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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35691

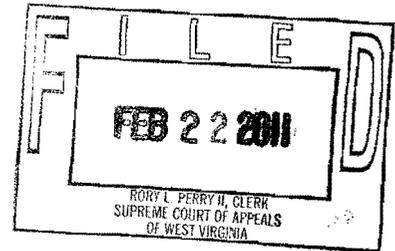
STATE OF WEST VIRGINIA,

*Appellee,*

v.

DAVID WAYNE KAUFMAN,

*Appellant.*



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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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I.

STATEMENT OF THE CASE

At the time of her murder, December 17, 2007, the victim, Martha Kaufman, was 52 years old and living in Parkersburg, West Virginia, with her husband, David Wayne Kaufman (“Appellant”), and their two children, Kristi and Zach Kaufman. Vol. I Tr. 59, 61, 62; Vol. II Tr. 45, 46, 47, 52.

Appellant and Martha were married in 1984 and by the late 80s they began to have marital problems. *See generally* State’s Ex. 2 at 7. These problems continued and reached a point to where they had not gone anywhere together, slept in the same room, “let alone” the same bed, for many years. Vol. I Tr. 72; Vol. II Tr. 94, 95; Vol. III Tr. 48; State’s Ex. 2 at 18, 19. Furthermore, Appellant and Martha had “very little conversation ever” at their house. Vol. III Tr. 48. Also, as experienced by Kristi and Zach, Appellant acted much differently in public than he did at home. At home, Appellant kept to himself and did not talk much whereas, in public, he was much more jovial

and talkative. Vol. I Tr. 65; Vol. III Tr. 52.

In May or June 2007, Appellant became friends with a woman named Susan Evans, who was working as a cleaning “temp” at the same plant, Nova Chemicals (“Nova”), where Appellant was employed.<sup>1</sup> Vol. I Tr. 60, 299, 300, 302; Vol. III Tr. 45, 138. Further into the summer of 2007, Appellant and Ms. Evans’ friendship developed into a sexual relationship. Vol. I Tr. 72, 308; Vol. II Tr. 49. This affair continued throughout the summer of 2007 and into the fall of 2007 – lasting at least until mid-November 2007. Vol. I Tr. 308, 309, 317, 329. Appellant also spent numerous nights and weekends at Ms. Evans’ place in Marietta, Ohio. Vol. I Tr. 311, 312. Although they had no physical contact with each other beyond mid-November 2007, throughout the rest of November and December 2007, Appellant and Ms. Evans continued to communicate with one another over the telephone and through e-mail.<sup>2</sup> *See generally* Vol. I Tr. 304, 305, 317, 329; State’s Ex. 15 at 1-70.

However, Ms. Evans was “bothered . . . that . . . [Appellant] was married” and, at one point, she informed him that she was “pissed” and thinking that he and she “need[ed] to just not see each other until . . . [he got] rid of that psycho.” State’s Ex. 15 at 1; Vol. I Tr. 307, 315. Appellant responded that he was “not sure what to do,” that they “need[ed] to talk,” and that he did not “want to lose . . . [her].” State’s Ex. 15 at 1. Ms. Evans replied by asking Appellant whether he was “going to . . . give . . . [his wife] control over the rest of . . . [his] life” and that, if he wished, she would terminate their relationship, as she was not going to let his wife “have any say in anything in . . . [her] life.” *Id.*

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<sup>1</sup>Nova was located in Belpre, Ohio. Vol. I Tr. 301; Vol. III Tr. 135.

<sup>2</sup>In fact, the communication between Appellant and Ms. Evans was still ongoing, as of February 2009. *Id.* at 305, 318, 320.

By fall of 2007, and learning of his affair, Martha and Appellant's marriage became "very tense" and was getting progressively worse with each passing day. Vol. I Tr. 71. Their marriage was further strained by financial problems and debt. At one point, their finances became so bad that Kristi had to loan her mother \$500.00 to pay the utilities. *Id.* at 62, 63. Furthermore, Martha was receiving calls concerning the homeowners and mortgage insurance being unpaid; she was forced to quit paying her credit card and cell phone bills; and, on one occasion, she attempted to withdraw some money out of an ATM machine for groceries and Christmas shopping, but was unable to do so because of insufficient funds in the account. *See generally* State's Ex. 2-B at 7, 44, 55, 60. The family also had an "enormous loan payment" on their house that was past due. Vol. III Tr. 313. To make matters worse, Appellant was soon to lose his job, as the plant where he worked, Nova, was due to close in January 2008.<sup>3</sup> Vol. I Tr. 61, 62, 322; Vol. III Tr. 46, 135, 259; State's Ex. 2-B at 9.

By this time, fall of 2007, with her family in financial crisis and her husband's infidelities, Martha was at "wit's end" and made a feeble attempt at killing herself. She took a few Xanax pills,<sup>4</sup> went into the garage, got into her car, started the engine, and went to sleep. State's Ex. 2-B at 5. However, Martha "really did not want to die." *Id.* Rather, she "just wanted/needed all of . . . [the problems in her family] to stop before . . . [her] entire family . . . [fell] apart." *Id.* at 6. Martha was later found by her daughter Kristi; when Kristi found her, Martha was upset and had been crying, but was alert at the time. Vol. I Tr. 69, 70.

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<sup>3</sup> At the time that Nova was to close, January 2008, Appellant was eligible to retire. Vol. III Tr. 260, 261. Because of his retirement eligibility, Appellant could continue his benefits, including medical, dental, vision, as well as his life insurance policy on his wife and himself. *Id.* at 261, 262.

<sup>4</sup> Xanax is an anxiety medication. Vol. I Tr. 257; Vol. II Tr. 160.

Following this incident, Martha had a discussion with Appellant regarding what she termed as her “lame suicide attempt,” during which Appellant expressed his anger that their children found her and that he was disappointed she “did not ‘get it right.’” State’s Ex. 2-B at 5.

On another occasion in the fall of 2007, while talking with one another, Appellant told Martha that she was “worth more to him dead – than alive.”<sup>5</sup> *Id.* at 8. Appellant had two life insurance policies on Martha, totaling \$200,000.00; these policies included a \$100,000.00 policy through Nova, and a separate policy for \$100,000.00 through State Farm Insurance Company (“State Farm”). *See generally* Vol. I Tr. 63, 321, 323, 324; Vol. III Tr. 142; State’s Ex. 2-B at 8, 9. In the event of Martha’s death, Appellant would receive the proceeds from these policies. *See generally* Vol. III Tr. 143; State’s Ex. 2-B at 8, 9, 15, 45. At one point, Appellant commented to his girlfriend Susan Evans that, if his wife would die, the proceeds from these policies would leave him free and clear of all of his debts. Vol. I Tr. 321, 321; Vol. III Tr. 314, 315. Finally, Appellant was under the impression that the policy he had with Nova would terminate once his job ended in January 2008.<sup>6</sup> *See generally* Vol. II Tr. 316; Vol. III Tr. 263, 264.

On another occasion in the fall of 2007, Appellant told Martha that she “just won’t fucking die[.]” Martha responded that she would die when her time came, to which Appellant replied “you should have been dead a long time ago[.]” State’s Ex. 2-B at 9.

Again, in the fall of 2007, Appellant and Martha got into an argument about finances, which

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<sup>5</sup> This was not the first time, nor the last time, that Appellant would say this to Martha. *Id.* at 8, 57.

