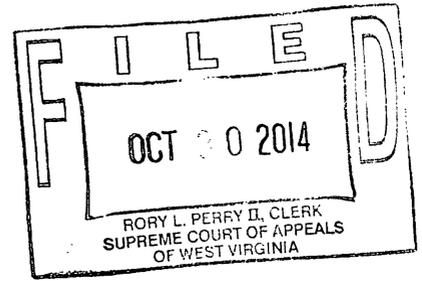


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff/Respondent,

v.

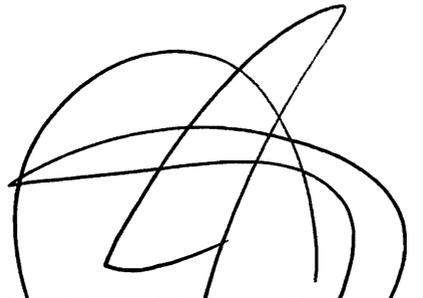
DARNELL CARLTON BOUIE,
Defendant/Petitioner.



14-0639
Appeal No. ~~13-0120~~

FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA
CASE NO. 13-F-76-3

RESPONDENT
STATE OF WEST VIRGINIA'S RESPONSE TO
PETITION FOR APPEAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
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V.

DARNELL CARLTON BOUIE,
Defendant/Petitioner.

Appeal No. 13-0120

FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA
CASE NO. 13-F-76-3

RESPONDENT
STATE OF WEST VIRGINIA'S RESPONSE TO
PETITION FOR APPEAL

**I. RESPONDENT'S STATEMENT OF CASE AND
PROCEDURAL SUMMARY**

For the purpose of conforming with Rule 10 of the West Virginia Rules of Appellate Procedure, Respondent provides the following Statement of Case and Procedural Summary to address perceived omissions in the Petitioner's Petition for Appeal.

On January 13, 2010, Jayar Poindexter, a resident of Harrison County, West Virginia, was shot through the window of his apartment and killed with a .25 caliber firearm at the Quarry Apartments in Clarksburg, West Virginia, during an attempted Burglary of his residence. Subsequent to the shooting, the Clarksburg Police Department conducted a lengthy and thorough investigation of the murder which resulted in the

identification of two (2) suspects: Ennis Charles Payne and Darnell Carlton Bouie. At the May 2013 term of the Harrison County Grand Jury, both Petitioner and Mr. Payne were indicted on the charges of First Degree Murder (Felony Murder) and Conspiracy to Commit Burglary.

Prior to Petitioner's Trial, several Pretrial Hearings were held. During the October 31, 2013, Pretrial Hearing, Sergeant Josh Cox of the Clarksburg Police Department testified as to the following. That on or about October 5, 2012, the Petitioner was arrested in the State of Pennsylvania on a warrant obtained for Murder and incarcerated in the Butler County Jail pending extradition to the State of West Virginia. *October 31, 2013, Pretrial Hearing Transcript p.23, line 17-23*. The Petitioner thereafter waived extradition to this State and Sergeant Josh Cox and Officer Steve Menendez of the Clarksburg Police Department traveled to Pennsylvania on October 25, 2012, to transport the Petitioner back to this State. *Id. at p.23, line 23-24; p.24, line 1-8*. After securing the Petitioner, the aforementioned Clarksburg Police officers transported Petitioner back to the Clarksburg Police Department for processing prior to transporting him to the North Central Regional Jail. *Id. at p.25, line 2-23*.¹

After processing the Petitioner, Sergeant Cox drove to the city fuel pumps to fuel his cruiser prior to driving the Petitioner to the North Central Regional Jail. *Id. at p.26, line 14-23*. While at the fuel pumps, the Petitioner requested a copy of the Complaint to read which Sergeant Cox provided him with. *Id. at line 14-16*. After providing the Petitioner with a copy of the Complaint, the Petitioner initiated conversation with Sergeant Cox by asking why he was charged with murder if he didn't shoot anyone. *Id. at*

¹ Processing lasted no longer than forty-five minutes, the normal amount of time it takes to process any Defendant. October 31, 2013, Pretrial Hearing Transcript, p.25, line 17-23.

p.27, line 21-23. Sergeant Cox responded by stating that he was charged because the murder occurred while Petitioner was trying to break into a house. *Id. at p.28, line 1-2.* The Petitioner thereafter stated that he (Petitioner) had walked around the residence but that he did not break into the house and that there were other people there at the time. *Id. at p.28, line 11-12.*

Sergeant Cox further testified that he did not ask the Petitioner any questions during his conversation with him and that the Petitioner was the individual who initiated the conversation. *Id. at p.35, line 9-10, 24; p.38, line 17-18.* Also during the Pretrial Hearing, the Petitioner's criminal history sheet (CIB) was admitted evidencing that he was thirty-two (32) years of age at the time he made statements to Sergeant Cox and that he had been arrested approximately twelve (12) times for various felonies and misdemeanors prior to the date on which he made the statements to Sergeant Cox.

On March 14, 2014, Trial in Petitioner's matter began. Sergeant Cox again testified identically to the matters which he had testified to during the Pretrial Hearing. Specifically, Sergeant Cox testified that while enroute to the jail, he stopped at the city gas pumps to fuel his cruiser. *Trial Transcript at p.702, line 1-4.* Sergeant Cox testified that while fueling his cruiser, the Petitioner asked for a copy of the criminal complaint and, after reading the complaint, the Petitioner asked Sergeant Cox why he was charged with murder if he was not the individual who shot the victim. *Id. at line 18-23.*

Sergeant Cox testified that he answered Petitioner's question by advising that Petitioner was charged with murder because he was present committing a felony when the victim was shot and that Petitioner thereafter stated that he was present at the residence. *Id. at p.703, line 1-5.* At no time did Sergeant Cox ever question Petitioner.

Pretrial, the State additionally moved for admission of statements of Petitioner's Codefendant as statements against interest². Petitioner's Codefendant (Ennis Charles Payne) made statements to an individual following the murder which amounted to an admission of guilt in regard to the murder of the victim during the attempted burglary of the residence. The witness, Aaron Carey, testified at a February 13, 2014, Pretrial Hearing that he and Mr. Payne were friends. *February 13, 2014, Pretrial Hearing Transcript, p.49, line 7-10*. Mr. Carey testified that a day or two following the murder, Mr. Payne arrived at Mr. Carey's residence looking scared and that Mr. Payne told him that he had shot someone during a robbery that had "gone bad" while trying to go in through a window of a residence³. *Id. at p.49, line 23-24; p.50, line 2-17*. Mr. Carey testified that Mr. Payne had told him that the motive for robbing the victim's apartment was to steal money and drugs (a significant amount of money and cocaine were located inside the victim's apartment following the murder). *Id. at p.52, line 23-24; p.53, line 1-8*.

Following the February 13, 2014, Pretrial Hearing, the court ruled that in the event that Mr. Payne exercised his Fifth Amendment privilege at Petitioner's Trial, the State would be permitted to only utilize the following statement of Mr. Payne made to Mr. Carey: That Mr. Payne had shot someone during a robbery to steal money and drugs.

Prior to Petitioner's Trial, Mr. Payne was served with a subpoena commanding his attendance at Trial. On March 20, 2014, Mr. Payne was called, outside of the presence of the jury, as a witness. *Trial Transcript, p.637*. At that time, and with his counsel present, Mr. Payne was questioned by the State in respect to his involvement in the

² The Trial of the Codefendant is currently scheduled for November 3, 2014.

