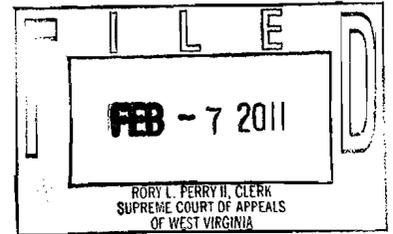

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 101179



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

RHONDA KAY STEWART,

*Defendant Below,
Petitioner.*

RESPONSE TO PETITION FOR APPEAL

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RESPONSE TO PETITION FOR APPEAL

**A. RESPONDENT STATE OF WEST VIRGINIA'S "STATEMENT OF CASE"
AND "STATEMENT OF FACTS."**

In June of 2009, Rhonda Stewart, age 54, (hereinafter "the Petitioner" or "Petitioner"), and her husband Sammy Stewart, age 56, (hereinafter "her husband" or "the Petitioner's husband"), had been married for about 38 years; however, they had been separated and living apart for more than two years, although his business income supported both of them. (Trial Tr., 522-28, Dec.16, 2009.) The Petitioner lived in their jointly-owned home; her husband lived in a different location in a camper. *Id.* Also, in June of 2009, the Petitioner's husband was hospitalized for five or six days due to pancreatitis; his treatment involved being placed into an artificial coma and on "life support" with a breathing tube. (*Id.* at 364-66, 533.) While her husband was in the hospital's intensive care unit and unconscious, the Petitioner visited him on several occasions. (*Id.* at 532-36.)

On June 13, 2009, the Petitioner's husband was awakened from his coma as part of his treatment and his breathing tube was removed; when the Petitioner visited the hospital on that day, her husband, although groggy and confused, told the Petitioner that he did not wish to see her; and, in a pleasant fashion, he told the Petitioner to leave the hospital (as noted by a nurse in his chart.) (*Id.* at 368-69.) The Petitioner drove home and got a handgun, concealed it in her purse, drove back to the hospital, woke her husband up, and shot him at close range in the head, literally blowing his brains out. (*Id.* at 445, 573-78.) The Petitioner claimed, when she testified as a witness in her own defense at her trial, that her husband's death was an accident, and that she had been intending to wake her husband so that he could see the Petitioner kill herself; but that when her husband woke up, he "nudged" her elbow, causing the gun to accidentally discharge. (*Id.* at 543.) The Petitioner's testimony about the incident was confusing and confused, even somewhat bizarre. (*See, e.g.*, Trial Tr., 566-84.) An eyewitness, nurse Tara Webb, who was five to ten feet away and saw the entire shooting, contradicted the Petitioner's version of events (which the Petitioner told for the first time at trial). (Trial Tr., 411, 426-27, 642.) Ms. Webb testified that the Petitioner simply stood by the bed and pointed the gun at her husband's head and shot her husband in the head, and that her husband did not reach up in any fashion. (*Id.*)

The Petitioner's trial began on December 16, 2009. Before the trial, the prosecution sought a pretrial ruling via a motion *in limine* to exclude allegations that while the parties had lived together, the Petitioner had at times been the victim of domestic abuse by her husband, on the grounds that such evidence was more prejudicial than probative. (R. at 107-12.) The trial judge **denied** the prosecution's motion with respect to the Petitioner's testimony, but preliminarily and tentatively granted the motion with respect to the Petitioner's expert psychologist witness and the

Petitioner's relatives, stating that the judge would revisit the ruling upon request at trial after he saw how the evidence was going. (Trial Tr., 72, 81-82, 85-86, 520.)

The Petitioner took the stand as a witness in her own defense; and despite having *carte blanche* to do so, she did not testify to a single instance of past abuse. (*Id.* at 521-84.) Moreover, during the trial, the Petitioner's trial counsel never asked the judge to revisit the judge's pretrial rulings with respect to other witnesses, and her counsel never placed into the record any evidence regarding alleged past abuse from the other witnesses--nor did he place into the record a copy of a "report" that her expert had prepared dealing with the Petitioner's mental state. The judge also refused to give the Petitioner's requested instruction on the affirmative defense of accident, finding that there was no appreciable evidence that would support the instruction. (R. at 159, Def.'s Ex. 14; Trial Tr., 653-54.) In closing arguments, the prosecutor responded to arguments from the Petitioner's trial counsel that misstated the evidence. (Trial Tr., 738-39, 747.) During the jury's deliberations, the jury sent the judge a note asking if a period of a few seconds could constitute deliberation; without objection from the Petitioner's trial counsel, the judge told the jury to rely on the instructions that they had already received. (R. at 161.) The jury convicted the Petitioner of first degree murder with a recommendation of mercy; and the trial judge denied motions for judgment of acquittal and for a new trial. (R. at 171.)

B. RESPONDENT STATE OF WEST VIRGINIA'S RESPONSE TO THE PETITION FOR APPEAL'S "PROCEEDINGS AND RULINGS BELOW" AND "STATEMENT OF FACTS" SECTIONS.

The central allegation and claim in the petition for appeal is that the West Virginia Supreme Court of Appeals, (hereinafter "this Court"), should reverse the Kanawha County Circuit Court jury's verdict convicting the Petitioner of first degree murder--because the judge who presided over

the Petitioner's trial, (hereinafter "the trial judge" or "the judge"), **"prevented defense counsel from presenting any lay or expert witness testimony [that] the petitioner is a battered woman and a victim of domestic violence by her husband."** (Petition for Appeal, 1, "Proceedings and Rulings Below," emphasis added.)

This central allegation and claim in the petition for appeal is false. The truth is that the trial judge explicitly permitted the Petitioner, when she took the stand to testify *as a witness* in her own defense, to testify *without limitation* that she was a "battered woman," and to testify about *any and all* alleged past instances of "domestic violence by her husband." *Id.* See discussion at 5-8 *infra*. However, when the Petitioner took the stand to testify as a witness, the Petitioner's trial counsel did not ask the Petitioner one question about any alleged instances of domestic violence or abuse. *Id.*

The Petitioner's appeal fails, in almost 50 pages of argument, to even mention that when the Petitioner took the stand as a witness in her own defense, she was given *carte blanche* to testify about alleged past instances of domestic violence, but did not do so--cannot be reasonably seen as a merely negligent minor factual omission. Rather, this omission must be seen as deliberate conduct that closely approaches--and possibly reaches--the level of violating appellate counsel's duty of candor toward a tribunal.¹ Additionally, this substantially misleading omission is of a piece with

¹See *Gum v. Dudley*, 202 W. Va. 477, 505 S.E.2d 391 (1997):

"The duty of candor to the tribunal is a widely recognized one within the legal profession [;]" "[a]ll attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice[;]" . . . "[W]here there is danger that the tribunal will be misled, a litigating lawyer must forsake his client's immediate and narrow interests in favor of the interests of the administration of justice itself[;]" "The [judicial] system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end." . . .¹⁴

(continued...)

a number of other substantially misleading omissions and misstatements in the petition for appeal. As an initial matter, this response will correct a number of these omissions and misstatements, and show what the record actually reveals.

1. **Omissions and Misstatements About the Purportedly Erroneous Exclusion of Evidence Relating to Alleged Past Instances of Domestic Abuse.**

The Petitioner fails to advise this Court that: (a) as noted, that she was permitted to testify without limitation as to alleged past instances of abuse; and that her trial counsel did not ask her a single question about such alleged instances; (b) the trial judge's rulings with respect to the testimony of the Petitioner's psychologist and relatives with respect to past alleged instances of abuse were expressly preliminary and tentative, and subject to reconsideration during the trial; however, the Petitioner's trial counsel did not ask the trial judge to reconsider any of his rulings during trial; (c) the Petitioner's trial counsel did not place into the record any evidence indicating the nature of any alleged past instances of abuse, or how such alleged instances purportedly contributed to the Petitioner's killing her husband; (d) the Petitioner's expert psychologist apparently did not have the opinion that the Petitioner suffered from any form of battered women's syndrome at the time she killed her husband; and he also expressly stated that he could not evaluate the credibility of any allegations of past abuse.

¹(...continued)

¹⁴“There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation[;]” . . . “Selective omission of relevant information, therefore, ‘exceeds the bounds of zealous advocacy and is wholly inappropriate.’”

Id. at 485-86 & n.14, 505 S.E.2d at 399-400 & n.14 (alternation in original) (footnote omitted) (citation omitted).

