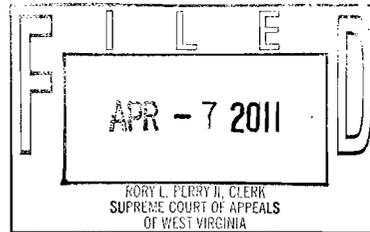


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 101457



STATE OF WEST VIRGINIA,

*Plaintiff Below,  
Respondent,*

v.

ARNOLD WAYNE McCARTNEY,

*Defendant Below,  
Petitioner.*

---

RESPONSE TO PETITION FOR APPEAL

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---

RESPONSE TO PETITION FOR APPEAL

---

I.

STATEMENT OF THE CASE

On February 18, 2010, the Petitioner, Arnold McCartney, was convicted of first degree murder by a Lewis County jury. The jury did not recommend mercy. The Petitioner has appealed to the West Virginia Supreme Court of Appeals, setting forth in his petition ten assignments of alleged error in the trial proceedings that he argues should cause this Court to set aside the jury's verdict. The Respondent State of West Virginia contends that the verdict was reached after a fair and legally correct trial and should not be set aside.

II.

SUMMARY OF ARGUMENT

The trial judge did not commit reversible error when he continued the Petitioner's trial into a second term of court, or when he ruled that the Petitioner's statement of December 21, 2008, was

voluntarily given and admissible. The judge also did not commit reversible error when he admitted the murder weapon into evidence, or when he ruled that the record contained sufficient evidence to establish the victim's cause of death. Additionally, the judge did not commit reversible error in connection with the failure of the Petitioner's counsel to make a closing argument in the mercy phase of the bifurcated trial, or when the judge gave an instruction about premeditation over the Petitioner's objection. The judge also did not commit reversible error by refusing to instruct the jury to disregard a comment made by the prosecutor in closing argument. Lastly, the Petitioner's conviction should not be reversed because the indictment misspelled the victim's name, or because cumulative error requires reversal of the Petitioner's conviction, or because the evidence at trial was insufficient to support Petitioner's conviction.

### **III.**

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Respondent State of West Virginia does not believe that oral argument of the instant case is necessary.

### **IV.**

#### **STATEMENT OF FACTS**

An appellate court should ordinarily view the facts of a case on review as being the factual assertions contained in the admissible evidence and reasonable inferences therefrom that are consistent with the jury's verdict. *See, e.g., State v. Bull*, 204 W. Va. 255, 258 n.1, 512 S.E.2d 177, 180 n.1 (1998) ("in light of the jury's guilty verdict, we view factual conflicts in the evidence as having been resolved by the jury in a fashion consistent with the jury's verdict."). *See also State v. Atkins*, 163 W. Va. 502, 515, 261 S.E.2d 55, 62-63 (1980) ("the jury's verdict of guilty is taken

to have resolved factual conflicts in favor of the State . . . .”); *State v. Kirk N.*, 214 W. Va. 730, 735, 591 S.E.2d 288, 293 (2003) (“We set forth in a footnote a summary statement of facts taken from the evidence at trial, assuming that the jury believed those pieces of evidence consistent with their verdict.”). Adhering to this standard, the following statement of facts is primarily based upon the evidence admitted at trial that is consistent with the Lewis County jury’s verdict convicting the Petitioner of first degree murder without a recommendation of mercy. (Trial Tr., 422, 435, Feb. 18, 2010.)

On December 20, 2008, in Lewis County, West Virginia, the Petitioner, while seated on the bed in the bedroom of his trailer, fired one shot from a .41 Magnum double-action revolver, at point blank range, into the head of the his fiancée, Ms. Vickie Page; the shot killed Ms. Page instantly. (Trial Tr., 204-07, Feb. 16, 2010; Trial Tr., 241-42, Feb. 17, 2010.) At the time of the shooting, the only other person in the trailer was the couple’s four-month-old son Eli—who fortunately was in another room when his mother was killed. (Trial Tr., 209, Feb. 16, 2010; Trial Tr., 249, Feb. 17, 2010.)

Shortly before the shooting, Brian Joseph, a friend of the Petitioner who had been staying with the Petitioner and Ms. Page, was seated in the trailer’s living room area. Mr. Joseph heard several “thumping” noises that sounded like a heavy object hitting the floor and wall of the bedroom where the Petitioner and Ms. Page were at the time. (Trial Tr., 109-13, Feb. 16, 2010.) Mr. Joseph interpreted the noises as the Petitioner being physically abusive to Ms. Page. (*Id.* at 109-23.) Mr. Joseph testified that he heard Ms. Page “hit the floor” several times—and that when Mr. Joseph looked into the bedroom, he saw Ms. Page on the floor. (*Id.* at 123.) On cross-examination, the

Petitioner's trial counsel elicited from Mr. Joseph that the noises could have been "a sack of corn" hitting the wall—however, no sacks of corn were mentioned in any testimony. (*Id.* at 125.)

Mr. Joseph confronted the Petitioner about what was going on in the bedroom; the Petitioner became angry; and Mr. Joseph, who was raised not to "[b]eat a woman," left the trailer and went to a neighbor's residence. (*Id.* at 114, 124, 131.) The Petitioner admitted to having drunk more than a 12-pack of beer during the day of and prior to the shooting. (*Id.* at 210; Trial Tr., 235, Feb 17, 2010.)

About half an hour after Mr. Joseph left the trailer, the Petitioner, with blood on his hands and shoes, left his trailer and walked to a neighbor's trailer; where the Petitioner stated, "I just shot my Vickie." (Trial Tr., 115, Feb. 16, 2010.) The neighbor gave the police a statement saying that the Petitioner was calm, and was drinking beer from a can that was covered in blood. (*Id.* at 142; Trial Tr., 351, Feb. 17, 2010.)

The police were called to the scene and the Petitioner was arrested for murder; after receiving and acknowledging a full suite of *Miranda* warnings, the Petitioner gave a lengthy recorded statement at the scene to the chief investigating officer in which the Petitioner admitted that he had shot and killed Ms. Page, and in which he also claimed that the shooting was an accident. (Trial Tr., 194-215, Feb. 16, 2010.) The Petitioner's counsel stipulated to the admissibility of this statement at the Petitioner's trial. (*Id.* at 162.) The Petitioner was then transported to the Regional Jail. (*Id.* at 145.) During the trip, the Petitioner volunteered the statement, "never let your friends move in with you," and "I think she was fucking him [Brian Joseph]." (*Id.* at 145-46.)