³ Mr. Payne also made numerous statements implicating the Petitioner but the trial court correctly did not permit these to be used.

murder at which time he asserted his Fifth Amendment privilege and declined to answer the State's questions. *Id. at p.637, line 19-23; p.638, line 3-18.* In addition to verbally advising the court that he would assert his Fifth Amendment privilege at Petitioner's Trial and refuse to testify, Mr. Payne and his counsel submitted an Affidavit in which Mr. Payne advised the court that he asserted his Fifth Amendment privilege and declined to testify at Petitioner's Trial. *Id. at p.643, line 2-24.*

On March 20, 2014, Aaron Carey was called as a witness and testified that he knew Mr. Payne, how long he had known Mr. Payne, that Mr. Payne had told him that he (Mr. Payne) had shot someone during a robbery for money and drugs. *Id. at p.771, line 15-20.*

During the investigation of Petitioner's matter, Sergeant Cox obtained recordings of telephone calls made by the Petitioner while he was incarcerated at the Central Regional Jail⁴. At the October 31, 2013, Pretrial Hearing, the State called James Hamrick, a booking clerk at the jail. Mr. Hamrick testified that inmates at the jail are advised by way of a booking form that their phone calls are recorded except those made to their counsel. *October 31, 2013, Pretrial Hearing Transcript, p.17, line 6-10.* Mr. Hamrick testified that Petitioner had been provided with a booking data sheet upon his admission to the jail which advised him that his telephone calls may be recorded and that Mr. Bouie had acknowledged the information on the sheet by way his signature. *Id. at p.17, line 14-24; p.18, line 1-13.*

At the February 13, 2014, Pretrial Hearing, the State called Sergeant Tonya Peters and Margaret Cook, employees of the Central Regional Jail. Sergeant Peters testified that

⁴ All of the phone calls were between Petitioner and his girlfriend (i.e. there were no calls that were recorded between Petitioner and his counsel).

there approximately thirty-two (32) phones located the Central Regional Jail that were accessible by inmates. *February 13, 2014, Pretrial Hearing Transcript, p.11, line 13-18.* Sergeant Peters testified that when an inmate makes a telephone call, a message is played at the beginning of the call advising the inmate that all calls may be monitored except for those placed to their attorney. *Id. at p.13, line 2-12.* Sergeant Peters testified that were warnings posted by the inmate accessible phones advising that inmate calls were subject to monitoring and being recorded. *Id. at p.13, line 6-20; p.16, line 14-24.* Sergeant Peters testified that not only are inmates advised that their telephone calls may be monitored and recorded by way of the recording played when an inmate makes a call and the warnings posted by the phones, but in addition the inmate is advised of this by way of the booking data form and the inmate handbook which each inmate is provided with when they are admitted to the jail. *Id. at p.17, line 16-23.*

Ms. Cook testified that one of the responsibilities of her job at the Central Regional Jail was to manage the inmate phone system. *Id. at p.28, line 20-24; p.29, line 1-3.* Ms. Cook testified as to how specific inmate calls are tracked by way of their inmate identification number. *Id. at p.31, line 19-24; p.32, line 1-5.* During the February 13, 2014, Pretrial Hearing, the relevant portions of Petitioner's phone calls were played which included the warning at the beginning of each call advising the inmate (Petitioner) that his telephone call was subject to monitoring and being recorded. *Id. at p.47, line 4-5.*

During Petitioner's Trial, the State again called James Hamrick, Sergeant Tonya Peters and Margaret Cook for the purpose of admitting the relevant portions of Petitioner's phone calls from jail. Mr. Hamrick again testified to the booking data form signed by Petitioner warning Petitioner that his jail calls were subject to monitoring,

interception, recordation and disclosure except those made to counsel. *Trial Transcript*, p.359, line 1-17. Mr. Hamrick testified that he reviewed the information on the form with Petitioner and that Petitioner did not have any difficulty understanding the information on the form. *Id.* at p.359, line 18-24.

Sergeant Peters testified that there were signs posted by the inmate telephones warning the inmates that their phone calls may be monitored and recorded. *Id.* at p.363, line 2-13. Sergeant Peters testified that a warning is played to the inmate over the phone at the beginning of each call that advises that the call may be monitored and recorded. *Id.* at p.363, line 14-21. On day three of Petitioner's Trial, the recordings of relevant portions of Petitioner's jail calls were admitted and played during which the message at the beginning of each call warning the inmate (Petitioner) that the call may be monitored and recorded was clearly heard. *Id.* at p.408, line 10-14.

During the investigation of the murder, footprints located in snow under the victim's bedroom window (the window through which he was shot and killed) were located. Castings were taken of the footprints and appeared to depict two distinct sets of footprints – one left by a sneaker (athletic) type shoe and one left by a boot type shoe.⁵ Also during the investigation, video surveillance footage was obtained from various local businesses showing the Petitioner and his coconspirator together, showing them travelling to the apartment complex where the victim was murdered, and showing them arriving at a gas station following the murder (the Petitioner was travelling in a pickup

⁵ The boot type footwear impression was sent to the FBI laboratory in Quantico, Virginia, and compared to a pair of boots seized pursuant to a search warrant from the coconspirator's residence. The analysis performed by the FBI resulted in a finding that the boots seized from the coconspirator's residence matched the boot type footprints under the victim's bedroom window in size and design. No shoes were seized from Petitioner due to several factors including the lapse of time between the crime and Petitioner's arrest date.

truck and the coconspirator, Mr. Payne, was travelling in a Cadillac following the pickup truck).

In two (2) of the surveillance videos, the Petitioner's footwear was clearly observed and both surveillance videos showed the Petitioner to be wearing basketball type athletic shoes on the night of the murder⁶. *Trial Transcript, p.672, line 13-17; p.673, line 3-5*. In the same two surveillance videos, the other individuals who were with Petitioner the night of the murder are all observed wearing boot type shoes (in other words, the Petitioner was the only individual in the group wearing shoes that were capable of leaving the type of sneaker footprint located at the crime scene). *Id. at p.670, line 17-24; p.671-674*.

After photographing and casting the footwear impressions located at the crime scene, and having observed the Petitioner to be the only individual wearing sneaker type shoes on the night of the murder, Sergeant Cox took screen capture photos of the portions of surveillance videos showing the Petitioner's footwear. *Id. at p.674, line 23-24; p.675, line 1-21*. After taking the screen capture photos of Petitioner's shoes on the night of the murder, and having taken into consideration his observations of the footwear impressions left at the crime scene and statements of witnesses who advised that Petitioner only wore Nike shoes (*see Trial Transcript, p.495, line 2-8*), Sergeant Cox contacted the FBI laboratory in Quantico, Virginia, for assistance with forensic comparative analysis of the images of Petitioner's footwear to the footwear impressions left at the crime scene. *Id. at p.683, line 12-18*.

⁶ The surveillance videos showed not only the outer design of Petitioner's shoes but also showed the sole or tread pattern of the shoes Petitioner was wearing on the night of the murder.

After contacting the FBI laboratory, Sergeant Cox researched shoes matching the appearance of the footwear worn by Petitioner on the night of the murder, contacted Nike and purchased exemplar shoes with the same design and appearance characteristics as the shoes Petitioner was observed wearing (the shoes purchased were Nike Air Jordan Fusion). *Id. at p.683, line 19-24; p.684, line 1; p.688, line 2-3.* Sergeant Cox purchased the exemplar shoes because they possessed the same design and sole (tread) characteristics as the shoes Petitioner was observed wearing. *Id. at p.684, line 5-10.* Sergeant Cox testified at Trial that after purchasing the exemplar shoes, his observations led him to believe that there were similarities in the coloration and design of the exemplar shoes to the shoes Petitioner was observed wearing in the surveillance videos recorded the night of the murder. *Id. at p.693, line 15-20.*

Sergeant Cox testified that after making his observations, he sent the exemplar shoes to the FBI laboratory along with the screen captures taken from the surveillance videos showing the footwear Petitioner was wearing the night of the murder. *Id. at p.694, line 20-24; p.695, line 1-6.* The exemplar shoes and screen capture photos were thereafter received by Kim Meline, an FBI video and image analyst.

