certain witnesses that would have been impeachment witnesses had died, reports were lost, there had been a degradation of physical evidence, the trailer or "crime scene" was no longer available to photograph to show inconsistencies in the witnesses testimony. The victim's bed was no longer available. Defense counsel never raised the issue of loss and corruption of memory, loss of other witnesses: i.e., teachers, neighbors, social workers, SCAN Agent, and loss of letters written to the grandmother and mother of the Defendant by Jeri Poore indicating her knowledge that the Defendant had nothing to do with this child's death.

The Defendant asked his counsel consistently for the babysitter, Mrs. Johnson to be called as a witness, as well as witnesses who would have known him at the time of his son's death which would have presented a more accurate picture of the Defendant was and potentially impeach testimony offered by the State.

Defense Counsel failed to effectively represent the Defendant when he failed to draw

attention to the lack of scientific evaluation engaged in by Dr. Kaplan allowing him to change the manner and cause of death without examining any physical evidence.

Defense Counsel failed to effectively represent the Defendant in that he failed to instruct his investigator to locate neighbors from that period, interview old boyfriends of Jeri Williams who might have told him that they in fact did some of the things that Richard was accused of in the 404(b) hearing; failed to interview the original prosecutor and try to obtain his file; failed to secure original dispatch records to determine how this call developed and who initiated the contact.

Defense Counsel failed in his duties to effectively represent the Defendant when he failed to move for a directed verdict of acquittal at the conclusion of the State's case and at the conclusion of the Defendant's case. The record is silent on any such attempt by Defense counsel to make any arguments of this nature whatsoever.

Here the mistakes of Defense Counsel were so profound and so persistent under any objective standard of reasonableness that one must determine that counsel was ineffective. Likewise, it is abundantly clear that, based on the forgoing explanations of counsel's errors, that there is a reasonable probability that but for the cumulative effect of the errors, the result at trial would have been markedly different.

5. The State withheld exculpatory evidence violating the Defendant's substantive due process rights under Brady v. Maryland.

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 wilfully 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).

Disclosure required under Brady exists whether a motion is made or not. The government must act in good faith in discharging this duty; if in doubt, it should submit the material in question to the court itself for in camera review. Disclosure under the Brady rule should also be made at a time when the disclosure would be of value to the accused and, at least, before the taking of the accused's evidence is complete. In a complicated situation, where there is exculpatory evidence having a material bearing on defense preparation, the government should provide the defense with the exculpatory material prior to trial, otherwise the defense would not be able to capitalize on it. United States v. Anderson, 481 F.2d 685; 1973 U.S. App. LEXIS 9163 (4th Cir 1973).

In review of the record, the original, **unredacted** police report was included. *See Appellate Record First "Report of Investigation" Exhibits*. The Defendant never saw the unredacted police report. The Defendant here was only provided the **redacted** version, which is also a part of the appellate record. *See Appellate Record Second "Report of Investigation" Exhibits"*. The first time that the Defendant or the undersigned counsel saw the un-redacted police report was when the record was provided by the Supreme Court of Appeals.

The un-redacted police report is full of exculpatory evidence, impeachment evidence, and information that the Defense should have but was denied access to prior to trial. For example, the officer notes that Richard was willing to take a polygraph, that Dr. Foster was of the opinion that nothing improper was involved, that Deputy Stevens, the first officer on the scene at the hospital, did

not feel that there was any indication of criminal problems and that Richard did not kill the child, that Trooper Lake in his report felt that State's witness "Chuckie" (Charles) mistook the slap that Richard gave the baby to try to resuscitate the child misinterpreted by the child as trying to beat the child (as he testified to), and that the child showed no signs of being thrown to the floor (as was stated). In addition, the un-redacted police report reveals that Dr. Frost only observed one minor bruise on the child that he deemed caused by resuscitation attempts (the State argued that the bruising on the child was consistent with shaken baby syndrome), and that -- according to Dr. Frost - - there was no evidence of trauma that would be consistent with shaking of the child by the father. The investigation report goes on to say that there is no real or circumstantial evidence that would support any conclusion but that the child's death was by natural causes. **Virtually all of this information was testified to falsely by witnesses throughout hearings and the trial. In reality, without Chuckie's testimony, as the supposed "eyewitness", there would have been no case.**

It is clear that this information was exculpatory on its face. Therefore, we must visit the second prong of the Brady test. Here, the failure to provide the police report without redaction clearly indicates that the evidence was suppressed. It is clear as day from the redacted police report that was given to the Defense (the one with blackened out areas) that crucial information was suppressed by the State and the Judge.