To begin with the most egregiously misleading omission in the petition: far from “prevent[ing]” defense counsel from presenting any . . . testimony that the petitioner [was] a victim of domestic violence by her husband,” (Petition for Appeal, 1), the trial judge explicitly permitted the Petitioner to present such testimony: “THE COURT: . . . your defendant can testify [to] *anything she wants* about the past.” (Trial Tr., 85, emphasis added.) The judge reiterated this ruling in a colloquy with counsel just before the Petitioner took the stand:

DEFENSE COUNSEL:	I do want the record to reflect that my client has a right to tell her story.
THE COURT:	Absolutely. No one disagrees with that.
DEFENSE COUNSEL:	With the facts that she might have been abused by him.
THE COURT:	Go on, we've been through that. Just tell her story, that's her day in court.
DEFENSE COUNSEL:	Thank you, Judge, that's what I was hoping you would say.
THE COURT:	Her day in court.
DEFENSE COUNSEL:	I one hundred percent agree. They're trying to limit what she can say.
PROSECUTION:	No we're not.
THE COURT:	No.

(Trial Tr., 520.)

However, when the Petitioner took the stand to testify in her own defense, her trial counsel never asked the Petitioner a single question about any alleged past instances of abuse. (Trial Tr., 521-84.) As noted, the Petitioner’s appeal fails to mention this fact as well.

The Petitioner’s failure to mention these facts must be seen in light of the petition’s core argument that “[e]vidence of *battering and its effects* would have provided a context for [the Petitioner’s] actions, was relevant to explain her actions and behavior, and *was essential* to rebut the prosecutor’s argument regarding malice, premeditation, and intent to kill.” (Petition for Appeal, 19.) If such purported evidence of “battering and its effects” was “essential” to the Petitioner’s defense,

then the Petitioner clearly had a duty to tell this Court that she--the one witness who could have provided such "essential" evidence (if it existed) and who chose to take the stand as a witness in her own defense--was given *carte blanche* to testify in this regard--but she declined to provide any such testimony. This response will discuss further in the Argument section, pp. 16-30 *infra*, why the Petitioner's failure to present or preserve any evidence of alleged domestic violence weighs against the merits of her claims on appeal. But at this juncture, it is noteworthy that the Petitioner's statements about the proceedings, ruling, and facts of the instant are so misleading as to potentially violate the duty of candor toward a tribunal. *See note 1 supra*.

Ignoring the Petitioner's deliberate choice to keep purported evidence of alleged past abuse from the jury, the Petitioner instead rests her argument in this regard on a substantially inaccurate characterization of the trial judge's preliminary rulings regarding a pretrial prosecution *motion in limine*, (R. at 107-12), relating to domestic abuse allegations against the victim in the instant case. These rulings applied to the testimony--not of the Petitioner--but of the Petitioner's expert psychologist witness, Dr. David Clayman (hereinafter "the Petitioner's psychologist") and the Petitioner's sister and daughter. Notably, the Petitioner fails to disclose to this Court that the trial judge's pretrial rulings with respect to these witnesses were expressly preliminary and tentative in nature:

THE COURT:	. . . We will hear the facts. The State's going to put them on. At the end of that, at the end of the State's case in chief I always reserve the right to revisit these rulings. Absolutely.
DEFENSE COUNSEL:	I also after I put on my case, have the Court to make -- address that ruling.
THE COURT:	That's what I invited [--] at anytime I can revisit the ruling.
. . . .	

DEFENSE COUNSEL: I just want to make sure, Judge, you are saying at this time you're not going to permit the ruling [sic – the evidence from the petitioner's expert Dr. Clayman relating to alleged past instances of abuse by the decedent]. But you are going to permit him to sit in on the trial. And you are not precluding me from trying to address that later on after the Court has heard the testimony. Is that correct, sir?

THE COURT: After the Court heard what?

MR. MITCHELL: Heard the evidence.

THE COURT: Yeah. But at this time I'm precluding it. . . .

. . . .

THE COURT: I continually say I [will] revisit that because I haven't heard the facts of the case.

(Trial Tr., 72, 81-82, 85.)

The Petitioner also fails to disclose to this Court that her trial counsel did not ask the judge to revisit or reconsider any of the judge's pretrial rulings during trial, either before or during the witnesses' testimony. The Petitioner erroneously paints a picture of adverse evidentiary rulings that permanently crippled her case at trial--when, in fact the her trial counsel had an ample and expressly invited opportunity to ask the judge to revisit the rulings, but chose not to do so. As shown in the argument section of this response, pp. 16-21 *infra*, the result of this choice is that any assumed error in the rulings was not properly preserved for appellate purposes.

The Petitioner also mis-characterizes not just the finality, but also the scope of and grounds for the preliminary rulings themselves. On this point, the Petitioner notably fails to tell this Court that the her trial counsel conducted the trial in such a fashion that there is not a single document or piece of testimony in the record that contains the substance of any evidence that the trial judge purportedly erroneously excluded. Thus, the Petitioner's expert psychologist apparently created some sort of written report, (*see, e.g.*, Trial Tr., 87), but her trial counsel never offered the report into

the record, either as evidence or for vouching purposes. And no affidavits or *in camera* testimony were ever presented from the Petitioner's relatives.

Instead of candidly admitting that the record does not contain *any* actual evidence of past instances of abuse--whether or not such evidence was allowed to go before to the jury--the petition for appeal cobbles together a claim that the trial judge erroneously suppressed such "evidence" from citations to a few remarks by counsel or the judge (*see, e.g.*, Petition for Appeal, 12, *citing* to remarks of trial counsel.) In fact, the nonexistent record of any instances of alleged abuse in the instant case--whether presented to the jury or not--is such a gaping hole that the petition for appeal impermissibly directs this Court to a "Presentence Report," (Petition for Appeal, 9 n.1)--that is also not in the record before this Court. By asking this Court to consider purported post-trial hearsay that is nowhere to be found in the record, the petition for appeal

would have this Court deviate from its long established standard and permit the averments in [petitioner's] brief to be accepted as accurately depicting what occurred. "Lacking this documentation, counsel's [allegations] amounted to nothing more than an attorney's argument lacking evidentiary support". *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 707, 474 S.E.2d 872, 887 (1996). "[S]elf-serving assertions without factual support in the record will not [suffice]". *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61 n.14, 459 S.E.2d 329, 338 n.14 (1995).

Coleman v. Sopher, 201 W. Va. 588, 616, 499 S.E.2d 592, 612 (1997) (McHugh, J. concurring).

This Court should decline the Petitioner's invitation to accept the "averments" in the Petitioner's brief as any sort of record upon which this Court can render a decision in favor of the Petitioner. And as also shown in the argument section of this response, pp. 20-21 *infra*, the failure of the Petitioner's trial counsel to see that any purportedly excluded evidence of abuse was placed into the record for appellate review means that any assumed error in excluding such evidence was not properly preserved for appellate purposes.

In the absence of any such evidence in the record, the petition for appeal apparently feels free to mislead this Court about what such evidence would supposedly have been. Thus, the petition repeatedly suggests that the Petitioner's expert psychologist witness, Dr. David Clayman, would have testified in some fashion that the petitioner was a "battered woman" at the time she shot her husband. (Petition for Appeal, 12.) The record--although close to nonexistent on this issue, due to petitioner's trial counsel's conduct of the trial--is more equivocal:

THE COURT: There is no expert that testified to that there is battered spouse syndrome. There is no expert that testified to that. We are at 11:30 on the day of trial.
DEFENSE COUNSEL: May I bring Dr. Clayman in, please?
THE COURT: He can't come in here and make up something. He can't come in here and say now I have seen it. The evidence is frozen. He had an opportunity to do all of this before today.

(Trial Tr., 87, Dec. 16, 2009.)

THE COURT: . . . where I am having trouble, is finding out what relevance Dr. Clayman has to this case and how he can be relevant if he cannot give a diagnosis of any kind.
DEFENSE COUNSEL: I believe the battered spouse syndrome everybody talks about, yeah, I have no intention of that from him at all.

(*Id.* at 606.)

Additionally, the Petitioner's psychologist testified that he could not vouch for the credibility of any of the allegations by the Petitioner about past abuse (from who knows when?) that the Petitioner may have reported to him:

DR. CLAYMAN: . . . I am not a finder of fact, not an investigator. I can't go back in a time machine and determine whether she was there. It really rest on the jury['s] shoulder, if they believe that she is -- the witnesses in this, Mrs. Stewart, are credible. *** But

as far as my coming in here without my having been there, I can only allow the jury to make that decision.

(Trial Tr., 615, 627.)