Ms. Meline testified at Petitioner's Trial that she examined the exemplar shoes and images of the footwear Petitioner was wearing the night of the murder. *Id. at p.812.* Ms. Meline testified to the methodology she employed in examining the exemplar shoes and images. *Id. at p.813-816.* Ms. Meline testified that after performing her analysis, she reached an opinion that there were "several similarities between the two shoes, both the questioned shoes and the exemplar shoes, including the tonality of the soles themselves, of the tops of the shoes, the sides of the shoes, and the heels. However, the ultimate

conclusion reached was that there was not enough detail in the video itself in order to determine whether they were the same brand and model.” *Id. at p.816, line 11-17.*

During Petitioner’s Trial, and in respect to the exemplar shoes, the jury was advised by the State on repeated occasions that the exemplar shoes were not Petitioner’s shoes and that no shoes had ever been seized from Petitioner.⁷ *Id. at p.677, line 23-24; p.678, line 1; p.684, line 2-4; p.687, line 5-7; p.812, line 19-24; p.813, line 13-16.* The court, during the portion of the Trial respecting the exemplar shoes, even provided an instruction to the jury that read, in pertinent part:

“you’re instructed that the exemplar shoes utilized by the prosecution during trial are not actual evidence recovered from the crime scene, nor obtained from either of the defendants charged in this matter. These shoes were merely purchased by the State as a demonstrative aid based solely upon the investigation of Sergeant Josh Cox. They are not Mr. Bouie’s shoes. They are not Mr. Payne’s shoes nor do they belong to any of the witnesses. You are instructed that you may consider these exemplar shoes only as a demonstrative aid used by the State in furtherance of its theory of the case and may lend them no greater weight than that in your deliberations.” *Id. at p.687, line 10-21.*

During Petitioner’s Trial, which lasted approximately five (5) days, the State called approximately thirty five (35) witnesses and introduced approximately one hundred sixty eight (168) exhibits. In sum, the evidence in the form of testimony and exhibits consisted of the following: That on January 12, 2010, the Petitioner traveled from Pittsburgh, Pennsylvania, to Clarksburg, West Virginia, for some purpose; that the purpose for which Defendant traveled to this State was not made clear to those he was travelling with but it was the belief of those individuals that the trip would be brief; that upon arriving in Clarksburg, the Petitioner met up with several other individuals including his Codefendant; that the Petitioner and Codefendant and the other individuals

⁷ In fact, the jury was told repeatedly that the exemplar shoes had been purchased from Ebay. *Id. at p.685, line 16-21; p.686, line 15-17.*

spent varying amounts of time with one another at a local bar; that around 3:00 a.m. the Petitioner left the bar and entered a vehicle driven by another individual; that around 3:00 a.m. the Codefendant left the bar and entered a vehicle driven by another individual; that there were two occupants in the vehicle in which Petitioner was located (Defendant and the driver); that there were three occupants in the vehicle in which the Codefendant was located (Codefendant, the driver and another occupant); that the vehicle in which Petitioner was located followed the vehicle in which the Codefendant was located through Clarksburg and to the Quarry Apartments; that both vehicles were tracked via video surveillance through Clarksburg and up until the point they arrived at an area near where the entrance of the Quarry Apartments is located; that the last time the vehicles were captured on video surveillance was at approximately 3:15 a.m. at an area near where the entrance to the Quarry Apartments is located; that at approximately 3:15 a.m. two witnesses observed the vehicles in which Petitioner and his Codefendant were located entering into the Quarry Apartments; that witnesses testified that upon arriving at the Quarry Apartments, both vehicles parked in an area some distance away from the victim's apartment; that the other occupants of the vehicles in which Petitioner and the Codefendant were located did not know why they were going to the Quarry Apartments and that neither Petitioner nor the Codefendant told them why they were going to this location; that the Petitioner and Codefendant left their respective vehicles upon arriving at the Quarry Apartments; that the Petitioner and Codefendant were observed walking away from the vehicles; that after approximately ten to fifteen minutes, the Petitioner and Codefendant were observed walking back to the vehicles together; that during the time period when the Petitioner and Codefendant were gone, the victim was shot; that a 911

call was placed at approximately 3:30 a.m. by the victim's girlfriend; that the screen to the victim's window had been cut; that the screen to the window had not been damaged prior to the time of the murder; that two (2) distinct sets of footprints were located under the victim's bedroom window; that one set of footprints appeared to be a boot print and one set appeared to be a sneaker type print; that the victim was shot and killed with a .25 caliber projectile; that the shooting of the victim was the proximate cause of the victim's death; that a large amount of money was located in the victim's apartment; that a large amount of suspected cocaine was located in the victim's apartment; that the Codefendant was observed on the video surveillance wearing black boots; that the Petitioner was observed on video surveillance wearing sneakers; that the Petitioner was the only individual amongst those at the Quarry Apartments at the time of the murder wearing sneaker type shoes; that the Petitioner was witnessed to only wear Nike Air Jordan type shoes at the time of the murder; that there were sneaker type footprints in the snow under the victim's bedroom window; that the victim's bedroom window was approximately six feet off of the ground; that the Codefendant is approximately five feet seven inches tall; that the Petitioner is approximately six feet tall; that no ladder or other climbing device was located outside the victim's bedroom window; that the Codefendant was observed on video surveillance wearing a distinctive type of hat prior to the murder; that the same type of hat was located near the scene of the murder; that the Codefendant was observed on video surveillance without the hat immediately following the murder; that a .25 caliber shell casing was located under the victim's bedroom window; that a loaded .25 caliber ammunition magazine was located in a jacket belonging to the Codefendant; that forensic analysis of the magazine located in the Codefendant's jacket revealed that one of the

loaded shells in said magazine had been extracted from the same firearm that had fired the spent shell casing found under the victim's bedroom window; that a pair of black boots similar to those observed on video surveillance being worn by the Codefendant on the date of the murder were located in the residence of the Codefendant; that forensic analysis of the black boots located in the Codefendant's residence revealed that they corresponded in size and design to the boot type footprints located under the victim's bedroom window; that the Petitioner told the arresting officer that he was at the location of the murder on the date of the murder but that he didn't have anything to do with it; that the Petitioner made telephone calls from jail after being arrested in which he stated that all that the police had was that one "print" and that was not enough to convict him of murder; that at the time the Petitioner made this statement, no information had been communicated to Petitioner that the police had print evidence; that the Petitioner made telephone calls from jail after being arrested in which he stated that he was sure that the Codefendant was not talking; that the Petitioner made telephone calls from jail after being arrested in which he stated that if he had listened he would not be in this mess and that he should have turned his life around; and that the Codefendant made a statement to an individual that he had shot and killed someone during a robbery that had gone bad. *See record generally.*

On March 21, 2014, the jury returned a verdict finding the Petitioner guilty of First Degree Murder (Felony Murder), with a recommendation of mercy, and Conspiracy to Commit Burglary. The Petitioner thereafter filed a Motion for Post Verdict Judgment of Acquittal and Motion for New Trial, both of which were denied by the court.

II. RESPONDENT'S SUMMARY OF ARGUMENT

A. THAT THE CODEFENDANT’S STATEMENTS WERE PROPERLY ADMITTED AS STATEMENTS AGAINST INTEREST FOLLOWING THE ANALYSIS PRESCRIBED BY THIS COURT.

Pursuant to Rule 804(b)(3) of the West Virginia Rules of Evidence provides in pertinent part that “[t]he following are not excluded by the hearsay rule if the declarant is unavailable as a witness...[a] statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the claim unless he or she believed it to be true.” “[U]navailability as a witness” is defined in pertinent part pursuant to section (a) of Rule 804 of the West Virginia Rules of Evidence as the declarant “is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his or her statement; or persists in refusing to testify concerning the subject matter of his or her statement despite an order of the court to do so; or testifies to a lack of memory of the subject matter of his or her statement...”

