

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 15-0578

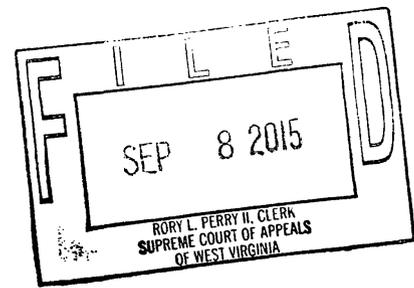
**JESSICA MAY WILSON,**

*Petitioner,*

v.

**STATE OF WEST VIRGINIA,**

*Respondent.*



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*Appeal from the Circuit Court of Kanawha County, West Virginia*

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**PETITIONER'S APPEAL BRIEF**

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**PETITIONER'S APPEAL BRIEF**

**I.**

**ASSIGNMENT OF ERROR**

**A. THE PROSECUTOR BREACHED PETITIONER'S PLEA AGREEMENT OF  
STANDING SILENT BY ARGUING PETITIONER STABBED THE VICTIM  
FOUR TO FIVE TIMES**

**II.**

**STATEMENT OF THE CASE**

Instead of standing silent at Jessica May Wilson's (hereinafter referred to as Wilson) sentencing as he had agreed, the prosecutor misused the "correct factual inaccuracies clause" of

the plea agreement and argued that Wilson had stabbed the victim four to five times and returned to the scene of the crime after the night of the murder.

Wilson pleaded guilty to First Degree Murder in violation of Chapter 61, Article 2, Section 1, for which she received a sentence of life imprisonment without the possibility of parole. (JA at 169, 170) The State agreed to stand silent at sentencing, however, the Office of the Prosecuting Attorney did reserve the right to cross-examine witnesses offered in mitigation of punishment and to correct any factual inaccuracies which came to the attention of the court or which were contained in the pre-sentence investigation report.(JA at 11-28) This is an appeal of the lower court's sentence of life imprisonment without the possibility of parole.

On January 4, 2014, Nancy Lynch Burdette was robbed and murdered in her house in St. Albans, West Virginia. Wilson and one of her co-defendants, Timothy Paul Shafer, went to the victim's house. The events that followed are uncertain. Wilson and Timothy Paul Shafer gave conflicting statements. (JA at.72-74) Wilson has maintained throughout her 5 hour interrogation by three detectives that she was coerced into participating in the robbery and did not believe she stabbed the victim. (JA Statement of Jessica Wilson at 1-63, Continuance of Statement of Jessica Wilson at 1-21)

On January 30, 2014, Wilson spent 5 hours with three detectives giving a confession. (JA at 79-81) She was incompetent at the time.(JA at 43) The detectives first took her to McDonald's for a hamburger, and then, inexplicably, after the confession, drove her home. During the confession, the detectives tried their best, and these were very experienced officers, to persuade Wilson, that she stabbed the victim. Officers got up on a table to attempt to recreate the crime scene. (JA Continuance of Statement of Jessica Wilson at 7) Wilson maintained that her co-

defendant tried to force her to stab the victim, but she didn't believe she did.

Q. Did you do anything to her?

A. No.

Q. You sure?

A. You didn't kick her?

Q. I'm positive

Q. Hold her?

A. I didn't ...No. I'm positive I couldn't ...after he did that it just made me cry. (JA Statement of Jessica Wilson at 35)

Later during the confession:

Q. So he hand...he took the time...pulled the knife out and said, here, stab here?

A. Yeah, and I just couldn't.

Q. And what'd you do?

A. And I threw the knife to him. I couldn't...I can't do nothing like that. I can't ...I just... (JA Statement of Jessica Wilson at 55)

Later during the continuation of the confession:

Q. But out on the railroad track you said it could have been two or three times?

A. Yes.

Q. And you swung the knife at her?

A. Yes, just like that. But...

Q. But you don't know whether it hit her is what you said.

A. Right. I don't know if it hit her or not. (JA Continuation of Statement of Jessica Wilson at 3)

Later, during the statement:

Q. Or stabbing her. You don't know if it hit her or not.

A. He told me that...when we went in and he said, if you don't...you know, if you say anything to anybody at all, he said, this is what will happen to you. So I didn't say nothing to nobody.

