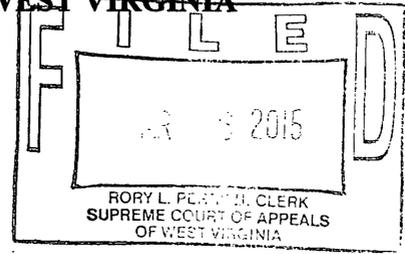


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0890



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

vs.

JULIA SURBAUGH,

*Defendant Below,
Petitioner.*

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE.....	1
II. SUMMARY OF THE ARGUMENT.....	3
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	5
IV. ARGUMENT.....	5
A. Standard of Review.....	5
B. Petitioner’s Assignments of Error are without merit.....	6
V. CONCLUSION.....	15

TABLE OF AUTHORITIES

CASE	Page
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993).....	7, 8
<i>State v. Durham</i> , 156 W. Va. 509, 195 S.E.2d 144 (1973).....	6, 13
<i>State v. Easton</i> , 203 W. Va. 631, 510 S.E.2d 465 (1998).....	5
<i>State v. Guthrie</i> , 194 W. Va. 675, 461 S.E.2d 163 (1995).....	10-12
<i>State v. Jones</i> , 220 W. Va. 214, 640 S.E.2d 564 (2006).....	14-15
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996).....	12
<i>State v. Osakalumi</i> , 194 W. Va. 758, 461 S.E.2d 504 (1995).....	9

STATEMENT OF THE CASE

The Petitioner has twice been convicted by a jury of the first degree murder of her husband, Michael Surbaugh, and it is from the second conviction that the instant appeal follows. Many of the facts are undisputed. On August 6, 2009, in the morning hours, the Petitioner shot her husband at least twice in the face; the origin of a third shot to the face is the subject of dispute, with the Petitioner insisting that the victim shot himself once during the debacle. (Appendix pages 206-207; Transcript Pages 719-722). In fact, the Petitioner argues that she acted in self-defense in shooting her husband, and that at some point he turned the gun on himself in a suicidal mood and fired at least one of the shots to his head. The State argued differently, and the jury on both occasions has agreed with the State's interpretations of the facts at hand.

Michael Surbaugh survived three gunshot wounds from a .22 caliber handgun fired at close range. None of the shots pierced his cranial cavity, i.e., none of the bullets entered his brain, but one of the shots fractured the large sinus cavity at the front of the face. (Appendix Pages 224-227; Transcript Pages 791-804). After several 911 calls in which the Petitioner presented varying stories to the 911 dispatchers, first responders arrived on the scene, initially treating the case as an attempted suicide based on what the Petitioner had stated. (Appendix Page 205; Transcript Page 715). The victim, however, was lucid and communicative for nearly four hours after being shot, interacting with a number of police and EMS workers, and consistently maintained that he had been awakened by a loud, severe pain to the head that seemed like a baseball bat hitting his skull; that he had felt that more than once; and that as he started to realize what had happened to him, he told everyone he could that "the bitch shot me" or some variation thereof, referring to the Petitioner (Appendix page 95; Transcript page 276).

Michael Surbaugh died while in transit to a larger hospital, having been fairly stable from the scene to the Health Net landing area, and then crashing into cardiopulmonary arrest as he was being loaded onto the helicopter. (Appendix Page 185; Transcript Page 636). Subsequent attempts to revive him were unsuccessful. After examining the body, the state's forensic expert, Dr. Hamada Mahmoud (whose testimony will be discussed below), concluded that the cause of death had been the gunshots and ruled the death a homicide.

The Petitioner gave numerous voluntary and inconsistent statements to the police in the hours and days following her husband's death. (Appendix Page 210; Transcript Page 736). Her primary theory is that her husband was depressed and suicidal as a result of losing his job as a teacher after a drug and gun violation, and this, coupled with the Surbaughs' marital problems (he was openly having an affair, and both had agreed to end the marriage) and Mike's alcoholism, combined to create a volatile situation where the Petitioner felt afraid and threatened, and only fired upon her husband after he had pulled the gun on her and threatened her (Appendix pages 206-207; Transcript Pages 719-722). The State's forensic evidence tends to disprove the Petitioner's assertions of where she was in relation to the decedent when she shot him. In any case, the Petitioner's statements vary in the number of times she shot him, when and why she initially shot him, and other key details, leading a reasonable jury to doubt the Petitioner's portrait of events that morning.

