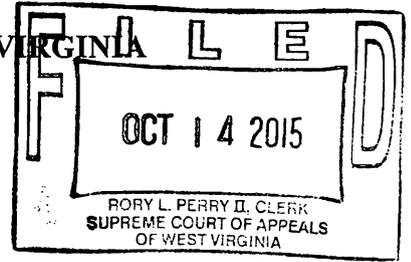


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0578



STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

vs.

JESSICA MAY WILSON,

*Defendant Below, Petitioner.*

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**BRIEF ON BEHALF OF THE RESPONDENT**

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I.

STATEMENT OF THE CASE

The petitioner and her co-defendant, Timothy Paul Shafer (who has also appealed his sentence in 15-0115) viciously murdered Nancy Lynch-Burdette. The co-defendants plotted their crime in advance. A multi-count indictment charged the petitioner and Shafer with burglary (by way of breaking and entering and entering without breaking), conspiracy, murder, robbery, additional counts of burglary, grand larceny of a car and other items of personal property. (Appendix [hereinafter, “App.”] at 5-9.)

The State offered, and the petitioner accepted a plea agreement. As pertinent to this appeal, the petitioner agreed to plead guilty to the felony offense of murder in the first degree, for which the maximum penalty is life imprisonment. “The Office of the Prosecuting Attorney agrees to stand silent as to sentencing, however, the Office of the Prosecuting Attorney does

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 are contained in the pre-sentence investigation report.” (*Id.* at 11.) (Emphasis added.) Notably, the plea agreement would appear to require the State to refrain from taking a stance on the issue of mercy, as that was the only sentencing variable under the plea. The plea agreement does not require the state to refrain from correcting factual inaccuracies set before the sentencing court.

The pattern of Ms. Wilson minimizing her involvement in the brutal series of events which led to the murder of the helpless victim is apparent from the transcript of the plea proceeding. In lying the factual basis for the plea, the petitioner stated that she knew Tim was going over to rob her, and clarified that the “her” in question was Ms. Lynch. (Plea transcript, April 20, 2015, at 18.) The petitioner admitted that she participated in the robbery, and blamed the killing on her co-defendant Shafer. When asked by the court if the State was satisfied with the petitioner’s allocution, the prosecutor, without objection stated that “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.” (*Id.* at 20.)

A pre-sentence report was prepared. The petitioner’s LS/CMI risk level was high. (App. at 33.) As listed in the pre-sentence report in the “Official Version of the Offense”, a neighbor of Ms. Lynch’s was concerned because she had not been able to contact her. On January 26, 2014, that neighbor entered the house and found the victim, dead in her house. Both of her cars were missing, and checks had been written on the victim’s checking account to the co-defendant, Timothy Shafer. (*Id.* at 34.)

In a statement to the police, the petitioner said she was told by Shafer that he'd beaten up someone pretty bad. Shafer asked the petitioner to get rid of jewelry for him. (*Id.* at 35.) Upon being questioned again, the petitioner stated that Shafer talked about robbing Ms. Lynch, and that she and Shafer walked to the Lynch house. Shafer had a knife. The petitioner participated in an effort to get money from an ATM using Ms. Lynch's debit card. According to the pre-sentence report, the petitioner admitted holding Ms. Lynch while Shafer stabbed her, and then admitted to stabbing the victim herself. (*Id.* at 37.)

In the petitioner's version of events to the probation officer, she blamed everything on her co-defendants. She stated she knew Shafer was going to rob Ms. Lynch but that Hughes and Shafer were the ones who kept returning to the home and stealing the victim's belongings, stealing her cars, and taking her mail from the mailbox. (*Id.* at 37-38.) Co-defendant Hughes stated that "When Tim and Jessica killed Nancy they had already robbed her house. . . ." (*Id.* at 38.) Ms. Hughes stated that Shafer had told her that petitioner was the one who killed the victim. (*Id.*) The victim's family clearly believed that petitioner had actually stabbed the victim: "Tim could have stopped Jessica from stabbing her." (*Id.* at 39.)