<sup>6</sup> Unbeknownst to Appellant, because he was eligible to retire, this policy would continue beyond January 2008, when he was to lose his job at Nova. Vol. III Tr. 261, 262. Also, unbeknownst to Appellant, the premiums on the policy that he had with State Farm were not paid up in full. Vol. III Tr. 161; State’s Ex. 2-B at 8.

escalated to a point where Appellant informed her that “all [their] problems would be solved if . . . [she] would ‘just die [.]’” *Id.* at 15. Appellant then asked Martha “to kill . . . [herself] and ‘do it right this time[.]’” *Id.* at 16. Thereafter, Appellant offered to help Martha commit suicide. *Id.* Frustrated with the situation, Martha indicated to Appellant that he should just kill her rather than prolonging the same. *Id.* In response, Appellant stated “‘don’t think I haven’t thought about it.’” *Id.* Then Appellant proceeded to tell Martha that “he’s researched how to beat a lie detector test, how to make a murder look like a suicide and how to fool the cops around . . . [their area] because none of them . . . [were] qualified to go up against someone like him.” *Id.* at 16-17. Hearing this, Martha informed Appellant that the police would confiscate his computer to see what he had been researching, to which Appellant replied that “he’s not that stupid & there are many computers he could use besides his own.” *Id.* at 17. Appellant further informed Martha that “he found out how to get gunpowder on . . . [her] hands without . . . [her] pulling the trigger.” *Id.*

On November 12, 2007, another bad argument erupted between Appellant and Martha, which eventually involved their children – Zach and Kristi, that lasted for several hours. *See generally* Vol. I Tr. 73-81; Vol. III Tr. 54-62; State’s Ex. 2-B at 21-28. This argument began when Martha asked Appellant some questions, and made some derogatory comments, about his girlfriend Susan Evans. *See generally* State’s Ex. 2-B at 21-22. Zach was in the house when this argument occurred. Vol. III Tr. 54; State’s Ex. 2-B at 22. Upset that his parents were arguing, Zach expressed his displeasure with them. Vol. III Tr. 57. Also upset and angered by the situation, Martha then left the house and was pulled over by the police for running a stop sign. Vol. I Tr. 77; Vol. III Tr. 37, 58; State’s Ex. 2-B at 24.

After receiving a warning from the police, Martha called Kristi, who was staying with her

boyfriend, Jimmy Schreckengost, at the time. Vol. I Tr. 74; Vol. III Tr. 39, 40; State's Ex. 2-B at 24, 25, 26. In response, Kristi left her boyfriend's house and drove to meet her mother at another location. Vol. I Tr. 74; State's Ex. 2-B at 26. Once Kristi met with her mother and discussed what had occurred at their house, she became angry and then she and Martha drove back to their house. Vol. I Tr. 77; State's Ex. 2-B at 26. Thereafter, the entire family engaged in a heated argument, during which Kristi, followed by Martha, confronted Appellant about his girlfriend. *See generally* Vol. I Tr. 77-80; Vol. III Tr. 59-62; State's Ex. 2-B at 26-28. At the end of this argument, the family agreed that, once Appellant lost his job at Nova, they would go their separate ways. Vol. I Tr. 81; Vol. II Tr. 106; Vol. III Tr. 62.

On another occasion in November 2007, in discussing one of his guns with Martha, Appellant told her that "it was powerful enough to 'kill a pig.'" State's Ex. 2-B at 49. When Martha asked him what he meant by that comment, Appellant replied that the type of gun he had was "used to go through thick skin & very hard skulls." *Id.* Appellant then informed Martha "to fake sick & and not make Thanksgiving dinner . . . [because] he . . . [wanted] to take Zach out to eat . . . [on Thanksgiving.] *Id.* This, of course, upset Martha because she knew how much Zach loved her holiday dinners. *Id.* When Martha refused to do as Appellant wished, she "found . . . [herself] with an extension cord around . . . [her] neck, being pulled so tightly that . . . [she] thought . . . [she] was going to die right then." *Id.* at 49-50. After this incident, Martha asked Appellant what she should do about the marks on her neck prior to Zach returning home. *Id.* at 50. In response, Appellant "told . . . [Martha] to hide them with . . . [the] fat rolls on . . . [her] neck." *Id.* Appellant went on to warn

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<sup>7</sup> Appellant owned a number of firearms, which he kept at the house, including rifles and handguns. *See generally* Vol. I Tr. 62; Vol. II Tr. 24, 306, 308, 309; Vol. III Tr. 49.

Martha that if she showed anyone the marks on her neck or even allowed them to be seen, he would tell people that she tried to hang herself. *Id.* at 50-51.

On Thanksgiving Day morning, 2007, Martha did as Appellant instructed – she informed Zach that she could not make him Thanksgiving dinner because she was too sick. Vol. III Tr. 64. Zach and Appellant thereafter went to have Thanksgiving dinner, and when they returned, Martha informed Zach that the reason that she did not make him Thanksgiving dinner was not because she was too sick, but rather that Appellant would not allow her to do so. Vol. II Tr. 115; Vol. III Tr. 65, 66. Martha then showed Zach the marks on her neck and informed him that Appellant attempted to strangle her. Vol. II Tr. 114, 115; Vol. III Tr. 66; State’s Ex. 2-B at 53.

In early December 2007, another fight erupted between Appellant and Martha when Martha made several insulting comments about Appellant’s girlfriend and, thereafter, called his girlfriend, as well as her son. *See generally* State’s Ex. 2-B at 29-31. Martha then informed Appellant what she had done, who was not pleased about the situation, but said nothing. *Id.* at 31. Martha continued making derogatory comments about Appellant’s girlfriend and finally indicated that she would go to Ms. Evans’ house to speak to her in person, to which Appellant responded with an enraged expression. *Id.* at 31, 32. Martha then indicated to Appellant that she was going to go talk to Ms. Evans’ son at the college he was attending. *Id.* at 32.

Immediately thereafter, Appellant went upstairs and when he returned he “started waving a dark colored pistol at . . . [Martha].” *Id.* at 32-33. Martha then found herself “up against the wall with . . . [Appellant’s gun] in . . . [her] face.” *Id.* at 33. Appellant had Martha “pinned by the neck & said if . . . [she] ever called or went near either . . . [his] girlfriend or her son – he’d use . . . [the gun] on . . . [her].” *Id.* At that point, Martha became faint and Appellant “punched . . . [her], . . .

grabbed . . . [her] neck again . . . [and] was screaming in . . . [her] face like a madman [, saying] ‘do you understand? do you understand?’” *Id.* at 33-34. Appellant then warned Martha not to say anything to Zach about what had occurred, or anything about his girlfriend or her son to him again and, if she did, she would “be sorry.” *Id.* at 34.

Following this incident, Martha had a telephone conversation with Kristi, who was at her boyfriend Jimmy’s at the time, and informed her about Appellant threatening her with the gun. Vol. I Tr. 81, 82; Vol. III Tr. 5, 6. *See also* State’s Ex. 2-B at 34. At Martha’s request, Jimmy then drove Kristi home to get some work clothes for the next day and was to take her back to his house to spend the night. Vol. I Tr. 84; Vol. III Tr. 7, 9. *See also* State’s Ex. 2-B at 34, 35. While Kristi was in the house gathering her clothes, Martha went outside to talk to Jimmy, who remained in the car. Vol. III Tr. 9, 10, 12. *See also* State’s Ex. 2-B at 35. In talking to Jimmy, Martha informed him that Appellant had pushed her up against the wall and, with a gun in his hand, he told “her to keep her mouth shut [about his girlfriend] or he would shut it for her.” Vol. III Tr. 14. *See also* State’s Ex. 2-B at 35. Martha also informed Jimmy that Appellant attempted to strangle her with a cord. Vol. III Tr. 15.

Prior to her death, Appellant told Susan Evans that Martha had informed him that she had breast and ovarian cancer and was not going to undergo treatment for the same.<sup>8</sup> Vol. I Tr. 333; Vol. III Tr. 172. However, no one else in her family, including her children, had ever heard anything

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<sup>8</sup> Prior to her death, Appellant also told one of his friends, Karen Lodwick, as well as one of his coworkers, Chris Nutter, that Martha had informed him that she had cancer and that she was going to refuse treatment. Vol. III Tr. 359, 360, 373, 374.

concerning Martha having cancer, “let alone” her refusing to undergo treatment.<sup>9</sup> Vol. I Tr. 66; Vol. III Tr. 53. In fact, Martha did not have cancer – her family doctor, Dr. James Spsychalski, in treating Martha since January 2002, never saw or had any concerns about Martha having any type of cancer; nor did he ever refer her to another physician concerning the possible diagnosis or treatment of cancer. Vol. II Tr. 159, 163. Likewise, Dr. Zia Sabet, in performing the autopsy on Martha on December 18, 2007, did not find any evidence of cancer. Vol. I Tr. 252, 253, 258.