Then how was this information material? All of it was. The fact that Dr. Foster was of the opinion that nothing improper was involved could have been used to impeach Dr. Kaplin. The fact that Deputy Stevens did not feel that there was any indication of criminal problems and that Richard did not kill the child could have been used to impeach any officer's testimony to the contrary. The fact that Trooper Lake felt that State's witness "Chuckie" (Charles) mistook the slap that Richard

gave the baby to try to resuscitate the child misinterpreted by the child as trying to beat the child (as he testified to) could have been used by the Defense to refute Chuckie's testimony at trial to the contrary. The fact that and that the child showed no signs of being thrown to the floor (as was stated) could have been used to contradict or impeach Chuck Hinton. In addition, the un-redacted police report reveals that Dr. Frost only observed one minor bruise on the child that he deemed was caused by resuscitation attempts (the State argued that the bruising on the child was consistent with shaken baby syndrome), and that -- according to Dr. Frost, **who actually saw and examined this child alive** -- there was no evidence of trauma that would be consistent with shaking of the child by the father. Remember, this was argued by the Prosecutor as proof positive of SBS **from the opening to the closing**. This all would have been available to the Defense to pursue additional questioning, gather additional evidence, or undertake different avenues of cross examination of crucial State's witnesses -- many of whom were not cross examined at all or to a minimal degree. Because the investigation report goes on the say that there is no real or circumstantial evidence that would support any conclusion but that the child's death was by natural causes, this could have been used to further undermine the credibility of any State's witness or bolster the Defense case either by the calling of crucial witnesses or allowing the Defense to undertake different avenues of research. All of this evidence was highly material to the Defense and its suppression was prejudicial to the Defendant. Had the Defendant known that this evidence was available, he may have well changed case strategy about his own testimony, because the report would have supported so much of his expected testimony.

There was simply no reason why all of this information was redacted by the State or the Court other than to gain advantage over the Defendant. It is inconceivable to believe, after a

thorough review of the redacted and un-redacted police reports that this information was not provided to the Defendant under the State's duty to provide potentially exculpatory evidence. Further items that the State failed to provide were the letter that Dr. Kaplan wrote the Bureau of Vital Statistics, the witness statements were effectively not provided, Kaplan's report itself, the two pages utilized with the Grand Jury, and the original Prosecuting Attorney's file, not to mention that attorney was available to testify but was not utilized by the defense council. Under a Brady analysis, this case should be reversed.

6. The State knowingly used false testimony during the Grand Jury proceedings and Trial to obtain a conviction.

A conviction obtained through use of false evidence, know to be such by representatives of the state, must fall under the due process clause of the Fourteenth Amendment; the same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears. First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, Mooney v. Holohan, 294 US 103, 79 L ed 791, 55 S Ct 340, 98 ALR 406; Pyle v. Kansas, 317 US 213, 87 L ed 214, 63 S Ct 177; Curran v Delaware (CA3 Del) 259 F. 2d 707. See New York ex rel. Whitman v. Wilson, 318 US 688, 87 L ed 1083, 63 S Ct 840, and White v Ragen, 324 US 760, 89 L ed 1348, 65 S Ct 978. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Alcorta v Texas, 355 US 28, 2 L ed 2d 9, 78 S Ct 103; United State ex rel. Thompson v. Dye (CA3 Pa) 221 F. 2d 763; United State ex rel. Almeida v. Baldi (CA3 Pa) 195 F. 2d 815, 33 ALR2d 1407; United State ex re. Montgomery v. Ragen (DC 111) 86 F Supp 382.

Here it is clear that the indictment was obtained through false testimony. For example, Trooper Bauso testified that autopsies had been done, but the final conclusions had not been made, Grand Jury Transcripts Page 3, Lines 21-22. And he stated that there was insufficient evidence at the time, be it medical or anything else, to conclude the death as anything at the time, Grand Jury Transcripts, Page 11 Lines 1-3. Again, Bauso testified that the autopsy was completed then, all the notes and everything that was performed on the infant at the time was documented, but there was never any conclusion made. Grand Jury Transcripts Page 11, Lines 11-14. And he stated that autopsy was performed but there was not an autopsy report made or a conclusion or finding of fact, Grand Jury Transcripts, Page 24, Line 23 thru Page 25, Line 1.