In the pre-sentence report "[t]he defendant accepted no responsibility for the crime which she has been convicted and has expressed little remorse." (*Id.* at 43.) She said she simply watched her co-defendant "do it". The presentence report noted that multiple statements were given to the police and in one, the petitioner admitted holding Ms. Lynch while Shafer stabbed her and ultimately stabbing the victim herself. (*Id.*) The crime was described, accurately, as horrific, and in the opinion of the reporting officer, regardless of whether the petitioner admitted stabbing the victim, she showed little regard for human life. "The defendant and co-defendant both blame each other for the brutal events that led to Nancy Lynch's death." The victim was

stabbed multiple times, was not combative before her death. The murder was senseless and committed for greed to fuel drug addiction. (*Id.*)

The police report was also included in the pre-sentence investigation. A neighbor had not been able to contact the victim for several days. The neighbor entered the house, found the victim and called the police. Officers, upon entering the house found the victim, dead on the floor, covered by a tarp. The victim's dog was also dead. (*Id.* at 62.) A cooperating individual called the police and suggested they talk to the petitioner because she had information about items stolen from the victim's house. (*Id.* at 65.) Ms. Wilson voluntarily went to the police station where, in her first statement, she asserted that co-defendant Shafer planned to rob someone. She professed to have no further information; save that Shafer asked her if she could get rid of jewelry for him. (*Id.*)

Ms. Wilson voluntarily accompanied the officers to the station for another statement. The officers told her before giving her statement that she was going to return to her own home after the statement. The petitioner admitted being with Shafer at the victim's home (perhaps on a Sunday.) She stated she did not know the victim. While in the home, the petitioner had on gloves. Before going to the victim's home, Shafer talked about robbing the victim. After that, the petitioner and Shafer walked to the victim's house. The petitioner admitted holding the victim while Shafer stabbed her, and then admitting "she may have stabbed the victim eight or nine times." Ms. Wilson demonstrated for the police how she had stabbed the victim. The petitioner was returned home and informed she would be arrested the next day. (*Id.* at 72.)

A statement was taken from Shafer. Shafer stated that he and the petitioner planned to rob Ms. Lynch. Shafer stated he had a toy gun and Wilson had the knife. The pair approached the victim outside her house, and Shafer told Ms. Lynch she was being robbed. The two took

Ms. Lynch inside her home. After the victim was unable to provide much money or the correct sequence of numbers for an ATM card, Shafer said that Wilson told him to look away. Wilson then stabbed Ms. Lynch repeatedly. (*Id.* at 73-74.)

Ms. Lynch had been dead for a significant period of time before her body was found. (*Id.* at 76.)

Two Kanawha County deputies, Elkins and Snuffer, took the inculpatory statement from Wilson. The version above is from Deputy Elkins' report. Sergeant Snuffer's synopsis includes that Wilson initially stated that Shafer stabbed the victim, then stated that she (Wilson) waved the knife at the victim, and then stated she may have "glanced" the victim with the knife. Wilson later stated she "may" have swung the knife at the victim more than one time, and then stated she "may" have slashed the victim. (*Id.* at 80-81.)

Ms. Wilson gave a statement to the police. She admitted going with Shafer to the victim's home, and knowing Shafer planned to rob the victim. (Wilson Statement, January 30, 2014, at 6.) At first, she stated that only Shafer stabbed her. (*Id.* at 7.) She professed not to know that Shafer had the knife until he pulled it out and started stabbing the victim. (*Id.* at 9.) Before leaving the house "the first time", Shafer "made" her carry out a camera. (*Id.* at 11-12.) They left, and then went back to get the victim's car. They entered the house again. (*Id.* 14-15.)

Wilson had no excuse for why she hadn't called the police after Shafer was arrested and jailed. (*Id.* at 30.) She denied doing anything to the victim. (*Id.* at 35.) She denied doing anything else, but when confronted admitted she had accompanied Shafer to the ATM. (*Id.* at 38.) She admitted putting number into the ATM. (*Id.* at 43.)

Although she had initially stated that she had no idea that Shafer intended to harm the victim, she later stated that Shafer had said he was going to kill the victim if he didn't get

anything. (*Id.* at 50.) She then stated that Shafer tried to get her to stab the victim. (*Id.* at 53.) She initially stated she never held the knife, then admitted that Shafer handed her the knife. (*Id.* at 54.) Her story changed from Shafer stabbing the victim, and holding her down, to Shafer picking the victim back up. (*Id.*) She then stated she “threw” the knife, and might have hit the victim’s coat. (*Id.* at 56.) The petitioner then stated that she held the victim down with her coat, and Shafer stabbed her more. (*Id.* at 58.)