Prior to her death, Appellant also told Susan Evans that Martha had informed him that she was going to kill herself on Monday, December 17, 2007. *See generally* Vol. I Tr. 324-330; Vol. III Tr. 166-171. Appellant also told Ms. Evans that Martha had informed him that he needed, so as to have an alibi, to be somewhere else at the time that she killed herself. *See generally* Vol. I Tr. 328-330. Just days before her death, Appellant also informed Ms. Evans that Martha indicated to him that she had gotten one of his guns, a 22 caliber pistol, and hid it to where he would be unable to find it. Vol. III Tr. 164, 165, 166. However, Martha absolutely “hate[d]” and was “horrified . . . of guns.” State’s Ex. 2-B at 18. Martha’s fear and hatred of guns was long-standing, stemming from her first husband killing himself by shooting himself in the head. Vol. I Tr. 68. Furthermore, Martha’s children had never seen her “so much as” touch, “let alone” fire a gun. Vol. I Tr. 69; Vol. III Tr. 53, 54.

Martha suffered from depression, for which she was receiving treatment from her primary physician, Dr. Spsychalski, who reported that she was managing with her depression and that her mood stayed fairly consistent, rather than fluctuating wildly. Vol. II Tr. 162. Consistent with this,

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<sup>9</sup> Neither of Martha’s sisters-in-law, Charlotte Cowan and Peggy Ruble, had been told or knew anything about Martha having cancer. Vol. III Tr. 309, 329.

on the morning preceding the day of her death, Kristi said goodbye to her mother as she left for work<sup>10</sup> – there was nothing out of the ordinary about this goodbye. Vol. I Tr. 106. Likewise, on the morning of the day of her death, Zach and his mother said goodbye to one another as he left for work<sup>11</sup> – again, there was nothing different or unusual about this goodbye on his mother’s part or otherwise. Vol. III Tr. 76. However, on this same morning, Zach noticed that his father was acting a “little different than usual” and was “fidgeting a lot.” *Id.* at 75.

In the morning hours of December 17, 2007, the day of her murder, Appellant, Martha and Zach were all at their house; Kristi was not there, as she had spent the night at her boyfriend Jimmy’s house. Vol. I Tr. 86; Vol. III Tr. 73, 74. Zach left the house for work at approximately 12:00 – 12:30 p.m. Vol. III Tr. 75, 123. On this day, by prior arrangement, Appellant was to go to his mother’s, Geneva Kaufman, house in Washington, West Virginia, to make cookies. On the way there, Appellant was to pick up some ingredients for the cookies, as well as lunch for the two of them. *Id.* at 266, 269, 270, 271, 289. Appellant was seen, by video, at McDonald’s picking up lunch just before 1:00 p.m. (12:59:39 p.m.). *See generally Id.* at 291-295. He arrived, with lunch and cooking supplies, at his mother’s between 1:00 and 1:30 p.m.; his two sisters, Charlotte Cowan and Peggy Ruble, were already at the house. *Id.* at 289, 290, 291, 320, 321, 322. Charlotte left her mother’s house between 1:30 and 2:00 p.m. and went home; Peggy left to go home at approximately 2:00 p.m. *See generally Id.* at 303, 321, 328.

After his sisters left, Appellant stayed at his mother’s house until he left to go to his sister

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<sup>10</sup> At the time, Kristi was working at “Toys-R-Us” in Vienna, West Virginia. Vol. I Tr. 58, 91, 92.

<sup>11</sup> Zach was working at “Sam’s Club” in Vienna at the time. Vol. III Tr. 44.

Peggy's house in Washington, West Virginia, arriving there at approximately 7:00 p.m.<sup>12</sup> *See generally Id.* at 275-277, 322-323, 334. Appellant stayed at Peggy's until approximately 9:00 p.m. and then left to go home. *Id.* at 324, 335.

On this same evening, December 17, 2007, Kristi attempted to call her mother after work at approximately 5:30 – 5:45 p.m. Vol. I Tr. 87, 88. Unable to reach her, Kristi left a message, but her mother never called her back. *Id.* at 88, 89. Having tried several more times to call her mother to no avail, Kristi began to worry. *Id.* at 89. Thereafter, Kristi went home, arriving there between 8:30 and 8:45 p.m., and began searching the house for her mother, who she was unable to find. *Id.* at 89, 90. Appellant came home around 9:00 – 9:15 p.m. and Kristi began to question him about her mother's whereabouts. *Id.* at 90, 91. After several evasive answers, Appellant finally indicated to Kristi that he had dropped Martha at the Wal-Mart in Vienna earlier that afternoon, that she was going to do some shopping, and that afterward she was going to walk over to Kristi's workplace and "catch" a ride home with her. *Id.* at 91, 92, 93.

Feeling something was wrong, Kristi called her brother Zach, who was finishing his work shift in Vienna, and informed him that their mother was missing. She then left the house, drove to the Wal-Mart in Vienna, where she met Zach and some of their friends. *See generally* Vol. I Tr. 93-94; Vol. III Tr. 77-79. Unable to locate their mother, Kristi and Zach called the police. Vol. I Tr. 95; Vol. III Tr. 79. During this same time frame, Zach called his father at the house to ask about his mother's whereabouts. During this conversation, Appellant kept stressing, "God, Zach, I don't

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<sup>12</sup> However, prior to finally leaving his mother's to go to Peggy's, Appellant did leave his mother's for a brief period of time. *Id.* at 276-277. Interestingly, on the same evening, one of Appellant's neighbors, Deidre Lake, saw Appellant walking towards his home in Parkersburg at approximately 5:30 p.m. *Id.* at 175, 183, 184, 186, 188.

know. Jeez, Zach, I don't know.'" Vol. III Tr. 80. Zach found Appellant's answers strange and, in fact, "honestly thought he was lying." *Id.* at 80, 81.

After being contacted and speaking with Kristi and Zach, the police went to the Kaufman's house, arriving there shortly after midnight on December 18, 2007. *See generally* Vol. II Tr. 6-9, 283-285. There, the police found Martha dead in a bedroom closet, with a gunshot wound to the left side of her head and a .22 caliber pistol in her left hand— Martha was right-handed. *See generally* Vol. I Tr. 67, 137, 139, 140, 141, 144, 145; Vol. II Tr. 15, 109, 125; Vol. III Tr. 53.

The police interviewed and questioned Appellant about when and where he had last seen Martha. In response, Appellant initially told them the same thing he had told his daughter Kristi — that he had dropped Martha at the Wal-Mart in Vienna earlier that afternoon (12:30 – 1:00 p.m.), that she was going to do some shopping, and that afterward she was going to walk over to Kristi's workplace and ride home with her. Vol. II Tr. 11-12, 288-289. The police then advised Appellant that Wal-Mart had excellent surveillance cameras that would reveal whether he actually dropped Martha off at this store. *Id.* at 30-31, 302. Hearing this, Appellant admitted that he had been lying to them and that, in fact, he had not taken Martha to Wal-Mart at all. *Id.* at 31, 302-303. Appellant then proceeded to inform the police that Martha had advised him to tell this "so-called" Wal-Mart story to everyone, including the police. *Id.* at 31, 303. Appellant also admitted to the police that his earlier statements to Susan Evans and others that Martha had cancer and was not going to undergo treatment for the same was untruthful as well. Appellant again indicated that Martha had advised him to tell this "so-called" cancer story to others. Vol. I Tr. 333; Vol. II Tr. 32; Vol. III Tr. 172.

During their investigation, the police found and seized numerous items from the Kaufman's house; these items included, among other things, the diary/journal of Martha, which was found in

a dresser drawer in Martha's bedroom, hidden under some socks.<sup>13</sup> Vol. I Tr. 98, 102; Vol. II Tr. 311, 312. The police also discovered and seized a handgun case containing a piece of electrical cord wrapped up in a yellow gun cloth. *See generally* Vol. II Tr. 70-74, 99. The electrical cord was later tested and found to have material on it consistent with the DNA profile of Martha. *See generally Id.* at 267-272, 277.

On December 18, 2007, an autopsy was performed on Martha, which revealed that she died from a contact gunshot wound<sup>14</sup> to the left side of her head. *See generally* Vol. I Tr. 252-255, 272. The time of death was determined to have occurred in the early p.m. hours of December 17, 2007, sometime between 12:00 p.m. and 4:00 p.m.<sup>15</sup> *Id.* at 270. Finally, toxicology testing revealed that Martha did not have any alcohol or drugs, including Xanax or Paxil,<sup>16</sup> in her system at the time of her death. *Id.* at 256, 257.

