

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0622

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JEFFREY R. FINLEY,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

BENJAMIN F. YANCEY, III
ASSISTANT ATTORNEY GENERAL
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Telephone: (304) 558-2522
State Bar No. 7629
Email: bfy@wvago.gov

Counsel for Respondent

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BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

On August 11, 2008, Jeffrey Finley (“Petitioner”) intentionally, deliberately and premeditatedly murdered his wife Lynn Finley by shooting her in the back of the head. The facts and circumstances giving rise to this murder are as follows:

At the time of her murder, August 11, 2008, Lynn was 29 years old and living in West Logan, West Virginia, with Petitioner, their son Isaiah Finley, and her stepdaughter Shanda Finley. Day 3 Trial Tr. 42-43, April 14, 2010.¹ Also at this time, Lynn and Petitioner were having marital problems and were contemplating separating from one another. *Id.* at 47.² Their marital problems and contemplation of separation stemmed from Lynn’s connection with another man named Mike.

¹ Isaiah was six years old at the time; Shanda was 17. *Id.* at 17, 43-44.

² Petitioner and Lynn had been discussing their separation for approximately 3 to 4 weeks. *Id.* at 47.

Id. at 46-47.³

Several days before her murder, Lynn, along with Petitioner, Isaiah, Shanda and Lynn's mother Linda Blevins, went to Ohio to visit Lynn's family. *Id.* at 44-45.⁴ The family began their trip back home on August 10, 2008 (Sunday). *Id.* at 45. During this return trip, the family stopped at a Cracker Barrel in Parkersburg, West Virginia, to get something to eat. *Id.* After finishing their meal and while Lynn and her mother Linda went to the cashier to pay the check, Petitioner excused himself to go to the bathroom. *Id.* at 46.⁵ However, Petitioner did not go to the restroom. *Id.* Instead, Petitioner went to the car and looked through Lynn's purse, where he found a letter that Lynn had written to Mike, who, as noted above, had a connection with Lynn. *Id.* The letter indicated that Lynn and Mike had plans to meet each other for the first time in October 2008. *Id.* at 53.

Angered by this letter, Petitioner began pacing around outside the restaurant. *Id.* at 46. Thereafter, the family continued their trip home, during which Petitioner and Lynn "nitpicked" at one another. *Id.* at 48-49. The Finleys arrived back to their home in West Logan between 11:30 p.m. and 12:00 a.m. on August 10, 2008. On her way into the house, Lynn picked up the newspaper and mail; once inside, Lynn also grabbed the telephone. *Id.* at 49-50. Seeing this, Petitioner began "picking" on Lynn and tried to start an argument with her by stating, "[w]hat are you doing, looking

³ The record does not reveal Mike's last name.

⁴ The trip to Ohio was actually to attend an anniversary party of Lynn's aunt and uncle. *Id.* at 44.

⁵ Apparently, Petitioner suffers from high blood pressure and, for reasons unexplained in the record, he had to take urine samples from himself, which is why he stated he needed to go to the bathroom. *Id.* at 46, 48.

for your boyfriend's number on the phone?" *Id.* at 50. Lynn, not wanting to argue, stated that they had been gone for three days and that other people may have called her while they were away. Immediately thereafter, Lynn went upstairs to her bedroom. *Id.* at 50.

Petitioner stayed downstairs and began pacing, talking to himself, and saying that Lynn needed to leave their home. *Id.* at 50, 51. Petitioner then told his daughter Shanda that he was going to go upstairs and talk to Lynn because she needed to leave the house. *Id.* at 52. Upstairs, Petitioner informed Lynn that she needed to pack her belongings and leave the house immediately. *Id.* at 52. In response, Lynn ignored Petitioner and began reading the newspaper. *Id.* Petitioner then came back downstairs and commented to Shanda that Lynn needed to leave but was not going to do so. *Id.* Hearing this, Shanda commented to Petitioner that maybe he should leave the house, to which Petitioner replied that he could not do so, as it was his house. *Id.*

At that point, Petitioner retrieved the letter that Lynn had written to Mike out of the house safe, allowed Shanda to read the letter, and then placed the letter back in the safe. *Id.* at 52-53. Petitioner then proceeded to sit on the couch and watch television with his son Isaiah; he also told Shanda to go back to looking at the computer, which she did. *Id.* at 53. Thereafter, Petitioner got up, retrieved a gun out of the safe, and began pacing back and forth behind Shanda. Petitioner then had Shanda type a letter to Lynn's mother, Linda Blevins--this letter falsely indicated Lynn as its author. *Id.* at 54. The letter indicated that Lynn was leaving, as she needed some time to make sure that her life with her current family was really what she wanted for herself. *Id.* at 55. The letter also indicated that Lynn was not worried about her son Isaiah's welfare, as he would be taken care of after she left. *Id.* Finally, this letter, which was signed "Love Lynn," indicated that Lynn loved her mother and would contact her soon. *Id.*