The trial judge did allow the Petitioner's psychologist to testify about his (qualified) opinion that the Petitioner was depressed and suicidal on the day that she shot her husband:

DR. CLAYMAN: And what I wrote in my letter to you [petitioner's counsel], in my report to you, was that I was not comfortable making a firm conclusion with regard to her suicidality.

....
PROSECUTOR: You can't say beyond a reasonable degree of scientific certainty that she [was] suicidal?

DR. CLAYMAN: I don't think anybody can.

(Trial Tr., 614-15, 628.)

2. Misstatements and Omissions About the Purported "Accidental Shooting" and "Suicide Note."

The Petitioner also fails to follow a cardinal rule governing the appellate review of jury verdicts--that when there was contradictory evidence at trial and/or where credibility is a key issue, an appellate court should ordinarily view the "facts" of the case as being those reasonable inferences from the evidence that are consistent with the jury's verdict. *See, e.g., State v. Bull*, 204 W. Va. 255, 258 n.1, 512 S.E. 2d 177, 180 n.1 (1998) ("... in light of the jury's guilty verdict, we view factual conflicts in the evidence as having been resolved by the jury in a fashion consistent with the jury's verdict."). *See also State v. Atkins*, 163 W. Va. 502, 515, 261 S.E.2d 55, 62-63 (1980) ("... the jury's verdict of guilty is taken to have resolved factual conflicts in favor of the State"); *State v. Kirk N.*, 214 W. Va. 730, 735, 591 S.E.2d 288, 293 (2003) ("We set forth in a footnote a summary statement of facts taken from the evidence at trial, assuming that the jury believed those

pieces of evidence consistent with their verdict.”). Disregarding this rule, the Petitioner repeatedly states her version of events--even when it is inconsistent with the jury’s verdict--to be a “fact.”

For example, the petition states as a “fact” that the Petitioner’s husband, while lying in bed, “pulled, pushed, or moved [the Petitioner’s elbow] and the gun accidentally went off.” (Petition for Appeal, 6.) However, although the jury heard the Petitioner’s somewhat confused testimony about this purported “fact,” (Trial Tr., 568-83), the jury also heard the unequivocal and directly contradictory testimony of hospital nurse Tara Webb, who stood five to ten feet away from the victim’s bed, and was an eyewitness to the shooting. (Trial Tr., 407-29.) Ms. Webb told the jury:

TARA WEBB: When I looked up, when the monitor was ringing off, she [the petitioner] was standing there with a gun to Sam[‘s] head.

PROSECUTOR: . . . you actually saw her shoot him?

TARA WEBB: Yes. . . . she was standing over top of him to the right with a gun pointed to his head.

....
PROSECUTOR: . . . There’s no question in your mind that you saw this woman Rhonda Kay Stewart?

TARA WEBB: Yes.

PROSECUTOR: With a gun in her hand?

TARA WEBB: Yes.

PROSECUTOR: Standing over the victim?

TARA WEBB: Yes.

PROSECUTOR: Who was defenseless?

TARA WEBB: Yes.

PROSECUTOR: And shoot him in the head?

....
PROSECUTOR: . . . you were five or ten feet away when you saw Rhonda Stewart?

TARA WEBB: Yes.

....
PROSECUTOR: Did you see Sammy Stewart reach his hand up in any fashion as she had that gun pointed at his head?

TARA WEBB: No.

(Trial Tr., 411, 426-27, 642.)

Moreover, the jury heard evidence that the gun that the Petitioner used had a substantial “trigger pull” that would make an accidental discharge unlikely; and the jury saw an actual demonstration of the force that was required to pull the trigger and fire the gun. (Trial Tr., 639-40.) The jury even saw the eyewitness Tara Webb re-enact the shooting with Petitioner’s trial counsel. (Tr. 421-22.) The jury was able to evaluate the credibility of both the Petitioner and Ms. Webb on the stand; and the jury’s verdict was consistent with Ms. Webb’s testimony, not the Petitioner’s. Therefore it is Ms. Webb’s version of events--not the Petitioner’s--that is a presumptive “fact” for purposes of the instant appeal.

Additionally, the petition states as a “fact” that the Petitioner “wrote a suicide note to her daughters . . . and left it at the house for them to find.” (Petition for Appeal, 5.) (The issue of the prosecutor’s closing argument remarks about the so-called “note” is discussed in this response’s argument regarding Assignment of Error No. 3, pp. 34-35 *infra*.) The evidence in the record about the so-called “suicide note” that is consistent with the jury’s verdict is quite different from what the petition states to be a “fact.” The record shows that *five months after* the Petitioner shot her husband, and three weeks before her trial, the Petitioner’s trial counsel gave the prosecution a copy of a handwritten “suicide note” document purportedly dated “6/13/09,” the day that the Petitioner shot her husband. (R. at 148 (copy); Trial Tr., 35-44.) The Petitioner’s trial counsel told the trial judge that the document “wasn’t found until a couple of weeks ago” and had just been given to him by the Petitioner’s daughter--who counsel said claimed to have found the document in the Petitioner’s home. *Id.* The prosecution questioned the alleged note’s late discovery and authenticity via a pretrial motion *in limine*. *Id.* At the hearing on the prosecution’s motion, the Petitioner’s trial counsel did not express any intent to introduce the alleged “note” into evidence:

DEFENSE COUNSEL: Your Honor, at this juncture we've never even indicated we were going to introduce this into evidence per se in our defense case in chief. We just simply disclosed it to the Prosecutor's Office. They confiscated it.

THE COURT: Okay. At this point the State doesn't have any - - no interest in using it in their case in chief.

PROSECUTOR: No, sir.

THE COURT: And it will be prohibited for the defense to use that until we have an opportunity to approach the Bench and see what, if any, context that will come in.

(Trial Tr., 37-38, 42-43.)

The Petitioner's trial counsel never attempted to introduce the "note" into evidence. At trial, when the Petitioner took the stand in her own defense, she testified that she wrote a farewell "note" to her daughters. (Trial Tr., 33-35.) However (as the petition for appeal notably fails to tell this Court), the Petitioner's trial counsel did not show the Petitioner a copy of the alleged "note" that she testified about, nor ask that it be admitted into evidence. Nor did counsel later ask the Petitioner's daughter (who supposedly found the "note") to testify about it.

The Petitioner states that the "note" was "never admitted into evidence" "**[p]er the trial court's ruling.**" (Petition for Appeal, 31, emphasis added.) This is a substantially misleading statement. The trial judge never ruled that the "note" was inadmissible at trial. Rather, as the foregoing-quoted excerpt from the record shows, the judge told the Petitioner's trial counsel that counsel would have to make a proper evidentiary proffer, and establish a foundation for introducing the document, before the court would consider its admissibility. (Trial Tr., 37-38, 42-43.) This could have been easily done through the testimony of the petitioner--*if* the "note" was something other than a *post hoc* fabrication to support the Petitioner's "suicide attempt" defense--which it clearly was. Thereafter, during his closing argument, the Petitioner's trial counsel attacked

the prosecution for the *prosecution's* purported failure to present a copy of the alleged "suicide note" to the jury:

DEFENSE COUNSEL: Now what did she do? What they want you to forget about, she sits down and writes a note to the kids. Not an I am sorry I killed your dad note. Or I hope you will understand some day note. This is a suicide note. Nothing in that note inferred that she was going to kill Sammy. *If it did, don't you think you would see it?*

(Trial Tr., 726-27, emphasis added.)

In reply to this outrageously misleading argument by Petitioner's trial counsel, the prosecutor stated:

PROSECUTOR: But we are here today to make a decision based on the evidence. It is the defendant's theory here today that she went in intending to commit a suicide. *Why didn't he [petitioner's trial counsel] introduce the suicide note?*

DEFENSE COUNSEL: Objection, Your Honor.

THE COURT: That's sustained. The objection is sustained. The suicide note is not in evidence and cannot be referred to by prior court order. So the jury should disregard any motive ascribed to the suicide note.²

(Trial Tr., 738-39, emphasis added.)

Under the evidence presented to the jury, which did not include a copy of the so-called "suicide note," the jury was entitled to conclude that the Petitioner's testimony about the "suicide note" was a self-serving fabrication. Thus, when the Petitioner states as a "fact" to this Court that she wrote a "suicide note," (Petition for Appeal, 5), the petition is impermissibly and erroneously

²The Petitioner does not assign any error to this "curative" statement by the trial judge, even though the statement arguably weakened the contention by the Petitioner that she had written such a note.

substituting the Petitioner's version of events with the "facts" that are consistent with the jury's verdict--which was that the Petitioner did not write any such note--(at least, not before she shot her husband).