Also on December 18, 2007, Appellant was arrested and charged with the first-degree murder of his wife – Martha Kaufman. State's Ex. 2 at 77. On May 16, 2008, the Grand Jury for Wood County likewise indicted Appellant for the first-degree murder of Martha. R. at 2.

Prior to his trial, Appellant moved the Circuit Court ("court") to exclude from evidence the

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<sup>13</sup> Kristi actually found her mother's diary and turned it over to the police. Vol. I Tr. 97, 102; Vol. II Tr. 311, 312.

<sup>14</sup> A contact gunshot wound occurs where, as in this case, the barrel or muzzle of the gun is pressed up against the victim's head. Vol. I Tr. 277.

<sup>15</sup> Originally, the time of death was set at late p.m. However, following the autopsy on December 18, 2007, the Medical Examiner's Office conducted a peer review involving five medical examiners on May 30, 2008, and the time of death was determined to have occurred during the early p.m. hours of December 17, 2007. *Id.* at 269-270, 274-275, 294-295.

<sup>16</sup> Paxil is a antidepressant medication. Vol. I Tr. 257; Vol. II Tr. 160.

diary of Martha , statements that she made to her children – Kristi and Zach, as well as statements that she made to Kristi’s boyfriend, Jimmy Schreckengost, detailing threats and acts of violence that Appellant perpetrated against her prior to her death. Also prior to trial, Appellant sought to suppress the prosecution’s introduction of Rule 404(b) evidence, which, again, involved threats and acts of violence exacted upon Martha by Appellant. *See generally* R. at 164, 179. After numerous in camera hearings,<sup>17</sup> the court, on October 10, 2008, ruled that Martha’s diary, as well as her statements to Kristi, Zach and Jimmy, were admissible. The court also permitted the prosecution to introduce its Rule 404(b) evidence. *See generally* 10/10/2008 Hr’g at 23-30.

Appellant’s trial began on February 18, 2009, and ended on February 27, 2009, with the jury convicting him of first-degree murder without a recommendation of Mercy. Vol. IV Tr. 119, 149; R. at 328, 330. On March 4, 2009, Appellant moved the court to grant him a new trial based, among other things, on his assertion that the jury’s verdict was against the manifest weight of the evidence presented at trial; the court denied this motion. *Id.* at 315-316. On April 27, 2009, the court sentenced Appellant to life in the penitentiary without the possibility of parole. *Id.* at 333. Thereafter, Appellant brought the current appeal.

## II.

### SUMMARY OF ARGUMENT

Martha Kaufman’s written diary and oral statements to her children and others, detailing prior threats and acts of violence exacted upon her by Appellant, are nontestimonial. As such, the court, in admitting the diary and statements, did not violate Appellant’s confrontation rights under the Sixth

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<sup>17</sup> These hearings took place on August 7, 2008, August 29, 2008, September 22, 2008, and October 10, 2008.

Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution.

Despite his contention to the contrary, the court's admission of Martha's diary and statements to her children and others under certain exceptions to the general rule prohibiting hearsay was also proper, as the diary and statements show the nature of Martha and Appellant's relationship, as well as their "state of mind" in the days and weeks leading up to Martha's death. Martha's "state of mind" is an important issue in this case, as Appellant has asserted that she made her diary in contemplation of suicide and her plan that the diary would be used against Appellant when he was prosecuted for her murder. Likewise, Appellant's "state of mind" is also important in this case, as it goes to motive and intent on his part.

For much the same reasons, the court also properly admitted Appellant's prior threats and violent acts under Rule 404(b). Finally, there was more than adequate evidence presented at trial for the jury to convict Appellant of first degree murder.

### III.

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

The State believes that oral argument, under Rules of Appellate Procedure, Rule 19, is necessary in this case for the following reasons:

1. This is a first-degree murder case, resulting in Appellant being convicted and receiving a life sentence without the possibility of parole;
2. Appellant's assignments of error concern the admissibility of hearsay statements and Rule 404(b) evidence, which involved the application of settled law;
3. The Circuit Court has discretion as to the admissibility of evidence and Appellant

claims that it committed an unsustainable exercise of this discretion;

4. Appellant claims that his conviction was based upon insufficient evidence and/or was against the weight of the evidence; and,
5. This case involves narrow issues of law.

See R. App. Proc. 19(a).

Because of the importance and complexity of the issues involved, the State believes that this case is not appropriate for a memorandum decision. Finally, Appellant has requested additional time for oral argument, to which the State will defer to the discretion and wisdom of the Court.<sup>18</sup>

#### IV.

#### ARGUMENT

#### A. **THE CIRCUIT COURT DID NOT ERR WHEN IT DENIED APPELLANT'S MOTION TO EXCLUDE FROM EVIDENCE THE WRITTEN JOURNAL/DIARY OF THE VICTIM, MARTHA KAUFMAN. NOR DID THE CIRCUIT COURT ERR WHEN IT DENIED APPELLANT'S MOTION TO EXCLUDE FROM EVIDENCE STATEMENTS MADE BY THE VICTIM, MARTHA KAUFMAN, TO HER CHILDREN AND OTHERS REGARDING THREATS AND INCIDENTS OF ABUSE BY APPELLANT.**

##### 1. **Standard of Review**

On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.

Syl. pt. 7, *State v. Hager*, 204 W. Va. 28, 511 S.E.2d 139 (1998) (internal quotations and citations

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<sup>18</sup> Please note that by Order, dated February 1, 2011, the Court scheduled this case for oral argument under Rule 20 of the Revised Rules of Appellate Procedure, with the argument to take place on March 30, 2011.

omitted). “The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syl., *State v. Fox*, 207 W. Va. 239, 531 S.E.2d 64 (1998) (internal quotations and citations omitted).

**2. The Statements of Martha Kaufman in Her Diary and to Others Do Not Trigger Application of the Confrontation Clauses in the Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution, as These Statements are Nontestimonial. Thus, it was Proper for the Circuit Court to Admit These Statements into Evidence.**

The Sixth Amendment to the United States Constitution provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]” Article III, Section 14 of the West Virginia Constitution likewise provides, in pertinent part, that “[i]n all . . . [criminal] trials, the accused shall . . . be confronted with the witnesses against him[.]” On appeal, Appellant asserts that the court violated his rights under these two constitutional provisions when it failed to exclude the statements of Martha Kaufman in her diary and to others. *See generally* Appellant’s Brief at 16, 18. In support of this assertion, Appellant argues as follows:

The journal is suspect because there is no indication as to when it was written and an examination of same would show that it may have been written in contemplation of Mrs. Kaufman’s suicide. While not tantamount to a suicide note, the journal talks about her previous suicide attempt and could have been left as a declaration to paint Mr. Kaufman in an unfavorable light to his children and others even though the allegations may have been false. In her anger and disdain for the Petitioner, Mrs. Kaufman could have written this journal in contemplation of her suicide and her hope that Mr. Kaufman would be blamed for her death and prosecuted for murder as is the current case.

Appellant’s Brief at 18-19.

To begin with, this was not suicide – it was cold, calculated first degree murder! Regarding her previous, feeble suicide attempt and any future acts on her part of killing herself, Martha said it best:

Anyone who knows me well, knows how I feel about suicide. I've been the one left behind to pick up the pieces & go on & I would NEVER put my kids through that. I think I was just trying to get the message across to my family that the whole situation with Dave & his girlfriend . . . all this stuff is just too much to handle. So I popped a few Xanax, put the car window down, started the engine & just laid down & went to sleep. I really did not want to die – just wanted/needed all of this to stop before my entire family falls apart. When the kids woke me up in the car & realized what I attempted to do, their reactions made it 100% clear to me that I need to live. I need & want to be to be around for my kids no matter what. Dave's reaction to my attempt was painful to me but it was nothing in comparison to seeing the devastation to my kids that I'd caused, just for my own selfish attempt to get my family's attention. I will NEVER do anything so foolish & selfish again. It's clear that my kids love & need me & my only goal in life now is to ALWAYS put them first – regardless of my own pain. I love them more than anything in this world. They are my "2 perfect works of art[.]"

....