After typing this letter, Shanda believed that Petitioner was planning to kill Lynn. *Id.* at 56. Upset by this, Shanda told Petitioner that he was crazy and that he needed to leave the house right away and go somewhere else to “vent.” *Id.* at 56-57. However, Petitioner did not leave. Instead, Petitioner attempted to hand Shanda the gun and convince her to kill Lynn—Shanda refused. *Id.* at 57-58. Thereafter, Petitioner kept telling Shanda that he had to kill Lynn and get rid of her, and that she needed to keep her mouth shut and act as if nothing ever occurred. *Id.* at 58. Petitioner also threatened to kill Shanda and Isaiah if Shanda did not keep her mouth shut. *Id.* Petitioner then continued telling Shanda of his plans to kill Lynn and dispose of her body; Petitioner’s plans included Shanda helping him dispose of Lynn’s body. *Id.* at 59.⁶

After threatening Shanda, Petitioner placed the gun back in the safe, went upstairs, and told Lynn that she needed to leave the house immediately—Lynn, in turn, ignored Petitioner. *Id.* Angered by Lynn ignoring him, Petitioner came back downstairs and began pacing again, saying that Lynn was not going to leave, that she needed to leave right now, that he was going to go back upstairs and try to convince her to leave one more time, and that if she refused to do so he was “done with it.” *Id.* at 60. When he went back upstairs to convince her to leave, Lynn became angry and told Petitioner that she was not going anywhere and that she had to work the next day. *Id.*⁷ Petitioner then came back downstairs, retrieved the gun back out of the safe, sat on the couch and told Isaiah that everything was going to be okay, and again threatened Shanda that if she said anything to anyone

⁶ Specifically, Petitioner indicated to Shanda that he was going to kill Lynn, throw her body in the bed of their truck, have Shanda drive Lynn’s body to Charleston and dump her in a pond or, alternatively, have Shanda drive Lynn’s body to another part of the Logan area known as Peach Creek and dump her in a pond. *Id.* at 59.

⁷ Lynn actually worked at a Walmart in the Logan area. *Id.* at 52.

he was going to kill her and Isaiah and perhaps himself as well. *Id.* at 62. Thereafter, Petitioner stated that he was going upstairs to lay down and think about what he was contemplating—Petitioner took the gun with him. *Id.* At 3:51 a.m., of this same night, August 11, 2008 (Monday), Petitioner shot and killed Lynn. *Id.* at 42, 64, 85.⁸

After murdering Lynn, Petitioner came downstairs, grabbed Shanda, told her that they needed to get Lynn’s body out of the house, and that she was going to help him do so. *Id.* at 65. Wanting no part in his plans, Shanda informed Petitioner that she could not do as he wished and that she would call someone for help. *Id.* at 65-66. Petitioner then went back upstairs, as did Shanda, at Petitioner’s insistence. *Id.* at 66. Upstairs, Petitioner rolled Lynn over in the bed on her back and covered her head with a sheet. *Id.* at 66, 67. Petitioner then laid out Lynn’s hair straightener and makeup to make it appear as if she had gone to work. *Id.* at 67. Petitioner then rolled Lynn’s body onto a sheet and told Shanda to help him lift Lynn’s body from the bed to the floor. *Id.* Reluctantly, Shanda helped Petitioner move Lynn’s body from the bed onto the floor. *Id.* at 68. Thereafter, Petitioner and Shanda drug Lynn’s body down the steps. *Id.* Because he was having difficulty lifting and moving her body, Petitioner became angry and began calling Lynn “names” and “cussing” Shanda because she was “upset and crying.” *Id.* Petitioner also told his son Isaiah, who was upset and crying, that “[m]en don’t cry.” *Id.* at 69.