In Interest of Anthony Ray Mc, 200 W.Va. 312, 489 S.E.2d 289 (1997), this Court addressed the issue of the admissibility of statements against interest of a non-testifying declarant. The court held that in order for statements against interest of a non-testifying declarant to be admissible at the trial of another, the court must determine each separate individual statement and remove such from any narrative, determine that the statements are actually against the penal interest of the declarant and not facially neutral statements, determine the reliability of the statements, determine that the declarant is unavailable as a witness and conduct an examination of the statements under the parameters of the Confrontation Clause. *Id.*

This Court in Anthony Ray Mc., *supra*, opined that the mere fact that a statement genuinely inculpatates the declarant is a guarantee of trustworthiness. Additionally, this Court in Anthony Ray Mc., *supra*, found that analysis under the Confrontation Clause of statements against the penal interest of the declarant is lessened due to the fact that the inculpatory nature of such statements relieves much of the reliability concerns associated with Confrontation Clause analysis.

In the present matter, and during Pretrial Hearings, the trial court carefully examined the statements made by Mr. Payne under the parameters of both Rule 804(b)(3) of the West Virginia Rules of Evidence and Interest of Anthony Ray Mc., 200 W.Va. 312, 489 S.E.2d 289 (1997) and, following such careful analysis, the trial court correctly found that the two statements of the Codefendant admitted at Petitioner's Trial were admissible, relevant and proper exceptions to the hearsay rule.

B. THAT THE DEFENDANT'S STATEMENTS WERE PROPERLY ADMITTED AT TRIAL AS SAID STATEMENTS WERE NOT TAKEN IN VIOLATION OF HIS FIFTH OR SIXTH AMENDMENT RIGHTS

Pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court found that a Defendant should be apprised of certain constitutional rights in a custodial interrogation situation. *Also see* State v. Honaker, 193 W.Va. 51, 454 S.E.2d 96 (1994). Miranda does not dictate that a Defendant be advised of the rights espoused therein simply when the Defendant is taken into custody and statements made by a Defendant after being taken into custody are not necessarily inadmissible simply because Miranda warnings were not provided prior to the Defendant making the statements. "The special safeguards outlined in Miranda are not required where a suspect is simply taken into custody, but rather only where a suspect in custody is subjected to interrogation."

Syllabus Point 8, State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999); Syllabus Point 3, Damron v. Haines, 223 W.Va. 135, 672 S.E.2d 271 (2008).

The United States Supreme Court held in Edwards v. Arizona, 451 U.S. 477 (1981), that after the right to counsel has been asserted by an accused, further interrogation of the accused should not take place unless the accused initiates further conversations or communications with the police. In Oregon v. Bradshaw, 462 U.S. 1039 (1983), wherein the United States Supreme Court held, in Syllabus Point 4, that “[i]n asking, while being transferred to jail, ‘well, what is going to happen to me now?’, the Defendant, who had previously invoked his right to counsel, ‘initiated’ further conversation for the purpose of the Edwards rule as [the] question evinced a willingness and desire for generalized discussion about the investigation and was not merely a necessary inquiry arising out of incidence of custodial relationship.”

For a Defendant to waive a previously asserted right to counsel, the accused “must initiate a conversation which shows an intelligent and knowledgeable desire for a generalized discussion about the investigation.” State v. Lucas, 178 W.Va. 686, 689, 364 S.E.2d 12, 15 (1987). Additionally, “[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by [the holding in Miranda].” Miranda 384 U.S. 436 at 478; State v. Holland, 178 W.Va. 744, 364 S.E.2d 535 (1987).

In the present matter, there was no necessity that Petitioner be advised of his Miranda rights by Sergeant Cox simply because Petitioner was in custody, the Petitioner initiated generalized discussion about the investigation that was not merely a necessary inquiry arising out of incidence of custodial relationship and Petitioner voluntarily made

statements that were not in response to any questioning by Sergeant Cox, thus making Petitioner's statements clearly admissible.⁸

C. THAT PETITIONER'S PHONE CALLS FROM JAIL WERE PROPERLY ADMITTED AS SAID CALLS WERE LEGALLY OBTAINED AND PETITIONER HAD NO PRIVACY INTEREST IN SAID CALLS.

West Virginia Code 31-20-5e provides in pertinent part that “[t]he executive director or his or her designee is authorized to monitor, intercept, record and disclose telephone calls to or from inmates housed in regional jails in accordance with the following provisions: 1) All inmates housed in regional jails shall be notified in writing that their telephone conversations may be monitored, intercepted, recorded and disclosed; 2) Only the executive director and his or her designee shall have access to recordings of inmates’ telephone calls unless disclosed pursuant to...this subsection; 3) Notice shall be prominently placed on or immediately near every telephone that may be monitored; 4) The contents of inmates’ telephone calls may be disclosed to the appropriate law enforcement agency only if the disclosure is...B) Necessary for the investigation of a crime...C) Necessary for the prosecution of a crime...”

Telephone calls made by an inmate from jail, barring those to the inmate’s counsel, are admissible as there is generally no expectation of privacy in such calls. See State v. Blevins, 231 W.Va. 135, 744 S.E.2d 245 (2013 *per curiam*)

In the present matter, the State complied with the requirements of West Virginia Code 31-20-5e in obtaining Petitioner’s phone calls from jail and Petitioner, as an inmate, possessed no privacy interest in said calls. Thus, the portions of Petitioner’s jail calls which were admitted at Trial were properly admitted.

⁸ As evidenced by the record, at no time during his contact with Petitioner on October 25, 2012, did Sergeant Cox ask Petitioner any questions or otherwise “interrogate” Petitioner.

D. THAT THE EXMPLAR FOOTWEAR EVIDENCE WAS PROPERLY UTILIZED AT TRIAL AND WAS NOT UNFAIRLY PREJUDICIAL TO PETITIONER.

Rule 701 of the West Virginia Rules of Evidence provides “[i]f the witness is not testifying as an expert, his or her testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.”

Sergeant Cox testified at Trial as to why he employed the exemplar shoes (to aid in his investigation as he is, after all, an investigator) and that his employment of the shoes, in conjunction with the video surveillance evidence and footwear impression evidence, allowed him to offer an opinion that the exemplar shoes appeared similar to the shoes Petitioner was wearing the night of the murder. In other words, his opinion or inference was limited to that which was based on his perception and was helpful to a clear understanding of not only his testimony regarding his method of investigation that identified Petitioner as a suspect but also demonstrative of why he sent the shoes to the FBI for analytical comparison to the shoes Petitioner was observed wearing.

There was no danger of confusing the jury that the exemplar shoes were the Petitioner’s shoes as this fact (that they were not the Petitioner’s shoes and that they had been ordered from the internet) was repeatedly stated to the jury. At no time did Sergeant Cox testify that the exemplar shoes were the Petitioner’s shoes, that they were the shoes that left the shoe prints, or that they were the shoes that the Petitioner was wearing. The jury was clearly and unequivocally advised of the purpose of the shoes and any weight to be given to the manner in which they were used was a question for jury.

E. THAT THERE WAS MORE THAN SUFFICIENT EVIDENCE FROM WHICH A JURY COULD FIND, BEYOND A REASONABLE DOUBT, THAT THE STATE PROVED EACH AND EVERY ELEMENT OF THE CRIMES FOR WHICH PETITIONER WAS CONVICTED.

West Virginia Code 61-2-1 provides in pertinent part that “[m]urder...in the commission of, or attempt to commit....burglary...is murder in the first degree.” West Virginia Code provides in pertinent part that “[i]f any person shall in the nighttime, break and enter, or enter without breaking...the dwelling house...of another with the intent to commit a crime therein...” said person shall be guilty of Burglary. West Virginia Code 61-11-8 provides that an individual is guilty of an attempt to commit a crime when the person “attempts to commit an offense, but fails to commit or is prevented from committing” the offense.