The following morning, the chief investigating officer interviewed the Petitioner a second time at the regional jail, prior to the Petitioner's previously scheduled arraignment before a

magistrate at about noon. (*Id.* at 165.) As with his first statement, the Petitioner affirmatively acknowledged all of his *Miranda* rights, including his right to an attorney and his right to refuse to answer any questions. (*Id.* at 166-67.) The officer testified that his reason for obtaining the second statement was that the Petitioner was intoxicated and upset when he gave his first statement, and the officer wanted to give the Petitioner a chance to “calm down.” (*Id.* at 167-68.)

The second statement was in all material respects identical to the first statement. (*See* discussion at Trial Tr., 170-71, *infra*, and detailed comparison at Endnote 1.) At the Petitioner’s trial, the circuit court determined that the second statement was voluntary (and also duplicative of the first statement) and admissible. (Trial Tr., 172, Feb. 16, 2010.) As previously noted, the Petitioner maintained in both statements that he only had intended to “scare” Ms. Page, and that the “gun went off” accidentally. (*See, e.g., id.* at 203.) Petitioner’s trial counsel told the jurors in his closing argument that both statements were consistent. (Trial Tr. at 401-02, Feb. 17, 2010.)

In his statements, the Petitioner stated that prior to the shooting, he thought Ms. Page might be “cheating” on him [with Brian Joseph] because “she used to . . . want . . . a whole lot to do with me [in bed] and here lately . . . she just acted like she didn’t want that much to do with me.” (Trial Tr., 241-43, Feb. 17, 2010.) The Petitioner admitted that “[i]t did kind of aggravate me a little bit when [Brian Joseph] came in there and asked me if everything was all right.” (*Id.* at 254-55.) The Petitioner stated that he and Vickie then

got into it . . . got to arguing back and forth a little bit . . . got to arguing and fighting . . . I went in there and got my damn pistol [from a gun cabinet] . . . just to scare her . . . and then she sat down on the bed and she kept arguing and I said, ‘Well, I don’t want to hear it.’ We, you know, kept arguing. And I just pointed it at her, you know, and didn’t think it was going to go off and I accidentally pulled the trigger . . . I mean man, I love her. I love her with all my heart. There will never be another one.

(Trial Tr., 203, 206-07, Feb. 16, 2010.)

The Petitioner stated that he ordinarily kept the gun, that he shot Ms. Page with, loaded. (*Id.* at 211.) The Petitioner also stated that he had no recollection of the actual moment of the shooting. (Trial Tr., 242, Feb. 17, 2010.) The Petitioner asked the investigating officer “what do you think I am going to get out of this . . . Do you think they’ll cut me any slack at all?” (Trial Tr., 200, Feb. 16, 2010; Trial Tr., 242, Feb. 17, 2010.)

On March 2, 2009 the Petitioner was indicted for murder by a Lewis County Grand Jury. (Pet. for Appeal, 6.) The indictment misspelled Ms. Page’s first name as “Vicki Page”; the correct spelling is “Vickie.” (R. at 1.) At trial, the Petitioner’s counsel asked that the charge against the Petitioner be dismissed based on this discrepancy; the trial judge overruled this objection, stating that the jury could decide whether the discrepancy defeated the charge against the Petitioner. (Trial Tr., 185-90, Feb. 16, 2010.) Petitioner’s counsel did not argue this issue to the jury.

The Petitioner’s trial was originally scheduled for October 2009; however, at a pretrial hearing on October 9, 2009, the Petitioner’s trial counsel presented a motion to exclude certain evidence or to dismiss the charges against the Petitioner on the grounds that the prosecutor had not timely provided requested forensic evidence to the defense, making it impossible to adequately prepare for trial. (Trial Tr., 284-85, Feb. 17, 2010.) The prosecutor responded to the motion by stating that the delay had occurred because of the failure of the forensic laboratory in Charleston to complete its work in a timely fashion. (Pet. for Appeal, 16-19.) The judge did not address the motion to exclude or dismiss; but, instead, continued the trial on his own motion until the following term of court. (Trial Tr., 289, Feb. 17, 2010.)

At trial, the judge admitted the Petitioner’s “double-action” .41 Magnum revolver into evidence, over a “chain-of-custody” objection by the Petitioner’s trial counsel. (*Id.* at 315-18.) A

police firearms examiner testified that the gun worked properly—and that when tested in the laboratory, the gun did not accidentally fire. (*Id.* at 318-19.) The examiner testified that the gun required four pounds of pressure on the trigger to fire if the hammer was cocked, and eleven pounds of pressure if the hammer was not cocked. (*Id.* at 319-20.) The examiner identified his initials and the initials of the police officers as showing the receipt of the gun at the police firearms laboratory. (*Id.* at 322.)

Also at trial, the Petitioner’s counsel challenged the prosecution’s case as not having established the “cause” of Ms. Page’s death—on the grounds that the person who actually conducted an autopsy of Ms. Page’s body did not testify. (*Id.* at 307-10.) However, the judge ruled that the Petitioner’s statements alone provided sufficient “cause of death” evidence for the jury to find that Ms. Page died from the Petitioner’s gunshot to her head. (*Id.* at 288, 290.) The trial judge also overruled the Petitioner’s motion for a directed verdict on the grounds that there was insufficient evidence for the jury to find the Petitioner guilty. (*Id.* at 347.)

The prosecutor told the jury during his closing argument that “nothing will bring Vickie back, it’s true, but letting a murderer go invites a repeat of the same crime.” (*Id.* at 408.) The Petitioner’s trial counsel did not object to this statement at the time it was made; however, after the prosecutor finished his argument, the Petitioner’s counsel asked the judge to instruct the jury to disregard the statement. (*Id.* at 408-09.) The judge agreed that the remark was questionable, but noted that there had not been a contemporaneous objection to the remark; the judge said, “I think that it would be worse to say something to them about it now, just let it go.” (*Id.*)

When the court was preparing its charge to the jury, the Petitioner’s trial counsel objected to the following instruction as being confusing to the jury:

The jury is instructed that Murder in the First Degree consists of an intentional, deliberate, and premeditated killing, which means the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies, as the minds and temperaments of people differ, and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for First Degree Murder.