The police and Wilson went to try to find the knife. The petitioner told the police while at the railroad tracks that she, Wilson, “went after (her) two of three times.” (Wilson Statement 2, January 30, 2014 at 3.) Wilson stated affirmatively “. . .I went after her with a knife but I don’t know if I got her or not. . .” and this “going after” was two or three times. (*Id.*) She then reiterated that she held the victim down while Shafer stabbed her, and that “I don’t know but I only went in there two or three times and he did the. . .he did the hard. . .the more than. . .It’s just crazy.” (*Id.* at 6.) Despite her claims that she was afraid of Shafer, the police pointed out that she was out drinking beer with him. Wilson stated “. . .we’re like close. He’s like. . .he was like my brother.” “And he was like. . .we was like best-best friends.” (*Id.* at 14.)

To sum up, Shafer talked about robbing someone, and she went with him. Shafer stabbed her, and Wilson had the knife in her hand and “swung” it at the victim two or three times. She didn’t know how many times she hit the victim, but knew it hit the victim’s coat. Wilson then held the victim down while Shafer stabbed her. (*Id.* at 15-18.)

Detective Crawford was present when Shafer initiated contact with the police and gave a second statement. Crawford summarized Shafer’s statement as the motivation for the robbery was to fund Shafer’s girlfriend’s drug addiction. Ms. Lynch was selected as a victim because she had been robbed previously and not reported it. (App. at 88.) Shafer stated Wilson had the knife,

and he was armed with a toy gun. Shafer and Wilson walked to the victim's home, and waited for her to come home. (*Id.*) When Ms. Lynch returned home, Shafer threatened her with the toy gun and Wilson brandished the knife and Ms. Lynch let them into her house. Shafer stated Wilson demanded money, went outside, and came back in and shoved the victim down. After Wilson found the ATM card, she demanded the PIN number. When Ms. Lynch gave her different numbers, Wilson became angry and again threatened the victim with the knife. The petitioner told Shafer to look away, and he did, briefly. When he looked back, Wilson was stabbing Ms. Lynch. Apparently, Shafer re-enacted how the victim was stabbed for the police. Wilson stabbed the victim numerous times. (*Id.* at 89.) Shafer returned to the victim's house after her death to steal more personal property, medication, mail, and the victim's checkbook. (*Id.* at 91.)

When found, the victim was clad, including having a coat on. (*Id.* at 114.) The autopsy revealed that the victim had been stabbed at least nineteen times. (*Id.* at 118.) The coat had several perforations. (*Id.* at 127.)

In a sentencing memorandum prepared for the court, counsel for the petitioner stated unequivocally that the petitioner did not stab the victim, and that her participation in the crime was coerced. (*Id.* at 29.)

In terms of objections to the presentence report at disposition, counsel for the petitioner noted only that the term "the defendant" was used when the person who went to the pawnshop was Megan Hughes, that "the defendant" was used in another portion of the report when it was Ms. Hughes' stepfather who assisted in locating the suspects; another reference to the petitioner being in pawnshop when it was Hughes, and that the petitioner was at Sharpe for six months, not for three years. (Sentencing Transcript, May 7, 2015, 3-5.)

The petitioner argued for mercy, stating that she had gone to the victim's home and "While there, a woman died. And Ms. Wilson was scared to death." (*Id.* at 9.) The court noted that petitioner's counsel was "telling me things that are not supported by anything in the record before me." (*Id.* at 10.) Petitioner's counsel agreed that there wasn't much of a record "other than that she was present when this woman died." The judge immediately noted that statement was disputed by the co-defendant who claimed that the petitioner was the one doing the stabbing. The court requested that petitioner's counsel confine himself to the record. (*Id.* at 10-11.)

When counsel posited that the reason the police hadn't arrested Ms. Wilson after her first incriminating statement was that they had trust in her, the court again noted there was no factual basis for that assumption. (*Id.* at 12.)

As mitigating factors, trial counsel pointed out that he believed the petitioner was neglected by her parents, she had a low IQ and never made it to high school, she was a substance abuser, she had been diagnosed with ADHD, anxiety, adjustment disorder, depression and bipolar disorder. (*Id.* at 15-17.) The petitioner had a minimal criminal history. However, as the judge pointed out, the petitioner's use of illegal drugs was the precipitating factor in the loss of her children in abuse and neglect proceedings. (*Id.* at 18-19.)