The testimony of most of the medical personnel that the decedent encountered shows that most of these first responders, nurses, and doctors considered that the gunshots wounds were the cause of death; however, most of these people also were somewhat surprised that the victim died from these wounds, given how responsive he was in the hours following receiving them. The general consensus seems to be that the shot to the sinus cavity allowed the passage of air into the

bloodstream, which created an air embolism, which travelled to the heart and eventually caused the sudden cardiopulmonary arrest. This is the theory espoused by the State's expert witness, and that accepted by the jury.

The Petitioner, both during the trial and on appeal, discounts the air embolism theory in an attempt to create medical malpractice where there is none. Most of the medical personnel to appear as witnesses in this trial found nothing unusual in the manner in which Mr. Surbaugh was treated; his death was surprising to them at the time because they did not have all the facts about where the bullet went when initially treating the patient. The Petitioner attempts to create a situation where the decedent was given too much IV fluid, which led to a fatal pulmonary edema. (Appendix Page 185; Transcript Page 636). This argument is an attempt to provide a break in the causation chain that would otherwise hold the Petitioner responsible for foreseeable consequences of her actions, but would supposedly not hold her responsible if improper medical care were provided to the victim, as she asserts here. The jury found no merit in this argument, as will be discussed below.

SUMMARY ARGUMENT

The Petitioner claims that multiple errors occurred during the course of this twelve day trial, and that any of those should be sufficient to warrant a reversal. Initially, the Petitioner argues that the State failed to prove the corpus delicti of the crime charged, i.e., murder. There is no merit in this argument, however. The Petitioner boldly claims all expert testimony shows that the gunshots themselves, without more, would not have been fatal. This is controverted by a number of statements in the record in which the witnesses testify that Michael Surbaugh died as a result of the gunshot wounds. There is therefore no merit in the corpus delicti claim.

Next the Petitioner claims that the court should not have allowed the State's expert witness, Dr. Mahmoud, to testify as to the possibility (as opposed to scientific certainty) of an air embolism as the cause of death. This is an example of the Petitioner trying to create significance where there is none. Dr. Mahmoud used the phrase "possibility" to distinguish from "medical certainty," not from probability, as the Petitioner seems to claim. Further, the words and their import are clear enough that the degrees inhabited by "possibility," "probability," and "medical certainty," are not likely to confuse a jury.

Additionally, the Petitioner had moved to dismiss the indictment because the State had not kept intact physical evidence, in particular bed linens, which the Petitioner argues would have exonerated her. The trial court had concluded that the linens were of no real import and that pictures of them were sufficient to keep as evidence. The Petitioner wanted to test the linens for gunshot residue in an attempt to support her self-defense claim. However, it is significant to note here that the State did maintain the bed linens during and after the first trial, and only destroyed them after the Petitioner had failed to require their use.

The Petitioner also claims there is insufficient evidence to support the jury's verdict. However, a jury verdict will only be disturbed in the gravest of circumstances. In this case, the court's instruction to the jurors is not at issue on this point; there is no evidence that the jury simply ignored the Court's instructions.

The Petitioner does take issue with some of the jury instructions, however. The Court denied proposed instruction No. 7, which addressed the "possibility" and "certainty" issues; instruction No. 8, which allowed that contradictory evidence of cause of death itself is enough to create reasonable doubt; and No. 5, which would have allowed the jury to consider the

decendent's alleged mental abuse of Petitioner in determining her state of mind with regard to self-defense.

Finally, the Petitioner alleges that the trial court should not have allowed into evidence statements made by the Petitioner when she was under the influence of Xanax or otherwise not aware of the full import of the things she was saying. There is no error or abuse of discretion in any of these decisions by the court, as will be shown below.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner has requested oral argument in this case, primarily as a result of the number of errors asserted. While the State agrees that the number of errors is relevant to the inquiry, these errors are all simply addressed and should not create any great difficulty for the Court to determine the outcome of this case on the briefs and from the record. The State therefore is of the opinion that oral argument is not necessary for the resolution of this case.

The State has no opinion with regard to the type of opinion that should issue from the Court in this case.

ARGUMENT

I. Standard of review

As a general rule, a reviewing court should allow great deference to the findings of a jury in a criminal trial. As stated in Syl. Pt. 1, *State v. Easton*, 203 W.Va. 631, 510 S.E.2d 465 (1998), “[a] reviewing court should not reverse a criminal case on the facts which have been passed upon by the jury, unless the court can say that there is reasonable doubt of guilt and that the verdict must have been the result of misapprehension, or passion and prejudice. Syl. Pt. 3, *State v. Sprigg*, 103 W.Va. 404, 137 S.E. 746 (1927).” The Petitioner thus carries a heavy burden of persuasion in her attempt to reverse the jury’s decision.