(*Id.* at 378.)

The judge overruled the objection, stating that the instruction had been taken directly from a leading case, *State v. Guthrie*, 194 W. Va. 657, 676-77, 461 S.E.2d 163, 182-83 (1995). (Trial Tr., 366, Feb. 17, 2010.)

The Petitioner did not take the stand during the “guilt determination” phase of his bifurcated trial. After the jury delivered its first degree murder verdict, the Petitioner was the sole witness during the “mercy phase” of his trial. (Trial Tr., 427-33, Feb. 18, 2010.) The Petitioner testified that the State’s witnesses were lying, and that the shooting of Ms. Page was an accident. (*Id.* at 430-31.) The prosecutor and the Petitioner’s trial counsel did not argue to the jury at the end of the “mercy phase.” The jury returned a verdict making no recommendation of mercy. (*Id.* at 435.)

## V.

### ARGUMENT

#### **A. THE TRIAL JUDGE DID NOT COMMIT REVERSIBLE ERROR WHEN HE CONTINUED THE PETITIONER’S TRIAL DATE BECAUSE THE POLICE FORENSIC LABORATORY WAS LATE IN PROVIDING CERTAIN DISCOVERY MATERIALS TO THE PROSECUTION.**

The Petitioner was arrested on December 20, 2008. (Trial Tr., 145, 153-55, Feb. 16, 2010.) He was indicted on a charge of first degree murder on March 2, 2009; and his trial was scheduled for October 2009, within the same term of court as his indictment. (Pet. for Appeal, 6.) On

October 9, 2009, the prosecution delivered copies of certain evidence to the defense. (*Id.* at 7.) On October, 22, 2009, the trial judge held a hearing on a defense motion to exclude the late-provided evidence. (*Id.*; Trial Tr., 284-85, Feb. 17, 2010.) At the hearing, the trial judge asked the prosecutor why evidence had been provided late to the defense—and why other evidence, such as an autopsy report, had still not been provided as of the date of the hearing. (Pet. for Appeal, 16-19.) The prosecutor explained without contradiction that despite repeated inquiries to the State Police, the prosecutor had not been able to acquire the evidence in a timely fashion. (Trial Tr., 289, Feb. 17, 2010.) The trial judge, on his own motion, continued the Petitioner’s trial date to the following term of court; the case was tried on February 16-18, 2010. (Pet. for Appeal, 7-8; Trial Tr., 284, Feb. 17, 2010.)

The petition for appeal asserts that the Petitioner’s conviction should be reversed because the judge continued the Petitioner’s trial date, citing to West Virginia Code § 62-3-1 [1981], which provides that unless good cause for a continuance is shown, a criminal defendant must be tried in the same term of court in which he is indicted—commonly referred to as the “one-term rule.”<sup>1</sup>

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<sup>1</sup>West Virginia Code § 62-3-1 [1981] states, in pertinent part: “When an indictment is found in any county, against a person for a felony or misdemeanor, the accused, if in custody, or if he appear in discharge of his recognizance, or voluntarily, shall, unless good cause be shown for a continuance, be tried at the same term.”

The Petitioner also cites to West Virginia Code § 62-3-21 [1959], which provides that subject to enumerated exceptions a criminal defendant shall be discharged from all prosecution if not tried within three terms of court after presentment, indictment, or appeal from an inferior tribunal—commonly referred to as the “three term rule.” The “three term rule” is not implicated by the facts of the instant case. Syllabus Point 1 of *State ex. rel. Shorter v. Hey*, 170 W. Va. 249, 251, 294 S.E.2d 51, 53 (1981), states that “[w]hereas West Virginia Code 62-3-1 provides a defendant with a *statutory* right to a trial in the same term as his indictment . . .” (in the absence of good cause for a continuance), West Virginia Code § 62-3-21 [1959] is the legislative declaration of what ordinarily constitutes the constitutional right to a “speedy trial.”

("[F]or good cause shown upon the record, a trial court pursuant to *W. Va. Code*, 62-3-1, may, upon its own motion or upon motion of one or more parties, continue a criminal trial beyond the term of indictment." *State ex. rel. Shorter v. Hey*, 170 W. Va. at 255, 294 S.E.2d at 57 (footnote omitted).)

Syllabus Point 2 of *Shorter v. Hey* states that the determination of what is good cause pursuant to West Virginia Code § 62-3-1 [1981] for a continuance of a trial beyond the term of indictment is in the sound discretion of the trial court. The burden is on a defendant to show that the court erred in continuing a trial without good cause. *Good v. Handlan*, 176 W. Va. 145, 149, 342 S.E.2d 111, 114 (1986).

In the instant case, it is undisputed that the prosecution, although it made numerous good-faith efforts to do so, was unable to obtain the requested forensic evidence, due to delay that was out of the prosecution's control. (Trial Tr., 289, Feb. 17, 2010.) In *State ex. rel. Workman v. Fury*, 168 W. Va. 218, 222, 283 S.E.2d 851, 853 (1981), this Court stated that one example of "good cause" for a continuance may be where other difficulties beyond the court's or litigants' control arise. The record in the instant case clearly establishes—and in fact, the petition for appeal demonstrates at length—that the time frame for providing the forensic evidence was not within the prosecutor's control. Therefore, the continuance in the instant case was founded in good cause. The Petitioner has not met his burden of proving that his trial date was continued without good cause.

Moreover, Syllabus Point 4 of *Shorter v. Hey* states:

Where the trial court is of the opinion that the state has *deliberately or oppressively* sought to delay a trial beyond the term of indictment and such delay has resulted in substantial prejudice to the accused, the trial court may, pursuant to *W. Va. Code*, 62-3-1, finding that no good cause was shown to continue the trial, dismiss the indictment with prejudice . . . .

(Emphasis added.)

Nothing in the record of the instant case suggests that the prosecution “intentionally or oppressively” sought to delay the Petitioner’s trial.

Nor does the record suggest—and the petition for appeal does not demonstrate—that any delay occasioned by the continuance “substantially prejudiced” the Petitioner. There is no assertion in the Petition, for example, that a key witness for the defense became unavailable during the duration of the continuance. In fact, the continuance benefitted the defense, because the Petitioner and his counsel had additional time to fully review the late-provided evidence. The unsupported contention in the petition for appeal that the continuance “prejudicially” took away “what [the Petitioner] believed was a fair jury” is speculative and meritless, because there is no assertion that the Petitioner “believed” that the jury that did convict him was unfair.