West Virginia Code 61-10-31 provides in pertinent part that “it shall be unlawful for two or more persons to conspire to commit any offense against the State...” An “agreement to commit any act which is made a felony or misdemeanor by the law of this State is a conspiracy to commit an ‘offense against the State’ as that term is used in the statute.” Syllabus Point 1, State v. Less, 170 W.Va. 259, 294 S.E.2d 62 (1981). In order to be convicted of Conspiracy, the State must show “that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy.” Syllabus Point 4, *Id.* “The agreement may be inferred from the words and actions of the conspirators, or other circumstantial evidence, and the State is not required to show the formalities of an agreement.” *Id.* at 265, 67. “It is not necessary that each conspirator involved in the conspiracy commit his or her own overt act. The overt act triggering the conspiracy as to all the conspirators can be committed by any one of their number.” *Id.*

In the present matter, the State proved beyond a reasonable doubt each and every element of First Degree Murder (Felony Murder) and Conspiracy. Specifically, and in sum, the State presented evidence at Petitioner's Trial demonstrating that he was present at the location of the murder when it took place, that he was present with the individual who committed the murder, that he was present at the location of the murder for the purpose of burglarizing the victim's residence, that the victim was murdered during the attempted burglary and that Petitioner and his Codefendant were attempting to commit a burglary when the victim was shot and killed.

III. RESPONDENT'S STATEMENT REGARDING ORAL ARGUMENT

Respondent does not believe oral argument is necessary due to the clarity of the facts and law involved in this matter but that in the event this Court does decide oral argument is necessary, Respondent believes such submission should be under the parameters of Rule 19 as the issues in the pending Appeal involve a narrow issue of law.

IV. ARGUMENT AND ANALYSIS

A. **THAT THE CODEFENDANT'S STATEMENTS WERE PROPERLY ADMITTED AS STATEMENTS AGAINST INTEREST FOLLOWING THE ANALYSIS PRESCRIBED BY THIS COURT.**

Rule 804(b)(3) of the West Virginia Rules of Evidence provides in pertinent part that "[t]he following are not excluded by the hearsay rule if the declarant is unavailable as a witness....[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another,

that a reasonable person in the declarant's position would not have made the claim unless he or she believed it to be true.”

“[U]navailability as a witness” is defined in pertinent part pursuant to section (a) of Rule 804 of the West Virginia Rules of Evidence as the declarant “is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his or her statement; or persists in refusing to testify concerning the subject matter of his or her statement despite an order of the court to do so; or testifies to a lack of memory of the subject matter of his or her statement...”

“Generally, out of court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state of mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules.” Syllabus Point 1, State v. Maynard, 183 W.Va. 1, 393 S.E.2d 221 (1990). A statement made by a Codefendant may be admissible at the trial of an accused as an exception to the hearsay rule pursuant to the “statement against interest” exception found in Rule 804(b)(3) of the West Virginia Rules of Evidence. Also see State v. Helmick, 201 W.Va. 163, 495 S.E.2d 262 (1997).

In State v. Mason, 194 W.Va. 221, 460 S.E.2d 36 (1995), an examination of the admissibility of statements against interest pursuant to the hearsay exception for such statements was undertaken. In Syllabus Point 8 of Mason, *supra*, the court held that “to satisfy the admissibility requirements of Rule 804(b)(3) of the West Virginia Rules of Evidence, a trial court must determine: (a) The existence of [the statement]; (b) whether

[the statement] was against the penal interest of the declarant; (c) whether corroborating circumstances exist indicating the trustworthiness of the statement; and (d) whether the declarant is unavailable.”

In Mason, the court first noted that the admissibility of the statements in question would be first tested by looking to see whether the statements would be admissible pursuant to the Confrontation Clause of the Sixth Amendment and the exceptions to the hearsay rules. *Id. at 42, 227*. Following the decision in Mason, the United States Supreme Court took up the issue of the admission of extrajudicial statements against an accused in Crawford v. Washington, 541 U.S. 36 (2004). The gist of the holding in Crawford was “[t]estimonial statements of witnesses absent from trial [can] be admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” *Id. at 59*.

In State v. Mechling, 219 W.Va. 366, 372, 633 S.E.2d 311, 318 (2006) this Court noted that the fundamental principle guiding the decision in Crawford, *supra*, was that “the testimonial character of a witness's statement separates it from other hearsay statements, and determines whether the statement is admissible at trial or not because of the Confrontation Clause.” This Court in Mechling, *supra*, pursuant to the Crawford decision, *supra*, noted that “the decision made it clear that only “testimonial statements” cause the declarant to be a “witness” subject to the constraints of the Confrontation Clause and that non-testimonial statements by an unavailable declarant, on the other hand, are not precluded from use by the Confrontation Clause.” *Id. at 373, 318*.

The Crawford court defined “testimonial statements”, in sum, as “statements that were made under circumstances which would lead an objective witness reasonably to

believe that the statement would be available for use at a later trial.” Crawford at 51, 52. In other words, a testimonial statement would be one made by a declarant under circumstances which the declarant would believe would lead to memorialization of the statement as evidence for later use at trial (i.e. statements to police, depositions, affidavits, etc.).

In comport with Crawford and Mechling, supra respectively, if the statement is hearsay and is non-testimonial, it is not barred from admission by the Confrontation Clause and is admissible if it meets an exception to the hearsay rule. The “statements against interest” category is an exception to the hearsay rule pursuant to Rule 804(b)(3) of the West Virginia Rules of Evidence so the examination must be one that focuses on whether the statements offered are non-testimonial and what requirements must be met in order for the statement to come in under this exception.

In Mason, supra, this Court noted the test for determining the admissibility of an extrajudicial statement consisting of a statement against interest consists of: The identification of the statement; whether the statement is against the penal interest of the declarant; whether corroborating circumstances indicate the trustworthiness of the statement; and whether the declarant is unavailable. Mason at 44, 231.

In Interest of Anthony Ray Mc, 200 W.Va. 312, 489 S.E.2d 289 (1997), this Court again revisited the issue of the admissibility of statements against interest of a non-testifying declarant. This Court held that in order for statements against interest of a non-testifying declarant to be admissible at the trial of another, the court must determine each separate individual statement and remove such from any narrative, determine that the statements are actually against the penal interest of the declarant and not facially neutral

statements, determine the reliability of the statements, determine that the declarant is unavailable as a witness and conduct an examination of the statements under the parameters of the Confrontation Clause. *Id.*

The court in Anthony Ray Mc., *supra*, opined that the mere fact that a statement genuinely inculpatates the declarant is a guarantee of trustworthiness. Additionally, the court in Anthony Ray Mc., *supra*, found that analysis under the Confrontation Clause of statements against the penal interest of the declarant is lessened due to the fact that the inculpatory nature of such statements relieves much of the reliability concerns associated with Confrontation Clause analysis.

Prior to Trial in this matter, the State moved for admission of several statements against interest made by the Codefendant. In order to prove the elements of the crimes for which Petitioner was indicted, the State was required to prove that there was a murder and that such occurred during the attempted commission of a felony (Burglary). Evidence of the Codefendant's statements against interest were highly probative of the issues of how the victim died and what the circumstances were at the time of the victim's death.

The State identified the following statements of the Codefendant as being against the penal interest of Codefendant and which the State sought to use at Petitioner's Trial: That the Codefendant shot an individual at the Quarry Apartments while he and another person were attempting to rob the victim of drugs and money; that the Codefendant shot the victim when the person who was participating in the crime with Codefendant was grabbed by the victim; and that the Codefendant "killed" an individual during an attempt by Codefendant and another person to rob the victim of drugs and money. The trial court carefully reviewed the legal authority for admission of said statements and found that

much of what the State wished to use would be inadmissible but that certain portions of said statements were in fact admissible pursuant to the Rules of Evidence and the previous rulings of this Court.

Ultimately, the trial court found that only the statement of the Codefendant that he had shot an individual during a robbery for drugs and money would be admissible, thereby removing any reference to whom the Codefendant was with and the role of the individual who was with the Codefendant at the time of the murder. In making its rulings, the court carefully engaged in the pertinent legal analysis.⁹

Specifically, the trial court first analyzed the statements under the parameters of Rule 804(b)(3) of the West Virginia Rules of Evidence. The trial court found, in comport with this Court's decision in Mason, *supra* at *Syllabus Point 8*, that "to satisfy the admissibility requirements of Rule 804(b)(3) of the West Virginia Rules of Evidence, a trial court must determine: (a) The existence of [the statement]; (b) whether [the statement] was against the penal interest of the declarant; (c) whether corroborating circumstances exist indicating the trustworthiness of the statement; and (d) whether the declarant is unavailable." *Order Ruling on Pretrial Motions*, p.13.

