

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 101179

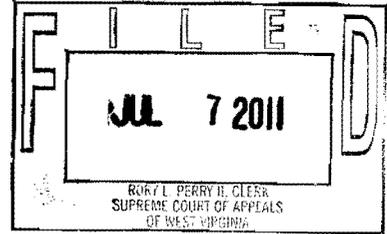
STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

RHONDA K. STEWART,

*Defendant Below,
Petitioner.*



SUPPLEMENTAL RESPONSE BRIEF OF THE RESPONDENT
STATE OF WEST VIRGINIA

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SUPPLEMENTAL RESPONSE BRIEF OF THE RESPONDENT
STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

The Respondent adheres to its previous Statement of the Case in its original Response Brief.

II.

SUMMARY OF ARGUMENT

The Respondent adheres to its previous Summary of Argument in its original Response Brief.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court has already indicated that this case will be set for a Rule 20 oral argument.

IV.

STATEMENT OF FACTS

The Respondent adheres to its previous Statement of Facts in its original Response Brief.

V.

ARGUMENT

- A. **THE PETITIONER'S CLAIM THAT HER CONVICTION OF FIRST-DEGREE MURDER, BASED ON EYEWITNESS TESTIMONY, SHOULD BE REVERSED ON THE GROUNDS THAT THE TRIAL JUDGE PREVENTED DEFENSE COUNSEL FROM PRESENTING WITNESS TESTIMONY ABOUT ALLEGED PAST DOMESTIC ABUSE OF THE PETITIONER THAT WAS ESSENTIAL TO THE PETITIONER'S DEFENSE, IS UTTERLY WITHOUT MERIT. THE FAILURE OF THE JURY TO HEAR SUCH PURPORTED EVIDENCE, AND THE FAILURE OF THE RECORD TO CONTAIN ANY SUCH PURPORTED EVIDENCE FOR THIS COURT'S REVIEW, IS ENTIRELY THE RESPONSIBILITY OF THE PETITIONER AND HER TRIAL COUNSEL.**

The Petitioner's Supplemental Response Brief claims that the trial judge wrongfully deprived her of "two-thirds" of her defense. Pet'r's Supplemental Br., 1.¹ This claim, respectfully, is ridiculous. As this Supplemental Response Brief will show, if the Petitioner was "deprived" of any significant portion of her defense, it was the Petitioner herself (and her trial counsel) who were solely responsible for the deprivation.

The Petitioner's defense at trial, it will be recalled, was that "I brought a concealed handgun to the hospital ICU bedside of my estranged husband, who was coming out of a coma in the CAMC Hospital Intensive Care Unit, and I 'accidentally' bungled a suicide attempt that was caused by (unspecified) 'abuse' that occurred (at unspecified times) during our marriage."

¹By letter dated June 14, 2011, Petitioner's counsel asked the Court to consider the Petitioner's Reply Brief as Petitioner's Supplemental Brief. As such, Respondent will refer to the captioned Reply Brief as "Pet'r's Supplemental Br."

During her testimony as a witness on her own behalf, the Petitioner was given *carte blanche* by the trial judge to tell the jury at any length she wanted of any and all incidents of past alleged “abuse,” and about how that alleged abuse purportedly led to her claimed “bungled suicide attempt.” THE COURT: [Y]our defendant can testify [to] *anything she wants* about the past[;] (Trial Tr., 85, emphasis added.)

However, when the Petitioner took the stand as a witness in her own defense, she did not tell the jury “anything at all” about the past. She did tell the jury a bizarre, chaotic, self-contradictory, and highly implausible tale of her elbow being “bumped” while she held a loaded handgun next to her husband’s head, planning to kill herself, and the gun’s “accidental” discharge, literally blowing his brains out and causing his death. Trial Tr., 566-584. Notably, the Petitioner’s story was directly contradicted by a nurse eyewitness to the crime. Trial Tr., 411, 426-27, 642.

The Petitioner’s claim that the trial judge wrongfully deprived her of “two-thirds of her defense” is simply ludicrous. How could the Petitioner expect the jury to even begin to believe her defense that purported “abuse” that she had suffered at unknown times in the past led to her “bungled suicide attempt” – unless, when she took the stand, the Petitioner told the jury herself of the alleged abuse?

There can be absolutely no doubt that it was *the Petitioner’s own choice*, and not any ruling by the trial judge, that “deprived” the Petitioner of *more than ninety percent* of the purported “abuse” component of her implausible defense.

The Respondent’s original Response Brief at 29 explains the likely reason for this choice, which was the Petitioner’s likely calculation that any such evidence would have also provided a very strong motive for the jury to find that the Petitioner deliberately murdered her husband, and also for

the jury to conclude – as the jury clearly did, even without hearing a story of alleged abuse – that the unlikely “bungled suicide” story that the Petitioner told the jury (and that she told *anyone* for the first time at trial) was entirely invented and untrue.

