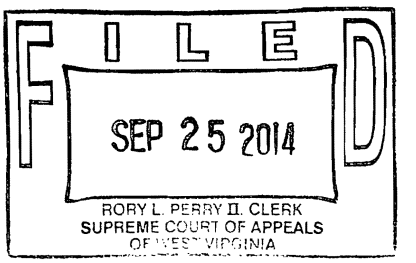
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0455




STEVEN MICHAEL WILLIAMS,

*Petitioner,*

v.

STATE OF WEST VIRGINIA,

*Respondent.*

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# SUMMARY RESPONSE

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## SUMMARY RESPONSE

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Comes now the Respondent, State of West Virginia, by counsel, Julie A. Warren, Assistant Attorney General, and submits the following summary response to the Petition for Appeal filed by Steven Michael Williams (hereinafter "the Petitioner").

## I. STATEMENT OF THE CASE

On October 16, 2013, the Petitioner was indicted by a Mercer County Grand Jury on two counts of Wanton Endangerment, wherein it was alleged that on May 5, 2013, he "intentionally, feloniously and wantonly [shot] a firearm into the motor vehicle occupied by Devin Honacker and Kody Smith." App. at 388. The indictment also included a count of "Unlawful Shooting at Another in Street, Alley or Public Resort," stemming from the same incident as the prior two counts, but adding the firearm was discharged "at Devin Honaker in the parking area of McDonald's restaurant," as well as a count of "Felon in Possession of a Firearm," wherein it was alleged that the Petitioner was "unlawfully and feloniously" in possession of a firearm after having been "adjudged guilty of malicious wounding on July 27, 2011, in Tazewell County Circuit Court in Virginia." *Id.* at 388-89.

Prior to trial on the aforementioned charges, the State filed a Motion in Limine to prohibit the Petitioner from questioning one of the State's witnesses, Victoria Combs, about her prior guilty plea to a Conspiracy charge and the probationary sentence she received after her adjudication was held in abeyance. *Id.* at 49. According to the court's rendition of the State's motion, Ms. Combs' record was expunged after she completed her probationary sentence and the case was dismissed. *Id.* According to the State, Ms. Combs entered into a deferred adjudication on September 19, 2012. *Id.* at 52. The State proffered at the hearing that Ms. Combs was expected to testify as to the substance of the one and only statement she gave to law enforcement shortly after the shooting, wherein she stated that she was working at the McDonald's drive-in window at around 4:00 a.m., and she witnessed the Petitioner get into a verbal altercation with the car behind him at the window, and she saw him reach for and retrieve a gun and placed said gun on his lap. *Id.* at 52-53. The trial court inquired of the Petitioner as to the factual basis for his claim that the statement was solicited in return for an early release from probation, to which the Petitioner replied, "I don't know, Your Honor. But at the same time, her credibility about what she told the state police officer that night is directly at issue. She was the key witness - -." *Id.* at 53. The Petitioner speculated that since Ms. Combs was on probation, that she may have felt pressure to cooperate with the police. *Id.* at 55.

The court offered to have the Petitioner inquire of Ms. Combs in an in camera interview to determine if she felt compelled to cooperate with the investigation, prior to eliciting the testimony in front of the jury. *Id.* at 57-58. The court offered that she testified at the hearing that if she did feel so compelled, that it would overrule the State's motion. *Id.* The Petitioner informed the court that this compromise was not sufficient, arguing that the jury had the right to judge Ms.

Combs' credibility. *Id.* at 58-59. The court granted the State's motion, and agreed that since Ms. Combs had never actually been convicted, as required under W.V.R.E 609(a)(2), that it was not proper impeachment evidence. *Id.* at 1, 60-64.

At trial, prior to her testimony before the jury, Victoria Combs testified at an in camera hearing where she was asked about the previous criminal charge, and she confirmed that she ended up entering a guilty plea to conspiracy under a deferred adjudication on November 19, 2012. *Id.* at 149-50. She testified that she gave a witness statement to Trooper Wood concerning the incident that she had witnessed on May 5, 2013, involving the Petitioner, wherein she stated that she saw the Petitioner pull out a gun from the glove compartment of his car while she was working the McDonald's drive-thru window. *Id.* at 150. She confirmed that when she gave her statement she was serving a two-2 year probation period. *Id.* at 150. She expressly denied that she received "any type of deal or any type of support" in exchange for her statement. *Id.* at 150-51. Ms. Combs further denied that she felt "pressured" into giving the statement, given her probationary status. *Id.* at 152. More specifically, she was asked "did you ever feel like that 'if I tell and help the West Virginia State Police in this crime, or try to solve this crime,' that you might try to get something in return," to which she responded "no," and further denied that the thought had ever crossed her mind. *Id.*