Having addressed a number of the significant omissions and misstatements in the "Proceedings and Rulings Below" and "Statement of Facts" sections of the petition for appeal, this response will now show that the arguments made in the petition for appeal--that the trial judge committed reversible error in the trial of the instant case--are without merit.

C. SUMMARY OF ARGUMENT.

The circuit judge did not err in his evidentiary rulings; nor did he err with respect to his instructions to the jury; nor did the prosecutor's comments constitute reversible error.

D. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

The Respondent State of West Virginia believes that oral argument is not necessary and that this matter may be decided on the briefs and record.

E. RESPONDENT STATE OF WEST VIRGINIA'S ARGUMENT IN RESPONSE TO ASSIGNMENTS OF ERROR.

1. The Trial Judge Did Not Commit Reversible Error in Making His Preliminary Rulings Relating to Evidence of Alleged Past Instances of Domestic Abuse.

- a. Because the Petitioner's trial counsel did not ask the trial judge to revisit and reconsider the judge's pretrial rulings with respect to the testimony of witnesses other than the Petitioner, and because counsel also failed to assure that the record contained adequate information for this Court to review the scope of those rulings, any alleged error in those rulings was not preserved for appeal.**

As set forth in the foregoing discussion at pp. 7-8 *supra*, the Petitioner's trial counsel never asked the trial judge during the Petitioner's trial to revisit or reconsider the judge's preliminary

pretrial rulings made in response to the prosecution's motion *in limine*. West Virginia law recognizes that a trial judge's rulings on pretrial motions *in limine* are inherently provisional in nature, and may be revisited at any time:

Certain types of exclusionary rulings in civil cases are commonly made before trial, such as rulings on the admissibility of settlement evidence. In most cases, judges are hesitant to rule finally on evidentiary questions in advance of trial. The role and importance of the disputed evidence, its fit with the other evidence in the case, and even the precise nature of the evidence may all be affected by, or at least clearly understood within, the context of the trial itself.

... A trial court is vested with the exclusive authority to determine when and to what extent an *in limine* order is to be modified.

... The circumstances justifying an *in limine* ruling often will change at trial. Problems that can be treated with some confidence in context are often very difficult to solve before other pieces of the puzzle have been assembled.

Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 112-13, 115, 459 S.E.2d 374, 389-90, 392 (1995). In *Coleman v. Sopher*, 201 W. Va. 588, 499 S.E.2d 592 (1997), the West Virginia Supreme Court held that a litigant had failed to preserve an alleged error when he did not challenge a trial court's preliminary, pretrial ruling denying his motion *in limine*.³ In *Sopher*, the trial judge preliminarily denied the appellant's motion to suppress alleged 404(b) evidence, but stated that he would reconsider his ruling later in the trial. *Id.* Under these circumstances, the West Virginia Supreme Court held that the appellant had not preserved the asserted error, when he failed to ask the trial court to reconsider the ruling during trial:

³In *Sopher*, the motion *in limine* by the opponent of certain evidence was preliminarily *denied*-- which is a different situation than the instant case, where the motion *in limine* by the evidence's opponent was preliminarily *granted* (in part). In this latter situation the onus is even greater on the complaining party to ask the judge to revisit the preliminary ruling during trial. But the general principles evinced by the decision in the *Sopher* case remain applicable.

The legal consequence of failing to address the issue the next morning meant that the trial court's prior tentative motion *in limine* ruling was insufficient, standing alone, to preserve the matter for appeal. The *Wimer* rule does not apply. *See Green Const. Co. v. Kansas Power & Light Co.*, 1 F.3d 1005 (10th Cir.1993) (party waived objection to denial of motion *in limine* to exclude evidence where party failed to renew objection during trial, after district court had indicated that ruling would be subject to reconsideration at trial)

201 W. Va. at 613, 499 S.E.2d at 617 (McHugh, J., concurring).

The law throughout the United States is consistent with this Court's holding in *Sopher*: where a court preliminarily grants a pretrial motion *in limine* to exclude evidence, but indicates that the court will on request revisit that ruling at trial, a party objecting to the ruling on the motion and the exclusion of the evidence must ordinarily renew their objection to the ruling at trial--and, as discussed further *supra*, the party must also assure that the record contains a full depiction of what evidence would be presented if the ruling were not in effect. *See* Annotation, 88 A.L.R.2d 12 (1963), "Necessity and sufficiency of renewal of objection to, or offer of, evidence admitted or excluded conditionally; IV. Renewal duties of party offering evidence; § 19[a] Rules and views generally --Generally; necessity for renewing offer or line of inquiry:"

The quite generally prevailing rule deducible from the cases is that where evidence offered and objected to has been excluded conditionally or temporarily, it becomes incumbent upon the party who sought to introduce such evidence to renew his effort in that respect at a later, appropriate stage of the trial by offering the evidence again or at least by resuming a line of interrogation directed toward getting such evidence into the record; and if he fails to so actively renew his effort to introduce the evidence he ordinarily will be precluded from contending on appeal that it was erroneously excluded or that there was error in the court's conditional or temporary ruling.

Thus, in *Evans v. Fruehauf Corp.*, 647 So. 2d 718, 720 (Ala. 1994), the court stated:

'The clear holding of these cases is that unless the trial court's ruling on the motion *in limine* is absolute or unconditional, the ruling does not preserve the issue for appeal.' . . . *Evans* acknowledges that there is no indication in the record that the trial court's ruling on Fruehauf's motion *in limine* was absolute or unconditional.

Therefore, Evans had to offer the contested memorandum at the trial and obtain a specific adverse ruling in order to preserve the issue for appellate review.

(Citations omitted.)

In a similar case, *Spindler v. Brito-Deforge*, 762 So. 2d 963 (Fla. App. 5 Dist. 2000), a Dr. Brito-Deforge had filed a motion *in limine* and a document entitled “Motion to Prohibit Expert Testimony of Opinions Not Disclosed in Depositions.” After a hearing on the morning before the trial began, the trial court granted the motion *in limine*. The following conversation occurred between the trial judge and Spindler’s counsel:

The Court: I am not, Mr. Comfort, going to allow you in any way to discuss the weight-bearing bars as connected to the doctor. In other words, you will be precluded from attempting to point to the doctor with regard to that being the standard of care that she breached, because of the fact that there was a weight-bearing bar in the room.

Mr. Comfort: Your Honor, I’d like the opportunity after the court has heard the testimony of the witnesses to revisit this issue.

The Court: Well, I’ll give you an opportunity.

Mr. Comfort: I’m asking that this not be done with prejudice to me not raising it again later on in the trial.

The Court: Alright.

The judge then reiterated a willingness to accept the proffer during the trial with the following statement:

The Court: Now, if you wish to, I will hear from you later after testimony. So if you feel that you wish to bring this up again later, briefly, after there’s been testimony. But at this point in time, I’m going to preclude you from utilizing it as it involves the doctor.

762 So. 2d at 964. Under these circumstances, where the trial judge stated that the evidentiary ruling granting the motion *in limine* could be revisited later in trial, the *Spindler* court concluded that any error in the judge’s ruling was not properly preserved:

Spindler contends on appeal that where an order *in limine* prevents a defendant from eliciting certain testimony at trial, the defendant need not proffer such testimony to preserve the issue for appellate review. *Bender v. State*, 472 So.2d 1370 (Fla. 3d

DCA 1985). However, this case is more analogous to *Donley v. State*, 694 So.2d 149 (Fla. 4th DCA), *cause dismissed*, 697 So.2d 1215 (Fla. 1997), in which the court held that if a trial judge tentatively grants a motion *in limine* concerning an area of evidence, but then indicates a willingness to reconsider its ruling after hearing the witness' testimony, it is necessary to proffer the testimony sought to be introduced in order to preserve the issue for appeal.

In this case, the trial court's pretrial ruling on the motion *in limine* was tentative and based upon an incomplete oral proffer. The "shifting sands" of trial may cause a judge to rethink an earlier evidentiary ruling based on a matured understanding of the case. The necessity of proffering the testimony is especially important where a judge has indicated a willingness to reconsider a prior ruling and entertain the proffer. Because no proffer was made, the judgment is affirmed.