Petitioner's trial counsel stressed that she was fully cooperative with the police. Counsel noted that she had not gone to the police because she was scared for her life. (*Id.* at 20.) Ms. Wilson at disposition stated that she knew "he" was going to rob her, but didn't know he would kill her. The judge asked her if she knew that Shafer said he was the one who did the stabbing and she said yes. (*Id.* at 21-22.)

The assistant prosecutor stated that he wanted to absolutely abide by the plea agreement, and would do so by standing silent as to any recommendation regarding the grant of mercy. (*Id.*

at 22.) The assistant prosecutor noted that the plea agreement also provided that the State could cross-examine witnesses and correct any factual inaccuracies which came to the attention of the court. The court itself had twice pointed out that the representations of petitioner's counsel were not supported by the record. The assistant prosecutor did not accuse defense counsel of any intentional misrepresentation but believed the facts had been "whitewashed" and were inaccurate. (*Id.* at 23.) The assistant stated that the impression left was that Ms. Wilson was merely present at the crime scene. Not only had she made statements to the police, which were on video; Dr. Smith's report reflected that the petitioner admitted stabbing four or five times. (*Id.* at 23.) The court asked for a copy of the autopsy report, to which petitioner's counsel objected. (*Id.* at 24.) Counsel had not objected to the remarks of the assistant prosecutor. The assistant prosecutor noted an additional factual inaccuracy: the petitioner had stated she had not returned to the victim's home, but had admitted to the police that she had. (*Id.* at 25.)

The court, in pronouncing disposition noted that he had carefully reviewed the matter including the circumstances of the death. He had previously reviewed the statements that the assistant prosecutor had pointed out in correcting the factual inaccuracies. The judge indicated that no matter whether she merely stood by and watched another stab the victim 19 times, leaving them to die, not contacting anyone for help—or whether she actively participated as she indicated in her statements to the police—neither was defensible. (*Id.* at 28.) The judge did not believe the mitigating factors asserted by defense counsel were accurate. The petitioner lost her children because she was continually violating the law (by her drug use) and hurting those around you. Further, "I don't find that your conduct in this matter in any way near makes you eligible for life with mercy." (*Id.* at 28-29.)

The petitioner filed a motion to reduce sentence, citing not only the mitigating factors as to the petitioner's personal circumstances, but noting that petitioner's counsel believed the assistant prosecutor had failed to abide by the "stand silent" portion of the agreement, causing the petitioner substantial prejudice. (App. at 174-177.) A motion was also filed to void the plea agreement on the grounds that the prosecutor breached the plea by making arguments to the court beyond correcting factual inaccuracies, causing substantial prejudice to the petitioner. (*Id.* at 171-172.) The State's response to that motion indicated that before sentencing, counsel for the State told defense counsel that any exaggeration of or understatement of facts would result in the State correcting those factual inaccuracies and responding to questions from the court. Defense counsel, however understated the petitioner's participation in the offense contradicting the investigative report and the co-defendant's statements. The judge, without prompting from the State, recognized that the facts were being minimalized and brought that to counsel's attention. Before making any statement, the assistant prosecutor referred to the plea agreement paragraph permitting correction of factual inaccuracies. The judge agreed that the State could correct those factual inaccuracies. (*Id.* at 179-180.) The supplemental response by the State noted that the defense at disposition unequivocally stated that the petitioner was merely a scared bystander who did not participate in stabbing the victim. The court at disposition stated that Shafer blamed the petitioner for the murder, and also stated that defense counsel's version of events was not supported by the record. Defense counsel did not call any witnesses to support the version of events, although the court gave counsel the opportunity to call witnesses. The presentence report citing the investigation, notes that petitioner admits stabbing the victim. A psychiatric report (not included in this appendix) found that Wilson admitted stabbing Ms. Lynch several times, perhaps as many as six times. In her video statement to the police, Wilson told Detective Snuffer

that she went after Ms. Lynch two or three times with a knife, but didn't know if she hit her. Then she stated when asked how many times she stabbed Ms. Lynch, the answer was 3-4, 4-5 times. To Detective Elkins she stated (or words to that effect) four stabs. (Although petitioner's statements are included in the appendix, only a draft transcript has been provided, not the actual video). Further, at disposition the petitioner denied returning to the victim's house after her death, but in her statements to law enforcement she admitted going back to the house twice. Therefore, factual inaccuracies were placed before the court, which gave the State the opportunity to correct those inaccuracies. The State only proceeded to correct the inaccuracies after permission was given by the court. The State stood silent as to the sentence the petitioner received. (*Id.* 182-185.)