After he got Lynn downstairs, Petitioner told Shanda to pull Lynn’s car in front of the house so that he could load her body into the vehicle’s trunk. *Id.* With Shanda “too upset” to help her

⁸ Lynn’s autopsy revealed that Petitioner shot her in the back of the head. *Id.* at 8. The autopsy also revealed numerous scrapes, bruises and opened wounds on Lynn’s body due to blunt force trauma. These additional injuries were not caused by the gunshot wound and were inflicted before Lynn died. *Id.* at 8, 13, 16. These additional wounds were primarily to Lynn’s face, but also to her genital and anus areas. *Id.* at 13.

father load Lynn into the trunk, Petitioner “got mad and jerked . . . [Lynn’s body] off the porch.” *Id.* Because he was having difficulty lifting Lynn’s body, Petitioner continued “calling her names” and indicated that “[i]f she wasn’t so fat, . . . [he would] be able to pick her up and stick her in . . . [the trunk.]” *Id.* at 70.⁹ Unable to get her in the trunk, Petitioner, using his daughter Shanda to help him, loaded Lynn’s body into the interior of the vehicle through the passenger side door. *Id.*

Petitioner then instructed Shanda to drive Lynn’s car and body up a hollow in the Logan area, known as Dingess, and push the car over a hill. *Id.* at 71. Shanda, feeling as if she was being “forced” to do so, complied with Petitioner’s request. *Id.* at 73. In fact, Petitioner told Shanda that “if . . . [she] wasn’t back at 6:00 o’clock [a.m.] that . . . [she] would come home to a dead brother.” *Id.* at 73. *See also Id.* at 75. Rather than taking the body to Dingess, Shanda drove to the Mud Fork/Hart’s Creek area of Logan County and left Lynn inside of the vehicle, where she was later found by the police. *Id.* at 74; Day 1 Trial Tr. 132-136, April 12, 2010; Day 2 Trial Tr. 10, 27, April 13, 2010.

Thereafter, Shanda made her way back to her house in West Logan, arriving there at 5:57 a.m. Day 3 Trial Tr. 76, April 14, 2010. At the house, Petitioner told Shanda that someone from Lynn’s workplace would be calling, as she was due to be at work at 6:00 a.m. *Id.* at 78. Petitioner then instructed Shanda that she had to wait for this call and “tell them that . . . [Lynn] left on her normal time and that . . . [she] ain’t seen her.” *Id.* at 78-79. After the call came in, Petitioner left the house to go to a doctor’s appointment; he arrived back at the house approximately 25 to 30

⁹ While attempting to put her in the trunk, Petitioner dropped Lynn’s body on the ground. *Id.* at 70.

minutes later. *Id.* at 80.¹⁰ During this 25-30 minute period, Petitioner repeatedly called Shanda because, as he stated, “he didn’t want . . . [her] to have a chance to get a hold of anybody.” *Id.* at 80. While he was gone, Shanda did not attempt to leave, as she was “scared because . . . [Petitioner] told . . . [her] that he would come and find . . . [her].” *Id.* at 81-82.

Thereafter, Shanda and her brother Isaiah went to Petitioner’s mother’s, Patricia Finley’s, house. *Id.* at 82. While there, Shanda did not say anything to her grandmother about what had occurred, as Petitioner ordered her not to do so and she “feared for . . . [her] and . . . [her] brother’s life.” *Id.* at 83. Later, when she was initially contacted by the police, Shanda did not reveal that Petitioner killed her stepmother Lynn. *Id.* at 83-84. The reason being that Petitioner “said he would come and find . . . [her] if . . . [she were] to say anything to anybody.” *Id.* at 84. On Petitioner’s orders, Shanda initially told the police that Lynn left the house at her normal time to go to work and that she had not seen or heard from her since. *Id.* However, after the police informed her that Petitioner implicated her as the “trigger man” in Lynn’s death, Shanda told the police the truth—that Petitioner murdered Lynn. *Id.* at 84-85.

After murdering Lynn and disposing of her body, at approximately 8:25 a.m. on August 11, 2008 (Monday), Petitioner went to the police station, where Petitioner informed the police that Lynn had not shown up for work and that he was wondering as to her whereabouts. Day 1 Trial Tr. 127, April 12, 2010.¹¹ Thereafter, Petitioner left the police station; as he was leaving, Petitioner indicated

¹⁰ As noted above, Petitioner had to take urine specimens of himself due to his high blood pressure condition. When he left the house, Petitioner went to his doctor’s office where he dropped off a urine sample. *Id.* at 79.

¹¹ Petitioner actually went to the West Virginia State Police’s Logan County Detachment to report Lynn missing. *Id.* at 127. Petitioner was accompanied by his mother-in-law Linda Blevins.
(continued...)

that he was going to go look for Lynn. *Id.* at 129.