The court found, again in comport with Mason, *supra* at 230, 45 quoting Williamson v. U.S. 512 U.S. 594, 114 S.Ct. 2431 (1994), that "when ruling upon admission of a narrative under this rule, a trial court must break down the narrative and determine the separate admissibility of each 'single declaration or remark.' This exercise is a 'fact intensive inquiry' that requires 'careful examination of all the circumstances surrounding the criminal activity involved.'" The trial court thereafter engaged in a

⁹ See Order of the trial court titled "Order Ruling on Pretrial Motions" that appears to have erroneously been left out of Petitioner's appendix and which Respondent failed to notice until such time as when this Response was being prepared.

detailed dissection of the statements made by Mr. Payne, the Codefendant, to Mr. Carey for further analysis to determine whether each statement was in fact against the penal interest of the Codefendant.

The court, in analyzing each separate statement, utilized the test espoused by In Interest of Anthony Ray Mc., *supra* at 321, 298, providing that “self serving collateral statements, even those statements couched in neutral terms, are not admissible under Rule 804(b)(3).” *Order Ruling on Pretrial Motions*, p.17. The court noted that this test mandates “redaction and exclusion of statements collateral to any self-inculpatory statements.” *Id.* at p.17 citing In Interest of Anthony Ray Mc., 322, 299. After engaging in the foregoing analysis, the court next examined the trustworthiness of each separate statement noting that it had the responsibility to “examine the totality of the circumstances surrounding the making of the statements as well as other relevant and credible evidence proffered by the Defendant that casts doubt on the trustworthiness of the statements.” *Order Ruling on Pretrial Motions*, p.18 citing Anthony Ray Mc., 323, 300. While engaging in this step of the analysis, the court correctly noted that “[t]he very fact that a statement is genuinely self-inculpatory is itself one of the particularized guarantees of trustworthiness.” *Order Ruling on Pretrial Motions*, p.19 quoting Anthony Ray Mc., 322, 299.

The court found that the evidence that had been presented by the State during the Pretrial Hearings held in this matter corroborated the statements made by the Codefendant to the witness, especially in light of the brief period of time that had elapsed between the date of the murder and the date on which the Codefendant advised the

witness that he had shot someone during a robbery for drugs and money. *Order Ruling on Pretrial Motions, p.19-20.*

After examining the entirety of the lengthy statement made by the Codefendant to the witness, the court concluded that the only admissible statement made by the Codefendant in the event that the Codefendant was unavailable would be: That the Codefendant, Mr. Payne, had shot someone during a robbery for drugs and money.

The court thereafter noted that in order for the statement to be admissible, the Codefendant would have to be unavailable for Trial as defined by the pertinent legal authority and that this determination could not be made until the time of Trial. *Order Ruling on Pretrial Motions, p.21 wherein trial court quotes “unavailability test” contained in Interest of Anthony Ray Mc., 324, 301.*

Lastly, the trial court addressed the Codefendant statement in the context of the Confrontation Clause (Sixth Amendment to the United States Constitution). The court correctly noted that pursuant to Syllabus Point 6 of State v. Mechling, 219 W.Va. 366, 633 S.E.2d 311 (2006), “the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross examine the witness.” *Order Ruling on Pretrial Motions, p.32.* The trial court went onto find that “a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Order Ruling on Pretrial Motions, p.32*, quoting Syllabus Point 8, Mechling, *supra*. The trial court additionally and

correctly found that “only testimonial statements cause the declarant to be a witness subject to the constraints of the Confrontation Clause. Non-testimonial statements by an unavailable declarant on the other hand, are not precluded from use by the Confrontation Clause.” *Order Ruling on Pretrial Motions*, p.32 quoting State v. Kauffman, 227 W.Va. 537, 550, 711 S.E.2d 607, 620 (2011).

The court thereupon went on to correctly find that the statement the Codefendant had made to Mr. Carey was non-testimonial as there was no reasonable way that the Codefendant could have reasonably believed said statement would be available for later use at a Trial. The court noted, among other things, that the Codefendant had told Mr. Carey, his friend, the information in confidence and that Mr. Carey was the Codefendant’s friend and not a law enforcement officer or any other individual whom the Codefendant would reasonably believe would report the statements to law enforcement.

After conducting the above analysis subsequent to the Pretrial Hearings held in Petitioner’s matter, the court ruled the statement referenced above, namely that the Codefendant had shot and killed someone during a robbery for money and drugs, would be admissible at Trial in the event that the Codefendant was unavailable.

Prior to Trial, the Codefendant, Ennis Payne, was served with a subpoena to appear and testify at Petitioner’s Trial. On March 20, 2014, the Codefendant was called as a witness, outside of the presence of the jury, and the State began asking the witness questions. *Trial Transcript*, p.637, line 11-22. The Codefendant at that time asserted his Fifth Amendment privilege advising “on advice of my counsel I assert the rights afforded to me by the Fifth Amendment and decline to answer.” *Id.* Thereafter, Petitioner’s trial counsel began asking questions of the Codefendant and the witness advised that he would

refuse to answer any questions, whether such would be from the State or Petitioner's counsel. *Id. at p.638*. Additionally, and after the State and Petitioner's trial counsel attempted to question the witness to no avail, the Codefendant's counsel submitted an affidavit executed by the Codefendant stating that he was exercising his Fifth Amendment privilege and would refuse to testify at Petitioner's Trial. *Id. at p.643*.

The court thereafter correctly found, without objection of Petitioner's trial counsel, that the Codefendant was unavailable for Trial. On March 20, 2014, the State called Aaron Carey, the individual to whom the Codefendant had made the statements that were against the penal interests of the Codefendant. During Petitioner's Trial, Mr. Carey limited his testimony to that of statement which the trial court had ruled was admissible, namely, that the Codefendant had told him that he (Mr. Payne) had shot someone during a robbery for drugs and money. *Trial Transcript p.771, line 15-20*.

As is clear from the record of this matter, the trial court correctly and carefully engaged in the analysis mandated by this Court in State v. Mason, *supra*, and In Interest of Anthony Ray Mc., *supra*. The court separated each statement made by the Codefendant, examined each separate statement to ensure that only those that were directly self inculpatory were considered, examined each separate self inculpatory statement to determine trustworthiness, examined each statement to ensure that such fell within the parameters of non-testimonial statements and adhered to the unavailability test required for admission of the statements.

In addition to the Petitioner's contention that the Codefendant's statements did not meet the requirements for admission generally, Petitioner also complains in his Petition for Appeal that the statements were untrustworthy due to several alleged factors

(that Mr. Carey was under the influence of marijuana, that Mr. Carey did not write the statements down, etc.). Your Respondent asserts that these issues do not necessarily go to the admissibility of the statements (i.e. they do not directly bear on trustworthiness), but that these issues instead go to the weight to be afforded to the statement. Petitioner's trial counsel addressed with Mr. Carey during Trial some of these issues and the jury was therefore able to determine what weight, if any, to give the statement.

Because the trial court carefully and correctly followed the procedures mandated by this Court for a determination of the admissibility of statement against interest, because such statements are exceptions to the hearsay rule under the circumstances of this matter and because the declarant was unavailable for Trial, the trial court correctly admitted the statement of the Codefendant.

B. THAT THE DEFENDANT'S STATEMENTS WERE PROPERLY ADMITTED AT TRIAL AS SAID STATEMENTS WERE NOT TAKEN IN VIOLATION OF HIS FIFTH OR SIXTH AMENDMENT RIGHTS

Pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court found that a Defendant should be apprised of certain constitutional rights in a custodial interrogation situation. *Also see State v. Honaker*, 193 W.Va. 51, 454 S.E.2d 96 (1994). In order for the principles of Miranda to be applicable, "[t]wo elements must be present...first, the person must be in custody, and, second, he or she must be interrogated. Honaker at 60, 105. The intent behind the warning required by Miranda is to ensure that a Defendant's statement is voluntary and not the product of some type of officially sanctioned coercion. Specifically, "the important considerations 'that courts have identified in assessing the voluntariness of a confession can be broken down into broad

categories: the police conduct involved and the characteristics of the accused.” Honaker at 57, 102, quoting Whitebread & Slobogin, Criminal Procedure 369 (3rd Edition 1992).