II. The Petitioner's Assignments of Error are without merit

A. The State did prove the corpus delicti of the crime charged, and therefore the trial court did not err in failing to grant petitioner's motion for judgment of acquittal.

The Petitioner here proceeds from a faulty premise, claiming that there is no dispute that the gunshot wounds – standing alone – did not kill Michael Surbaugh. On the contrary, this is a subject of much debate, since the State's argument is that the gunshot wounds caused the air embolism which caused death. Additionally, numerous witnesses testified that Michael Surbaugh died as a result of gunshot wounds. There is no agreement by all medical experts in the trial that the shots did not end his life.

The Petitioner argues that improper medical care – and the word improper is highly significant – took a bad wound to a fatal one. Under *State v. Durham*, 156 W. Va. 509, 195 S.E.2d 144 (1973), criminal liability can attach to an action, even if death is the result of intervening action, so long as the intervening action is the result of proper treatment of the wound or of a pre-existing condition or disability. The Petitioner here has based her entire theory of the case upon the suggestion that the cause of death was a pulmonary edema caused by excessive administration of IV fluid, medical treatment that the Petitioner claims would be “improper” and therefore not fall within the *Durham* protection for a chain of causation. The Petitioner argues that the allegedly improper care – if it existed at all – is a supervening cause that is the ultimate cause of death, not the gunshot wounds, and that the Petitioner has not effectively caused the decedent's death.

There are a number of flaws with this argument. First, in *Durham* itself, a pre-existing condition was at stake, and liability attached because the actions of the defendant therein,

coupled with the pre-existing conditions, formed a chain of causation that was unbroken by subsequent medical care (which was not alleged to be deficient). In this case, the Petitioner has certainly alleged improper medical care, but this is all it is – an allegation. There has been no finding by any body of a violation of the standard of care in this case, and the State’s witnesses, experts and lay, have unanimously supported the State’s arguments regarding cause of death (gunshot wounds) and propriety of treatment. The trial court made no such finding, and the jury – indeed, the juries in both cases – have found that the Petitioner is the sole cause of death.

In order to prove *corpus delicti*, the state must simply show that there is a dead body and that the actions of the defendant caused the death. There is no doubt that Michael Surbaugh is dead, and there is no doubt that his wife shot him at least twice in the face. There is a question of fact as to whether those shots caused his death, and the jury has concluded that they did. There is nothing inherently unreasonable or suspicious about such a conclusion. Absent some sign of passion or prejudice on the jury’s part, the Court should leave the jury’s findings undisturbed.

B. The Court did not err in admitting the testimony of Dr. Mahmoud

West Virginia, like many states, follows *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in determining the admissibility of scientific evidence at trial and the qualification of experts in providing such testimony. In general, a trial judge must act as a “gatekeeper,” allowing reliable and relevant material before the jury but keeping the junk out. The Petitioner reduces Dr. Mahmoud’s testimony to this singular question: whether he should be allowed to testify about the “possibility” of an air embolism as the cause of death. The Petitioner once again ignores the fact that Dr. Mahmoud and the court treat “possible” and “probable” analogously during this procedure; in any case, it matters not. (Appendix page 163; Transcript page 545). Dr. Mahmoud is subjected to considerable *voir dire* and is qualified as an expert in

forensic investigation, including rendering opinions on air emboli; he is never qualified based upon his understanding of the word “possibility.” (Appendix page 162; Transcript page 543). Similarly, the methodologies he employs as a whole in conducting forensic examinations does not come under attack; only his conclusion about the possibility of an air embolism in this particular case. As a result, it is overbroad to say that Dr. Mahmoud’s opinions have no scientific basis; he is not called upon to analyze only air emboli, but to conduct a full forensic analysis that includes, among other things, the possible cause of death. Given the sheer number of these investigations that he has done, it can hardly be maintained that Dr. Mahmoud is not a reliable and relevant expert or that his opinion is mere speculation.

C. The Circuit Court did not err in allowing Dr. Mahmoud to testify based on possibility, not probability, with regard to his opinions.

The Petitioner opines again that the expert’s testimony can be reduced to a single word – possibility – and that this word has a fixed legal meaning that we must guard against. The evidence herein already shows that Dr. Mahmoud is using the term possibility in contrast to certainty – not probability – and that is unlikely to confuse any jury. Additionally, we have two verdicts that suggest that the jurors at least held some understanding of what the Doctor meant. More importantly, the Petitioner offers no evidence that that Dr. Mahmoud’s testimony in fact was confusing to the jury or was no more than speculation; the cases cited herein are from foreign jurisdictions, and without any more specific West Virginia case law on the topic, a duly qualified expert should not have his testimony thrown out based on unfounded fears of speculation.