(JA Continuation of Statement of Jessica Wilson at 13)

The police report of the confession incorrectly reports that the Wilson admits to stabbing the victim eight or nine times. (JA at 72) The police report incorrectly states that Wilson may have slashed Nancy Lynch up to three times) (JA at 80) These incorrect police reports were used in Wilson's pre-sentence report: "but finally admitted she may have stabbed the victim eight or nine times herself" (JA at 37, 43) Wilson contends the prosecutor used these incorrect reports to argue that Wilson stabbed the victim four to five times. (JA Sentencing Transcript 23)

Wilson was arrested the following day, January 31, 2004. She asked for a lawyer at that time and stated:" My sister said I needed a lawyer, 'cause I can't read or write." (JA at 81) The court found Wilson to be incompetent and ordered her to Sharp Hospital to undergo treatment. She was returned to Court after three months and ordered back to Sharpe Hospital for an additional three months of treatment. After six months of treatment she was found to have been restored to competency (JA at 43)

Wilson was indicted by the May Term 2014 Kanawha County Grand Jury for Conspiracy, Burglary, Grand Larceny, Murder-Felony and First degree Robbery. (JA at 5-10) On April 9, 2015, the Petitioner signed a plea agreement. (JA at 11-28) In the written plea agreement, Jessica May Wilson agreed to plead guilty to the felony offense of First Degree Murder as contained in Count Four of Felony Indictment 14-F-228. The Office of the

Prosecuting Attorney agreed to stand silent as to sentencing, however, the Office of the Prosecuting Attorney did reserve the right to cross-examine witnesses offered in mitigation of punishment and to correct any factual inaccuracies which come to the attention of the court or which were contained in the pre-sentence investigation report. (JA at 11-28).

On April 10, 2015, Wilson entered the plea outlined above. At the plea hearing:

THE COURT: Okay. And you went through the eighth grade; is that correct?

THE DEFENDANT: Yes.

THE COURT: And you're not able to read or write; is that right?

THE DEFENDANT: Right.

THE COURT: So your lawyer has read all the paperwork to you; is that correct?

THE COURT: All right. You for some time were at Sharpe Hospital; is that correct?

THE DEFENDANT: Yes.

THE COURT: And that was to allow them to restore you to competency; is that correct?

THE DEFENDANT: Yes.

THE COURT: Your mind was kind of messed up from all the drugs you were taking; right?

THE DEFENDANT: Yes.

THE COURT: All right. Tell me what happened: who, what, when, where.

THE DEFENDANT: I knew Tim was going over to rob her.

THE COURT: Okay. Tim was going to rob who?

THE DEFENDANT: Nancy Lynch.

THE COURT: Okay. And what did you do about it?

THE DEFENDANT: Nothing. He told me if I say anything, that he'll do the same thing to me.

THE COURT: You were there?

THE DEFENDANT: Yes.

THE COURT: And was your intent to participate—you participated in that sequence of events; is that correct? The robbery?

THE DEFENDANT: Yes.

THE COURT: Okay. And where did this take place?

THE DEFENDANT: In St. Albans.

THE COURT: Here in Kanawha County?

THE DEFENDANT: Yes.

THE COURT: And what action, if any, did you take specifically?

(A private conference was had between the defendant and defense counsel.)

THE DEFENDANT: He—I don't know.

(A private conference was had between the defendant and defense counsel.)

THE DEFENDANT: Oh, I went into the house with Tim, and then –

THE COURT: (Interposing) You Guys broke in; you weren't invited in?

THE DEFENDANT: He walked in behind her.

THE COURT: Okay. But you were not invited in?

THE DEFENDANT: Right. And then he started hitting on her, and then he stabbed her.

THE COURT: And you knew the intention was to rob the house; is that correct?

THE DEFENDANT: Right. But I didn't know that he was going to kill her.

THE COURT: I understand that. That's why this is a felony murder. Is the State satisfied with that allocution?

MR. GIGGENBACH: Well, for the purpose of this plea hearing I believe that's sufficient to establish the elements of felony murder. If this were to go to trial, the State would present different evidence, more inculpatory evidence of the defendant, however.

THE COURT: All right. Well. We'll take that up at the appropriate time at disposition.

(JA at 1-20)

The transcript of the sentencing reveals that the State did not stand silent. First, the defense counsel argued mitigating factors as to why Wilson should be granted life imprisonment with mercy:

Mr. Campbell: The Court in *Kuhn v. United States* said that a court is "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."