Ms. Combs testified that she was unaware that Trooper File, who was involved in the investigation of her criminal charge, was also involved in the investigation into the subject criminal matter involving the Petitioner, and stated that her dealings with this case was limited to Trooper Wood. *Id.* at 151. Ms. Combs was asked why she was released from probation "an entire year early," to which she explained that she was released early due to "good behavior," and

that the recommendation came from her probation officer. *Id.* at 152-53. She again confirmed that "at no time did [she] receive any type of promises" from the State Police or her probation officer. *Id.* at 153. On cross examination, Ms. Combs confirmed that the charges against her were dismissed, that there was no conviction, and that the dismissal occurred "months before" being called to testify in this case. *Id.* at 153-54.

After Ms. Combs testimony in the in camera hearing, the circuit court reaffirmed its ruling granting the State's Motion in Limine, and in doing so, the court opined that her testimony actually "strengthens the Court's ruling because there does not appear to be any evidence in the quid pro quo for her statement to being released early from probation." *Id.* at 155-56.

Ms. Combs was then called to testify at trial, and she testified that on May 5, 2013, at approximately 3:30 to 4:00 a.m., she was working the second drive thru window at McDonald's. *Id.* at 158. She recalled that while she was returning to the second window with the driver's order, she heard someone say "why don't you come," but did not hear the rest of the statement. *Id.* at 159. When she went to serve the driver his drink, she witnessed the driver "pulling the gun up onto his lap, and kind of had his head turned to the car behind him," and then she "handed him his drink, shut the window and walked away." *Id.* The next car came up to the window and she handed occupants their order. *Id.* While she was preparing to serve the order for the last car, Ms. Combs heard a gunshot. *Id.* at 162. Ms. Combs testified that she gave her statement to police about 15 to 20 minutes after the shooting. *Id.* at 158.

The jury ultimately found the Petitioner not guilty of the two counts of Wanton Endangerment and the one count of Unlawful Shooting at another in Street, or Public Resort, but found him guilty of the offense of Felon in Possession of a Firearm. *Id.* at 3. The Petitioner

moved for a new trial on the grounds that he should have had the opportunity to cross-examine Ms. Combs regarding her probation status. *Id.* at 5, 23-29.

## II. ARGUMENT

The circuit court clearly did not abuse its discretion by refusing to allow the Petitioner to ask the State's witness, Victoria Combs, about her probationary status and/or whether she was offered any inducements in exchange for her statement. "Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term 'credibility' includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination." Syl. Pt. 4, *State v. Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982).

The Petitioner relies primarily on the U.S. Supreme Court decision in *Davis v. Alaska*, 415 U.S. 308, 315–17, 94 S.Ct. 1105, 1110, (1974), but as the trial court noted, the factor that distinguishes this case from the present is that the witness in *Davis* was to be questioned about his probation status following adjudication, which is not the case here where Ms. Combs had never been convicted.

Although referenced by the State in its Motion in Limine, and relied upon by the trial court in granting said motion, the Petitioner ignores this Court's recent memorandum decision in *State v. Lori F.*, 2013 WL 2301088 (May 24, 2013), which is directly on point to the facts presented in this case. There, this Court made note of several factors directly applicable here when it affirmed the

lower court's denial of Rule 609(a)(2) evidence.[1] First, the Court pointed out that the witness was subject to a pretrial diversion agreement stemming from an unrelated child abuse charge, which it held was "not relevant to any issue before the circuit court and was totally unrelated to petitioner's crime." *Id.*, 2013 WL 2301088 at 2. Second, it explained that "Rule 609(a)(2) of the West Virginia Rules of Evidence requires conviction before a witness may be impeached with a prior criminal act," and thus, because the witness had agreed to pre-trial diversion, it affirmed the circuit court's refusal to allow the defendant to impeach the witness because "simply put, there was no criminal conviction with which to impeach the witness." *Id.*, 2013 WL 2301088 at 3. Third, it found that "it is clear [the witness] was not motivated to testify against petitioner in order to avoid prosecution because he entered the pretrial diversion agreement prior to the date he reported petitioner's conduct and the agreement was fully discharged prior to his testimony." *Id.* Moreover, "the agreement did not call for [the witness] to testify in any matters and he therefore had no need to 'get in good with the police.'" *Id.*