For the foregoing reasons, the first assignment of error in the petition for appeal is without merit.

**B. THE TRIAL JUDGE DID NOT COMMIT REVERSIBLE ERROR WHEN HE RULED THAT THE PETITIONER’S SECOND STATEMENT TO THE POLICE, MADE ON THE MORNING AFTER THE PETITIONER SHOT MS. PAGE, WAS ADMISSIBLE AT TRIAL.**

The Petitioner argues that his second inculpatory statement was inadmissible because it was not voluntary, and was obtained in violation of the “prompt presentment” rule that is codified at West Virginia Code § 62-1-5(a)(1) [1997]:

An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence or as otherwise authorized by law, shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made.

An unreasonable and unjustified delay in taking an accused before a magistrate after his initial arrest may render a confession involuntary and hence inadmissible at trial. *See State v.*

*Persinger*, 169 W. Va. 121, 137-38, 286 S.E.2d 261, 271 (1982). However, failure to strictly comply with the requirements of West Virginia Code § 62-1-5 [1997] does not necessarily vitiate every confession; rather, any delay is treated as one factor in evaluating the voluntariness of the confession under traditional principles of due process. *State v. Mason*, 162 W. Va. 297, 302, 249 S.E.2d 793, 797 (1978). Delay in taking a defendant to a magistrate may be a critical factor [in the totality of the circumstances, making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant. Syl. Pt. 6, *State v. Persinger*.

In *State v. DeWeese*, 213 W. Va. 339, 344 n.8, 582 S.E.2d 786, 791 n.8 (2003), this Court stated:

To be clear, merely detaining a defendant in jail under an arrest warrant for fifteen hours before taking him/her to a magistrate will not trigger a sanctionable violation of the prompt presentment rule. A sanctionable violation occurs if the purpose for detaining the defendant is to conduct an interrogation to obtain an incriminating statement from the defendant about his or her involvement in the crime for which he or she was arrested.

Initially, it should be noted that the Petitioner has not demonstrated that in fact there was any actual “delay” in taking him before a magistrate. The magistrate’s office had independently scheduled the Petitioner’s arraignment for noon; and the Petitioner gave his second statement at 10:15 a.m.—well before his scheduled arraignment. (Trial Tr., 165-66, Feb. 16, 2010; Trial Tr., 233, Feb. 17, 2010.)

Moreover, the police had already obtained a detailed inculpatory statement from the Petitioner at the scene of the crime. In a similar case, *State v. Dyer*, 177 W. Va. 567, 572, 355 S.E.2d 356, 361 (1987), this Court noted, that a “second, written statement, though given during the course of the delay, was substantially the same as the prior oral statement. Moreover, the

voluntariness of the statements was tested by the appellant at the pretrial suppression hearings and resolved by the trial court in favor of admissibility.”

As in *Dyer*, in the instant case the Petitioner freely agreed to give a second statement. Notably, the Petitioner’s first statement was in all material respects identical to his second statement, (see Endnote 1) and was stipulated into evidence by the Petitioner’s trial counsel—who later argued that the two statements were “consistent.” (Trial Tr., 402, Feb. 17, 2010.)

In *State v. Wilson*, 170 W. Va. 443, 445-46, 294 S.E.2d 296, 299 (1982), this Court stated:

There is no indication from the record that over the crucial three hour period the appellant became so emotionally exhausted or psychologically disorganized that interrogation during that period overcame the appellant’s will so he confessed against his will. In the absence of such an indication and in view of the fact that the appellant had clearly been informed of his rights, we cannot conclude that there was an unreasonable delay in taking him before a magistrate. Consequently we do not believe that the trial court erred in refusing to suppress the confession.

As in *Wilson*, there is no suggestion in the instant case that the police officer was trying to or ever did “overcome the Petitioner’s will” in taking the second statement. On the contrary, the officer asked for a second statement from a sober Petitioner in order to *insure* that the Petitioner’s statement was truly voluntary! And a review of the statement, (see Trial Tr., 233, Feb. 17, 2010.), shows that the statement was completely voluntary.

The trial judge did not err in ruling that the Petitioner’s second statement was voluntary and admissible. The second assignment of error in the petition for appeal is without merit.

**C. THE TRIAL JUDGE DID NOT COMMIT REVERSIBLE ERROR WHEN HE ADMITTED THE MURDER WEAPON INTO EVIDENCE.**

The petition for appeal argues that the prosecution did not sufficiently prove a “chain of custody” regarding the gun that was introduced into evidence as the murder weapon. Whether a sufficient chain of custody has been shown to permit the admission of physical evidence is an issue

for the trial court to resolve. Syl. Pt. 2, *State v. Davis*, 164 W. Va. 783, 266 S. E.2d 909 (1980). To allow the admission of “physical evidence into a criminal trial, . . . it is only necessary that the trial judge, in his discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with.” (*Id.*, 164 W. Va. at 786-87, 266 S.E.2d at 912.) A trial court’s decision on chain of custody will not be disturbed on appeal absent an abuse of discretion. Syl. Pt. 2, *State v. Davis*.

The police officer who examined the gun, and through whom the prosecution introduced the gun into evidence at the Petitioner’s trial, identified the gun as the weapon that his office had received and tested—as well as identifying the initials of the evidence technicians who had received and stored the gun on the evidence tag. (Trial Tr., 315-16, Feb. 17, 2010.)

The petition for appeal does not allege or point to any evidence in the record tending to show that the weapon introduced into evidence was not genuine or had been tampered with. The petition does not demonstrate in any fashion that the judge’s ruling admitting the gun into evidence was an abuse of discretion.

The third assignment of error in the petition for appeal is therefore without merit.