In the afternoon hours of this same day, August 11, 2008 (Monday), the police interviewed Petitioner. *See generally* Hr'g Tr. 3-83, August 5, 2009.¹² The entire interview, including breaks, lasted a little over 4 hours, beginning at 12:40 p.m. and ending at 5:03 p.m. During this interview, Petitioner gave three separate statements. *Id.* at 8-9, 39, 50-51, 79.¹³ At the beginning of the interview, Petitioner was made aware that he was not under arrest and was free to leave at any time. *Id.* at 9, 10-11. Petitioner was also made fully aware of all his *Miranda* rights, including his right to remain silent and right to counsel. *See generally id.* at 6-12, 26-29. In fact, on at least two or three occasions throughout the interview, the police advised Petitioner of his *Miranda* rights. *Id.* at 57.

After being advised of and acknowledging his rights, Petitioner waived these rights and agreed to give a statement to the police. *See generally id.* at 12-16, 64-65.¹⁴ At no time, during the entire interview process, did the police ever coerce or threaten Petitioner into giving any statements.

¹¹(...continued)
Id.

¹² The interview was conducted at the West Virginia State Police's Logan Detachment by four State Police officers—Officers Roger Johnson, Randy Frye, J.B. Frye and Brian Brown. *Id.* at 5-6, 14, 21, 51, 66, 68.

¹³ The first statement lasted approximately 2 hours; 1 hour and 48 minutes to be exact. Combined, the second and third statements lasted approximately 11 minutes. *Id.* at 19, 43, 51. It should be noted that Officer Johnson was present only during the first statement; Officers Randy Frye and Brian Brown were present during all three statements. *See generally id.* at 21, 23, 27, 41, 62, 68. From the record, it appears that Officer J.B. Frye was also present during all three statements.

¹⁴ The *Miranda* process, including Petitioner being advised of his rights, acknowledging his rights, waiving his rights, and agreeing to give a statement to the police, lasted approximately 6 minutes beginning at 12:40 p.m. and ending at 12:46 p.m. *Id.* at 42-43, 63-64.

Nor were any promises made to Petitioner in exchange for his statements. *See generally id.* at 15, 23, 29, 40-41, 53, 54, 55, 57-58, 65, 69, 80.

During his first statement, Petitioner denied any wrongdoing in the death of his wife Lynn Finley. *Id.* at 30. Instead, Petitioner implicated his daughter Shanda as having murdered Lynn. *Id.* at 32, 41, 51, 71. After this first statement, the police informed Petitioner that he was free to leave. *Id.* at 43. However, rather than leaving, Petitioner indicated to Officer Frye that he wanted to speak to him again. *Id.* at 37-38. Officer Frye informed Petitioner that he would speak with him again after he talked to Shanda. *Id.* at 38. Petitioner responded by asking Officer Frye to make sure that he came back and spoke with him—Officer Frye agreed to this request. *Id.* at 38.¹⁵

Thereafter, the police, as noted above, spoke with Shanda and informed her that Petitioner had “fingered” her as Lynn’s murderer. *Id.* at 32-33. Hearing this, again as noted above, Shanda gave a statement to the police, during which she exposed Petitioner as Lynn’s actual murderer. *Id.* at 33, 71.

After obtaining Shanda’s statement, the police spoke with Petitioner a second time. *Id.* at 33. During this second statement, Petitioner requested that he have a lawyer present. *Id.* at 34-35, 52-53, 54, 72, 77. In response to this request, the police immediately stopped interviewing Petitioner. *Id.* at 35-36, 53, 72, 74, 77.¹⁶ At this point, the officers conducting the interview, Officers Frye and Brown, got up to leave the room and were stopped by Petitioner, who began to question Officer Frye as to what would happen next. *Id.* at 36. *See also id.* at 72. Officer Frye

¹⁵ This conversation between Petitioner and Officer Frye took place in the hallway after his first statement. *Id.* at 37-38.

¹⁶ This second statement was very brief, lasting only a few minutes, and terminated at 4:50 p.m. *Id.* at 35, 38, 52.

informed Petitioner that the investigation would continue and that he was free to leave, as he was not under arrest. *Id.* at 36, 54. Petitioner continued questioning Officer Frye, asking him what he intended to do, to which Officer Frye again reminded Petitioner that the investigation would continue and that he was free to leave. Hearing this, Petitioner asked Officer Frye if he could speak with him. In response, Officers Frye and Brown indicated to Petitioner that they could no longer speak to him, as he had asked for a lawyer. *Id.* at 37, 72. At this moment, Petitioner told Officer Frye that he had changed his mind about wanting a lawyer and requested to speak with Officer Frye. *Id.* at 37, 73, 78.