762 So. 2d at 964.

The governing principles in the instant case are exactly as in the foregoing-discussed cases, including *Sopher*. The trial judge in the instant case indicated that his rulings were preliminary, and invited the Petitioner's trial counsel to revisit the rulings during trial. *See pp. 7-8 supra*. Counsel failed to do so, thereby failing to preserve any alleged error for appellate review. Moreover, the Petitioner's trial counsel also failed to properly preserve any claimed error when counsel did not place into the record any evidence or other specific proffer showing what either the Petitioner's sister, her daughter, or the Petitioner's psychologist would have testified to. (The Petitioner's counsel could have easily provided the court with a copy of the Petitioner's psychologist's report and/or affidavits without interrupting the flow of the trial.) On this point, the West Virginia Supreme Court stated in *Gardner v. CSX Transp., Inc.*, 201 W. Va. 490, 498 S.E.2d 473 (1997):

W.Va.R.Evid. 103(a)(2) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." . . . the reasons for requiring offers of proof under Rule 103(a)(2) are not only to "permit the trial judge to reevaluate his or her decision in light of the actual evidence to be offered," but also to "aid the reviewing court in deciding whether the alleged error was of such magnitude that it was prejudicial to the substantial rights" of the non-moving party.

In that appellant failed to indicate, on the record, the substance of the evidence which was excluded below, this Court is unable to review whether the court's allegedly erroneous ruling was of such magnitude that it prejudiced appellant's substantial rights. *See Sullivan v. Rowan Companies, Inc.*, 952 F.2d 141, 147 (5th Cir.1992) (“[i]n order to preserve their objections for appeal, [appellants] had a responsibility to make an offer of proof sufficient to allow intelligent review.’ Their failure to do so precludes review[.]”

201 W. Va. at 501 n.14, 498 S.E.2d at 484 n.14 (citations omitted).

Thus, because the Petitioner’s trial counsel did not ask the trial judge to reconsider his preliminary pretrial rulings regarding the Petitioner’s expert psychologist and relatives, and failed to place into the record sufficient evidence to indicate what the substance of that evidence would be, any alleged error in the trial judge’s preliminary rulings was not preserved for appeal.

- b. Any limitations in the trial judge’s preliminary rulings with respect to evidence from witnesses other than the Petitioner herself relating to alleged past instances of domestic abuse did not--assuming that any error therein was properly preserved--otherwise constitute reversible error.**

The Petitioner’s argument on this issue is as completely misleading to this Court as are the statements in the “Proceedings and Rulings Below” and “Statement of Facts” sections of the petition. For example, the Petitioner argues that “[d]efense counsel, however, *was prohibited by the trial court from presenting . . . lay witnesses and expert testimony that she was a victim of domestic violence by her husband for many years.*” (Petition for Appeal, 17, emphasis added.) However, the Petitioner’s argument omits any mention of the fact that the most important “lay witness” to such alleged instances--the Petitioner herself--was not limited in her testimony in any fashion whatsoever. The Petitioner was given *carte blanche* to tell the jury “that she was a victim of domestic violence by her husband for many years.” *Id.*

The only rulings by the trial judge that even arguably limited the evidence that the jury heard regarding alleged past instances of abuse were the judge's pretrial preliminary rulings limiting the testimony of the Petitioner's sister and daughter, and the testimony of the Petitioner's psychologist. All of those witnesses testified after the Petitioner took the stand as a witness in her own defense, and after she deliberately chose not to present any firsthand testimony about the alleged abuse.

Of course, the Petitioner did not have to take the stand, and her failure to testify on her own behalf could not be used as any indicator of her guilt. But once the Petitioner did elect to testify, her failure to tell the jury *anything* about alleged past instances of abuse weighs strongly against her complaint that she was denied due process of law because the jury was not permitted to hear other, unspecified evidence from other witnesses about those alleged instances. To put it bluntly, if this evidence was so all-fired important, why didn't the Petitioner, who supposedly suffered the abuse, testify about it herself?⁴

Then, continuing in the same erroneous vein, the Petitioner argues that "the jury never heard . . . *the most important and convincing evidence* that would have demonstrated why [the Petitioner]

⁴*Cf. State ex rel. Myers v. Sanders*, 206 W. Va. 544, 551, 526 S.E.2d 320, 327 (1999) (Maynard, J. concurring):

In fact, every time a criminal defendant decides to testify in a criminal case and takes the stand, he waives his Fifth Amendment witness privilege and must answer all questions propounded to him. Once he elects to testify, he cannot selectively invoke his Fifth Amendment rights and answer some questions and refuse to answer others. *Cf. also State v. Taylor*, 168 W.Va. 380, 383, 285 S.E.2d 635, 637 (1981):

[The defendant] opted not to testify at trial because doing so would subject him to cross-examination on other issues relevant to the crime. This is the choice each defendant faces in exercising his privilege not to testify. There is no Fifth Amendment privilege of selective testimony.

was depressed and suicidal . . .” (Petition for Appeal, 17, emphasis added.) But the Petitioner again fails to tell this Court that the *real* reason that the “the jury never heard . . . the [purportedly] *most important and convincing evidence*” (which, of course, would have been the testimony of the Petitioner herself) was not the trial judge’s preliminary rulings--but the conscious decision of the Petitioner and her trial counsel. Any adverse effect on the Petitioner’s case flowing from the jury’s failure to hear such purportedly important and convincing evidence was overwhelmingly the Petitioner’s “fault”--and not the trial judge’s. Any prejudice flowing from the jury’s failure to hear such purported evidence from another source (if there actually had been such evidence--who knows?) was *de minimis*.

With respect to the Petitioner’s psychologist, her argument is that while she didn’t choose to tell the jury about alleged past abuse when she took the stand, she did tell a psychologist something about past abuse. Of course, this Court has no reliable idea of what the Petitioner or anyone else told her expert--or what those reports led her expert to conclude--thanks to the Petitioner’s failure to place the psychologist’s report in the record. The Petitioner appears to be arguing that even if she took the stand as a witness, but chose not to tell the jury what she claimed had happened to her, her psychologist nevertheless should have been allowed to tell the jury what she had told him--and to explain how those alleged instances made her a “battered woman.” The Petitioner speculates that her expert psychologist would have been able to tell the jury how the Petitioner’s having been a “battered woman” (if the jury found that she had been one from her testimony) could make her more likely to be suicidal. (Petition for Appeal, 18.) (The operative word in this sentence is “speculates.”)

Such a testimonial strategy, if successful, would have had made it impossible for the prosecution to cross-examine the Petitioner about her allegations of past abuse--which is no doubt why Petitioner's trial counsel pursued it. And if the Petitioner had not taken the stand as a witness in her own defense, such a scenario might have presented the trial judge with a different and more complex case. However, neither this response nor this Court need go down the evidentiary road that would be presented by such a scenario--because in the instant case, the Petitioner did take the stand as a witness in her own defense--and despite having *carte blanche* to do so, she did not mention a single instance of abuse.

As the discussion at page 10 *supra* shows, the trial judge concluded, based on what he had before him, that the petitioner's psychologist did not diagnose the petitioner as suffering from a "battered woman" syndrome at the time she shot her husband. *Id.* (The Petitioner's trial counsel told the court that he was not going to get into "that battered women's syndrome that everybody talks about." *Id.*) The expert's apparent conclusion is hardly surprising. The Petitioner had lived apart from her husband for more than two years. The Petitioner cites to cases and articles in which experts have opined that one of the responses of a desperate woman in an abusive domestic relationship--who feels for various reasons that she cannot safely leave or "escape" the abusive relationship simply by physically leaving--is to see "homicide" or "suicide" as an option.

But in the instant case, there was no evidence to indicate that such a domestic relationship existed at or anywhere near the time that the Petitioner shot her husband. The record is completely devoid of any suggestion that the petitioner's expert concluded that the petitioner saw "suicide" as a way to physically escape an abusive domestic relationship. If there had at one time been a physically abusive domestic relationship, the Petitioner had, in fact, escaped it without either

homicide or suicide. Moreover, if alleged incidents from years past had so colored the Petitioner's view of life in a fashion that affected her mental state at the time she shot her husband--it must be remembered that the Petitioner had *carte blanche* to tell the jury about those instances, when she chose to take the stand as a witness in her own defense. She chose not to do so.

On this point, the Petitioner's psychologist stated that any opinions he might have about the Petitioner's mental state at the time of the shooting were explicitly contingent and conditioned upon *the jury* believing the truth of the Petitioner's reports about past abuse--which the Petitioner's psychologist had no way to verify. *See* discussion at pp.10-11 *supra*.