I love them both so much & whatever is in store for me – I want to be around for a long, long time – just to let them know how wonderful they are & to let the world know that these 2 incredible human beings are my children.

....

Well, I'm NOT going to kill myself – if he wants that – he's going to have to do it himself or get someone else to do it. If I die – my blood will be on his hands – not mine.

State's Ex. 2-B at 5-6, 10-11, 17.

With no offense or sarcasm intended, it is absolutely absurd to think that Martha sat down with "pen and pad" and said to herself, "I'm going to 'crawl' into the closet and shoot myself in the head, but before I do, I'm going to write down all of the terrible things that my husband has said and done to me, which is nothing more than a 'pack' of lies, so that after I'm dead this diary will be

found and used against him when he is prosecuted for my murder.” As ridiculous as this sounds, this is exactly what Appellant proposes that Martha did in this case. Equally fantastic, before he was convicted of killing his wife, Appellant maintained that Martha told him that she was going to kill herself and that he needed to be somewhere else when she did so, so as to have an alibi. Now, on appeal, Appellant asserts that Martha killed herself and framed him for murder, by detailing, in her diary, numerous false allegations of mental, emotional and physical abuse on his part.<sup>19</sup>

In arguing that Martha created her diary in contemplation of suicide and that the diary would be used against him in his prosecution for murder, Appellant is essentially asserting that Martha’s diary is a testimonial statement – it is not! The law regarding the admissibility of testimonial versus non-testimonial statements is largely governed by the United States Supreme Court’s decision in *Crawford v. Washington*, 541 U.S. 36 (2004), and this Court’s adoption and interpretation of *Crawford* in *State v. Mechling*, 219 W. Va. 336, 633 S.E.2d 311 (2006).

In *Crawford*, the Court held that “[t]estimonial statements of witnesses absent from trial . . . [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” *Crawford*, 541 U.S. 58 (emphasis added). However, the *Crawford* Court clearly exempted the admission of nontestimonial statements from Confrontation Clause scrutiny altogether: “Where *nontestimonial hearsay* is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law . . . as would an approach that *exempted such statements from Confrontation Clause scrutiny altogether.*” *Crawford*, 541 U.S. 68 (emphasis added).

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<sup>19</sup> Appellant made this same argument before his trial and the court correctly found it to be “farfetched.” 8/07/2008 Hr’g at 84.

“Following suit” with the Court in *Crawford*, this Court, in *Mechling* has ruled that:

Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a *testimonial statement* by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.

Syl. pt. 6, *Mechling, supra* (emphasis added). In interpreting *Crawford*, the *Mechling* Court further stated that “*Crawford* makes clear that *only* ‘*testimonial statements*’ cause the declarant to be a ‘witness’ subject to the constraints of the Confrontation Clause. *Non-testimonial statements* by an unavailable declarant, on the other hand, are not precluded from use by the Confrontation Clause.” *Mechling*, 219 W. Va. 373, 633 S.E.2d 318 (emphasis added).

Courts, including the *Crawford* and *Mechling* Courts, have not provided us with a precise, “hard and fast” definition of the term “testimonial statement.” They have, however, provided some generalized principles to guide us in identifying such statements. For example, in *Crawford*, the Court stated the following, regarding the meaning and/or character of a testimonial statement: “The text of the Confrontation Clause reflects this focus. It *applies to witnesses against the accused* – in other words, those who *bear testimony*. *Testimony*, in turn, is typically [a] *solemn declaration or affirmation made for the purpose of establishing or proving some fact.*” *Crawford*, 541 U.S. 51 (internal quotations and citations omitted) (emphasis added). Regarding the character and/or meaning of a testimonial statement, this Court, in *Mechling*, stated that:

Under the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution*, a *testimonial statement* is, generally, a *statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.*

Syl. pt. 8, *Mechling, supra* (emphasis added).

Additionally, courts, whether at the federal or state level, have not “come up with” an exhaustive, all-inclusive list of testimonial statements, but they have given a number of examples:

Various formulations of . . . [a] core class of testimonial statements exist: *ex parte in court testimony or its functional equivalent* –that is, materials such as *affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.] . . .* Regardless of the precise articulation, some statements qualify under any definition -- for example, *ex parte testimony at a preliminary hearing.*

*Statements taken by police officers in the course of interrogations are also testimonial* under even a narrow standard.

*Crawford*, 541 U.S. 51-52 (internal quotations and citations omitted) (emphasis added). The *Crawford* Court added that “[w]hatever else the term [testimonial] covers, it applies at a minimum to *prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.*” *Crawford*, 541 U.S. 68 (emphasis added).

In *Davis v. Washington*, 547 U.S. 813 (2006), the United States Supreme Court “honed” its earlier finding in *Crawford* that statements made during a police interrogation were testimonial:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Davis*, 547 U.S. 822.

In *Mechling*, this Court “boiled down” the holdings of *Crawford* and *Davis*, regarding the

meaning of testimonial statements, into the following points:

First, a *testimonial statement* is, generally, a *statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial*. Second, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency. And third, a court assessing whether a witness's out-of-court statement is "testimonial" should focus more on the witness's statement, and less upon any interrogator's questions.

*Mechling*, 219 W. Va. 376-377, 633 S.E.2d 321-322 (emphasis added).

Here, despite Appellant's contention to the contrary, the statements made by Martha Kaufman in her diary, regarding threats and acts of violence perpetrated against her by Appellant, are not testimonial and the court correctly so found. The circumstances surrounding the creation of Martha's diary do not even come close to the types of circumstances under which other statements have been found to be testimonial, such as statements made in an affidavit or like legal document, or statements made during a deposition, a confession, a preliminary hearing, a grand jury hearing, a former trial, or a police interrogation. *See Crawford*, 541 U.S. 51-52. Additionally, Martha did not "write up" this diary for the purpose of establishing or proving that Appellant threatened and physically abused her. *See Crawford*, 541 U.S. 51. Furthermore, the circumstances under which Martha made the diary would not lead an objective witness reasonably to believe that the statements contained in her diary would later be used during Appellant's trial. *See Syl. pt. 8, Mechling, supra*.

In making the diary, Martha was doing nothing more than talking to herself and, as the court properly found:

This diary . . . is not only the incidents of domestic violence that are alleged, but routine daily things occurring in Ms. Kaufman's life – discussing football games, her children, her thoughts and feelings, what certain friends and acquaintances are doing and events in her life, from the routine to the very unusual when you get to the incidents surrounding her husband.

10/10/2008 Hr'g at 24. Finding that the diary was non-testimonial, the court also correctly found that "Ms. Kaufman [never] intended this diary to be seen by anyone, that it was a private thing. It was not made in anticipation of any litigation." 10/10/2008 Hr'g at 25. The court's finding on this point is well supported by Martha's own actions. Following her death, Martha's diary was found exactly where she was keeping it –in her bedroom dresser hidden under some socks.

In finding that Martha's diary was reliable, the court noted the following:

I also found Ms. Kaufman's diary very convincing when reading it. And from the totality of the evidence shown, despite Mr. Kaufman's denial, the Court can find no reason why she would fabricate this evidence that, on its face, appears very convincing. And there . . . [is] corroboration of the diary through the state trooper, through the football scores and games, through her children's testimony, through Mr. Schreckengost's testimony.

So this diary was not a work of fiction, but appears to be a periodical rendering of her feelings and things that were occurring in her life.

10/10/2008 Hr'g at 24-25. Although not discussed by the court, Martha's diary is extremely detailed and written in her own "hand," further "lending" to its trustworthiness. *See generally* State's Ex. 2-B; Vol. I Tr. 99, 100, 101; Vol. III Tr. 85-86.

Importantly, numerous courts have found non-testimonial diaries, such as Martha's diary, are admissible. One such case, which was partially relied on by the court in admitting Martha's diary, is *Parle v. Runnels*, 387 F.3d 1030 (9<sup>th</sup> Cir. 2004), wherein the United States Court of Appeals for the Ninth Circuit held that "[t]he *nontestimonial diary of an unavailable declarant* may be admitted into evidence over a Confrontation Clause objection if a close examination of the diary itself and the

circumstances surrounding its creation indicates that the *diary contains particularized guarantees of trustworthiness.*” *Parle*, 387 F.3d 1040 (emphasis added). As noted in *Parle*, other courts have found likewise:

[A]dmission of a *murder victim’s personal notebook* did not violate the Confrontation Clause where the declarant did not create the notebook in anticipation of litigation and did not make self-serving, frivolous, or scornful declarations, and nothing in the record indicated that the statements were made in bad faith or with any incentive to falsify or distort[.]