A hearing was held on the motion to void plea. Counsel for the petitioner argued that no factually inaccurate statements had been offered to the court. Counsel did acknowledge that at disposition “. . .the Court did state to me on a couple of occasions that perhaps what I offered was not supported in the record. . . .” “I believe I offered some speculation. . . .” (Motion Hearing Transcript, July 29, 2015 at 4.)

The State noted that at disposition, as well as in the sentencing memorandum, the defense “gave a clear and unequivocal impression that the defendant did not stab Nancy Lynch” and stated in the memorandum that the petitioner did not stab the victim. The prosecutor stated that was factually inaccurate. The prosecutor stated that the assertion that Shafer was the main actor in the offense was inaccurate, factually. The statement and impression that Wilson was a mere bystander to the crime was factually inaccurate. (*Id.* at 7-8.) Further, the State noted that defense counsel not only repeatedly said that the petitioner didn't stab anybody, but said that the petitioner never returned to the home. The assistant prosecutor noted that the court told defense

counsel at disposition that “Your version of events are not supported by the record.” The court told counsel he could call a witness to dispute what the court was saying about the facts, and defense counsel chose not to. (*Id.* at 9.)

Not only did the petitioner admit to Snuffer that she swung the knife, she apparently also admitted that “That’s why I’m saying I only stabbed her eight times.” When asked by Elkins how many stabs did she get in, the petitioner stated two to three, maybe one to two. Again, she apparently admitted stabbing the victim multiple times to Dr. Smith. (*Id.* at 10-11.)

The assistant prosecutor noted that he did not say a word regarding the issue of mercy, but only corrected factual inaccuracies. (*Id.* at 13-14.) Defense counsel asserted that simply because something was or was not in the record does not necessarily mean it was factually inaccurate, because there was no trial. The court pointed out that the representations at disposition were factually inconsistent with statements the petitioner had made previously, and that the position argued at disposition was not consistent with the facts in the record contained in statements “made by your own client.” (*Id.* at 15.) Judge Bloom further noted that he gave defense counsel the opportunity to clarify but defense counsel turned that opportunity down. (*Id.*)

Defense counsel maintained that he stood by his position that what he said was factually accurate “although perhaps there were some sections that were unsupported.” (*Id.* at 16.) The court made the finding that in the sentencing memorandum as well as the oral presentation counsel was attempting to persuade the court to a false conclusion, namely that Wilson was simply a bystander. The court further found that was a substantial factual misrepresentation that allowed the prosecution to review the evidence with the court. The State did not violate the plea agreement. The judge was aware of the information that the assistant prosecutor proffered at disposition before disposition ever began. The judge heard the allocutions of each of the

defendants in the case, reviewed discovery and psychological reports that included the petitioner's statements. The judge believed after that review that the representations made by defense counsel were inconsistent with the record. (*Id.* at 19.) The State was entitled to respond to correct the factual error, but the State did not proffer anything that the court had "not already concluded from my complete, thorough evaluation of all the facts and circumstances. . . ." (*Id.* at 20.)

The court did not believe that the State breached the agreement, but also affirmatively stated that nothing the State said influenced his opinion. The motion to void the plea agreement was declared to be without merit, and the court reiterated that there were factual inaccuracies spread upon the record, by the defense at sentencing, not supported by anything in the file. (*Id.* at 21-22.) The motion to reconsider sentence was denied. (App. at 187.) The motion to vacate the plea agreement was also denied with the court finding that the theory of the crime put forward by the defense was not consistent with discovery and that the theory was factually inaccurate. The State stood silent at sentencing and abided by the plea agreement. The court was well aware of the factual inaccuracies put forward by the defense without the State's comments, and the State's corrections as to those comments had no impact on the sentencing. (*Id.* at 189.)

## II.

### SUMMARY OF THE ARGUMENT

Counsel for the respondent absolutely agrees with the authority cited in Petitioner's Brief noting that a plea agreement is analyzed as a contract, and that if breached, the offended party is entitled to a remedy. Generally, that remedy is specific performance of the plea. However, this petitioner also has asked to vacate her plea based upon what she terms the state's breach of the plea agreement.