But it is clear from Trooper Lake's final conclusions that a conclusion **had been made** in this matter. Trooper Lake concluded that no murder had occurred. See Trooper Lake's Report.

Also during the Grand Jury proceedings, Trooper Bauso testified that according to the brother who was 5 years old at the time and was present, he watched the Father pick up the crying child and he began Forcefully Bouncing him on the couch. At some point the child rolled off onto the floor, then the father picked up his son and shook him till he went silent, Grand Jury Transcripts, Page 5, Line 1-20.

However, according to Trooper Lake's Report, Mrs. Cornell advised that Chuckie Poore, had told her that Daddy tried to kill his little brother and beat up on the baby and then threw the baby in the floor, Trooper Lake's Report, Page 4, Janie. The undersigned also talked with Charles Poore, who was present at the time that father realized that infant was not breathing, **THEN REDACTED**, Trooper Lake's Report, Page 5. Trooper Lake interpreted this as attempting to resuscitate the victim.

Perhaps most importantly, the Prosecutor stated to the Grand Jury that there appears

to be finger marks as if the child was grasped. Grand Jury Transcripts, Page 6, Line 19-22, Sweeney. Bauso also testified that there appeared to be finger marks around the rib cage of the infant, Grand Jury Transcripts, Page 6, Lines 22-23, Bauso.

Yet the contemporaneous police report by Trooper Lake says just the opposite. When Lake spoke with several nurses in the ER who viewed the child, they reported **no cuts, bruises, or marks** when brought in. There was Some bruising appeared those being claimed by medical staff they stated no sign of foul play existed, and they attributed this to the IV and CPR. Trooper Lake's Report, Page 3, Lake Nurses. Dr. Foster, the attending Doctor, stated that there were no signs of foul play or any indications of abuse or neglect whatsoever, Trooper Lake's Report, Page 3. Janice noticed nothing unusual to indicate foul play, Trooper Lake's Report, Page 4. Dr Myerburg had no reason or indication of abuse. Trooper Lake's Report, Page 5. George Knight EMS said that nothing appear foul. Trooper Lake's Report, Page 6. Deputy Stevens was contacted by family members and his feelings were that no illegal activities or abuse were present. Trooper Lake's Report, Page 8. Dr. Frost's notes indicated that there was no bruising on the child when brought in, but there was some bruising developed during CPR. Dr. Frost noted no evidence of trauma, or foul play. Dr. Frost's Note's, 4/18/81. According to Dr. Frost, shaking causing subdural hemorrhage has to be very vigorous and would expect to show other neck and cervical changes/dames, Dr. Frost's Notes, 4/19/81, which did not exist here. Likewise, the initial assessment record NICU stated that there was no bruising, or retinal hemorrhaging, West Virginia University Hospital Notes, 4/14/81, Page 8.

During the Grand Jury proceedings, trooper Bauso testified that as far as Medical Treatment, actually, another member of the family and her daughter arrived first. Grand Jury Transcript Page 12,

line 16 to 18. A juror asked if no CPR was done on the baby? Bauso then testified that there was by EMS Personnel and by one of the first responding there. Grand Jury Transcript Page 13, lines 12 to 22. And there were two trained people that did the CPR. Grand Jury Transcript Page 16, lines 9 and 10.

However, soon after the incident, Trooper Lake met with Mr. Richard Poore, father of the baby at Memorial hospital Emergency Room in Marietta, Ohio. He stated that the baby started making funny sounds and appeared to be choking. Mr. Poore then stated he picked up the baby, turned it over and slapped it a couple of times on the back to try to get it to breathe and began mouth to mouth resuscitation. He then had the five year old step-son, Chuckie, go for help. Trooper Lake's Report, page 2. The undersigned met with Washington County Ohio Deputy Stevens and discussed this case. Deputy Stevens was the first officer to the hospital and took a written statement from Mr. Poore. Trooper Lakes' Report, Page 4. Deputy Stevens could have testified to making an initial investigation into the case when contacted by members of the family at the hospital and to his feelings that no illegal activities or child abuse transpired. Also, Deputy Stevens could have testified to taking a voluntary statement from the father, Richard Alan Poore Sr. Trooper Lake's Report and Morgantown Records also In Frost's Note's etc.. Sworn Statement, Trooper Lake's Report.