**D. THE TRIAL JUDGE DID NOT COMMIT REVERSIBLE ERROR WHEN HE RULED THAT THE PROSECUTION HAD SUBMITTED SUFFICIENT EVIDENCE TO ESTABLISH THE VICTIM’S CAUSE OF DEATH.**

The petition for appeal contends that the prosecution’s proof of “cause of death” was deficient, and bases this argument on the factual assertion that “*the only evidence introduced by the State as to cause of death was the testing of Patrick Tomey, who testified as the County Coroner for Lewis County.*” (Pet. for Appeal, 30; emphasis added.) This factual contention is simply wrong. The Petitioner stated to the police and to his neighbors—statements that were introduced into

evidence by the State--that it was the Petitioner's gunshot which killed Ms. Page. (*See, e.g.*, Trial Tr., 207, Feb. 16, 2010; Trial Tr., 241-42, 248, Feb. 17, 2010.) For this reason, the Petitioner's fourth assignment of error is without merit.

**E. THE TRIAL JUDGE DID NOT COMMIT REVERSIBLE ERROR IN CONNECTION WITH THE PETITIONER'S COUNSEL FAILURE TO MAKE A CLOSING ARGUMENT IN THE MERCY PHASE OF THE BIFURCATED TRIAL.**

The Petitioner's counsel, in a post-trial motion, alleged that the Petitioner's counsel "were not permitted the chance to argue [mercy]." (Pet. for Appeal, 32.) The trial correctly found that this allegation was false. (Trial Tr., 432, Feb. 18, 2010.) Nothing in the record shows that the Petitioner's counsel ever asked or in any fashion sought leave to argue to the jury at the close of the mercy phase of Petitioner's trial.

"[I]n order to predicate error upon the refusal to allow argument it must appear that counsel has not waived the right by silence or acquiescence." *Collins v. Kansas Milling Co.*, 485 P.2d 1343, 1346 (Kan. 1971) (citations omitted). The petition cites no decision of this or any court that has held that a trial judge's failure to affirmatively advise a defendant's counsel of his right to argue to the jury constitutes the denial of that right.

There are only two possible explanations of the failure of the Petitioner's trial counsel to argue the issue of mercy to the jury: (1) trial strategy; or (2) incompetence. Neither explanation was the result of error by the trial judge. Looked at strategically, one can certainly imagine that the Petitioner's trial counsel did not want to "open the door" to the prosecution to make a reply argument, in which the prosecutor could again call the jury's attention to how the Petitioner's drunken, violent conduct caused the gruesome, senseless death of a young mother. Moreover, it is not as if the Petitioner's counsel would have had much to argue--none of the Petitioner's family or

friends testified for him during the mercy phase. Not making any further argument certainly would be a strategically viable consideration for the Petitioner's counsel. Alternatively, it is also possible that the failure of the Petitioner's counsel to argue to the jury at the close of the mercy phase was an oversight by counsel, occasioned because the judge did not affirmatively invite counsel to argue. If that is the case, the cause of the failure may have been ineffective assistance of counsel. The answer to this question is necessarily speculative at this point, and may have to be resolved in a *habeas corpus* proceeding.

For this reason, the Petitioner's fifth assignment of error is without merit.

**F. THE TRIAL JUDGE DID NOT COMMIT REVERSIBLE ERROR WHEN HE GAVE AN INSTRUCTION, OVER THE PETITIONER'S TRIAL COUNSEL'S OBJECTION, REGARDING THE ELEMENTS OF DELIBERATION AND PREMEDITATION IN A CHARGE OF FIRST DEGREE MURDER.**

The Petitioner contends that the trial judge erred when he overruled the Petitioner's trial counsel's objection to the prosecution's proposed jury instruction no. 6. The instructional language in question is taken directly from *State v. Guthrie*, 194 W. Va. at 676-77, 461 S.E. 2d at 182-83 (citations omitted), and is as follows:

The jury is instructed that murder in the first degree consists of an intentional, deliberate, and premeditated killing, which means the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ, and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction of first degree murder.

The defense objected to this instruction on the ground that it would confuse the jury as to all of the elements of the offense of first degree murder, because the language omitted a discussion of

the element of “malice.” (Trial Tr., 366, Feb. 17, 2010.) The trial judge stated in response to the objection that “I read it right out of the book.” *Id.*

The instructional language used by the trial judge was specifically approved by this Court in *State v. Guthrie*, 194 W. Va. at 676-77, 461 S.E. 2d at 183-84. The Syllabus of *State v. Miller*, 184 W. Va. 367, 400 S.E.2d 611 (1990), states:

The trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error.

In the instant case, the trial judge instructed the jury on all of the essential elements of first degree murder—including the element of malice. The judge specifically told the jury that: “malice, expressed or implied, is an essential element of Murder in the First or Second Degree. And if it is absent, the offense is of no higher grade than Voluntary Manslaughter.” (Trial Tr., 378, Feb. 17, 2010.) The judge also instructed the jury that “ if the jury believes beyond a reasonable doubt that [the Petitioner] . . . willfully, intentionally, deliberately, premeditatedly, *maliciously*, and unlawfully killed Vickie Page, then you may find [the Petitioner] guilty of the offense of Murder in the First Degree . . . .” (*Id.* at 376; emphasis added.)

The judge also told the jury that:

The word ‘malice,’ as used in these instructions is used in a technical sense. Malice is defined as, ‘An action flowing from a wicked and corrupt nature, a thing done with wrongful intent, under circumstances as carry them in the plain indication of a heart, heedless of social duty and fatally bent upon mischief.’ It is not necessary that malice must have existed for any particular length of time and it may come into existence at the time of the act or at any previous time. Malice must be proven to your satisfaction beyond reasonable doubt, the same as any other element of the offense in question.

(*Id.* at 374.)

The Court further instructs the jury that a person is guilty of Murder in the First Degree when the person willfully, deliberately and premeditatedly kills another person with malice

*(Id. at 376.)*

The Court instructs the jury that malice, expressed or implied, is an essential element of Murder in the First or Second Degree. And if it is absent, the offense is of no higher grade than Voluntary Manslaughter.

*(Id. at 378.)*

The Court instructs the jury that, although intoxication will never provide a legal excuse for the commission of a crime, the fact that a person may have been intoxicated at the time of the commission of a crime may negate the specific intent to kill, form malice, or act with premeditation or deliberation. So, evidence that a Defendant acted while in a state of intoxication is to be considered in determining whether or not the defendant acted with specific intent to kill maliciously or premeditatedly and deliberately. If the evidence in the case leaves the jury with a reasonable doubt whether, because of the degree of an intoxication, the mind of the accused was incapable of performing the specific intent to kill, or was incapable of acting maliciously or was incapable of acting with premeditation and deliberation, the jury should acquit the Defendant of Murder in the First Degree.