Miranda does not, however, dictate that a Defendant be advised of the rights espoused therein simply when the Defendant is taken into custody and statements made by a Defendant after being taken into custody are not necessarily inadmissible simply because Miranda warnings were not provided prior to the Defendant making the statements. “The special safeguards outlined in Miranda are not required where a suspect is simply taken into custody, but rather only where a suspect in custody is subjected to interrogation.” Syllabus Point 8, State v. Guthrie, 205 *W.Va.* 326, 518 *S.E.2d* 83 (1999); Syllabus Point 3, Damron v. Haines, 223 *W.Va.* 135, 672 *S.E.2d* 271 (2008). “[T]he special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. ‘Interrogation’ as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.” Rhode Island v. Innis, 446 *U.S.* 291, 300 (1980).

“Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by [the holding in Miranda].” Miranda 384 *U.S.* 436 at 478; State v. Holland, 178 *W.Va.* 744, 364 *S.E.2d* 535 (1987).

Further, and although in the context of the Sixth Amendment, the United States Supreme Court in Oregon v. Bradshaw, 462 *U.S.* 1039 (1983), held, in Syllabus Point 4, that “[i]n asking, while being transferred to jail, ‘well, what is going to happen to me now?’, the Defendant, who had previously invoked his right to counsel, ‘initiated’ further conversation for the purpose of the Edwards rule as [the] question evinced a willingness

and desire for generalized discussion about the investigation and was not merely a necessary inquiry arising out of incidence of custodial relationship.”

The “Edwards Rule” as referenced above arises from Edwards v. Arizona, 451 U.S. 477 (1981), in which the court held that after the right to counsel has been asserted by an accused, further interrogation of the accused should not take place unless the accused initiates further conversations or communications with the police. For a Defendant to waive a previously asserted right to counsel, the accused “must initiate a conversation which shows an intelligent and knowledgeable desire for a generalized discussion about the investigation.” State v. Lucas, 178 W.Va. 686, 689, 364 S.E.2d 12, 15 (1987).

Furthermore, “[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by [the holding in Miranda].” Miranda 384 U.S. 436 at 478; State v. Holland, 178 W.Va. 744, 364 S.E.2d 535 (1987).

Petitioner raises both Fifth and Sixth Amendment issues in his Petition for Appeal. Relevant to both issues, it must first be noted that Sergeant Cox did not ask the Petitioner any questions to elicit his statements. As noted in the “FACTS” section above, Petitioner himself asked for a copy of the criminal complaint and, after reading it, voluntarily made statements to the officer. These statements were not made in response to any questioning but were the type of volunteered statements contemplated in Miranda, *supra*, and Holland, *supra*.

Sergeant Cox at no time interrogated the Petitioner. Therefore, there was no requirement that he advise the Petitioner of his Miranda [citation omitted] rights upon coming into contact with him. See Syllabus Point 8, State v. Guthrie, *supra*, and Syllabus

Point 3, Damron v. Haines, *supra*. In addition to not being required to advise the Petitioner of his Miranda rights, Sergeant Cox did not initiate the conversation with the Petitioner. The Petitioner himself initiated generalized discussion about the investigation that was not merely a necessary inquiry arising out of incidence of custodial relationship.

In addition, and although outside of the scope of a Miranda [citation omitted] analysis, Respondent believes it is nonetheless important to note the characteristics of Petitioner, as referenced in Honaker, *supra*, at the time he made the statements to Sergeant Cox. As noted in the “FACTS” section above, the Petitioner was thirty two (32) years of age and had previously been arrested for approximately twelve (12) different misdemeanors and felonies at the time of his contact with Sergeant Cox. In other words, and from more of a practical than legal standpoint, if anyone was aware that they should not speak in the presence of a law enforcement officer for fear of such statements being used at a later date, it was Petitioner.

Because the Petitioner was never interrogated by Sergeant Cox, because there is no requirement that an individual be advised of their Miranda rights simply because they are taken into custody, because the Petitioner himself initiated generalized discussion regarding the investigation and not necessary to the conditions of his confinement, because Petitioner was a mature adult with significant experience with law enforcement and because the statements made by Petitioner were volunteered statements, the statements made by Petitioner to Sergeant Cox on October 25, 2012, were properly admitted at Trial.

C. THAT PETITIONER’S PHONE CALLS FROM JAIL WERE PROPERLY ADMITTED AS SAID CALLS WERE LEGALLY OBTAINED AND PETITIONER HAD NO PRIVACY INTEREST IN SAID CALLS.

West Virginia Code 31-20-5e provides in pertinent part that “[t]he executive director or his or her designee is authorized to monitor, intercept, record and disclose telephone calls to or from inmates housed in regional jails in accordance with the following provisions: 1) All inmates housed in regional jails shall be notified in writing that their telephone conversations may be monitored, intercepted, recorded and disclosed; 2) Only the executive director and his or her designee shall have access to recordings of inmates’ telephone calls unless disclosed pursuant to...this subsection; 3) Notice shall be prominently placed on or immediately near every telephone that may be monitored; 4) The contents of inmates’ telephone calls may be disclosed to the appropriate law enforcement agency only if the disclosure is...B) Necessary for the investigation of a crime...C) Necessary for the prosecution of a crime...”

Telephone calls made by an inmate from jail, barring those to the inmate’s counsel, are admissible as there is generally no expectation of privacy in such calls. See State v. Blevins, 231 W.Va. 135, 744 S.E.2d 245 (2013).

During the investigation of Petitioner’s matter, Sergeant Cox obtained hundreds of jail calls made by Petitioner for the purpose of aiding in his investigation of the murder. The trial court thereafter directed the State to identify, with particularity, the specific calls and portions thereof which were relevant (i.e. which made any fact of consequence to a determination of Petitioner’s matter more or less probable than such would be without the information). The State thereafter identified three (3) telephone calls and the specific portions thereof which were relevant to Petitioner’s involvement in the murder.

During the course of the Pretrial Hearings held in Petitioner's matter, and during the Trial itself, the State called numerous witnesses who were employees of the Central Regional Jail, the facility where Petitioner was housed at the time he made the calls from jail. These employees were James Hamrick, a booking clerk at the jail, Sergeant Tonya Peters, a correctional Sergeant at the jail, and Margaret Cook, the individual designated to oversee the inmate telephone system at the jail.

As stated in the "FACTS" section above, Mr. Hamrick testified that the Petitioner received, acknowledged, understood and signed a booking data form upon Petitioner's admittance to the jail that advised Petitioner that all of his telephone calls from jail were subject to monitoring, recording and disclosure. Sergeant Peters testified that warnings were posted by each inmate accessible telephone advising the inmates that their calls were subject to monitoring and recording and that each inmate was provided an inmate handbook upon admittance which also warned that telephone calls made by inmates were subject to being monitored and recorded. Sergeant Peters also testified that at the beginning of each call placed by an inmate, a warning was played that advised the inmate that their telephone calls were subject to being monitored and recorded.

Ms. Cook authenticated the relevant telephone calls and when such were published, the warning advising Petitioner that the telephone call was subject to being monitored and recorded was clearly and plainly audible. Thus, it would be absolutely impossible for Petitioner to truthfully contend that he was unaware that his telephone calls were subject to being monitored, recorded and disclosed.