Again, Trooper Bauso testified that at the time of the baby's death the Defendant, Richard, was suspected of abuse. Grand Jury Transcript, Page 15, lines 2 to 4.

Trooper Lake, however, according to his report, talked with Mrs. Poore, mother of the baby. Mrs. Poore stated that she felt there was no indication of foul play, Trooper Lake's Report, Page 3. The undersigned officer talked with several nurses in the emergency room and viewed the infant child.... They stated that no signs of foul play existed. Trooper Lake's Report, Page 3. Trooper Lake

also spoke with Dr. Foster, the attending physician. Dr. Foster advised that he had observed or learned of no foul play and had no indications whatsoever of any abuse or neglect to cause the baby's condition. Trooper Lake's Report, Page 4. Mrs. Cornell stated that upon arriving at the house she had noticed nothing unusual to indicate foul play in the loss of the baby's life. Trooper Lake's Report, Page 4. Dr. Myerburg of the WV Medical Center called the investigating officer by phone.... Dr. Myerburger advised he had no reason or indication of any abuse or attempt on the baby's life. Trooper Lake's Report, Page 5. Deputy Steven, his feelings that no illegal activities or child abuse transpired. Trooper Lake's Report, Page 8. Fathers—polygraph test by Trooper Henry—no signs/ indications of falsehoods, did not intend or purposely cause. Frost's Notes from 4/18/1981. "I do not feel that either of the parents intentionally hurt this child." Susan Wilson, the SCAN agent stated in the records from Morgantown Records, page 21, that "It is my personal and professional opinion that the infants father was not involved in abuse

Trooper Bauso testified at the Grand Jury that there was no other way that the baby could have received the injuries that caused his death, other than SIDS. Grand Jury Transcript, Page, 17, lines 17 to 21. However, in talking with Janice it was learned by Trooper Lake that the mother had some type of blood disorder that was never determined by doctors. Trooper Lake's Report, Page 7. It was learned from the mother that she had a difficult time in carrying the baby during pregnancy and had herself suffered from some type of blood disorder that was never determinable by the doctors. Trooper Lake's report, page 7. From the mother, "My baby has been coughing, sneezing and has diarrhea with bloody stools for approximately 3-4 days." Selby General Hospital, History of Physical Exam. Stool (describe) brown loosely formed with frank bleeding. WV University Hospital, Page 8, initial assessment record. BM- smell foul and have characteristics of bowel

mucosa with blood. WV University Hospital, page 17, NICU, 4/15/81. Page 44 of University Records, Urine, Blood initially in urine, but later negative. In addition, the Babysitters's daughter kicked the subject in the head, subject cried hard when it happened four days prior to becoming ill. Dr. Frost's notes dated 6/17/81. Thus there were several different reasons why the infant here could have died.

During the Grand Jury proceedings, Trooper Bauso, said there was insufficient evidence at the time, be it medical or anything else, to conclude the death as anything at the time and that the State was waiting for further information. Grand Jury Transcript, Page 12, Lines 1 to 3. Bauso state that they know it was an abusive head injury that caused the death of the child. Grand Jury Transcript, Page 23, lines 3 to 7.

However, what did they look at? Bauso stated that looked at the autopsy conclusions. Grand Jury Transcript, Page 23, line 11 to 14. They didn't exhume the baby. It was the original evidence from the original autopsy. And the assessment was just a new assessment of old evidence. Grand Jury Transcript, Page 24, lines 5 to 19.

Indeed, from Trooper Lakes report it appears that fact was learned that nothing appeared foul. Trooper Lake's Report, page 5. In talking with the nurses, Trooper Lake's report indicated that no signs of foul play existed. Trooper Lake's Report, page 3. The attending physician Dr. Foster advised that he observed or learned of no foul play and had no indications of any abuse. Trooper Lake's Report, page 3. Most definitely, Trooper Lake's Report concludes -- as does this brief -- that no murder occurred.

Once again, in the Grand Jury Proceedings, trooper Bauso testified that there was no apparent sickness, illness. Yet, the mother made the statement that he was in the hospital basically three

times; for his birth, once when he was dehydrated from diarrhea, and for his death. Grand Jury Transcript, Page 18, lines 9 to 15.