*Lori F.* is directly on point to the case at bar. First, the fact that Ms. Combs was on probation for an unrelated conspiracy charge was irrelevant to the statement she gave to police after having witnessed the Petitioner's possession of a firearm on the night in question. Second,

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[1] W.V.R.E. 609(a)(2) provides:

> Witnesses Other Than Criminal Defendants. For the purpose of attacking the credibility of a witness other than the accused:
>
> 1. evidence that the witness has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and
> 2. evidence that the witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

her probation was subject to a deferred adjudication agreement, and the charges were dismissed pursuant to the same. Therefore, since Rule 609(a)(2) required a conviction in order to impeach Ms. Combs with the charge, the court was correct in denying the Petitioner's request to use such impeachment evidence to attack her credibility. Third, as Ms. Combs revealed during her in camera hearing, she gave her statement to law enforcement within minutes of the shooting, she never felt pressured to give a statement, nor was she offered any inducement and/or promise by the State Police, her probation officer, or anyone else for that matter, in exchange for said statement. In fact, she testified that her being on probation at the time her statement was given had no bearing on her providing the same to law enforcement. Moreover, as in *Lori F.*, there is no dispute that Ms. Combs entered into her deferred adjudication agreement prior to giving the statement and that her charges were dismissed per the agreement prior to her testimony at the Petitioner's trial. Simply put, the Petitioner presents no evidence to even suggest that Ms. Combs' probationary status had any influence at all on her decision to give a statement to law enforcement, or her decision to testify against the Petitioner at trial for that matter.

The Petitioner's entire argument on appeal is based on conjecture, when in fact; he simply wished to be allowed to discredit a witness without any evidentiary basis to do so. The circuit court's refusal to allow the Petitioner to attack the credibility of the State's witness with questions concerning her probationary status on an unrelated charge for which she was never convicted, clearly conformed to this Court's holding in *Lori F.* Therefore, the circuit court clearly did not abuse its discretion in granting of the State's Motion in Limine.

## III. CONCLUSION

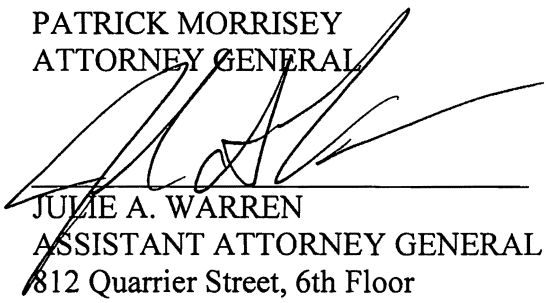
Therefore, for the reasons herein stated, the Respondent respectfully requests that this Court deny the Petitioner's appeal of his conviction.

Respectfully submitted,

THE STATE OF WEST VIRGINIA
*Respondent*

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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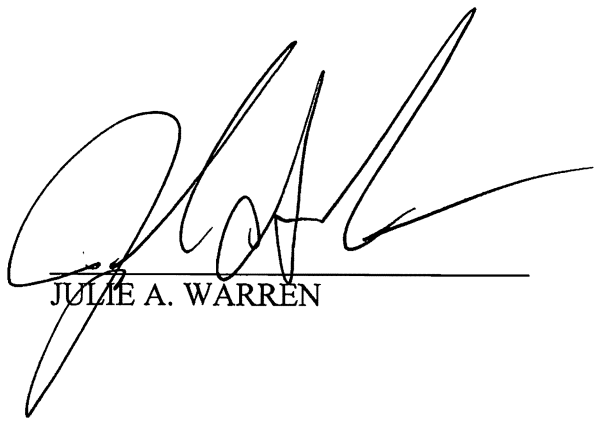
## CERTIFICATE OF SERVICE

I, JULIE A. WARREN, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the "*SUMMARY RESPONSE*" upon Petitioner by depositing said copy in the United State mail, with first-class postage prepaid, on the 26th day of September, 2014, addressed as follows:

Ryan J. Flanigan
Sanders, Austin, Flanigan & Flanigan
William H. Sanders, II Memorial Highway
320 Courthouse Rd.
Princeton, W 24740



JULIE A. WARREN