*Parle*, 387 F.3d 1040-1041 (internal quotations omitted) (emphasis added) (*quoting Taylor v. Hannigan*, 1998 WL 239640 at 7-8 (D. Kan. 1998)).

[A]dmission of a *diary written by the defendant’s deceased wife* did not violate the Confrontation Clause where the declarant wrote an entry every day in her own hand, the entries did not appear to be frivolous, and there was no reason for the declarant to lie to herself or make false, negative statements in her diary[.]

*Parle*, 387 F.3d 1041 (internal quotations omitted) (emphasis added) (*quoting United States v. Sheets*, 125 F.R.D. 172, 177-179 (D. Utah 1989)).

[A]dmission of a *diary against a federal criminal defendant* was not an abuse of discretion under the residual hearsay exception now codified at Federal Rule of Evidence 807; even though the declarant’s attorney had advised the declarant to begin keeping the diary in anticipation of litigation, the *diary contained circumstantial guarantees of trustworthiness*[.]

*Parle*, 387 F.3d 1041 (internal quotations omitted) (emphasis added) (*quoting United States v. Treff*, 924 F.2d 975, 982-983 (10<sup>th</sup> Cir. 1991)).

As with the nontestimonial nature of her diary, “so goes the story” of Martha’s statements to her children and Jimmy Schreckengost. Martha never intended her statements to her children or Mr. Schreckengost to go any further than whoever was listening at the moment. In fact, and as readily admitted by Appellant, she instructed Kristi and Zach to remain silent about Appellant

threatening and physically abusing her. *See generally* Vol. I Tr. 117-118; Vol. III Tr. 68; Appellant's Brief at 3. Importantly, there was absolutely no governmental involvement when the statements were made. "*Crawford* indicates that *governmental involvement* in some fashion in the creation of a formal statement is *necessary to render the statement testimonial* in nature." *In re T.T.*, 892 N.E.2d 1163, 1174 (Ill. App. 1 Dist. 2008) (emphasis added). Also important, at the time that Martha informed Jimmy Schreckengost about Appellant's threats and abuse, she and Jimmy had just met one another and were having a casual conversation outside of her home. *See generally* Vol. III Tr. 4-15. "An accuser who *makes a formal statement to government officers bears testimony* in a sense that a person who *makes a casual remark to an acquaintance does not.*" *Crawford*, 541 U.S. 51 (internal quotations and citations omitted) (emphasis added).

**3. After Correctly Finding That the Statements Made by Martha Kaufman in Her Diary and to Others Were Nontestimonial, the Circuit Court Properly Proceeded to Admit These Statements Under the Hearsay Exceptions Contained in Rules 803(3) and 803(24) of the West Virginia Rules of Evidence.**

"Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules."

Syl. pt. 3, *State v. Woodson*, 222 W. Va. 607, 671 S.E.2d 438 (2008) (quoting Syl. pt. 1, *State v. Maynard*, 183 W. Va. 1, 393 S.E.2d 221 (1990)).

On appeal, Appellant boldly states that "the evidence in question [, Martha's diary and her statements to her children and others,] was not admissible under any exception to the hearsay rules contained in the West Virginia Rules of Evidence." Appellant's Brief at 24. Appellant takes

particular issue with the court's admittance of this evidence under Rule 803(3) of the West Virginia Rules of Evidence – an exception to the general rule, Rule 802, prohibiting hearsay. *See generally* Appellant's Brief at 24-25. As an exception to Rule 802, Rule 803(3) provides as follows:

*A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.*

W. Va. R. Evid. 803(3)(emphasis added). In support of his position that the court incorrectly admitted Martha's diary and statements to her children and Mr. Schreckengost under this Rule, Appellant further asserts that:

[The prosecution was] attempting to prove that the Petitioner committed physical violence upon Martha Kaufman by putting into evidence her statements that he committed such violence as contained in her journal and as related to her children. This is not what is contemplated by the exception to the hearsay rule [Rule 803(3)] and, of course, should be excluded from evidence.

Appellant's Brief at 25.

On the contrary, the prosecution, by seeking to introduce Martha's diary as well as her statements to her children and others, was attempting to show Martha's thoughts and feelings about the events occurring in her life, which were close in time to her death:

“[W]e believe the journal, the diary from Ms. Kaufman is a present sense impression. The very inherent nature of the journal is thinking what has gone on, putting your thoughts on paper as to what has taken place during that time period.”<sup>20</sup>

08/07/2008 Hr'g at 78-79.

At trial, and here on appeal, Appellant made Martha's “state of mind” an issue in this case

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<sup>20</sup> Please note that the prosecution later clarified that it mistakenly used the term “present sense impression,” as found in Rule 803(1), when it was actually referring to the “state of mind” exception found in Rule 803(3). *See generally* R. at 175-176.

by asserting that her diary statements about Appellant's threats and physical abuse were made in contemplation of her committing suicide and her plan that the diary would be used against Appellant when he was prosecuted for murder. Having done so, the diary as well as Martha's statements to her children and others are admissible under Rule 803(3).

*[S]tatements of present state of mind to prove the state of mind of the declarant that is in issue in a case--is admissible to prove such things as motive, intent, reliance, etc., of the declarant. However, the key factor for this type of statement is that the declarant's state of mind is at issue and relevant to the resolution of the case. As a partial guarantee of trustworthiness, the statements introduced must be made under circumstances indicative of sincerity.*

*State v. Phillips*, 194 W. Va. 569, 579, 461 S.E.2d 75, 85 (1995) (footnote omitted) (emphasis added). “[T]he bulk of the statements were properly admitted as evidence of . . . [the victim’s] mental state- *which the defense put into question when it implied she committed suicide* -under the state-of-mind exception.” *Evans v. Luebbers*, 371 F.3d 438, 444 (8<sup>th</sup> Cir. 2004) (citations omitted) (emphasis added).

Appellant's threatening comments and actions, as related by Martha in her diary and her statements to her children and Mr. Schreckengost, are also admissible under Rule 803(3), as they relate to Appellant's "state of mind" or, more to the point, premeditation and intent on his part. "*A threat is a manifestation of the defendant's state of mind as it relates to the issue of premeditation and is therefore an exception to the hearsay rule under W. Va. R. Evid. 803(3).*" Syl. pt. 6, *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995) (emphasis added).

Although not relied upon by the court, Appellant's threatening comments and actions, as talked about by Martha in her diary, as well as her communication of these threats and acts to her children and Mr. Schreckengost, are admissible as nonhearsay under Rule 801(d)(2), which

provides, in pertinent part, that “[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party’s own statement, in either an individual or a representative capacity . . . .” In applying this rule, this Court has ruled, “time and time again,” that admissions and threats, of the kind made by Appellant in this case, are admissible under Rule 801(d)(2). “[A]n admission by a party-opponent is a statement which is not hearsay and thus, is admissible as substantive evidence.” *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W. Va. 498, 505, 625 S.E.2d 260, 267 (2005) (quoting *McCloud v. Salt Rock Water Pub. Serv. Dist.*, 207 W. Va. 453, 456, 533 S.E.2d 679, 682 (2000)). “A threat to commit an act in the future, if made by the declarant/party and offered against the party, is not hearsay under W. Va. R. Evid. 801(d)(2).” Syl. pt. 5, *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995) (emphasis added).

On appeal, Appellant also takes issue with the court’s admission of Martha’s diary and statements to her children and others under Rule 803(24) – another exception to Rule 802’s general prohibition against hearsay. *See generally* Appellant’s Brief at 25. Rule 803(24) provides as follows:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Correctly, the court found that all of the requirements of this Rule were met:

I believe there’s guarantees of trustworthiness in the diary so that it comes in under the hearsay exception of 803(24), the general hearsay exception. It is a statement offered as evidence of a material fact. The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts and the general purposes of these rules and the interest of

justice will be served, best be served by admission of this statement in evidence.