The State agreed in the plea agreement in this matter to “stand silent” as to disposition. The petitioner pled guilty to murder in the first degree. There is only one disposition: life imprisonment. The sole sentencing issue is whether the court (after plea) or jury (at verdict) recommends mercy. Therefore, the State was forbidden to comment upon or make a recommendation about whether or not the petitioner was an appropriate candidate for mercy.

The State scrupulously upheld that portion of the plea agreement, noting, in fact, that it was (essentially) avoiding the issue of mercy. However, an equally important clause in the plea agreement permitted the State to attempt to correct factual inaccuracies. Trial counsel, at disposition, made representations that were inaccurate and incomplete. The court, on more than one occasion noted that petitioner’s counsel should confine himself only to the record, and that counsel was making representations unsupported by the record.

The assistant prosecutor noted that the representations were belied by the record as a whole, and with specificity pointed out the inaccuracies, *without* argument or recommendation as to mercy. The State requested permission from the court before going forward with the specific notation of factual inaccuracy, and the court noted it was already aware of the inaccuracy and that nothing stated by the prosecutor changed his mind as to disposition. The State did not abandon its position of neutrality on the issue of mercy and did not violate the plea agreement.

### III.

#### STATEMENT REGARDING ARGUMENT AND DECISION

This appeal involves an area of the law that is well-settled. There is no substantial question of the law and upon consideration of the record and the standard of review, no prejudicial error. Therefore, a memorandum decision is appropriate. The respondent does not believe that oral argument is necessary in that the dispositive issue has been authoritatively

decided. The facts and legal arguments are adequately presented in the briefs and record on appeal. The decisional process would not be aided by oral presentation. Should, however, this Court deem oral argument to be desirable, this matter would appear to more suitable for Rule 19 argument than Rule 20.

#### IV.

#### ARGUMENT

When a defendant enters into a valid plea agreement with the State that is accepted by the trial court, an enforceable “right” inures to both the State and the defendant not to have the terms of the plea agreement breached by either party. Syllabus Point 4, *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998).

In the case at bar, petitioner is asserting that the assistant prosecutor violated the express terms of the plea agreement by not “standing silent.” There was no breach. The express terms of the plea agreement reserved to the State the opportunity to cross-examine witnesses offered in mitigation and “to correct any factual inaccuracies which come to the attention of the court or which are contained in the pre-sentence investigation report.” (App. at 11.)

The sentencing memorandum in this case stated clearly that the petitioner did not stab the victim and her participation in the offense was coerced. (*Id.* at 29.) At disposition, counsel for the petitioner stated that the petitioner had gone to the victim’s house, while there the victim died and the petitioner was scared. (Sentencing Transcript, May 7, 2015, at 9.) When rebuked by the judge that comment was not supported by the record, defense counsel stated that the record supported the fact that she was present when the victim died. The judge again noted that passive behavior was belied by the co-defendant, and requested trial counsel confine himself to the record. (*Id.* at 10-11.) Counsel posited that the reason Ms. Wilson hadn’t been arrested was

because the police trusted her, and the court again stated there was no factual basis for that assumption. (*Id.* at 12.) The petitioner herself stated that she knew “he” was going to rob the victim, but didn’t know that he would kill her, again propounding personally that she was an innocent, terrified, passive bystander to the horrific brutality inflicted upon Nancy Lynch. (*Id.* at 12.)

The assistant prosecutor noted carefully that he was abiding by the plea agreement, which required the state to stand silent regarding the issue of mercy. (*Id.* at 22.) The prosecutor then made specific reference to the record which contained factual material which was inconsistent with the statements made by counsel at disposition including her statements to the police and a court-appointed psychiatrist in which she admitted actually stabbing the victim and holding her down for the co-defendant to butcher her. (*Id.* at 23.) The co-defendant stated that Wilson actually stabbed the victim.

While trial counsel maintained that the statements made were not factually inaccurate, those representations were belied by an examination of the file as a whole. Moreover, the court specifically stated it was aware of the inaccuracies before they were mentioned by the prosecutor. (*Id.* at 28.) The judge indicated that whether the petitioner stood by and watched Ms. Lynch be stabbed nineteen times, and then left her to die, or whether she actively participated in the stabbing as indicated in her own statements to the police—neither was defensible. (*Id.* at 28.) Her conduct simply did not render her eligible for a grant of mercy. (*Id.* at 28-29.)