In addition, trooper Lake conducted an Interview was conducted with the mother, Jeri Poore, into details of the baby/s conditions prior to the date the problem began. It was learned from the mother that she had a difficult time carrying the baby during her pregnancy and had herself suffered from some type of blood disorder that was never determinable by doctors. IN talking with the mother it was learned that the baby, about four days prior to the incident, was showing signs of sickness but thought to be just a cold or the flu. Also the baby had been of a sickly nature since birth according to the mother. Trooper Lake's Report, page 7. This child is the product of an extremely complicated pregnancy. Prenatal care began during the third month gestation at 4 months gestation the mother was hospitalized for 3 days because she was "losing amniotic fluid" at 6 months gestation the mother was hospitalized because of severe bleeding from GI tract (with bowel ??? & vomiting) It was suggested at the time that Mrs. Poore might have leukemia, however this was ruled out. Blood pressure during pregnancy was very low, 92/32 at the time of admission (6 months gestation.) The Mother was transfused with 2 pints of blood during delivery. Morgantown University Hospital Medical Records, Page 21.

A Grand Juror asked if the mother thought the father was capable of doing something like this? Trooper Bauso testified thatat the time this happened, directly prior to this happening, the mother was actually hiding from him and he found her. She had brought the kids over here to stay, and he found her and moved in. Grand Jury Transcript, 18/23 through 19/1.

This was simply untrue. There was no such mention of this in all of her interviews. The SCAN Agent, Susan Wilson state that she felt that the parents were open with her regarding the

problems present in there family, their feelings about the child, the incident. She stated that she would contact Protective Service's with the available information and to request that they offer **supportive services** to the family, not abuse prevention services. *See*. Morgantown University Hospital Medical Records, SCAN notes, Page 21.

Here, there was so much falsehood during the presentation of the case to the grand jury, our constitution, previously cited case law, and the interests of justice warrant a reversal of this case.

7. The delay and passage of time between the alleged commission of the crime herein and the arrest of the Defendant warrants a dismissal of this case.

According to this Court, a delay of 11 years between the commission of a crime and the arrest or indictment of a defendant, his location and identification having been known throughout the period, is presumptively prejudicial to the defendant and violated his right to due process of law. The presumption is rebuttable by the government. The effects of less gross delays upon a defendant's due process rights must be determined by a trial court by weighing the reasons for delay against the impact of the delay upon the defendant's ability to defend himself. State ex rel. Leonard v. Hey, 269 S.E. 2d 394, 1980 W.Va. LEXIS 559 (W.Va. 1980); State v. Beard, 194 W.Va. 740, 461 S.E. 2d 486, 1995 W.Va. LEXIS 160 (1995).

This Court has previously ruled that where there is delay between the commission of the crime and the return of the indictment or the arrest of the defendant, the burden rests initially upon the defendant to demonstrate how such delay has prejudiced his case if such delay is not prima facie excessive. State v. Richey, 171 W.Va. 342, 298 S.E. 2d 879, 1982 W.Va. LEXIS 962 (1982). It has also ruled that the due process clause of the fifth amendment to the United States Constitution and

this section require the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the state's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense. Hundley v. Ashworth, 181 W.Va. 379, 382 S.E. 2d 573, 1989 W.Va. LEXIS 156 (1989). This created a burden on the Defendant to show deliberate advantage.

However, in this Court's more recent decision in clarified the principle of delay in criminal cases. This Court stated as follows:

Only by eliminating the burden imposed on a defendant to demonstrate that the State gained advantage through pre-indictment delay, will the ever-arching concern of fundamental fairness that undergirds the Due Process Clause be furthered. . . . A defendant is required to introduce evidence of "actual substantial prejudice" to establish that his case has been prejudice by pre-indictment delay.

The Court went on to indicate that mere speculation is not sufficient, but that the Defendant identify with specificity what witnesses could have been called and establish the content of their testimony so that the Trial Court can determine if those witnesses could be located or whether the information could have been garnered through other sources. Syl . Pts. 2,3 and 4. State ex rel. Knotts v. Facemire et al., 223 W.Va. 594, 678 S.E. 2d 847; 2009 W.Va. Lexis 50.