I'll begin with a history of Ms. Wilson. By the age of eight Ms. Wilson was being treated by medical professionals. She had already been diagnosed with ADHD and was failing third grade for the second time. Doctors described her abstract thought as fair at best. Her general fund of information was poor, even at this early age of eight. By the time she was nine she was diagnosed with Anxiety Disorder and Adjustment Disorder.

THE COURT: Are there any statistics of homicidal incidence of individuals diagnosed with ADHD at eight or nine?

Mr. Campbell: No, your Honor, not that I know of. But what this does show is that, is that there was, there was mental issues that started at early age, that manifested, that required professional

help, that have persisted throughout her life.

At the age of 13, Ms. Wilson became pregnant with her first child and immediately dropped out of school. She didn't even manage to finish eighth grade. She never made it to high school, not one day.

It was at this time that Ms. Wilson began smoking marijuana, and at 14 she gave birth to her first child. I was at the age of 14 she met a man, a much older man she became pregnant. She gave birth to her second child at the age of 15, and at the age of 17 she got married to this man who turned out to be extremely abusive. Ms. Wilson was married to this man for eight years and endured severe beatings, to the point that she was beaten on the face and the back of the head unconscious.

THE COURT: Well, shouldn't that have made her more in time to inflicting violent harm on individuals—

MR. CAMPBELL: (Interposing) No, your Honor.

THE COURT: (Continuing) - - personally? Or participating in that event.

MR. CAMPBELL: She - - this – the severe beatings, its our contention, made Ms. Wilson more submissive. It was during the eight years that she was married to this man that there were numerous Child Protective Services investigations. And even during these investigations the investigators noted how submissive that Ms. Wilson was. I believed there are quotes in these reports where Ms., Wilson would apologize for things for her husband that were completely out of her control. And she was completely at his will, honor- - I mean, she was, she was a beaten woman. (JA Sentencing Transcript 5-7)

The State improperly used the “correct any factual inaccuracies” clause in the plea

agreement to argue the Petitioner's role in the murder. At the sentencing hearing:

MR. GIGGENBACH: Your Honor, if you go to the court document section of the presentence report and to the plea agreement—and I and Ms. Salango want to absolutely abide by the plea agreement. And I call your attention to paragraph 2 of the plea agreement, signed by the defendant, signed by all counsel. “The State agrees to stand silent at sentencing.” That means we stand silent as to whether or not we recommend mercy or no mercy. We’re not going to say anything about mercy or no mercy. We are silent as to that. “However, the State reserves the right to cross-examine witnesses.” I would submit at this point I could cross-examine Ms. Wilson, but I do not choose to do so. “And to correct any factual inaccuracies which come to the attention of the Court.” Your Honor stated there was no factual basis and it was not supported by the record after Mr. Campbell stated certain facts about the night of the incident. And I believe the State is well within its right to correct factual inaccuracies that I believe occurred. You, your Honor, stated that—

THE COURT: (Interposing) You may proceed.

MR. GIGGENBACH: Continuing) –they’re not supported by the record. and again, as I said, I want to make sure this plea goes through, I don’t want any appeals, I don’t want a habeas; however, the impression was given by Ms. Wilson was merely present and that’s all that happened. However, she stated to Detective Elkins with the St. Albans Police Department—we have it on video. If you look at Dr. Smith’s report, it states it as well. That she admitted to stabbing four or five times. And I could cue it up and show you “three or four times” once she says and then “one or two more.”

And Detective Snuffer and Gilbert were there as well. She admitted to swinging with the knife in her hand at the victim, Nancy Lynch Burdette, not sure if it went through. So that is not merely present. That is not just standing there while something goes on.

THE COURT: I actually was looking for the autopsy report, and I don't want to make this unnecessarily gruesome, but I did not find it in the presentence report.

MR. GIGGENBACH: I brought a copy of the autopsy report with me, your Honor.

THE COURT: How many times was the victim stabbed?

MR. CAMPBELL: Your Honor, I object. I don't believe it's necessary here today. I mean, there was a factual basis laid for a felony murder, you accepted it, and we're here today for sentencing, not to discuss anything having to do with how many times someone was stabbed. (*Petitioner's counsel preserved the assignment of error*).

THE COURT: Okay. Thank you for that, and your objection is overruled.

MR. GIGGENBACH: Your Honor, I have a copy of the autopsy report.