After conferring with each other for a few minutes, Officers Frye and Brown decided to allow Petitioner, for the third time, to continue talking to them. *Id.* at 37, 79. Petitioner initiated this third statement to the police; neither Officer Frye nor Officer Brown did anything to initiate this third statement. *Id.* at 37, 40, 73, 78.¹⁷ In fact, before taking his third statement, the police reminded Petitioner of his *Miranda* rights, indicated to him that he had asked for an attorney, and asked whether he was recanting his earlier request for a lawyer—Petitioner responded affirmatively. *Id.* at 55-56, 57, 58-59, 73-74. During his third statement, Petitioner confessed to having shot and killed his wife Lynn Finley. *Id.* at 39-40, 74-75.¹⁸

On August 11, 2008, following his third statement, the police arrested Petitioner. *Id.* at 26.

On May 11, 2009, the Logan County Grand Jury indicted Petitioner for first degree murder. Indictment No. 09-F-76-P.

¹⁷ Approximately 3 or 4 minutes lapsed between the time that Petitioner changed his mind about wanting a lawyer and giving his third statement to the police. *Id.* at 40-41, 78, 81.

¹⁸ As with his second statement, Petitioner's third statement was very short, beginning and ending respectfully at 4:54 p.m. and 5:03 p.m. *Id.* at 38-39.

On May 29, 2009, Petitioner moved the circuit court (“court”) to suppress all three statements that he gave to the police on August 11, 2008. Omnibus Pre-trial Motions Including Motion to Suppress 6-7, May 27, 2009.

On August 5, 2009, a suppression hearing was held on Petitioner’s Motion to Suppress his August 11, 2008 statements to the police. *See generally* Hr’g Tr. 1-86, Aug. 5, 2009. During this hearing, West Virginia State Police Officers Roger Johnson, Randy Frye and Brian Brown testified for the prosecution. *See generally id.* at 3-83. Petitioner did not testify on his own behalf or offer any other testimony or evidence in support of his position. *See generally id.* at 1-86. *See also id.* at 84.

On August 21, 2009, Petitioner filed with the court his Memorandum of Law in Support of Motion to Suppress Statement. *See generally* Memorandum of Law in Support of Motion to Suppress Statement, Aug. 17, 2009. In this Memorandum, Petitioner narrowed his previous Motion to Suppress all of the statements that he gave to the police on August 11, 2008, asking only that his third statement be excluded. *Id.* at 4.¹⁹

On September 21, 2009, the court ruled that all three of the statements that Petitioner gave to the police on August 11, 2008, were admissible at Petitioner’s trial in the prosecution’s case in chief. Order at 2, Sept. 21, 2009.

Petitioner’s trial began on April 12, 2010, and ended on April 16, 2010, with the jury convicting him of first degree murder. Day 5 Trial Tr. 90-91, Aug. 16, 2010. *See also* Certified Commitment Order, April 16, 2010; Verdict Form, April 16, 2010; Order at 2, April 27, 2010.

¹⁹ Please note that, on August 19, 2009, the prosecution likewise filed its Memorandum in support of the admissibility of Petitioner’s August 11, 2008 statements to the police. *See generally* Memorandum, Aug. 19, 2009.

Immediately following the jury's verdict, the court sentenced Petitioner to life in the penitentiary without the possibility of parole. Day 5 Trial Tr. 92, April 16, 2010. *See also* Certified Commitment Order, April 16, 2010; Order at 2, April 27, 2010.²⁰ Thereafter, Petitioner brought the current appeal.

II.

SUMMARY OF ARGUMENT

During his interview with the police, Petitioner gave three separate statements. During his second statement, Petitioner requested an attorney. Hearing this, the police immediately ceased questioning Petitioner and shut the interview down. No sooner that the interview was terminated, Petitioner initiated further discussions with the police, during which he recanted his earlier request for an attorney. The police then took Petitioner's third statement, during which he confessed to shooting and killing his wife Lynn Finley. Prior to this confession, the police again reminded Petitioner of his *Miranda* rights, which he knowingly and voluntarily waived. Petitioner's third statement, including his confession, was not brought about by any threats, coercion or promises on the part of the police. Thus, the court committed no error in admitting Petitioner's third statement at trial.

III.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner appears to have waived oral argument, stating that "oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and record on

²⁰ Please note that this Court, on December 27, 2010, remanded the case to the circuit court to resentence Petitioner for the purpose of allowing him to timely appeal his conviction. On March 10, 2011, the circuit court resented Petitioner, as ordered by the Court. The circuit court's sentence was the same—life without the possibility of parole.

Appeal and the decisional process would not be significantly aided by oral argument.” Pet’r’s Br.

4. The State agrees with Petitioner’s statement regarding oral argument and, unless directed otherwise by the Court, will forego the same.