While it is axiomatic that expert witnesses may in some instances be permitted to testify as to hearsay, the hearsay must be of a type that experts regularly rely on. *See* Rule 703, West Virginia Rules of Evidence. In the instant case, the Petitioner's psychologist stated that he had no basis for relying on the accuracy or credibility of the information about alleged past abuse that he had been given, which he deemed to be a matter for the jury, based on the Petitioner's evidence. *See* discussion at pp. 10-11 *supra*.

The Petitioner also argues that the trial judge's preliminary rulings failed to follow Syllabus Point 6 of *State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009), which states that "evidence that the decedent had abused or threatened the life of the defendant is relevant and may negate or tend to negate a necessary element of the offense charged, such as malice or intent." The trial judge's rulings did no such thing. When the trial judge agreed with the Petitioner's trial counsel that "[the Petitioner] has a right to tell her story . . . [w]ith the facts that she might have been abused by him . . . ," (Trial Tr., 520), and denied the prosecution's pretrial motion *in limine* with respect to the Petitioner's testimony, the judge acted in complete consonance with *State v. Harden*. The Petitioner

was given *carte blanche* to present such evidence, without limitation, and her failure to do so when she took the stand refutes her argument on appeal that the trial court's preliminary rulings violated the requirements of *Harden*. Moreover, *Harden* did not say that *all* evidence from whatever source that may tend to show past alleged domestic abuse--without regard to how remote in time the instances of alleged abuse might be; without regard to whether the evidence is hearsay; and without regard to whether the evidence might be more prejudicial than probative--even if it may be arguably *relevant* in a homicide case--is necessarily *admissible*.

Harden is not a departure from common sense. It is understandable and reasonable, as *Harden* holds, to allow a homicide defendant to testify that they had been the recent subject of threats or a beating by a victim. But it is quite another matter, and at the very least within the discretion of the trial judge, when such a defendant takes the stand as a witness in her own defense but provides no such testimony--whether or not to allow an expert or other third parties to act as "surrogates" to bring hearsay before the jury.

In this regard, the case of *State v. Riley*, 201 W. Va. 708, 500 S.E.2d 524 (1997) (*per curiam*), is instructive. In *Riley*, the defendant, who shot her husband and killed her husband in their home, took the stand as a witness in her own defense and testified to instances of abuse during her marriage. The defendant, whose conviction for second degree murder was upheld by this Court, asserted that the trial judge erroneously limited the testimony of an expert who had diagnosed the defendant as suffering from "battered women syndrome" due to alleged instances of abuse that the defendant had reported. 201 W. Va. at 711, 500 S.E.2d at 527. This Court found no error in the trial judge's rulings, stating that although an expert can rely on hearsay to form an opinion and refer to

it to explain his diagnosis, the hearsay cannot be received as direct evidence, and so the testimony was properly limited. *Id.* Additionally, this Court stated that:

We have consistently maintained that rulings on the admissibility of evidence are largely within the sound discretion of a trial court. In syllabus point two of *State v. Franklin*, 191 W.Va. 727, 448 S.E.2d 158 (1994), we explained:

“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.’ Syllabus Point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955).” Syl. pt. 4, *State v. Ashcraft*, 172 W.Va. 640, 309 S.E.2d 600 (1983).

“[E]videntiary decisions of a trial court are entitled to substantial deference.” *McDougal v. McCammon*, 193 W.Va. 229, 235 n.5, 455 S.E.2d 788, 794 n.5 (1995).

Riley, 201 W. Va. at 714, 500 S.E.2d at 530.

The instant case can be profitably compared to *Riley*. In *Riley*, the defendant had presented to the jury direct testimony of instances of abuse, so the expert’s hearsay was not the only evidence on that subject; whereas, in the instant case, the Petitioner deliberately chose not to present any such direct testimony to the jury, so her expert’s hearsay testimony about such instances, if allowed, would have been the only evidence on that subject, and would not have afforded the jury any basis to find that such alleged abuse had in fact occurred. Moreover, in *Riley*, the defendant’s expert had diagnosed the defendant as having battered woman’s syndrome at the time of the shooting; whereas, the record in the instant case contains no such diagnosis--so any hearsay from the Petitioner’s expert would not have been for the purpose of explaining a diagnosis. Just as the trial judge in *Riley* did not err in his discretionary evidentiary rulings, neither did the trial judge in the instant case.

The Petitioner also argues that the trial court’s pretrial rulings were at odds with the principles contained in other jurisdictions’ cases that have allowed women to tell juries about the

alleged facts and effects of their being abused as relevant to their mental state and criminal responsibility. However, a review of the cases cited in the petition for appeal shows that (1) *none* of the cited cases involved a defendant who took the witness stand in her own defense and deliberately did not testify about any alleged past abuse; (2) *none* of the cited cases involved the opinion of an expert who expressly excluded a “battered woman” diagnosis; and (3) *none* of the cited cases involved a record containing no evidence whatsoever, proffered or otherwise, about the alleged abuse.

Moreover, most of the cases cited in the petition for appeal--that do not involve the “self-defense” defense to homicide based on being a “battered woman”--involved women who asserted that they were innocent of or less culpable for a non-homicide offense (like drug dealing) due to duress or coercion--because their abuser coerced them into the criminal conduct. (Petition for Appeal, 15.) *See, e.g., State v. Wyatt*, 198 W. Va. 530, 482 S.E.2d 147 (1996) (welfare fraud.) *None* of the cited cases involves a woman who claimed that her being a “battered woman”--two years prior to her killing someone--caused her to make a suicide attempt in which she accidentally killed her former purported abuser. There is simply no case in the “battered woman” case law cited in the petition that supports the arguments made in the instant case.

This lack of support in the case law for the Petitioner’s arguments is not surprising. As shown in the ALR Annotation cited at p. 32 *infra*, the instant case is certainly not the only time that an “I was just trying to kill myself” defense to a murder charge has been attempted (albeit with little or no success). However, the instant case may be the first on record in which one “I bungled my suicide attempt” defense to murder has been combined with an “[a]nd I was suicidal because the fellow I killed had been abusive to me when we were living together more than two years ago”

claim. And as the Petitioner's conviction and the annotation cited to at p. 32 *supra* show--the "bungled suicide attempt" defense alone is a tough sell to a jury (especially when there is a disinterested eyewitness who testifies that the Petitioner was lying about how the shooting actually happened).

Nevertheless, the Petitioner was free to tell the jury any facts she wished when she took the stand as a witness in her own defense. Why didn't she do so in support of a "battered woman" claim, given that the trial judge had said she could do so without limitation? The most likely answer is that the Petitioner's trial counsel thought they were already pushing the envelope with the facially implausible "attempted suicide" claim. Presenting the jury with the details of alleged past abuse--as providing a "motive" for or cause of the Petitioner's purported suicide attempt--would have also provided the jury with grounds for finding, instead, that the alleged abuse provided an equally or even stronger motive for a deliberate, anger-based homicide. The Petitioner's decision to not give the jury any firsthand evidence of alleged past abuse when she testified as a witness in her own defense was likely a strategic decision. It certainly was not the result of any erroneous rulings by the trial judge.

Additionally, with respect to the trial judge's preliminary pretrial rulings, insofar as they applied to the testimony of the Petitioner's daughter and sister--there was no error. The trial judge had advised the Petitioner's trial counsel that he would revisit the judge's pretrial rulings with respect to these witnesses, but counsel did not ask the court to do so. The Petitioner's trial counsel never proffered any testimony by these witnesses about alleged past abuse, so the judge had no idea if they had any independent knowledge of purported instances of past abuse, or whether and/or to what degree their information was hearsay and based on what the Petitioner had allegedly told them.

And both were able to testify as to the Petitioner's depression without limitation. As previously noted, both of these witnesses followed the Petitioner, who did not testify to any such instances.

Had the Petitioner not taken the stand, it is possible that these witnesses' testimony as to purported past instances of abuse would have been a more important issue. But that would have been another trial. In the trial that is at issue in the instant case, the Petitioner is hard pressed to claim any prejudice in the trial judge's preliminary and tentative exclusion of such purported evidence--even from purported eye-witnesses to alleged past abuse (from who knows how far back in time?)--when the Petitioner herself, when she took the stand, was unwilling to give the jury any firsthand evidence supporting her claims. Under the circumstances, it was not an abuse of discretion and not reversible error for the trial judge to have made his preliminary rulings with respect to the testimony of the Petitioner's daughter and sister. For the foregoing reasons, the arguments in the petition for appeal contending that the Petitioner's conviction should be reversed--because the jury was erroneously kept from hearing evidence and opinion based on purported past alleged instances of abuse of the Petitioner by her estranged husband--are without merit.