THE COURT: Well, let me review it then, please. (JA Sentencing Transcript at 22-24)

Wilson's confession of the robbery and murder has been misconstrued and inaccurately reported throughout Wilson's presentence report: "The defendant admitted to holding Nancy Lynch while Timothy Shafer stabbed her, but finally admitted she may have stabbed the victim eight or nine times herself. (JA at 37), "Tim finally told me, but he told me Jessica killed Nancy and acted like he wasn't involved..."(JA at 38), "Tim could have stopped Jessica from stabbing her."(JA at p.39), "Although multiple statements were given to the police, the defendant admits in one statement to holding Nancy Lynch while Timothy Shafer stabbed her, then finally

admitting she may have stabbed the victim eight or nine times.”(JA at.43, 73) A review of Petitioner’s statement reveals she did not stab the victim. (JA Statement of Jessica Wilson at1-63, Continuation of Jessica Wilson’s Statement at 1-21) The prosecutor’s argument that Wilson stabbed the victim is factually inaccurate and breaches the plea agreement. The prosecutor had no factual inaccuracies to correct. Wilson maintained that she was coerced and did not stab the victim throughout her five hour interrogation by the three skilled detectives. That fact that the Wilson was incompetent at the time of the confession should signal more restraint to the prosecutor in choosing to argue at Wilson’s sentencing.

On May 7, 2015, after argument, Wilson was sentenced to life without mercy. The Notice of Appeal for this appeal was filed on June 8, 2015. A hearing on Wilson’s Motion to Vacate Plea and Motion for Reconsideration were heard July 29, 2015. Defense counsel argues why Wilson’s plea should be vacated. (JA Motion to Vacate Plea at 1-6) The prosecutor argued his position of correcting factual inaccuracies. (JA Motion to Vacate Plea Transcript 7-14) Defense counsel objects to the prosecutor’s position. (JA Motion to Vacate Plea Transcript at 8-9) (*Here again, defense counsel preserves the assignment of error.*) The Prosecutor continues to argue his incorrect and misconstrued version of the Statement of Jessica Wilson. (JA Motion to Vacate Plea Transcript at10, 11)

The prosecutor argued that Wilson returned to the house after the night of the crime. (JA Motion to Vacate Plea Transcript at 11) This was misconstrued as shown by Wilson’s statement in her pre-sentence report. “I never went back to Nancy’s House.”(JA at 37) Wilson’s confession clearly shows she went back the same night, but not after the night

of the murder. (JA Statement of Jessica Wilson at 15) By order dated July 30, 2015, the Circuit Court denied Wilson's Motion for Reconsideration and Motion to Void Plea Agreement. (JA at 187-191).

### **III.**

#### **SUMMARY OF THE ARGUMENT**

On January 30, 2014, twenty-six days after the crime, Wilson gave a confession to the felony murder of Nancy Lynch Burdette. After arrest, Wilson, who could not read or write, was found to be incompetent with a functionally retarded IQ of 63. In her confession, Wilson stated she knew one of her co-defendants, Timothy Paul Shafer, was going to rob Nancy Lynch Burdette; however, she stated she did not know her co-defendant, Timothy Paul Shafer was going to stab Nancy Lynch Burdette to death. She stated she was frightened by Timothy Paul Shafer and he had threatened to stab her on the night of the murder. Wilson stated her co-defendant attempted to coerce her to stab the victim. She believed she did not stab Nancy Lynch Burdette.

Wilson entered into a plea agreement with the Office of the Prosecuting Attorney to plead guilty to felony murder and the Office of the Prosecuting Attorney agreed to stand silent at sentencing. A deal is a deal. The prosecutor did not stand silent. The prosecutor breached Wilson's plea agreement under the presence of correcting factual inaccuracies and argued that Wilson had stabbed the victim four to five times and returned to the crime scene after the night of the robbery and murder. His argument was incorrect and plainly wrong. Wilson maintained in her confession that she did not believe she stabbed the victim, and that she did not return to the house after the night of the robbery and murder.

#### IV.

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

The Petitioner believes that oral argument is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

#### V.

#### **ARGUMENT**

#### **THE PROSECUTOR BREACHED THE PETITIONER'S PLEA AGREEMENT OF STANDING SILENT BY ARGUING PETITIONER STABBED THE VICTIM FOUR TO FIVE TIMES**

“The Supreme Court of Appeals reviews sentencing orders...under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.’ Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E. 2d 221 (1997).” Syl. Pt. 1, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). “Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). This Court applies a three-ponged standard of review to orders denying Rule 35 motions: “We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a de novo review.” Syl. Pt. 1, in part, *State v. Head*, 198 W.Va. 298, 480 S.E. 2d 507 (1996).