D. The Circuit Court did not err in denying the Petitioner’s Motion to Dismiss based upon the destruction of evidence by the state.

The destruction of the bed linens is not an effective challenge, given that the Petitioner failed to use this evidence in the first proceeding in this matter, and the Petitioner's failure to utilize the bed linens in that first trial led directly and predictably to the items' destruction by the State. There is no requirement that items be held indefinitely. Petitioner cites the case of *State v. Osakalumi*, 194 W. Va.758, 461 S.E.2d 504 (1995) for the standard of review on this issue. *Osakalumi* provides, in Syllabus Point 2, that the trial court in a case where discoverable evidence has been destroyed while in the custody of the State must determine whether the state had a duty to preserve the material and, if it did not, whether the state's failure to preserve the material constitutes an actionable breach. Factors such as the degree of negligence or bad faith and the availability of adequate substitute items of evidence are considered in determining whether any consequences should flow from a breach.

In the present case, the trial court determined that the state had not breached any duty to preserve the bed linens because photographs were available and no bad faith was evident. Indeed, the destruction occurred only after the linens were not used in the first trial, and despite the Petitioner's suggestion that the State should have kept the linens pending an appeal, the Petitioner's failure to use the linens in the first trial precluded any use of them upon that appeal, so the State would argue that there was not even a duty to maintain the articles after the Petitioner's failure to utilize them in the first trial.

Further, even if the State had a duty to maintain the evidence, there was no evidence of bad faith or negligence adduced to support the Petitioner's argument. The State reasonably relied on the failure of the Petitioner to use the linens in the first trial, the natural effects that would have on any appeal, and the existence of photographs as a viable substitute for the

evidence. The State cannot keep an infinite amount of evidence, and these factors suggest not only that a reasonable decision was made, but also a fair one devoid of bad faith or negligence.

Finally, the Petitioner makes much of the argument that it could have tested the linens to try to advance the self-defense theory. The Petitioner's failure to do this the first time around notwithstanding, the inability of the Petitioner to perform these tests is irrelevant to the State's case against her. The testimony of Dr. Mahmoud established that the shots were fired from within eighteen inches of the victim's face, but not against his skull. The Petitioner claims that the State's theory of the case is dependent upon the Petitioner having fired those shots at the victim while he was sleeping, but this is not the case. That is one theory, to be sure, but the State has asserted that the Petitioner shot her husband from the range the Dr. Mahmoud indicated. The State is not dependent upon the position of the bedsheets for its conviction. Mrs. Surbaugh admits to shooting the victim. The gunshots caused the victim's death. Whether any residue might appear on the sheets is not material to the State's case, nor would the presence of such material affect the State's case. The trial court found that the photographs are an adequate substitute, and that the State did not act in bad faith. Testing the bed linens would be no more probative than determining exactly from which distance the gun was fired. The jury simply did not find Mrs. Surbaugh to be a credible witness, her stories changed repeatedly, she admitted in each of them to shooting the victim, and the shots caused the victim's death. The failure of the State to keep the bed linens does not affect any of that.

E. The Circuit Court did not err in denying the Petitioner's Motion for Judgment of Acquittal.

As stated in Syllabus Point Syl. 1 of *State v. Guthrie*, 194 W. Va. 675, 461 S.E.2d 163 (1995):

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

The Petitioner argues that insufficient evidence supports the jury's verdict and that the jury incorrectly resolved evidentiary conflicts, particularly with respect to where the victim was when shot. There is no merit to this argument. The Petitioner simply re-hashes the bed linens issue and determines that the jury could not have resolved the conflict between where the victim says he was when he was shot – the bed – and where the Petitioner claims he was when shot, namely attacking her.

This argument is not enough to meet the heavy burden placed on a defendant challenging sufficiency of evidence on appeal:

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilty so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. . .

Syl. Pt. 3, *Guthrie, supra*.

There was not strong evidence either way regarding the location of Mr. Surbaugh, but the jury clearly chose to discredit the Petitioner's testimony. Given the inconsistencies in her stories to the authorities and the testimony of the authorities themselves as to her demeanor when making these statements, it is easy enough for the jury to conclude that the Petitioner is not a

reliable source of information. Discounting her version of the story leaves the State's version, which the jury was clearly permitted to choose. In such a case, the inferences favor the prosecution:

When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt.