To be clear: the only purported evidence allegedly relating to past “abuse” of the Petitioner that was the subject of an adverse ruling by the trial judge (and a preliminary and tentative ruling, at that) – was (1) the purported testimony of two family members – the substance of which was entirely speculative, and was never placed before the trial judge or into the record for this Court’s review, and that might well have been mostly or even entirely hearsay; and (2) an apparently equivocal expert opinion that also was never placed into the record, prepared by an expert who testified that he could not attest to the credibility of statements that the Petitioner reportedly made to the expert.

Thus, the Petitioner’s principal claim on appeal that *the trial judge* improperly excluded evidence that was “*essential* to rebut the prosecutor’s argument regarding malice, premeditation, and intent to kill[,]” (Pet., 19, emphasis added), and that *the trial 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.” (Id. at. 1, emphasis added.), are without merit. (The Petitioner, of course, is a lay (non-expert) witness, and she took the stand *as a witness* in her own defense. The trial judge did not “prevent[] defense counsel from presenting any. . . lay witness testimony that [the Petitioner was a battered woman]. . .” (Id.)

(To be clear on another point: at no point in the Petitioner's original Petition/Brief did she even *mention* that the trial judge permitted her to testify *carte blanche* about alleged past instances of abuse by her husband whom she shot and killed; or did she even *mention* that the Petitioner took

the stand, and chose not to tell the jury of any such instances. The Supplemental Brief's suggestion that the Petitioner's mischaracterization of the facts and the issues before this Court in her original Brief was not deliberately misleading rings hollow. There can be no doubt that the Petitioner's original Brief was deliberately misleading and disingenuous in characterizing the trial court's rulings.)

Of course, the Petitioner had the right to decide that when she took the stand, she would not tell the jury about her allegations of abuse. But the exercise of that right had consequences. The Petitioner's failure to tell the jury about this purportedly "essential" evidence completely undermines her claim that it was the trial judge's rulings that were responsible for the jury's not hearing purportedly "essential" evidence, and for this Court not having this purported evidence available for its review. It was not the judge's fault – it was entirely the Petitioner's fault. Having conceded that the Petitioner was fully permitted to tell the jury about any and all alleged instances of past abuse, and that the Petitioner deliberately chose not to do so when she took the stand, the Petitioner's Supplemental Brief inappositely cites this Court to cases that have found that denying a criminal defendant the opportunity to present corroborating witnesses, so as to have a "complete defense," may constitute reversible error. For example, at page 8 of the Pet'r's Supplemental Br., the Petitioner quotes from *State v. McCoy*, 219 W. Va. 130, 136, 632 S.E.2d 70, 77 (2006): "[t]he importance of corroboration testimony, which is consistent with that of the original witness, [is that it] has the direct effect of *bolstering the original witness's credibility*." (emphasis added).

If the Petitioner had chosen, when she took the stand, to describe alleged instances of past abuse, thereby giving "original witness" testimony that some other witness might have corroborated and possibly bolstered the Petitioner's credibility, then the foregoing quotation from *McCoy* and the

Petitioner's arguments based thereon might have some applicability.

But the Petitioner did not do so, and the entire line of "corroboration" and "complete defense" cases cited by the Petitioner are simply and entirely inapposite to the issues in the instant case, where there was no "original witness" testimony to corroborate, and where it was entirely the choice of the Petitioner to *assure* that her defense was not "complete" – when she chose not to tell the jury about any alleged abuse when she took the stand.

Consider what a "complete" defense by the Petitioner might have actually been, under the trial judge's preliminary rulings, if the Petitioner had not decided to keep the only clearly first-hand purported evidence of alleged abuse from the jury.

The Petitioner could have taken the stand and testified at length about all the things that she had reportedly told her expert about alleged past abuse, going back for years, and how that alleged abuse had supposedly contributed to her alleged decision to blow her own brains out in front of her husband, as he was recovering from a coma in the ICU unit, after he sent her away. (The prosecution would have cross-examined her, of course, and any weaknesses in her story would have come out; and it appears that there were quite a few).

At this point, the trial judge would have had a body of original evidence alleging past abuse – upon which he could decide whether he should adhere to his preliminary rulings about purportedly corroborative and expert opinion evidence – instead of basically "flying blind." Based on the lengthy colloquy that accompanied the trial judge's preliminary rulings, the court was clearly ready to do that.