Prejudice here is clear, if not *prima facie*. Here, in this case, over *twenty years* passed between the alleged commission of the crime and the Defendant's trial. Here the delay was **presumptively** excessive, as it was in Hey. Here, the indictment was bought on new interpretations of old evidence. Here, the indictment was brought after the investigating officer, the examining pathologist, and the prosecuting attorney at the time all decided that nothing happened. Then, some twenty years later, only armed with a new theory of the case, and indictment was brought by the prosecutor backed up by the reworking of a report by the current medical examiner. While the State may well argue that it did not know of the crime until 2006, at some point in time the delay in the

case makes it prejudicial to the defendant --- witnesses become hard to track down or die, evidence is lost, etc. However, here, we have a situation where a new chief medical examiner *changes* an original autopsy which determined there was no homicide. Then a defendant is expected to build a defense after decades of evidence being stale.

To begin, the very fact that the State's case is based upon a diagnosis which is somewhat elusive: though a recognized diagnosis (Shaken Baby Syndrome) remains an unsettled science and controversial. It is as easy to misdiagnose Shaken Baby Syndrome as to accurately diagnose. There are a variety of causes for the appearance of post-mortem brain swelling. One marked factor that is missing in the pictures is the absence of eye protrusion. This would be the first place the internal pressures can visibly be seen. You need a neurologist to accurately identify the absence of this being present in the instant case. The claim, that the State can now identify this years later, is factually non-diagnosable. The Defendant had no way to refute the State's evidence or the claims of what the evidence meant. In addition the individual who was making such a diagnosis was doing the same over twenty years later, without the benefit of actually seeing the body or performing the autopsy.

The Defendant has compiled the following list of persons who were initially involved in this case and who could have been potential witnesses, many of whom could have been called to refute testimony of the State's witnesses:

Richard A. Poore Sr., the Defendant's father, who was deceased, who could refute much of the 404(b) evidence that Richard was a monster, that he abused his children, and could testify about the relationship between his wife and family **after**. Geraldine Poore, Richard's mother, is now 70 years old, is in ill health and has fading memories. She, too, could have testified to much of what

Richard's Father knew about this matter. Robert L. and Lynida Poore, Richards Grandparents, are now both deceased, but could have testified to the same.

The emergency Workers: 911 Dispatcher, unknown name, Steven Knight, EMT Responder and Frank Morris, EMT Responder, could have all testified to the bruising marks, the 911 calls, the incidents surrounding the death of the child, and the resuscitation attempts.

Staff at Marietta Memorial Hospital – Nurses in the Emergency Room and Attending Physician, Dr. Foster, could all have testified about what happened in the ER to cause the minimal bruising that occurred and, as the attending Physician, could have given a first hand account of the condition of the child at the time of the incident. All of these individuals whereabouts were and are unknown.

Members of the Transport Team from MMH to Ruby Memorial could have testified to the treatment that the child received *en route* to Ruby Memorial, which could have provided an explanation of some of the minimal bruising on the child.

Staff at University Hospital –, Dr. Ball, Dr. Fakadej, Dr. Scobata, Dr. Carter and several unknown nurses could all have testified about the condition of the child near the time of the incident and given first hand accounts of the child's condition and the lack of any physical injuries to the child consistent with SBS . All of these individuals' whereabouts are unknown to the Defense.

Mother's Family – Jeri A. Williams, mother, Heather Dunn, half-sister, Allen Hinton, half brother, Charles Hinton, half-brother, Laura Lamb, half sister, Janice Cornell, great aunt and Tammy Maston, great niece.

Baby-sitter and her children – Darlene Johnson and children Connie, Roy, Allen and Sherri,

could have testified to the fact that her own child kicked the baby in the head prior to the incident. The baby-sitter now is very old and has Alzheimer's Disease. She was located by the Defense in South Carolina, but here whereabouts are now unknown.

The Pathologist, Dr. Jack Frost, actually had a stroke and the Trial was continued twice for his inability to appear. Although he did testify, his memory was clouded and impaired.

Police Officers – Washington County Ohio Sheriff Deputy Stevens, Investigating Officer, Trooper Cunningham, spoke to Dr. Frost, Trooper Waybel, spoke to SCAN agents (from Morgantown who were supposed to investigate any abuse allegations, but who concluded that no abuse had occurred), and Trooper Henry the polygraph examiner. All those officers did not testify and there whereabouts are unknown to the Defense at this time.

As he has pointed out, Ms. Susan Wilson, is of particular interest. She was the SCAN (STOP CHILD ABUSE NOW) staff person at the hospital in Morgantown. This program has long been stopped and no one now knows where she is. In the medical records, one paragraph seems to indicate that she interviewed both of the parents and she determined that the Defendant did not abuse the child. However, this would have been hearsay, and we have no idea the specifics of her investigation or why she made the conclusions that she did. Her testimony would have been crucial to the Defense, as someone who was trained in identifying abuse (and perhaps SBS) could have testified that **no abuse occurred**.