10/10/2008 Hr'g at 25-26.

All of these findings are correct and well supported by the record. Specifically, the diary is very reliable, as it is extremely detailed and in Martha's own handwriting. Adding to its trustworthiness, the court properly found that diary discusses "not only the incidents of domestic violence" on the part of Appellant, but other "routine daily things occurring in Ms. Kaufman's life," such as "football games, her children, her thoughts and feelings, what certain friends and acquaintances are doing and events in her life, from the routine to the very unusual when you get to the incidents surrounding her husband." *Id.* at 24. Speaking to the diary's reliability, the court also correctly found that it could "find no reason why . . . [Martha] would fabricate" the diary, and that the contents of the diary were corroborated through a "state trooper, through the football scores and games, through her children's testimony, [and] through Mr. Schreckengost's testimony." *Id.* at 24, 25.

There is also no doubt that the diary and Martha's statements to her children and others was offered as evidence of material facts, such as whether she committed suicide, the relationship between Appellant and herself, which culminated in her being murdered, as well as Appellant's motive and intent for carrying out the same. Martha's diary and statements were also more probative on these points than any other evidence that the prosecution could have procured elsewhere. Simply put, because she was dead and there were no witnesses to her death, her diary and statements to others was basically all that remained for the prosecution to use to "prove up" these material facts. Because of this, the general purposes of the rules of evidence as well as the interest of justice were best served by the court's admission of Martha's diary and statements to her children and others.

In ruling on the admissibility of Martha's oral statements to her children and Jimmy Schreckengost, the court found as follows:

I'm not sure if I put this on the record, but I intended this be part of my ruling on the statements by the children and to Mr. Schreckengost from Ms. Kaufman, that they would come in under the West Virginia case of *State vs. Sutphin*. *State vs. Sutphin*, as far as the hearsay issue, they would come in under *State vs. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402, and those are statements made by the decedent, Mrs. Kaufman, to others.

Obviously, then, Ms. Kaufman's not available for cross-examination. The people to whom the statements were made, the two children, as well as Mr. Schreckengost, are available for cross-examination. In fact, [they] have been already vigorously cross-examined by Mr. Cosenza at the in-camera hearing.

10/10/2008 Hr'g at 41.

On appeal, Appellant essentially argues that the court committed error in relying on *Sutphin*, as *Sutphin* dealt with the admissibility of a murder victim's statements as "excited utterances" under Rule 803(2). Appellant further argues that Martha's oral statements to her children and Mr. Schreckengost were not "excited utterances" under this Rule, as she was not reacting under the stress or excitement of the events – Appellant threatening her with a gun and, on another occasion, strangling her with an electrical cord – when she made the statements to her children and Mr. Schreckengost. *See generally* Appellant's Brief at 25-26. First, the State agrees that Martha's statements to her children and Mr. Schreckengost were not excited utterances. However, the State disagrees that the court, in relying on *Sutphin*, attempted to "pass off" Martha's oral statements as "excited utterances." In fact, nowhere in its ruling does the court even remotely indicate that these statements were admissible as "excited utterances." The court's reliance on *Sutphin* was based on this Court's finding in *Sutphin* that a murder victim's statements that the defendant threatened her are admissible under Rule 803(3) – "*A threat is a manifestation of the defendant's state of mind as*

*it relates to the issue of premeditation and is therefore an exception to the hearsay rule under W. Va. R. Evid. 803(3).” Syl. pt. 6, State v. Sutphin, supra (emphasis added).*

**B. THE CIRCUIT COURT DID NOT ERR BY ADMITTING ACTS OF VIOLENCE BY APPELLANT AGAINST THE VICTIM, MARTHA KAUFMAN, PURSUANT TO WEST VIRGINIA RULES OF EVIDENCE 404(b).**

**1. Standard of Review**

The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the “other acts” evidence is more probative than prejudicial under Rule 403.

*State v. Mongold*, 220 W. Va. 259, 264, 647 S.E.2d 539, 544 (2007) (citation omitted).

This Court reviews a lower court's determination regarding the introduction of Rule 404(b) other crimes evidence under an abuse of discretion standard. We have emphasized that a circuit court abuses its discretion in admitting Rule 404(b) evidence only where the court acts in an “arbitrary and irrational” manner.

*Hager*, 204 W. Va. 36, 511 S.E.2d 147 (citation omitted). “Rule 404(b) is an inclusive rule through which all relevant evidence of other crimes or acts is admitted unless the sole purpose of the evidence is to demonstrate criminal disposition.” *Hager*, 204 W. Va. 37, 511 S.E.2d 148 (citing *State v. Edward Charles L.*, 183 W. Va. 641, 647, 398 S.E.2d 123, 129 (1990)). “In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence . . . maximizing its probative value and minimizing its prejudicial effect.” *State v. Willett*, 223 W. Va. 394, \_\_\_, 674 S.E.2d 602, 605 (2009) (citation omitted).

**2. All of the 404(b) Requirements for Admission of Appellant's Prior Violent Acts Towards Martha Kaufman Have Been Met in This Case, Including a Preponderance of the Evidence That These Acts Occurred and That Appellant Committed Them, the Acts Are Relevant to Issues in the Case, the Probative Value of Admitting the Acts Is Not Substantially Outweighed by Their Prejudicial Effect, and Limiting Instructions Were Given at Numerous Points in Appellant's Trial. Thus, the Circuit Court's Admission of These Acts Was Proper.**

On appeal, Appellant asserts that the court, in violation of Rule 404(b) of the West Virginia Rules of Evidence, incorrectly admitted evidence of Appellant's previous violent acts towards Martha Kaufman. *See generally* Appellant's Brief at 1, 11. Rule 404(b) provides, in relevant part, as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be *admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident . . .*

W. Va. R. Evid. 404(b) (emphasis added). In order for evidence of prior bad acts, such as the violent actions carried out by Appellant in this case, the following requirements must be met:

"Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general

charge to the jury at the conclusion of the evidence.”

Syl. pt. 3, *State v. Lively*, 226 W. Va. 81, 697 S.E.2d 117 (2010) (quoting Syl. Pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994)).

All of these requirements were satisfied by the court in this case. First, the court conducted numerous in camera hearings on the admissibility of Appellant’s prior acts of violence towards Martha. These hearings took place on August 7, 2008, August 29, 2008, September 22, 2008 and October 10, 2008. Furthermore, the court correctly found, by a preponderance of the evidence, that these violent acts did occur and were committed by Appellant:

I think the Court at this point can determine and be satisfied that there is a preponderance of evidence that these things occurred. Again, I relate back to the diary itself, which I believe was very convincing if you read that as a whole and take into account the entire diary, plus there is evidence from the children to corroborate what was in the diary. I don’t believe there’s any evidence to show that the declarant, Ms. Kaufman, had reason to fabricate any evidence. It appears that her intent was that the diary or the incidents would never be made public. They were certainly not made in anticipation of litigation. So I believe her testimony is convincing and the Court does not believe she had a motive to lie or fabricate this evidence.

10/10/2008 Hr’g at 27-28.

Turning to the relevancy requirements of Rules 401 and 402, this Court, in its decisions, has announced what appears to be a low threshold for satisfying these two rules.<sup>21</sup> “To satisfy the relevancy requirement under Rule 401 of the West Virginia Rules of Evidence, the offered *evidence merely needs to make a fact of consequence more or less probable than it would be without the evidence.*” *State v. Sugg*, 193 W. Va. 388, 404, 456 S.E.2d 469, 485 (1995) (emphasis added) (citing *State v. Derr*, 192 W. Va. 165, 178, 451 S.E.2d 731, 744 (1994)).

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<sup>21</sup> As the Court is well aware, Rule 401 defines relevant evidence and Rule 402 allows for the admission of relevant evidence, as well as prohibiting the admission of irrelevant evidence.

In addressing the relevancy requirements of Rules 401 and 402, as these rules relate to Appellant's prior violent acts, the court found as follows:

It is . . . relevant under Rules . . . [401] and 402 because it shows the history of the relationship . . . [in] the months immediately before Ms. Kaufman's death. It shows her relationship with the Defendant. So it would go to intent and motive on the part of the Defendant. It is also particularly relevant in this case since there is going to be an issue as to whether Ms. Kaufman's death was caused by homicide or was suicide. The Defendant has raised the possibility of suicide as opposed to homicide, so I think it particularly becomes relevant to prove not the cause of death, but the manner of death.