Counsel for the respondent acknowledged that at disposition he had offered speculation, and that the Court had stated “. . .on a couple of occasions that perhaps what I offered was not supported in the record. . . .” (Motion Hearing Transcript, July 29, 2015 at 4.)

The court noted that the representations made by defense counsel at disposition were factually inconsistent with her own statements and that the position (being a bystander only) argued at disposition was not consistent with the facts in the record. The sentencing court viewed trial counsel's representations as attempting to persuade the court to a false conclusion, that is, the petitioner was only a bystander. Not only was that a factual inaccuracy, it was a substantial factual misrepresentation. The State was entitled to respond, and that response was consistent with the record. (*Id.* at 19-20.) Moreover, the State proffered nothing that the court did not already know from its thorough review of the facts and circumstances of the case. The State not only did not breach the agreement, but nothing the State said influenced the court's decision. (*Id.* at 21-22.)

“‘[W]hen a plea rests in any significant degree on a promise or agreement . . . so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.’” *State ex rel. Gardner v. West Virginia Div. of Corrections*, 210 W. Va. 783, 786, 559 S.E.2d 929, 932 (2002) (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)). “It is settled that a defendant alleging the Government's breach of a plea agreement bears the burden of establishing that breach by a preponderance of the evidence.” *United States v. Snow*, 234 F.3d 187, 189 (4th Cir.2000). “[A]ny dispute over the terms of the agreement is to be resolved by objective standards.” *United States v. Fentress*, 792 F.2d 461, 464 (4th Cir. 1986) (quoting *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir.1980)).

The State did not breach the agreement. In interpreting the meaning of a plea agreement, “our starting point is the plea agreement[.]” *United States v. Kilcrease*, 665 F.3d 924, 927 (7th Cir. 2012), and “[t]he starting point in th[at] analysis is, of course, the plain language of the plea provision at issue.” *United States v. Hawkins*, 675 F. Supp.2d 617, 619 (E.D. Va. 2009).

The specific term regarding “stand silent” in this plea agreement expressly reserved to the State, the opportunity to cross examine witnesses offered in mitigation, or to correct factual inaccuracies. (App. at 11.) Although given the opportunity by the Court to call a witness, or witnesses to support the factual representations made at disposition, trial counsel for Wilson refused. However, the State was not obligated to place duct tape over the prosecutor’s mouth when the petitioner’s counsel made representations that the court, itself noted as being inaccurate, before any statement was made by the assistant prosecutor. A plea agreement should be read reasonably, *United States v. Larson*, 78 Fed. Appx. 650, 655-56 (10th Cir. 2003) (“a reasonable interpretation of the agreement in this case shows that the government did not breach its promises by making such statements”), without resort to “strained[,]” *United States v. Little*, 14 Fed. Appx. 200, 204 (4th Cir. 2001), or hyper-technical interpretation.

The prosecutor was required to maintain sentencing neutrality on the issue of mercy, and this he did. A striking example of the prosecutor breaching the neutrality provision as to sentencing occurred in *State v. Myers*. “During the sentencing hearing, the prosecutor asserted that Mr. Myers should be sentenced to life in prison without the possibility of parole and that the crime was committed with the use of a firearm. Both statements by the prosecutor were inconsistent with the plea agreement.” *State v. Myers*, 204 W. Va. 449, 455, 513 S.E.2d 676, 682 (1998).

No such breach occurred in the case at bar. The assistant prosecutor neither explicitly nor implicitly suggested that the court should or should not grant mercy. The prosecutor maintained strict sentencing neutrality, as required by the plea agreement.

Any reasonable interpretation of this provision of the plea agreement, that is, reservation of the right to correct factual inaccuracies, reveals that it is designed for the situation which arose

here. The petitioner presented information to the court in an effort to persuade the court that she was a candidate who deserved mercy, that is, the chance at parole. The stratagem employed by her defense counsel was to offer mitigating circumstances. However, at disposition, despite explicit comment from the court that trial counsel was proffering information which was not consistent with the record, counsel continued to offer information painting the petitioner as a passive non-participant in the offense, that she didn't return to the house, that she was coerced into committing the crime, and that the police "trusted" her. The court told counsel that was factually inaccurate, and the prosecutor was permitted to refute those factual inaccuracies.