2. The Trial Judge In The Instant Case Correctly Refused The Petitioner's "Not Guilty By Reason of Accident" Instruction.

The Petitioner argues that the jury that convicted her of first degree murder should have been instructed that if they had a reasonable doubt that Petitioner's shooting of her estranged husband was not simply a non-culpable "accident" that occurred while the Petitioner was attempting to commit suicide--then the jury must find the Petitioner not guilty of any criminal conduct. However, there was no evidence to support the affirmative defense of accident in the instant case, so the instruction was properly refused.

In West Virginia, a homicide is excusable as an “accident,” entitling an accused to be found not guilty of any crime (including involuntary manslaughter) in causing the homicide, if the homicide was not intentional and if it did not result from unlawful or other negligent conduct that “evidence[s] a reckless disregard for the safety of others, characterized by negligence so gross, wanton, and culpable as to show a reckless disregard for human life.” See Syl. Pt. 5, *State v. Green*, 220 W. Va. 300, 647 S.E.2d 736 (2007). The defense of “not guilty by reason of accident” is an affirmative defense and a defendant must present evidence in an appreciable degree supporting the defense, in order to be entitled to an instruction thereon. See Syl. Pt. 5, *State v. Daniel*, 182 W. Va. 643, 391 S.E.2d 90 (1990); Syl. Pt. 4, *State v. Evans*, 172 W. Va. 810, 310 S.E.2d 877 (1983).

In the instant case, according to the Petitioner’s evidence under its best possible interpretation, the Petitioner left her estranged husband’s bedside to retrieve a loaded handgun from her dresser drawer at home; she concealed the gun in her purse and brought it to the hospital intensive care unit, where she removed the gun from her purse; she reached across the bed to nudge her sleeping husband with one hand while holding the loaded gun in her other hand, so that he would be awake to see her shoot herself; then, he woke up and nudged her elbow, causing her to accidentally shoot her husband in the head at a close range instead of shooting herself. Under these assumed facts, the Petitioner was at the least guilty of involuntary manslaughter--if the other elements of a culpable homicide were found by a jury--because her self-described negligent or other unlawful conduct evidenced a reckless disregard for the safety of others and human life, *State v. Green, supra*. The Petitioner’s trial counsel conceded as much in his closing argument:

We have some real problems proving this is not involuntary manslaughter because [if the Petitioner] hadn’t been at the hospital with a gun, Sammy would not have died. If she had gone to the hospital with a gun in her purse and propped it up on a chair, and . . . somebody kicked that chair over and [the gun] accidentally went off

and shot Sammy. She would still be responsible. That's kind of the reckless disregard of the safety of others. So we're acknowledging coming right out of the [chutes], it is going to be very difficult for you as a jury to come back with a not guilty of all charges because we admit that we brought that gun into that hospital room and a gun that caused Sammy's death. We are not asking you to put your head in the sand.

(Trial Tr., 709-10.) The trial judge's ruling refusal to give a "not guilty by reason of accident" instruction in the instant case was completely in line with the law enunciated in similar cases in other jurisdictions. *See* Annotation, "Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide," 40 A.L.R.4th, 702 (1985). The apparently uniform holding of the relevant cases is that an accused who claims to have killed someone while attempting to commit suicide is not ordinarily entitled to an instruction allowing the jury to find the accused not guilty by reason of accident--because the alleged suicide attempt, even if proven, provides legal grounds for a finding of (at a minimum) involuntary manslaughter. *Id.*

For example, in *Nicholson on Behalf of Gollott v. State*, 672 So. 2d 744, 753 & n.3 (Miss. 1996) (citations omitted), the court stated:

Gollott argues error in that the trial court denied his instruction on accident. Gollott argues that their theory of the case was that Gollott accidentally killed Diane while Gollott attempted suicide. . . .

. . . Nevertheless, Gollott's admission that Diane was shot in his attempt to commit suicide constitutes an unlawful act.³ The defense of accident is not applicable, since Gollott was attempting an unlawful act, resulting in the death of Diane. Consequently, Gollott's instruction is an incorrect statement of the law, which the trial court was under no obligation to grant.

³Gollott's display of a pistol, and his heated request for Diane to shoot him, after his repeated threats against Diane, constitutes a violation of Miss. Code Ann. § 97-3-107 (1994 rev.) (violation of statute arises when person makes "credible threat, with the intent to place that person in reasonable fear of death or great bodily injury.>"). This unlawful act would also preclude accident as a defense here.

In another case, *Dugan v. Com.*, 333 S.W.2d 755, 756 (Ky. 1960), the court stated:

The appellant appears to concede the proposition that if the shooting, though accidental and unintentional, was the result of or was occasioned by a voluntary and intentional wrongful act, such as an attempt to commit suicide, a conviction of voluntary manslaughter would be justified. *See . . . State v. Levelle*, 34 S.C. 120, 13 S.E. 319, holding that the accidental killing of another person, in the course of an attempt to commit suicide, is a criminal homicide amounting at least to voluntary manslaughter.

(Citations omitted.) *See also People v. Chrisoltz*, 285 N.Y.S.2d 231 (N.Y. 1967) (even if defendant's attempted suicide claim was true, homicide was still not an innocent "accident").

Moreover, the Petitioner's conduct in the instant case was not only admittedly recklessly indifferent to human safety and life--it was also specifically unlawful and in violation of criminal statutes designed to prevent such dangerous recklessness; to-wit, the statutory prohibitions against brandishing a weapon and wanton endangerment with a weapon. *See State v. Bell*, 211 W. Va. 308, 310 n.2, 565 S.E.2d 430, 432 n.2 (2002):

West Virginia Code § 61-7-11 (1994) (Repl. Vol. 2000) provides in pertinent part as follows: "It shall be unlawful for any person armed with a firearm or other deadly weapon, whether licensed to carry the same or not, to carry, brandish or use such weapon in a way or manner to cause, or threaten, a breach of the peace." West Virginia Code § 61-7-12 (1994) (Repl. Vol. 2000) provides as follows: "Any person who wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another shall be guilty of a felony"

In the instant case, the trial judge correctly concluded that there was no appreciable evidence in the record to support the affirmative defense of "accident" so as to require the judge to give an instruction on that defense. The only proper basis for a "not guilty" verdict in the instant case--and the one basis that the jury was properly instructed about--was the general ability of the jury to find a failure of proof on one or more elements of the charged offenses, in their discretion. The Petitioner's argument that her conviction should be overturned because the judge did not tell the jury

that they could acquit her on the grounds that the prosecution had not proved beyond a reasonable doubt that her shooting her husband was not a blameless “accident”-- is without merit.

3. **The Circuit Court Did Not Commit Reversible Error as a Result of the Prosecuting Attorney’s Replying to a Misleading Statement Made By the Petitioner’s Trial Counsel in Closing Argument About a So-called “Suicide Note”; Nor as a Result of the Prosecutor’s Telling the Jury, in Response to Another Misleading Statement, That Premeditation and Deliberation Could Take Place in Two Seconds.**

The facts surrounding this assignment of error are discussed *supra* at pp. 13-16. With respect to the purported “suicide note,” it must be remembered that the Petitioner’s trial counsel had every opportunity to try to put the alleged “suicide note” into evidence, and could have easily done so. The trial judge never excluded the purported note, but rather preliminarily ruled that this document would be considered for admission when the Petitioner’s counsel tendered it. Either the Petitioner or her daughter would have had to identify the document, and testify that the Petitioner wrote it--but they never did so.

The prosecution, of course, never believing that the purported “note” was authentic, had no reason to offer the document in evidence. Nevertheless, during closing argument, the Petitioner’s trial counsel told the jury: “Nothing in that note inferred that she was going to kill [her husband]. *If it did, don’t you think you would see it?*” (Trial Tr., 726-27, emphasis added.) The prosecutor responded to this argument by saying to the jury: “It is the defendant’s theory here today that she went in intending to commit a suicide. Why didn’t *he* [Petitioner’s trial counsel] introduce the suicide note?” (See pp. 13-16 *supra*.)

The Petitioner’s trial counsel’s remarks implied both that the purported note existed (a fact that was not in evidence) and also that the prosecution had deliberately not presented the “note”

because it would tend to show that his client was suicidal. These remarks were entirely false and without any basis in the evidence. This sort of sleight-of-hand maneuver by the Petitioner's trial counsel was improper, because it misstated the evidence. The prosecutor had every right to respond to this misstatement by throwing the challenge back in Petitioner's trial counsel's face--"Why didn't *he* introduce the suicide note?" There was no error in the prosecutor's remarks. Moreover, any assumed error was cured and removed when the trial judge, at Petitioner's trial counsel's request, instructed the jury to set aside the issue of the note, *see* discussion at p. 15 note 2 *supra*.