But the complete turnabout of the Petitioner, who was so adamant about putting on abuse evidence, could not have been more dramatic. Having been given exactly what she wanted with

respect to her own testimony and her defense of “abuse-leads-to-bungled-suicide,” the Petitioner instead was entirely silent on the abuse issue. She did not give the judge one shred of original evidence about abuse upon which he could decide whether perhaps the expert could testify about abuse. Equally importantly, the Petitioner did not give the *jury* one shred of the kind of evidence that her own expert said was necessary to assess her underlying credibility – which was a necessary precursor for her expert’s opinions.

Moreover, the Petitioner's Supplemental Brief also concedes that no evidence of or relating to alleged past instances of abuse (hearsay, opinion, or otherwise) was placed in the record by the Petitioner’s counsel, in order to preserve any alleged error in connection with the trial court’s ruling on that purported evidence's admissibility.

The Petitioner's Supplemental Brief attempts to excuse the Petitioner’s failure to ask the trial court to revisit its preliminary rulings, and failure to place purportedly excluded evidence before the judge and into the record – by saying that “it is pretty evident” that the trial judge had “no interest” in considering the evidence's admissibility. Pet’r’s Supplemental Br., 6.

Remarkably, the Petitioner’s Supplemental Brief invites this Court to use a “little *imagination* to understand what the substance of the excluded evidence would have been.” Pet’r’s Supplemental Br., 5 (emphasis added).

The Petitioner’s Supplemental Brief’s Lennoesque suggestion that this Court should undertake to “*imagine*” what the Petitioner’s purported evidence might have been entirely misapprehends the purpose of the requirement of seeing that the substance of assertedly wrongfully excluded evidence is fully placed in the record—even if the trial judge is “not interested” in considering its admissibility. Placing such evidence into the record is necessary so that this Court

need not

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).

As this Court stated in *Gardner v. CSX Transp., Inc.*, 201 W. Va. 490, 498 S.E.2d 473 (1997):

[T]he 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.

201 W. Va. at 501, n.14, 498 S.E.2d at 484, n.14 (1997).

In the instant case, the Petitioner asks this Court to determine the magnitude of the trial court's alleged error based on this Court's "imagination" as to the substance of the evidence that the Petitioner claims was wrongfully excluded. This request is one to which this Court should not accede. Under *Gardner*, the question before this Court is whether the nature and substance of the preliminarily excluded purportedly "corroborative" evidence is sufficiently shown in the record so that this Court can evaluate the effect of the trial court's (tentative) decision to exclude the evidence. It is not.

The Petitioner's Supplemental Brief asks the rhetorical question: "if this evidence did not exist, why did the State file a motion to exclude it?" Pet'r's Supplemental Br., 5.² The answer

²The "otherwise why did the State file a motion *in limine*? argument in the Petitioner's (continued...)

is obvious and clearly shown in the record. The prosecution felt that any evidence about alleged past abuse would be irrelevant, primarily due to the alleged abuse's remoteness in time. R. at 108-112. After all, the Petitioner's husband had moved out of their home three years before she shot him, although he continued to support her financially. *Id.*

The record reflects that during a lengthy colloquy, the trial judge tended to agree with the prosecution that due to this lapse of time, the classic "self-defense" rationale for admitting evidence of domestic abuse was not met. *See, e.g.,* Trial Tr., 71-72. However, the trial judge ultimately made a clear ruling that both complied with this Court's ruling in *State v. Harden*, 223 W. Va. 796, 649 S.E.2d 628 (2009) and that showed a commendable belief that a criminal defendant has a right to "tell her story" to the jury, including about alleged instances of past abuse by the man whose brains she blew out as he lay in a hospital bed – no matter how remote in time. Trial Tr., 85.

The Petitioner then took the stand, but entirely failed to claim the benefit of the trial judge's ruling in her favor. Having "made a federal case" out of her purported desire to tell the jury about alleged past abuse, the Petitioner didn't say a word about claims that she argues were so "essential" to her defense. She also withheld her expert's written report from the record, and did not provide the Court with any summary of the purported "corroborative" testimony of her family members. As shown at the Respondent's original Response Brief at 10-11, the Petitioner's expert had explicitly testified that he could not assess the credibility of the Petitioner's statements to him about past abuse.

²(...continued)

Supplemental Brief implies that a reviewing court can make conclusions about the substance of purported evidence – merely because the evidence was objected to! This argument is as bizarre as the related argument in the Petitioner's Supplemental Brief that the substance of excluded evidence should be "imagined" by this Court, in a case where such recourse to imagination is necessitated by the Petitioner's counsel's failure to see that any such substance was placed into the record. These arguments are entirely without merit.