IV.

ARGUMENT

THE CIRCUIT COURT DID NOT COMMIT ERROR WHEN IT PERMITTED THE PROSECUTION TO ADMIT INTO EVIDENCE A THIRD STATEMENT GIVEN BY PETITIONER AFTER PETITIONER REQUESTED AN ATTORNEY AT THE CONCLUSION OF HIS SECOND STATEMENT.

A. Standard of Review

“It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review.” Syl. pt. 1, *State v. Black*, 227 W. Va. 297, 708 S.E.2d 491 (2010) (quoting Syl. pt. 2, *State v. Vance*, 162 W. Va. 467, 250 S.E.2d 146 (1978)). “A trial court’s decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.” Syl. pt. 7, *State v. Messer*, 223 W. Va. 197, 672 S.E.2d 333 (2008) (internal quotations and citations omitted).

B. Preliminary Rules for Admissibility of Confessions: Confessions Must Be Voluntarily Made.

It is the mandatory duty of a trial court, whether requested or not, to hear the evidence and determine in the first instance, out of the presence of the jury, the voluntariness of an oral or written confession by an accused person prior to admitting the same into evidence.

Syl. pt. 2, *Black, supra* (internal quotations and citations omitted).²¹ In determining the voluntariness of a confession, circuit courts must look at the totality of the circumstances. “[T]he totality of the circumstances must be assessed in a determination of the voluntariness of a confession.” *State v. Messer*, 223 W. Va. 197, 208 , 672 S.E.2d 333, 344 (2008) (citing *State v. Farley*, 192 W.Va. 247, 253, 452 S.E.2d 50, 57 (1994)).

C. Rules on Waiver of *Miranda* Rights, Including Right to Remain Silent and Right to Counsel, after *Miranda* Rights Have Been Exercised: Accused Must Initiate Further Communications with Police and Knowingly and Voluntarily Waive *Miranda* Rights.

“Once a person under interrogation has exercised the right to remain silent guaranteed by W.Va. Const., art. III § 5, and U.S. Const. amend. V, the police must scrupulously honor that privilege. The failure to do so renders subsequent statements inadmissible at trial.” Syl. pt. 4, *Farley, supra* (internal quotations and citations omitted). Likewise, “[o]nce an accused asks for counsel during custodial interrogation, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations.” Syl. pt. 1, *State v. Kilmer*, 190 W. Va. 617, 439 S.E.2d 881 (1993) (quoting Syl. pt. 2, *State v. Bowyer*, 181 W.Va. 26, 380 S.E.2d 193 (1989)). *See also Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981) (“[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further

²¹ Likewise, “[t]he State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.” Syl. Pt. 10, *State v. Keesecker*, 222 W. Va. 139, 663 S.E.2d 593 (2008) (quoting Syl. pt. 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975)).

communication, exchanges, or conversations with the police.”).

“For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel.” Syl. pt. 1, *State v. Jones*, 216 W. Va. 392, 607 S.E.2d 498 (2004) (quoting Syl. pt. 1, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987)). *See also Edwards*, 451 U.S. at 482 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (“[W]aivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case ‘upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.’”).

D. After Requesting an Attorney at the Close of His Second Statement, Petitioner Initiated Further Discussions with the Police. Before Giving His Third Statement, Petitioner Was Again Reminded of His *Miranda* Rights, Which He Knowingly and Voluntarily Waived Prior to His Third Statement. This Third Statement Was Not Brought About by Any Threats, Coercion or Promises on the Part of the Police. Thus, the Circuit Court Committed No Error in Admitting Petitioner’s Third Statement at Trial.

After he murdered his wife Lynn Finley, the police interviewed Petitioner. During this interview, Petitioner gave three separate statements to the police. In his third statement, Petitioner confessed to shooting and killing Lynn. On appeal, Petitioner asserts that the court committed error in not excluding this confession from his trial. In support of this assertion, Petitioner argues that his third statement, during which he gave his confession, was not voluntary, as the statement was taken after he exercised his right to counsel during his second statement. Petitioner further argues that his third statement was involuntary, as the statement came at the behest of the police threatening him

and his children. *See generally* Pet'r's Br. 3-11. Absolutely not!

To begin with, at the beginning of his interview, the police made Petitioner aware that he was not under arrest and was free to leave at any time. This interview also began with the police making Petitioner fully aware of all his *Miranda* rights, including his right to remain silent and right to counsel. These *Miranda* rights were repeated to Petitioner on at least two or three occasions during the interview. It was not until Petitioner was advised of his *Miranda* rights, acknowledged and waived these rights, that the police went forward with the interview, during which Petitioner gave three statements. All of this was well documented in the suppression hearing that took place on August 11, 2008, during which Officers Roger Johnson, Randy Frye and Brian Brown testified for the prosecution. Importantly, at this hearing, Petitioner did not offer any evidence or testimony, either from himself or anyone else for that matter, refuting the testimony of these of officers on these points.