Further, if the evidence in the case leaves the jury with a reasonable doubt whether, because of the degree of intoxication, the mind of the accused was incapable of performing or did form this specific intent to kill, or was incapable of acting maliciously, the jury should acquit the Defendant of Murder in the Second Degree.

*(Id. at 379-80.)*

The petition for appeal asserts that jury's alleged "confusion" was "born [*sic*] out" when the jury asked the judge for a written definition of the elements of various levels of homicide:

Foreperson: [W]e would like to have . . . written definition of the offenses as charged, Murder First, Murder Two, Voluntary Manslaughter, broken down so that we can compare and contrast . . . to make sure we cover all bases.

*(Id. at 413.)*

The trial judge responded to this inquiry by giving the jury a copy of the court's instructions, which contained all of the foregoing-quoted instructional language regarding malice. (*Id.* at. 414.) Thus the jury was fully apprised, both in the reading of the instructions and in the written copy of the instructions, of all of the essential elements of first degree murder, including malice. The jury's request does not show some sort of "confusion." Rather, the request shows the jury's diligence in "covering all the bases," to determine their verdict beyond a reasonable doubt, based on the law and evidence presented.

For the foregoing reasons, the sixth assignment of error in the petition for appeal is without merit.

**G. THE TRIAL JUDGE DID NOT COMMIT REVERSIBLE ERROR BY REFUSING TO INSTRUCT THE JURY TO DISREGARD A COMMENT MADE BY THE PROSECUTING ATTORNEY IN CLOSING ARGUMENT.**

The Petitioner contends that the trial court erred in failing to tell the jury to disregard a remark made by the prosecutor during closing argument. (Pet. for Appeal, 11.) In his closing argument, the prosecutor told the jury that "letting a murderer go invites a repeat of the same crime." (Trial Tr., 408, Feb 17, 2010.) When the prosecutor made that statement, the Petitioner's trial counsel did not object. The prosecutor finished his argument, and only then did the Petitioner's counsel ask the trial judge to instruct the jury to disregard the remark, contending that it was "improper argument." (*Id.* at 408-09.) The judge considered the Petitioner's counsel's request, noted that counsel had not objected when the remark was made, and concluded "that it would be worse to say something to them [the jury] about it now, just let it go." (*Id.*) In so doing, the trial court did not commit reversible error.

Initially, it should be noted that: “A prosecutor is allowed to comment on the prevalence of crime, the necessity of law enforcement as a deterrent, and the evil results which may befall the community when a jury fails in its duty.” *State v. Moorehead*, 875 S.W.2d 915, 918 (Mo. App. 1994). *See also Brown v. State*, 573 S.E.2d 110, 114 (Ga. App. 2002): “Moreover, the State may argue to the jury the necessity for enforcement of the law and may impress on the jury, with considerable latitude in imagery and illustration, its responsibility in this regard.” (Citations omitted.)

The comment by the prosecutor was entirely consistent with this authority, and therefore was not clearly erroneous. Moreover, assuming *argued*, any degree of impropriety in the prosecutor’s isolated remark, this Court stated in *State v. Guthrie*, 194 W. Va. at 684, 461 S.E.2d at 190:

Prosecutorial misconduct does not always warrant the granting of a mistrial or a new trial. . . . [A] conviction will not be set aside because of improper remarks and conduct of the prosecution in the presence of a jury which do not clearly prejudice a defendant or result in manifest injustice.

(Citations omitted.)

In *State v. Graham*, 208 W. Va. 463, 468, 541 S.E.2d 341, 346 (2000), this Court addressed the principles that should be used to evaluate allegedly improper prosecutorial comments during closing argument:

In reviewing allegedly improper comments made by a prosecutor during closing argument, we are mindful that “[c]ounsel necessarily have great latitude in the argument of a case,” *State v. Clifford*, 58 W.Va. 681, 687, 52 S.E. 864, 866 (1906) (citation omitted), and that “[u]ndue restriction should not be placed on a prosecuting attorney in his argument to the jury.” *State v. Davis*, 139 W.Va. 645, 653, 81 S.E.2d 95, 101 (1954), *overruled, in part, on other grounds, State v. Bragg*, 140 W.Va. 585, 87 S.E.2d 689 (1955). Accordingly, “[t]he discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the

complaining party have been prejudiced, or that *manifest injustice* resulted therefrom.” Syllabus Point 3, *State v. Boggs*, 103 W.Va. 641, 138 S.E. 321 (1927).

(Emphasis added.)

In the instant case, “manifest injustice” fails to “manifest” itself in the passing remark made by the prosecutor.

This Court stated in *State v. Guthrie*, 194 W. Va. at 677 n.25, 461 S.E.2d at 183 n.25, that a number of factors may be relevant to the evaluation of a prosecutor’s allegedly improper remarks—including whether the remarks were isolated or extensive, and whether the statement or evidence was deliberately placed before the jury to divert attention to irrelevant and improper matters. In the instant case, the limited, isolated, and non-diversionary nature of the remark is apparent from the record, and fully supports the trial judge’s exercise of his discretion not to issue an corrective instruction that would have brought further attention to the remark.

For the foregoing reasons, the seventh assignment of error in the petition for appeal is without merit.

**H. THE PETITIONER’S CONVICTION SHOULD NOT BE REVERSED BECAUSE THE INDICTMENT MISPELLED THE VICTIM’S NAME.**

In *State v. Rudy*, 98 W. Va. 444, 127 S.E. 190 (1925), this Court held that where an indictment contained a simple typographical error, and “[n]o other construction could possibly be placed on the language used,” such error was not fatal to an indictment. (*Id.*) In Syllabus Point 1 of *State v. Halida*, 28 W. Va. 499 (1886), this Court stated that “[n]either verbal or grammatical inaccuracies nor the misspelling of words in an indictment are fatal to it, where they do not affect the sense, and where from the whole context the words as well as the meaning can be determined with certainty by a person of ordinary intelligence.” The Court in *Halida* further stated that “[t]he

law is well settled that verbal or grammatical inaccuracies, which do not affect the sense, are not fatal. Mere misspelling is not fatal.” *Id.*

In the instant case, the Grand Jury returned an indictment naming “Vicki Page” as the victim. However, at trial the testimonial evidence adduced shows that the decedent’s name was actually spelled “Vickie Page.” Under the standard set forth in *Halida* by the West Virginia Supreme Court of Appeals, a “person of ordinary intelligence” can “determine with certainty” the meaning, or what was meant by the Grand Jury’s indictment naming “Vicki Page” as the victim. Furthermore, the “mere misspelling” of the decedent’s name cannot be fatal under the *Halida* standard. Therefore, the Petitioner’s conviction should not be reversed because the indictment contained a misspelling.