In Blevins, this Court, in affirming the decision of the Circuit Court to permit introduction of the Defendant's phone calls made from jail, noted "jail officials testified

that every inmate is given a handbook which contains a specified warning that all telephone calls, except to attorneys, may be monitored and recorded. Additionally, signs posted near each telephone warn inmates that calls will be monitored and recorded. On the telephone call itself, a recorded voice states that calls are monitored and recorded. The circuit court determined that Mr. Blevins knew he was being recorded and that no violation of privacy occurred in this regard.” *Id. at 150, 260*. This Court’s findings in Blevins, *supra*, supporting the admissibility of the recorded jail calls is exactly what happened in this case – namely, that the Petitioner was sufficiently warned that his calls were subject to being monitored and recorded and that Petitioner therefore had no expectation of privacy in said calls (other than those to his counsel which the State is obviously not privy to).

Petitioner claims in his Petition for Appeal that the State failed to adequately demonstrate that there was a warning sign at the specific phone Petitioner used during the time he made each of the three (3) specific calls used by the State at Trial. Respondent disagrees and again points to the testimony of Sergeant Peters who testified that there were signs posted by the inmate telephones warning the inmates that their phone calls may be monitored and recorded. Trial Transcript at p.363, line 2-13. Respondent asserts that if, for some reason, the warning sign next to the phone Petitioner used on a day in which his call was recorded had fallen down or was otherwise not present, it would make little difference in determining the admissibility of the phone call provided that the State could show that Petitioner was aware his phone calls were subject to being monitored and recorded. In other words, Respondent does not believe this issue is one of hyper-technicality but lies more in terms of answering the question: Did the inmate know his

telephone calls were subject to being monitored and recorded. In this case, the answer to that question is unequivocally “yes.”

Because the State complied with the requirements of West Virginia Code 31-20-5e, because the Petitioner had no expectation of privacy in his calls once made aware that they were subject to being monitored and recorded and because the facts of Petitioner’s matter clearly and unequivocally demonstrate that Petitioner was in fact aware that his calls were subject to being monitored and recorded, admission of Petitioner’s jail calls was proper.¹⁰

D. THAT THE EXEMPLAR FOOTWEAR EVIDENCE WAS PROPERLY UTILIZED AT TRIAL AND WAS NOT UNFAIRLY PREJUDICIAL TO PETITIONER.

Rule 701 of the West Virginia Rules of Evidence provides “[i]f the witness is not testifying as an expert, his or her testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.”

Sergeant Cox testified at Trial as to why he employed the exemplar shoes (to aid in his investigation as he is, after all, an investigator) and that his employment of the shoes, in conjunction with the video surveillance evidence and footwear impression evidence, allowed him to offer an opinion that the exemplar shoes appeared similar to the shoes Petitioner was wearing the night of the murder. In other words, his opinion or inference was limited to that which was based on his perception and was helpful to a clear understanding of not only his testimony regarding his method of investigation that

¹⁰ It should also be noted that at no time did Petitioner ever offer any evidence indicating that he was unaware that his calls were subject to being monitored and recorded.

identified Petitioner as a suspect but also illustrated why he sent the shoes to the FBI laboratory for forensic analytical testing.

There was no danger of confusing the jury that the exemplar shoes were the Petitioner's shoes as this fact (that they were not the Petitioner's shoes and that they had been ordered from the internet) was repeatedly stated to the jury.

Contrary to Petitioner's contentions, Sergeant Cox did have "perception" of the shoes Petitioner was wearing the night of murder because he had viewed the videos capturing Petitioner's footwear hundreds of times. The exemplar shoes, as explained to the jury, were nothing more than demonstrative evidence. As this Court has opined "[i]n its quest to find the truth, a jury should always be allowed to have the clearest evidence available." State v. Accord, 175 W.Va. 611, 614, 336 S.E.2d 741, 744 (1985).

E. THAT THERE WAS MORE THAN SUFFICIENT EVIDENCE FROM WHICH A JURY COULD FIND, BEYOND A REASONABLE DOUBT, THAT THE STATE PROVED EACH AND EVERY ELEMENT OF THE CRIMES FOR WHICH PETITIONER WAS CONVICTED.

Petitioner primarily complains in his Petition that the State failed to prove an agreement between Petitioner and his Codefendant in order to support his conviction for Conspiracy and that the State failed to present evidence demonstrating shared criminal intent of the Petitioner to commit burglary. As evidenced by the record and jury verdict, Petitioner is mistaken.

The agreement forming the conspiracy may be inferred from the words or actions of the conspirators. State v. Less, 170 W.Va. 259, 265, 294 S.E.2d 62, 67 (1981). In the present matter, the State presented evidence showing that the Petitioner and his Codefendant travelled to the murder scene following one another in separate vehicles, exited their respective vehicles at the same time, went to the location of the murder at the

same time, were present at the location of the murder at together when it was committed, left the scene together and returned to the vehicles together and at the same time and that it would be improbable if not impossible for only one of them to have gained entry into the residence without the help of the other. This was more than sufficient evidence from which a jury could find a conspiracy existed.

As for shared criminal intent, the State presented evidence Petitioner and his Codefendant travelled to the murder scene following one another in separate vehicles, exited their respective vehicles at the same time, went to the location of the murder at the same time, were present at the location of the murder at together when it was committed, left the scene together and returned to the vehicles together and at the same time and that it would be improbable if not impossible for only one of them to have gained entry into the residence without the help of the other. As this Court is aware, intent may be inferred from the facts and circumstances of a particular case. State v. Ocheltree, 170 W.Va. 68, 73, 289 S.E.2d 742, 746 (1982). From the record, there was ample evidence from which the jury could infer intent.

“[I]t is not necessary for a Defendant to do any particular act constituting at least part of the crime in order to be convicted of that crime as a principle in the second degree so long as he is present at the scene of the crime and the evidence is sufficient to show that he was acting together with another person who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.” State v. Fortner, 182 W.Va. 345, 358, 387 S.E.2d 812, 825 (1989). “[T]o be deemed a principle in the second degree, the law requires that the Defendant in some sort associate himself with the venture and that he participate in it as if it is something that he wishes to bring about –

that he seek by his actions to make it succeed.” State v. Harper, 179 W.Va. 24,28, 365 S.E.2d 69, 73 (1987). The evidence presented, as stated herein, was more than sufficient from which a jury could infer that the Petitioner had the intent to commit a burglary of the victim’s residence. The State proved its case at Trial and the Petitioner offered no alternative explanation as to why he was at the victim’s residence at the time of the murder.

V. CONCLUSION

Your Respondent submits that a review of the record of the underlying proceedings clearly demonstrates that said proceedings were regular and that the trial court’s admission of the evidence complained of was correct and proper. Petitioner was afforded a fair trial and the evidence admitted by the trial court was admitted under clear and established legal authority. The evidence presented by the State during Petitioner’s trial was competent, reliable, probative and not unfairly prejudicial and such evidence, as evidenced by the jury’s verdict, was more than sufficient to prove each element of the crimes charged against Petitioner beyond a reasonable doubt.

WHEREFORE, based upon the foregoing, Respondent requests that this Court deny the relief requested in the Petition for Appeal.

Respectfully submitted,
STATE OF WEST VIRGINIA,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff/Respondent,

V.

DARNELL CARLTON BOUIE,
Defendant/Petitioner.

Appeal No. 13-0120

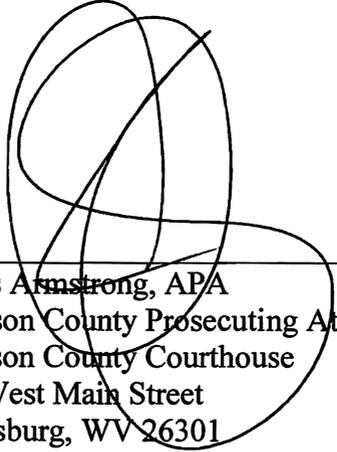
RESPONDENT
STATE OF WEST VIRGINIA'S RESPONSE TO
PETITION FOR APPEAL

CERTIFICATE OF SERVICE

I certify that on the 28th day of October, 2014, I served the foregoing Response to Petitioner for Appeal upon the following parties by depositing a true copy thereof, enclosed in a sealed envelope, postage prepaid, in the United States mail and addressed as follows:

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