Syl. Pt. 2, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996)

This is not, as the Petitioner says, a case where either of two conclusions is equally likely. The Petitioner herself cemented her fate by making herself a liability as a witness. She cannot choose to force the jury to give credit to her words where a reasonable juror could easily doubt them.

F. The Circuit Court did not err in denying Petitioner's jury instructions.

When a defendant challenges the denial of jury instructions, the following standard applies:

A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Guthrie, 194 W. Va. at 663-64, 461 S.E.2d at 169-70. The Petitioner therefore has a heavy burden to show such an abuse of discretion.

The Petitioner first asserts that proposed Jury Instruction No. 7, which would have limited the use of “possibility” testimony by Dr. Mahmoud so that it could not, on its own, create a causal relationship, should have been given. This is not error, much less reversible error. We have already seen that the Court was within its power in allowing Dr. Mahmoud to testify about medical possibility vs. medical certainty. Dr. Mahmoud did not testify based on speculation, but was a properly qualified expert forensic witness. The jury properly heard his testimony and gave it the weight it deserved. Even if this failure to so instruct the jury were error, however, it would be harmless error. The evidence against the Petitioner in this case is overwhelming. The word choice of a single witness would not change the fact that the Petitioner shot her husband and that he died as a result. The jury was clearly permitted to choose the State’s explanation of this death.

Next, the Petitioner argues that the Court should have given Proposed Jury Instruction No. 8, which relies on *Durham* for the proposition that contradictory evidence regarding the cause of death is in fact an element that should create reasonable doubt for the jury. Ignoring for the moment the preposterous result of this interpretation – virtually every murder would result in an acquittal – the Petitioner fails to explain or expound on this objection other than to use it to criticize the Court’s decision to allow Dr. Mahmoud to testify. This is a matter that has been discussed ad nauseum. There is no need to rehash it here.

Finally, the Petitioner finds error that her proposed Instruction No. 5, which would have allowed the jury to consider mental abuse in determining her state of mind, was improperly denied. The trial court correctly concluded that the Petitioner had adduced no evidence

whatsoever that she had been abused by the victim, mentally or otherwise, and that such an instruction was impermissible and unnecessary. All of the challenged jury instructions are clearly within the discretion of the trial court to deny.

G. The Trial Court did not err by failing to use the Petitioner's Jury Verdict Form.

The Petitioner alleges that the form used by the court discouraged the jury from considering self-defense in their deliberations. There is simply no merit to this argument, and the Petitioner does not bother to argue the point.

H. The Circuit Court did not err in admitting Petitioner's statements.

The Petitioner was repeatedly interviewed by the police, most of the time at her own request. If she was under the influence of Xanax, she should not have initiated an interview. Further, the police performing her interview did not have knowledge that she was the subject of a criminal investigation. The interviewing officers on several occasions offered to stop the interview. Consequently, there was a knowing waiver of Miranda protections, and the Court did not err in admitting these statements.

This Court has stated that "a trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syllabus Point 1, *State v. Jones*, 220 W. Va. 214, 640 S.E.2d 564, (2006.), quoting Syl. Pt. 3, *State v. Vance*. Further, when an appellate court reviews the ruling on a motion to suppress, all facts should be construed in favor of the State, as it prevailed below. Particular deference is given to the findings of the circuit court because it had the opportunity to observe witnesses and hear testimony. Factual findings are reviewed for clear error. Syl. Pt. 3,

Jones. Whether a statement is voluntary is determined from a review of the totality of the circumstances. Syl. Pt. 4, *Jones*. It should be clear from the record, and the testimony of the officers involved, that the Petitioner made numerous statements, at different times, to the police, and the police made every reasonable effort to protect her Miranda rights. The court was therefore within its discretion in admitting these statements.

CONCLUSION

The Petitioner has been twice convicted of first degree murder in the death of her husband. Nothing that occurred in the second trial did anything to change this outcome, despite the Petitioner's best efforts. There is overwhelming evidence that the Petitioner shot her husband multiple times in the face at close range, that he survived long enough to tell numerous people the same story about how she shot him, and that he died as a result of the wounds. Attacking Dr. Mahmoud is a red herring; virtually all the medical witnesses in this trial admitted their belief that the gunshots killed Michael Surbaugh. The Petitioner's assignments of error are without merit, and the conviction should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

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CERTIFICATE OF SERVICE

I, JONATHAN E. PORTER, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *RESPONDENT'S BRIEF* upon the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 6th day of March, 2015, addressed as follows:

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JONATHAN E. PORTER