For the foregoing reasons, the eighth assignment of error in the petition for appeal is without merit.

**I. THE PETITIONER’S CONVICTION SHOULD NOT BE REVERSED BECAUSE OF CUMULATIVE ERROR.**

This response has demonstrated that none of the individual assignments of error in the petition for appeal have merit; therefore, they have no cumulative weight that supports reversing the Petitioner’s conviction.

The Petitioner’s ninth assignment of error is therefore without merit.

**J. THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUPPORT PETITIONER’S CONVICTION OF FIRST DEGREE MURDER.**

The Statement of the Facts, pages 2-24, *supra*, sets forth the evidence from which the jury could properly conclude that the Petitioner committed first degree murder.

That evidence showed that the Petitioner began the episode that resulted in Ms. Page’s death with a sustained period of physical abuse, and the Petitioner then escalated his violence into the use

of a firearm to threaten and then kill Ms. Page. There was not a shred of evidentiary support for any suggestion that anything other than the Petitioner's volitional act caused the .41 Magnum revolver to discharge a deadly bullet into Ms. Page's head at close range. There was no suggestion of any defect in the gun or of a physical altercation involving the gun.

Moreover, the Petitioner did not just grab a weapon in a fit of blind rage. Rather, the Petitioner deliberately left the bedroom and retrieved the loaded gun from another room, and returned to the bedroom to threaten Ms. Page. When she still would not admit to infidelity, he then deliberately pointed the gun at Ms. Page's head and pulled the trigger. No evidence suggested or showed that the Petitioner's motive for his conduct was anything other than malicious retribution for Ms. Page's supposed infidelity and her refusal to admit it. This was no "mercy killing" or "accidental shooting" of an innocent bystander. The Petitioner shot a woman whom he had been slinging around like "a sack of corn"—because she refused to acknowledge infidelity.

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

Syl. Pt. 3, *State v. Guthrie, supra*.

The evidence, reviewed under this standard, supported the jury's determination that the Petitioner's killing of Ms. Page contained the elements of intent, malice, and premeditation. Therefore, a first degree murder conviction was justified under the evidence.

For the foregoing reasons, the tenth assignment of error in the petition for appeal is without merit.

VI.

CONCLUSION

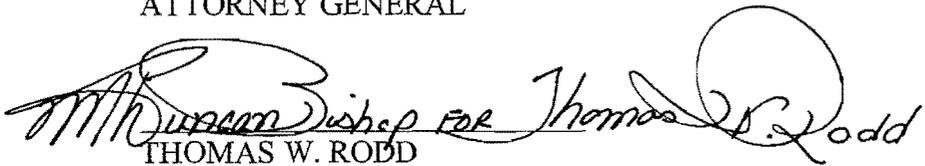
For the foregoing reasons, the Petitioner's conviction should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Respondent,*

By counsel,

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

A handwritten signature in black ink that reads "Thomas W. RoDD" with a large, stylized flourish at the end.

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**ENDNOTE 1: COMPARISON OF THE PETITIONER'S FIRST AND SECOND STATEMENTS**

**Similarities in the two Statements:**

**First Statement:** Officer explains Petitioner's rights to him and makes sure he understands. Petitioner agrees to initial/sign in the appropriate places. (Trial Tr., 194-200, Feb. 16, 2010.)

**Second Statement:** Officer explains Petitioner's rights to him and make sure he understands them. Petitioner agrees to initial/sign in the appropriate places (Trial Tr., 231-33, Feb. 17, 2010.)

**First Statement:** Petitioner indicates he does not read English well, but does understand it. (Trial Tr., 194, 195, Feb. 16, 2010.)

**Second Statement:** Petitioner indicates he does not read English well, but does understand it. (Trial Tr., 232, Feb. 17, 2010.)

**First Statement:** Petitioner indicates that his truck has been broken down. Vickie had gone Christmas shopping on the day of the incident, and when she came home, it led to a disagreement. (Trial Tr., 200, 201, Feb. 16, 2010.)

**Second Statement:** Petitioner indicates that Vickie had gone to town in order to do some Christmas shopping. Upon returning home, they began to argue over her shopping versus fixing his truck, which had been broken down for a while. (Trial Tr., 234, 238, Feb. 17, 2010.)

**First Statement:** Petitioner: "... I thought, you know, she'd been smoking dope and you know, fooling around, cause she tried to overdose once before." (Trial. Tr., 201, Feb. 16, 2010.)

**Second Statement:** Petitioner: "...I kind of thought maybe, you know, she was cheating on me a little bit and I thought maybe she might have been fooling with dope or something again, because she overdosed that one time on them pills." (Trial Tr., 234, 235, Feb. 17, 2010.)

**First Statement:** Petitioner indicates that he and Vickie were arguing in the bedroom when he decided to go get the gun. (Trial Tr., 202, 203, Feb. 16, 2010.)

**Second Statement:** Petitioner verifies that he and Vickie were arguing in the bedroom when he decided to go and get the pistol. (Trial Tr., 239, Feb. 17, 2010.)

**First Statement:** Petitioner relays to the officer that the gun was in the gun cabinet, located in the front room. Petitioner states that he did not know how many rounds were in the pistol, but that he usually kept it loaded. He did not load it, nor check to see if it was loaded. (Trial Tr., 204, 205, Feb. 16, 2010.)

**Second Statement:** Petitioner verifies that the pistol was in the gun cabinet, located in the front room. He states, "I don't think I don't think I did," (Trial Tr., 240, Feb. 17, 2010). when asked if he loaded it, but again states that he usually kept it loaded. (Trial Tr., 240, Feb. 17, 2010.)