Furthermore, and more to the point, upon hearing Petitioner's request for an attorney, which occurred during his second statement, the police immediately ceased questioning Petitioner and shut the interview down. A look at Petitioner's second statement undoubtably bears this out:

R. Frye: Today's date is August 11, 2008; time is 4:48 by my watch. Present at the Logan Detachment, uh, in the room is myself, Trooper Frye, Sergeant Brown and Jeff Finley. Um, Jeff, before we go any farther with this we had a conversation earlier where you was under Miranda is that true?

Finley: Yes.

R. Frye: Uh, you're free to roam about, do what you want to after that interv... after that conversation ended, uh, you may have gotten something to eat, I don't know what you did but you were free to leave after that conversation. Is that correct?

Finley: Right.

R. Frye: And uh, you understand we're here still speaking about the death of Lynn Finley.

Finley: Yeah.

R. Frye: Which is your wife, and uh, you're still under Miranda warning. Do you understand that?

Finley: Well, I'm going to ask a question.

R. Frye: Okay.

Finley: Would it be smart for me to have a lawyer present?

R. Frye: That's up to you. I mean you can do that, that is your option. You can do whatever you want to do.

Finley: Because I mean, if I'm going to be truthful then I want a lawyer present and I'll state the whole truth.

R. Frye: You can do whatever you want to do on, on that aspect, uh, you're more than welcome to have a lawyer present, um, but uh, there's some things that, on your prior statement that uh, that you made that may not, may not have been truthful. But it is your right to have a lawyer and if you wish to have a lawyer we'll, we'll terminate the interview at this time.

Finley: I want, I want a lawyer present.

R. Frye: Okay.

Finley: That way I can be told truthful an...

R. Frye: Alright. Concluding this interview, same date, the time now is 4:50 pm.

END

Second Statement of Petitioner, August 11, 2008.

No sooner that the interview was shut down during his second statement, Petitioner began to voluntarily initiate further discussions with the officers conducting the interview, Officers Randy Frye and Brian Brown. In fact, before they could even get out of the room, Petitioner stopped these

officers and began asking Officer Frye what would happen next. Officer Frye responded by informing Petitioner that the investigation would continue and that he was free to leave, as he was not under arrest. Despite this, Petitioner continued questioning Officer Frye, asking him what he intended to do, to which Officer Frye again reminded Petitioner that the investigation would continue and that he was free to leave. Instead of leaving, however, Petitioner asked Officer Frye if he could talk to him. In response, Officers Frye and Brown indicated to Petitioner that they could no longer speak to him, as he had requested a lawyer. At this moment, Petitioner informed Officer Frye that he had changed his mind about wanting an attorney and that he wanted to speak with him. After conferring with one another for a few minutes, Officers Frye and Brown permitted Petitioner to give a third statement, during which he confessed to shooting and killing his wife Lynn Finley. Again, all of this is well documented by the testimony of Officers Frye and Brown in the August 11, 2008 suppression hearing and, at the risk of sounding like a “broken record,” Petitioner did not refute these Officers’ testimony with any of his own or anyone else’s for that matter.

Before confessing to shooting and killing Lynn during his third statement, the following exchange between Petitioner and Officers Frye and Brown took place:

R. Frye: Today’s date is still August 11, 2008; the time now is 4:54 pm. Present in the room is myself, Trooper Frye, Sergeant Brown, Sergeant Frye, and Jeff Finley, um, Jeff we was going to talk just now and uh, uh, I advised you was still under your Miranda warning. You, you agreed you understood that and um, you have since changed your mind about having a lawyer present while giving a statement. Is that correct?

Finley: Yes.

R. Frye: Um, so you do not want a lawyer present you wish to speak with us, is that true?

Finley: Yes.

R. Frye: No promises of any kind had been made to ya, uh...

Sgt. Brown: No threats? Nobody's threatened you...

R. Frye: No threats, were just shootin' straight.

Finley: Shootin' straight.

R. Frye: An, trying to find out what happened to your wife. Is that true?

Finley: It's true.

R. Frye: Um, alright, if, if you want to just go ahead and tell us what happened startin' from uh, when ya'll got home from Ohio until today.

Third Statement of Petitioner, August 11, 2008.