Here the parade of witnesses as they unfold, are mostly unavailable, non-findable, dead, or just do not remember the facts with any clarity. Only the written record can be substantiated, and other than refreshing the memories of those involved if they would have testified, the Defendant had no way to pull up and clear up relevant facts surrounding the death of this child. Moreover, Jeri, the

mother of this child, was permitted to testify to 404(b) evidence that was, at the time, easy to prove as untrue. Documents were no longer available to defend the Defendant and witnesses could not be found to refute the unproven, undocumented allegations that Richard was abusive.

What is the meaning/reason of fast and speedy trial? Is not the meaning to enhance the validity of the evidence and preserve the integrity of witness testimony? Is not the indictment axiomatically covered under the fast and speedy provision of the Constitution, by implication? Thus, pre-indictment delay is not just a procedure claim, but goes to substantive due process.

Here the passage of time so hindered the Defendant, Richard Poore's, ability to defend himself that it was impossible Richard could get a fair trial. He could **never** get a fair trial under these circumstances. On this ground alone, and perhaps most importantly on this ground, this matter should be reversed. A remand for further hearing would be the wrong remedy here, because further proceedings would be impossible to the lack of witnesses and physical evidence to prove key facts about the case.

CONCLUSIONS AND RELIEF SOUGHT

The best conclusion that can be drawn here is the conclusion that was drawn by the investigating officer in 1981. Richard Alan Poore, your petitioner and Defendant herein, did not kill his child. As the officer stated ". . . [N]o real evidence or any circumstantial evidence exists that the Poore baby's illness and death was anything but natural sickness. . . . It is believed if the Father had caused any of the child's illness or death it was not done with intent or deliberate but that of

ignorance of the proper manner to supply medical or first aid attention."

The undersigned counsel, on behalf of the Defendant, implores the Supreme Court of Appeals to reverse this case. Counsel has attempted to brief the major areas of concern in this case and would welcome the opportunity for oral arguments on these and any other issues that the Court, after its review of the record, deems important or necessary. This case was a travesty of justice, and the Court should hear this matter and, thereafter, reverse the previous judgment of guilty and the sentencing Order of the Pleasants County Circuit Court entered on January 13, 2009, and, at the very least remand the matter for trial, if not reverse the decision altogether and order that the Defendant, Richard Alan Poore, be released.

RICHARD ALAN POORE

By Counsel



William B. Summers, Bar ID. No. 7239
Counsel for Petitioner
3301 Dudley Avenue
Parkersburg, WV 26104
(304) 420-0975

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RICHARD ALAN POORE, Petitioner, v. STATE OF WEST VIRGINIA,
Respondent

DOCKET NO: 35271

Pleasants County Circuit Court
Case No: 06-F-7
The Honorable Judge Robert L. Holland, Jr.

CERTIFICATE OF SERVICE

I, William B. Summers, do hereby certify that on January 11, 2010, I served a true copy of the hereto annexed **APPEAL BRIEF and MOTION TO EXCEED PAGE LIMIT** to all parties of record in the above referenced matter by United States Mail, first class, postage prepaid, at the following address:

Dawn E. Warfield, Deputy Attorney General
Attorney General's Office
State Capital, Room E-26
Charleston, WV 25305


William B. Summers

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RICHARD ALAN POORE, Petitioner, v. STATE OF WEST VIRGINIA,
Respondent

DOCKET NO: 35271

Pleasants County Circuit Court
Case No: 06-F-7
The Honorable Judge Robert L. Holland, Jr.

MOTION TO EXCEED PAGE LIMIT

Now comes the Petitioner, RICHARD ALAN POORE, by counsel, William B. Summers and, pursuant to Rule 3 of the Rules of Appellate Procedure, moves this Court to allow the Petitioner to exceed the fifty-page limit for appeal briefs.

WHEREFORE the Petitioner moves this Court to allow him to exceed the page limit for appeal briefs and for any further relief this Court deems just.

RICHARD ALAN POORE,

By Counsel,



William B. Summers, Bar ID. No. 7239
Counsel for Petitioner
3301 Dudley Avenue
Parkersburg, WV 26104
(304) 420-0975