Additionally, none of the cases on prosecutorial misconduct during argument that are cited in the petition for appeal in any fashion resembles the facts of the instant case. Of course, prosecutors have a scrupulous duty not to let their desire to obtain a conviction overshadow fairness to a defendant, but prosecutors are not doormats, who may not fairly correct and respond to misleading arguments by defense counsel. *See* Note, "*Restraining Adversarial Excess in Closing Argument*," 96 Colum. L. Rev. 1299, 1319 (1996). That is exactly what happened in the instant case, and there was no reversible error in connection with this exchange before the jury.⁵

⁵ Unlike prosecutorial misconduct, defense attorney adversarial excesses remain unchecked except at the trial level, due to the impossibility of appealing an improper acquittal. . . . Courts have long been concerned that appellate regulation of closing arguments excessively favors defendants and have developed a number of strategies to counter this procedural imbalance. Among the most effective has been the "invited response" doctrine, which permits prosecutors to respond in kind during their rebuttal to defense improprieties in argument. Invited response is explicitly allowed under the ABA Standards for Criminal Justice, which assert that restrictions on closing arguments must be reciprocal: "[A] prosecutor may be justified in making a reply to an improper argument of defense counsel if made without provocation by the prosecutor."

Note, "*Restraining Adversarial Excess in Closing Argument*," 96 Colum. L. Rev., 1319.

There was also no error when the prosecutor fairly responded to another misleading statement in the petitioner's trial counsel's closing argument. The Petitioner's counsel had argued that the jury had to make its decision as to premeditation based on:

what was in the mind of my client *when she walked into the hospital* [with a gun] . . . you must believe beyond a reasonable doubt that *at that moment* [when her husband told her to leave the hospital,] *right then* [the petitioner] had decided to kill [her husband.]

(Trial Tr., 712, 725.)

Responding to this argument, the prosecutor told the jury that the relevant point in time with respect to deciding whether the Petitioner had sufficiently premeditated her killing of her husband did not have to be when the Petitioner "walked into the hospital" or even earlier when the Petitioner's husband first told her to leave his hospital room. The prosecutor correctly told the jury that even if the Petitioner decided to kill her husband while she was approaching his bed with a gun in her hand--the jury could still find the requisite degree of premeditation for first degree murder:

Assuming what she said is true, let's assume that she . . . drove back to the hospital intending to shoot herself and she changed her mind [t]wo seconds before she put the gun to [her husband's] temple. Ladies and gentlemen, that's first degree murder.

(Trial Tr., 747.)

The prosecutor's remarks in closing argument drew no objection--because they were entirely consistent with the instructions that the trial judge had given to the jury and that had received no objection, to-wit:

to constitute first degree murder, it is not necessary for the intention to kill exist for any particular length of time prior to the actual killing. It is only necessary that such intention come into existence for the first time at the time of the killing or any time previous thereto. . . . The Court instructs the jury that to deliberate is to reflect, with

a view to making a choice. *If a person reflects even for a moment before he acts it is a sufficient deliberation.*

(Trial Tr., 676, 683-84, emphasis added.)

The prosecutor's statements were a correct statement of the law--and on this point, this response incorporates its arguments in the following section relating to the Petitioner's Assignment of Error No. 4, *see pp. 37-39 infra*.

The Petitioner's trial counsel, on the other hand, was entirely misstating the law when he told the jury that in order to convict the Petitioner they had to find that the Petitioner had formed an intent to kill her husband when she left the hospital to get a gun, or when she walked into the hospital with the gun. The prosecutor acted properly in replying to the misstatement of law in the Petitioner's trial counsel's closing statement in a fashion that correctly stated the law and tracked the instructions that had been given without objection to the jury.

4. **The Trial Judge Did Not Plainly Err in Refusing to Give the Jury a Definition of Premeditation That Arbitrarily Fixed a Minimum Time Period.**

The jury, while deliberating, sent a note asking the trial judge to provide a "clear-cut definition of premeditation, including a time element. Can it be a few seconds?" (R. at 161.) The petition for appeal argues that the trial judge--even though the Petitioner's counsel did not ask him to--had a "clear duty" to "instruct the jury that a few seconds was insufficient for premeditation[.]" (Petition for Appeal, 45), and that the trial judge's failure to do so *sua sponte* requires the overturning of the Petitioner's conviction. The Petitioner cites as authority for the proposition that the trial judge was required to tell the jury that "a few seconds are insufficient for premeditation" to the two cases of *State v. Hatcher*, 211 W. Va. 738, 568 S.E.2d 45 (2002), and *State v. Hutchinson*, 215 W. Va. 313, 599 S.E.2d 736 (2004). However, those cases do not support this novel

proposition; in fact, one of those cases readily demonstrates why this assignment of error is without merit.

In *State v. Hatcher*, the prosecutor erroneously told the jury in closing argument that “premeditation can be formed in an instant,’ going so far as to put this phrase on a slide that was projected on a screen to the jury during closing argument.” 211 W. Va. at 741, 568 S.E. 2d at 48. This Court reversed the defendant’s conviction in *Hatcher* because “*instantaneous* premeditation is not satisfactory for proof of first degree murder . . . ,” *id.* (quoting *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d (1995)), where that case stated:

“[A]ny [period or] interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder. . . . *The duration of that period cannot be arbitrarily fixed.*”

Id. (emphasis added). If the trial judge in the instant case had *sua sponte* responded to the jury’s note by doing what the petition for appeal argues the judge should have done--that is, by telling the jury that “a few seconds was insufficient for premeditation[.]” (Petition for Appeal, 45), then the judge would have been *expressly violating* the holding of *Hatcher* and *Guthrie*--by arbitrarily “fixing” a minimum period of time of more than “a few seconds” as necessary for premeditation. However, instead of violating the holding of *Hatcher*, the judge properly referred the jury to the instructions they had--about which there is no complaint in the petition for appeal.

Nothing in the *State v. Hutchinson* opinion or in any of the other cases cited in the petition for appeal in any fashion contradicts the holdings of *State v. Hatcher*. And for the foregoing reasons, the petition’s argument that the trial judge erred by not telling the jury that “a few seconds were insufficient for premeditation” is without merit.

D. CONCLUSION

First, this Court's attention is recalled to the substantially misleading factual omissions that the Petitioner makes in the instant case, as documented at pp. 3-16 *infra*--omissions that are so significant as to implicate the duty of candor to a tribunal. These misleading omissions paint a picture of the trial below that is so far removed from reality that they alone are sufficient to render the petition's arguments based thereon as utterly without merit.

Second, the Petitioner's core argument is that "the jury never heard [] the most important and convincing evidence that would have demonstrated why [the Petitioner] was depressed and suicidal . . . testimony that she was a victim of domestic violence by her husband for many years." (Petition for Appeal, 17.)

If such important and convincing evidence did in fact exist, the Petitioner has only two people to blame for the jury's failure to hear the purported evidence, and for the purported evidence's complete absence in the record of the instant case.

Those two people are the Petitioner herself, and her trial counsel--not the trial judge.

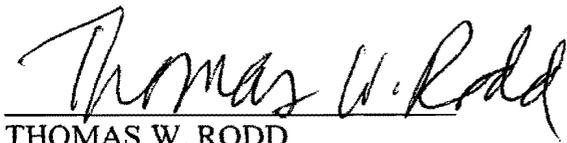
For the foregoing reasons, the judgment of conviction rendered by the Kanawha County jury should be upheld.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

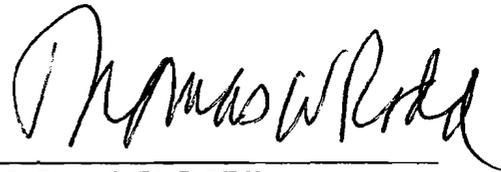


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CERTIFICATE OF SERVICE

I, THOMAS W. RODD, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the Response to Petition for Appeal upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 7th day of February, 2011, addressed as follows:

To: Gregory L. Ayers, Esquire
Deputy Public Defender
P.O. Box 2827
Charleston, West Virginia 25330

A handwritten signature in black ink, appearing to read 'Thomas W. Rodd', written in a cursive style.

THOMAS W. RODD