It is obvious from this exchange that Petitioner initiated his third statement and knowingly and voluntarily recanted his earlier request for a lawyer, which occurred during his second statement. It is also obvious from this exchange that the police did not promise Petitioner anything, "let alone" threaten him into giving this third statement. Despite this, Petitioner asserts on appeal that his third statement, during which he confessed to shooting and killing his wife Lynn, was brought about by the police threatening him and his children. Petitioner argues that these threats occurred during the four minute gap between the end of his second statement and the beginning of his third statement. *See generally* Pet'r's Br. 4, 7, 9-10. Nothing could be further from the truth!

First, at no time during the suppression hearing, held on August 11, 2008, did Petitioner offer any testimony, from himself or otherwise, that he received such threats. In fact, the first "peep" out of Petitioner regarding any such threats occurred when he testified during his trial. *See generally* Day 4 Trial Tr. 158-162, April 15, 2010. At best, Petitioner raised the "specter" of being threatened by the police during the suppression hearing. This occurred when Petitioner's counsel questioned

Officers Johnson, Frye and Brown about threatening Petitioner. All of these officers unequivocally denied any such threats and, to state the obvious, the court, and correctly so, believed them. If it had not, it would not have found Petitioner's statements, whether 1, 2 or 3, to have been knowingly and voluntarily given and, therefore, admissible. Importantly, on this point, "[t]his Court has previously noted that 'where credibility was the sole issue in a suppression hearing, we [will] not conclude that a judge abused his discretion in holding a confession [or statement] admissible.' *State v. Wilson*, 170 W.Va. 443, 445, 294 S.E.2d 296, 298 (1982)." *State v. Middleton*, 220 W. Va. 89, 102, 640 S.E.2d 152, 165 (2006) *overruled on other grounds by State v. Eilola*, 226 W. Va. 698, 704 S.E.2d 698 (2010).

Finally, "to make a long story short," without so much as a "hint" of coercion or underhandedness on the part of the police, whether in the form of promises or threats, Petitioner voluntarily initiated the taking of his third statement, during which he confessed to shooting and killing his wife Lynn Finley. Before giving this confession, Petitioner knowingly and voluntarily waived his right to counsel. This Court and others have found, "time and time again," that in such situations the defendant has validly waived his *Miranda* rights, including his right to remain silent and right to counsel, and the defendant's statements are "fair game" in terms of their admissibility at trial. *See State v. Little*, 201 W. Va. 523, 526, 498 S.E.2d 716, 719 (1997) (Holding the defendant validly waived his right to remain silent when he was not threatened by the police, he indicated that he wished to remain silent, the interview was discontinued, and then, 25 minutes later after talking to family members, the defendant told the police that he wished to make a statement.); *Savino v. Murray*, 82 F.3d 593, 599-600 (4th Cir. 1996) ("A defendant who ends police-initiated interrogation by requesting counsel, then specifically calls for an officer with whom to talk about the incident in

question, has reinitiated further conversation for *Edwards* purposes.”); *United States v. Evans*, 917 F.2d 800 (4th Cir. 1990) *overruled on other grounds by U.S. v. Lancaster*, 96 F.3d 734 (4th Cir. 1996) (Holding that the defendant, who initiated further conversations with police officers approximately 55 minutes after he was advised of his *Miranda* rights upon being arrested and asserting his right to counsel, made a knowing and voluntary waiver of his right to remain silent and to have counsel present during questioning.).

V.

CONCLUSION

Petitioner’s conviction should be affirmed.

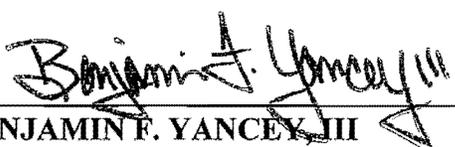
Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



BENJAMIN F. YANCEY III
ASSISTANT ATTORNEY GENERAL
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Telephone: (304) 558-2522
State Bar No. 7629
Email: bfy@wvago.gov

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0622

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

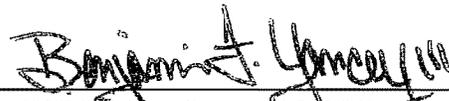
JEFFREY R. FINLAY,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent hereby certifies that a true and correct copy of the foregoing **BRIEF OF RESPONDENT STATE OF WEST VIRGINIA** was mailed to counsel for the Petitioner by depositing it in the United States mail, first-class postage prepaid, on this 3rd day of November, 2011, addressed as follows:

Mark Hobbs, Esquire
Professional Building
Post Office Box 974
Chapmanville, West Virginia 25508


BENJAMIN F. YANCEY, III