....

As to the 404(b) evidence, as stated in the notice,<sup>[22]</sup> I think some of the evidence as to threats against Mrs. Kaufman are not really 404(b), because they show what was occurring, a history of alleged domestic violence, that this was building up to some catastrophic conclusion. So it is evidence in and of itself of motive and intent which would come in independently of 404(b), but in the interest of caution, I will also apply the 404(b) analysis especially to the incident regarding the extension cord around the neck and the threat with the gun.

10/10/2008 Hr'g at 26.

Simply stated, the court's relevancy findings are consistent with the law. "*As to the relevancy of other violent acts between a defendant and a deceased, courts have generally permitted such evidence to show ill will or hostility as bearing upon intent, malice and motive for the homicide.*" *Hager*, 204 W. Va. 36, 511 S.E.2d 147 (emphasis added) (quoting *State v. Smith*, 178 W. Va. 104, 108 n.2, 358 S.E.2d 188, 192 n.2 (1987)). "[E]vidence of prior bad acts, threats, against the victim [is admissible] to prove intent[.]" *State v. LaRock*, 196 W. Va. 294, 311, 470 S.E.2d 613, 630 (1996) (emphasis added) (citing *State v. Berry*, 176 W. Va. 291, 342 S.E.2d 259 (1986)). "[T]he

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<sup>22</sup> The court's reference to "the notice" refers to the prosecution's two notices of its intention to use 404(b) evidence, which clearly indicate that the prosecution's purpose for introducing the prior threats and violent acts evidence was to show motive and intent on the part of Appellant. See generally R. at 168-169, 217-218.

*prior violence* between the defendant and his son was *relevant to show the nature of their relationship.*” *LaRock*, 196 W. Va. 311, 470 S.E.2d 630 (emphasis added) (citing *State v. Smith*, 178 W. Va. at 108 n.2, 358 S.E.2d at 192 n.2 (1987)). “[E]vidence of other crimes [is admissible] in order to complete the story or to show the context of the crime.” *Hager*, 204 W. Va. 37, 511 S.E.2d 148 (internal quotations and citations omitted) (emphasis added).

Moving to Rule 403<sup>23</sup> and the issue of whether the probative value of Appellant’s prior threats and violent acts are substantially outweighed by their prejudicial effect, the court enjoys broad discretion in this area and its findings on this point are not reversible unless it clearly abused its discretion. “As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court’s discretion will not be overturned absent a showing of clear abuse.” Syl. pt. 4, *State v. Winebarger*, 217 W. Va. 117, 617 S.E.2d 467 (2005) (quoting Syl. pt. 10, in part, *State v. Derr*, *supra*). “The balancing of probative value against unfair prejudice is weighed in favor of admissibility and rulings thereon are reviewed only for an abuse of discretion.” *LaRock*, 196 W. Va. 312, 470 S.E.2d 631 (citations omitted). “[A]n appellate court should find an abuse of discretion [in Rule 403 rulings] only when the trial court acted ‘arbitrary or irrationally.’” *State v. Knuckles*, 196 W. Va. 416, 473 S.E.2d 131, 139 (1996) (citing *State v. McGinnis*, 193 W. Va. 159, 455 S.E.2d 528).<sup>24</sup>

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<sup>23</sup> Again, as this Court is well aware, Rule 403 provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

<sup>24</sup> Furthermore, “[i]t is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not

Furthermore, as this Court has found,

*in order to be probative, [the] evidence must be “relevant” under Rule 401, that is, it must tend to make an issue in the case more or less likely than would be so without the evidence. Other factors that bear on the probative value are the importance of the issue and the force of the evidence.*

*State v. Guthrie*, 194 W. Va. 657, 681, 461 S.E.2d 163, 187 (1995) (citations omitted) (emphasis added). Additionally, “[u]nfair prejudice does not mean damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” *LaRock*, 196 W. Va. 312, 470 S.E.2d 631 (citations omitted) (emphasis added). Stated in a different manner, evidence causing unfair prejudice relates to evidence tending “to lead the jury, often for emotional reasons, to desire to convict a defendant for reasons other than the defendant’s guilt.” *Guthrie*, 194 W. Va. 683, 461 S.E.2d 189 (emphasis added).

Regarding the balancing test under Rule 403, the court made a thorough, legally and factually correct ruling, which follows:

[A]pplying the Rule 403 test, the balancing test, I believe this evidence is highly relevant. It is prejudicial, but I don’t think unfairly prejudicial, because it shows the relationship of the parties, and actually the evidence, I guess, could cut both ways. There is some evidence that would be favorable to the Defendant and some that would be unfavorable. But there is a substantial prejudicial impact; however, I think it’s fair in this case to show the entire story to show what the relationship was and what was occurring in the months immediately leading to Ms. Kaufman’s death. Therefore, I think it is highly probative and so that the probative value outweighs the prejudicial effect.

....

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substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction.” Syl. pt. 4, *Lively*, *supra* (quoting Syl. pt. 3, *LaRock*, *supra*).

[A]pplying the balancing test, again, I've already indicated my analysis there when I talk about the diary evidence, that it's relevant under Rule[s] 401, 402, and the balancing test under Rule 403 would be the same as the diary evidence, that it is prejudicial, but not unfairly prejudicial, and it is very probative to show the relationship of Mr. and Mrs. Kaufman in the days leading to her death and would go to the issue, to the manner of her death. Would also show intent and motive on the part of the Defendant. So that is admissible evidence in that regard.

10/10/2008 Hr'g at 26-27, 29.

Finally, as required, the court gave the jury a limiting instruction on the admissibility of Appellant's prior threats and acts of violence, which consisted of the court telling them that this evidence could only be used for the limited purpose of showing motive and intent on the part of Appellant, but could not be used directly for determining his guilt. The court repeated this limiting instruction throughout the trial, as well as during its charge to the jury. *See generally* Vol. I Tr. 76, 83; Vol. III Tr. 16, 68-69, 72-73; Vol. IV Tr. 19-20.

**C. THE CIRCUIT COURT DID NOT ERR BY DENYING APPELLANT'S MOTION FOR A NEW TRIAL ON THE GROUNDS THAT THE VERDICT OF GUILTY BY THE JURY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.**

**1. Standard of Review**

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.

Syl. pt. 1, *Guthrie, supra*.

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 guilt 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, in part, *Guthrie, supra*. “As we have cautioned before, appellate review is not a device for this Court to replace a jury's finding with our own conclusion. On review, we will not weigh evidence or determine credibility. Credibility determinations are for a jury and not an appellate court.” *Guthrie*, 194 W. Va. 669, 461 S.E.2d 175 (footnote omitted).

**2. Based on the Evidence, As Presented to It at Trial, the Jury Correctly Convicted Appellant of First Degree Murder.**

On appeal, Appellant asserts that, based upon the facts as “spelled out” in his Brief, the jury did not have sufficient evidence to convict him of killing his wife Martha. *See generally* Appellant’s Brief at 27. If one relied solely on the facts of his Brief, perhaps Appellant would be right. However, this jury heard much more evidence than Appellant includes in his Brief. In short, and at the risk of being too blunt, the jury heard evidence showing that Appellant wanted Martha dead, the life insurance money in his pocket, and “down the road” with his new girlfriend! Based on this and much more, the jury correctly convicted Appellant of first degree murder.

V.

CONCLUSION

Appellant's conviction should be affirmed.

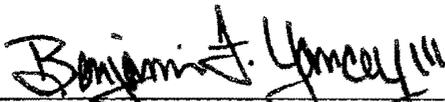
Respectfully submitted,

STATE OF WEST VIRGINIA,

Appellee,

By counsel

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35691

STATE OF WEST VIRGINIA,

*Appellee,*

v.

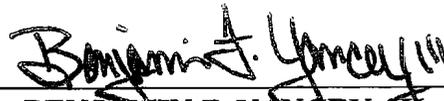
DAVID WAYNE KAUFMAN,

*Appellant.*

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing **BRIEF OF APPELLEE STATE OF WEST VIRGINIA** was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 22nd day of February, 2011, addressed as follows:

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