The prosecutor did not breach the plea agreement. However, the state would posit that this is that rare case where even if this Court assumes the plea agreement was breached, such breach was absolute and fundamentally harmless. The respondent is aware that *Myers, supra*, stands, in part, for the proposition that if the petitioner proves a breach, such breach is presumptively prejudicial.

However, all error, even error of constitutional dimension is subject to an analysis of whether the error is harmless. "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. Pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975) (quoting Syl. Pt. 21. *State v. Blevins*, 231 W. Va. 135, 744 S.E.2d 245 (2013)).

Counsel for the respondent maintains there was no breach, because the prosecutor made no argument or recommendation regarding the issue of mercy. As to the comments made by the prosecutor in response to the petitioner's inaccurate statements at disposition, the prosecutor limited himself only to information contained in the pre-sentence report and psychiatric reports, and in the petitioner's own varying statements. While the clear and distinct impression from

both the sentencing memorandum and the representations at disposition was that the petitioner was essentially nothing more than a mere bystander, coerced into criminal activity, the petitioner had made statements to the police in which she talked about actually stabbing the victim herself and stated to a psychiatrist she stabbed the victim. (Sentencing Transcript, May 7, 2015, at 23-5.)

The court cited at disposition that he had reviewed the circumstances of the victim's death, the statements of the petitioner compiled in the police report, and obviously the statement of the co-defendant who blamed Wilson for the stabbing. (*Id.* at 21-2; 28.) The court stated explicitly that he did not regard it as necessarily material whether or not Wilson personally stabbed the victim, or whether she simply watched Shafer stab Ms. Lynch without helping or calling for help. Neither position was defensible. Further, the petitioner lost her children because of her constant violation of the law. "I don't find that your conduct in this matter in any way near makes you eligible for life with mercy." (*Id.* at 28-9.)

In denying the petitioner's motion to vacate plea, the court again noted that petitioner's representations at disposition were factually inconsistent with her own previous statements, and that the picture painted of the petitioner at disposition was false, that is she was a mere bystander. Therefore, the State could review the evidence with the court. Nonetheless, the court, before imposing disposition heard the allocutions of both defendants—Wilson and Shafer—reviewed discovery, and psychological reports including the petitioner's own statements. The court was aware of all of this information before the assistant prosecutor said anything at disposition. The State's representations were consistent with the record. (Sentencing Hearing Transcript, July 29, 2015 at 15-9.) Moreover, the State proffered nothing that the court had "not already concluded from my complete, thorough evaluation of all the facts and circumstances. . . ."

(*Id.* at 20.) Nothing the State said influenced the court's opinion to withhold mercy. (App. at 189.)

Demonstrably, not only did the state abide by the plea agreement, but the state's comments did not affect the petitioner's sentence. The petitioner voluntarily accompanied her close friend, a man who was like her brother, her best friend (Wilson Statement 2, January 30, 2014, at 14) to the home of a woman who had done nothing to her and participated, actively, in both robbery and murder. She left the victim's body there to decay, and returned to the house at least once after the victim died to assist in the theft of her car. She received proceeds from the robbery. Not only did she participate in stabbing the victim, and fail to assist the victim as she lay dying, she failed to call for help that night, or any other night. The judge got it right. The State did not breach the agreement, and nothing, nothing in Wilsons' conduct exhibited a soul deserving of mercy.

## V.

### CONCLUSION

Based upon the foregoing recitation of fact and argument of law, counsel for the respondent respectfully requests that this Honorable Court determine that the petitioner's plea agreement was not breached, and affirm the sentence imposed upon the petitioner by the Circuit Court of Kanawha County. The Court should affirm the sentence imposed upon the petitioner of life imprisonment, without the possibility of parole upon her plea of guilty to murder in the first degree.

Respectfully Submitted,

STATE OF WEST VIRGINIA  
*Plaintiff Below, Respondent*

By counsel

PATRICK MORRISEY  
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Laura Young", with a stylized flourish at the end.

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**CERTIFICATE OF SERVICE**

I, LAURA YOUNG, Deputy Attorney General and counsel for the Respondent, hereby verify that I have served a true copy of "BRIEF ON BEHALF OF THE RESPONDENT" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 14<sup>th</sup> day of October, 2015, addressed as follows:

Charles R. Hamilton, Esq.  
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Charleston, WV 25304

  
\_\_\_\_\_  
LAURA YOUNG