**First Statement:** Petitioner states that he grabbed the gun "Just to scare her." (Trial Tr., 202, Feb. 16, 2010.)

**Second Statement:** Petitioner states again that he only grabbed the gun to scare Vickie. (Trial Tr., 240 Feb. 17, 2010.)

**First Statement:** Petitioner tells the officer that he returned to the bedroom with the pistol and continued arguing with Vickie. Petitioner says he pointed the gun at her and "accidentally pulled the trigger." (Trial Tr., 206, Feb. 16, 2010.)

**Second Statement:** Petitioner verifies that he returned to the bedroom, with the pistol, and continued to argue with Vickie. He then pointed the gun at her, and "accidentally pulled the trigger." (Trial Tr., 241, 242, Feb. 17, 2010.)

**First Statement:** Petitioner tells the officer that after the gun went off, he grabbed Vickie and began hugging and kissing her, and sobbing. (Trial Tr., 207, Feb. 16, 2010.)

**Second Statement:** Petitioner verifies that after the gun went off, he grabbed Vickie and began crying. (Trial Tr., 246, 247, Feb. 17, 2010.)

**First Statement:** Petitioner has a phone conversation with his mother, in which he states that he "fucked up," that he and Vickie had been fighting and the gun went off. (Trial Tr., 208, Feb. 16, 2010.)

**Second Statement:** Petitioner verifies that in a phone conversation with his mother, he told her "I fucked up," and told them what happened. (Trial Tr., 247, Feb. 17, 2010.)

**First Statement:** Petitioner relays that his father came up to the house after the phone conversation with his mother, and they hugged and cried and the Petitioner told his father he didn't mean to do it. (Trial Tr., 209, Feb. 16, 2010.)

**Second Statement:** Petitioner's father came to the house. They embraced and cried. (Trial Tr., 247, 248, 258, Feb. 17, 2010.)

**First Statement:** Petitioner relays to the officer that his son, Eli Jacob, was in his bouncing chair in the front room the entire time. (Trial Tr., 209, Feb. 16, 2010.)

**Second Statement:** Petitioner verifies the above. (Trial Tr., 249, Feb. 17, 2010.)

**First Statement:** Petitioner states that after the gun went off, he threw it down in the bedroom. (Trial Tr., 210, Feb. 16, 2010.)

**Second Statement:** Petitioner verifies that after the gun went off, he dropped it because “it scared [him].” (Trial Tr., 250, Feb. 17, 2010.)

**First Statement:** Petitioner divulges that he had drank “probably a 12pack” of Bud Light all day. (Trial Tr., 210, Feb. 16, 2010.)

**Second Statement:** Petitioner verifies that he drank “probably a 12pack or more,” all day. (Trial Tr., 235, Feb. 17, 2010.)

#### **Differences in the two Statements:**

In the **First Statement**, Petitioner tells the officer that it was a 41. Magnum. This was not stated in **Second Statement** (Trial Tr, 204, Feb. 16, 2010.) In the **First Statement**, Petitioner states the he was “right in front” of Vickie when the gun went off (*id.* at 206); in the **Second Statement** he states that he thinks he was standing up beside her. (Trial Tr., 257, Feb. 17, 2010.)

In the **First Statement**, Petitioner says that called his mom and dad (Trial Tr., 211, Feb. 16, 2010), but in the **Second Statement** Petitioner reveals that after the shooting, he went to Jason’s house and told Jason, Barney, and Monica about the shooting, and that Jason and/or Barney went to Petitioner’s parents’ house. His mom called him, and his dad came up. (Trial Tr., 247, 248, Feb. 17, 2010.)

In the **Second Statement**, Petitioner tells the officer that Brian Joseph “Barney” and his 16-year-old son Cody were at the house the day of the shooting, and had stayed the previous night. (Trial Tr., 236, Feb. 17, 2010.) Petitioner tells the officer three times that he did not have an altercation with Barney before he left the house; he left on good terms. (*Id.* at 237-39, 246, and 253-55.)

In the **Second Statement**, Petitioner lists the other guns that were in the house that night: .22, 250, .22, a shotgun (loaded), and Cody’s 410. (*Id.* at 243.)

In the **Second Statement**, Petitioner states that he told Vickie, “you better not be cheating on me,” before the gun went off. The officer gets some background info on their relationship, and inquires as to why Petitioner thought she was cheating on him, and with whom. (*Id.* at 243-46.)

Petitioner, in the **Second Statement**, tells the officer that he gave the gun to his father. (*Id.*, 250.) He later tells the officer that he took out the empty shell and gave it to Mr. Steve Mealey. (*Id.* at 258, 259.)

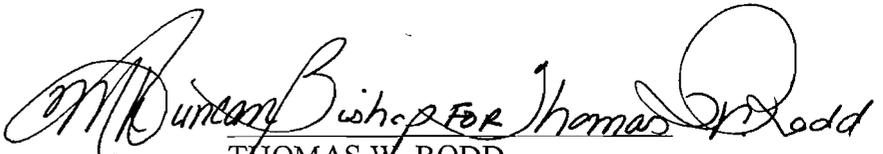
### Summary

The two Statements taken from Petitioner are nearly identical in substance. The Second Statement gives more details about his trip to Jason's house, and his conversation with Barney, neither of which is particularly important, and happened after the shooting. Further, the defense's main argument in this case was that there was no intent to kill; this was an accidental shooting for which Petitioner is very remorseful for. This is made apparent in the defense's closing arguments, when they stated this claim, whether by directly quoting the Petitioner, or via interpretation of the evidence, 72 times. On page 402 of the Court Trial Transcript, (Feb. 17, 2010), the defense states that Petitioner was consistent in his Statement that this was an accident and he was remorseful: "He would be backtracking on it when he gave the next Statement at the CRJ the next day. But did he? No, he didn't. He was consistent." Seeing that he was consistent in both of his Statement, the admissibility of the Second Statement made by the Petitioner was not prejudicial towards him, but actually benefitted the key point in his defense.

**CERTIFICATE OF SERVICE**

I, THOMAS W. RODD, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the Response to Petition for Appeal upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 7th day of April, 2011, addressed as follows:

To: Dennis J. Willett, Esq.  
Steven B. Nanners, Esq.  
Nanners & Willett, L.C.  
45 West Main Street  
Buckhannon, WV 26201

  
THOMAS W. RODD