Whether at the sentencing, (after which this appeal was filed) or at the reconsideration hearing (heard after this appeal was filed), Wilson contends the prosecutor breached her plea agreement.

“ Cases involving plea agreements allegedly breached by either the prosecution or the circuit court present two issues for appellate consideration: one factual and the other legal. First, the factual findings that undergird a circuit court’s ultimate determination are reviewed only for clear error. These are the factual questions as to what the terms of the agreement were and what the conduct of the defendant, prosecutor, and the circuit court. If disputed, the factual questions are to be resolved initially by the circuit court, and these factual determinations are reviewed under a clearly erroneous standard. Second, in contrast, the circuit court’s articulation and application of legal principles is scrutinized under a less deferential standard. It is a legal question whether specific conduct constitutes a breach is a question of law that is reviewed *de novo*.” Syl. Pt. 1, *State ex rel. Brewer v. Starcher*, 195 W. Va. 185, 465 S.E. 2d 185 (1995). The Petitioner has an enforceable right not to have the terms of the plea bargain breached. Syl. Pt. 4, *State v. Myers*, 204 W.Va. 449, 513 S.E. 2d 676 (1998); Syl., *State ex rel. Gray v. McClure*, 161 W.Va. 488, 242 S.E. 2d 704 (1978). In discussing plea agreements, this Court has stated that “[p]lea agreements are a form of contracts,” but that their unique nature requires ordinary contract principles to be supplemented with a concern that the bargaining and execution process does not violate the defendant’s right to fundamental fairness under the due process clause.” *Myers* at 458, 513 S.E. 2d at 685. “Due to the significant constitutional rights that a criminal defendant waives in connection with the entry of a guilty plea, the burden of insuring both precision and clarity in a plea agreement is imposed upon the State. Consequently,

the existence of ambiguity in a court-approved plea agreement will be construed against the State and in favor of the defendant.” Syl. Pt 3, *State ex rel. Thompson v. Pomponio*, 233 W.Va. 212, 757 S.E. 2d 636 (2014).

The prosecutor breached the plea agreement in its execution. Wilson maintains that she did not believe she stabbed Nancy Lynch Burdette and was coerced by her co-defendant to attempt to stab the victim. The confession is more credible given Wilson’s 63 IQ and inability to read and write. Wilson’s confession is the best evidence of what took place. The three detectives tried their best to get Wilson to say she stabbed the victim, but Wilson maintained the she did not think she did.

There were few facts determined in this case. All three defendants entered guilty pleas. The Petitioner had her confession. The co-defendant gave a completely different, self-serving, statement in his version. The third co-defendant, Megan Marie Hughes, was not present during the murder.(JA at 37, 38, 39)

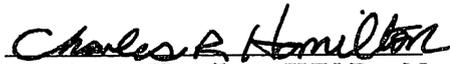
The police report obtained inaccurate statements of Jessica May Wilson’s confession. The inaccurate statements in the police report were used in Wilson’s pre-sentence report, her psychological report, and the arguments of the prosecutor at sentencing. It appears the Statement of Jessica Wilson was not reviewed. (App. Statement of Jessica Wilson, pp.1-63, Continuation of Jessica Wilson’s Statement at 1-21) It was clear error for the prosecutor to rely on this information and argue at sentencing. Wilson and Timothy Paul Shafer were the only witnesses to the robbery and murder. The prosecutor had no factual inaccuracies to correct and, by law and agreement, should have remained silent at Wilson’s sentencing.

VI.

**CONCLUSION**

For the foregoing reasons, Petitioner Jessica May Wilson, respectfully moves the Court to reverse the final order issued by the Circuit Court of Kanawha County and to hold that the Office of the Prosecuting Attorney breached the Petitioner's plea agreement. Futhermore, Petitioner seeks such other relief as the Court may deem appropriate.

**JESSICA MAY WILSON**, Petitioner  
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**CERTIFICATE OF SERVICE**

I, Charles R. Hamilton, do hereby certify that on September 8, 2015, filed the foregoing **PETITIONER’S APPEAL BRIEF and JOINT APPENDIX** with the Clerk of Court and served the same upon counsel for Respondent via U.S. mail, postage prepaid, a true copy thereof to the following:

Laura Young, Deputy Attorney General  
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Charles R. Hamilton