(The suggestion in the Pet'r's Supplemental Br., 5 that the trial judge abused his discretion by denying the Petitioner's request to have her expert present new opinion testimony in the middle of the trial, that would supplement the abuse-related opinions in his written report, is without merit. *Cf. Jenkins v. CSX Transp., Inc.*, 220 W. Va. 721, 728, 649 S.E.2d 294, 301 (2007) (trial judge did not abuse discretion in excluding expert testimony that was not disclosed pre-trial in expert's written report.) The trial judge permissibly exercised his discretion in ruling that the Petitioner's expert's testimony regarding alleged abuse was limited to the opinions that were set forth and summarized in his written report.

Finally, the Petitioner's Supplemental Brief does not dispute that when the judge preliminarily and tentatively granted the prosecution's motion *in limine* with respect to testimony by the Petitioner's family members and her expert about alleged past instances of abuse, the judge explicitly invited the Petitioner's counsel to ask the court to revisit these pre-trial rulings:

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. (2)

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

The Petitioner's Supplemental Brief cites to *Wimer v. Hinkle*, 180 W. Va. 660, 379 S.E.2d 383 (1989), where this Court held that the plaintiff had sufficiently preserved his objection to the admission of evidence at the time of the court's pre-trial ruling. The Petitioner's Supplemental Brief does not mention, however, that *Wimer* is inapplicable when there is an express statement by the court that the ruling was tentative and subject to reconsideration at trial. As explained by Justice McHugh in *Coleman v. Sopher*, 201 W. Va. 588, 499 S.E.2d 592 (1997):

[T]he 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 Petitioner's Supplemental Brief also does not discuss the ample additional authority on this point that is cited in the Respondent's original Response Brief at 18-21, including the following quotation from *Annotation*, 88 A.L.R.2d 12:

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.

Additionally, the Pet'r's Supplemental Br. at 4-5 erroneously suggests that the trial judge's rulings made immediately prior to the Petitioner's expert's testimony were a "revisiting" of the court's preliminary ruling on whether the expert could testify regarding the Petitioner's hearsay statements to the expert about alleged past abuse. This assertion is simply and flatly incorrect. In fact, the Petitioner's counsel made it clear to the Court at this juncture of the trial that counsel was now offering the Petitioner's expert, not to testify about alleged past instances of abuse and how they might have contributed to the Petitioner's mental state, but solely to testify about the Petitioner's apparent depression and suicidality, without discussing the role of alleged abuse. Trial Tr., 609-10. The Petitioner's counsel decidedly did not ask the trial judge to revisit his previous rulings; in fact, counsel said "I am very conscientious of the ruling you made." Tr., 508. (And, by the way, it should be remembered that the trial judge *allowed* the expert's non-abuse testimony, which was at best problematic on the Petitioner's "suicidal" claim. See Respondent's original Brief at 11.

In summary, the Petitioner's Supplemental Brief concedes that the Petitioner had a full opportunity to tell the jury about all of her first-hand evidence of alleged past abuse by the man whom she killed, and she also concedes that she took the stand and chose not to present any such testimony. The Petitioner's Supplemental Brief concedes that the Petitioner's expert said that he could not assess or rely on the accuracy or credibility of the Petitioner's any of hearsay statements to him about alleged past instances of abuse, and also concedes that the Petitioner never placed into the record for this Court's review either her expert's written report, or the substance of any proposed "corroborative" testimony by her family members. Moreover, the Petitioner's Supplemental Brief

concedes that the trial judge's evidentiary rulings were explicitly preliminary and tentative and that those rulings also explicitly invited the Petitioner's counsel to ask the Court to revisit those rulings; and the Brief does not point to a single instance where the Petitioner's counsel asked the trial judge to reconsider his preliminary rulings.

For the foregoing reasons, the Petitioner's claim that the Petitioner's conviction of first-degree murder, based on eyewitness testimony, should be reversed, because the trial judge "erroneously prevented defense counsel from presenting" evidence that was "essential to her defense" is without merit.

B. THE PETITIONER'S ABANDONMENT OF HER ASSIGNMENT OF ERROR REGARDING THE COURT'S REFUSAL TO GIVE A NOT GUILTY BY REASON OF ACCIDENT INSTRUCTION DOES NOT REQUIRE A SUBSTANTIVE RESPONSE, OTHER THAN TO POINT OUT THAT THE JURY'S VERDICT OF FIRST DEGREE MURDER NECESSARILY MEANS THAT THEY DISBELIEVED THE PETITIONER'S STORY OF AN "ACCIDENTAL" SHOOTING THAT WOULD HAVE AT LEAST CONSTITUTED MANSLAUGHTER; AND THAT THE JURY BELIEVED THE TESTIMONY OF THE NURSE/EYEWITNESS – TO-WIT, THAT THERE WAS NO "ACCIDENTAL SHOOTING," BUT A DELIBERATE AND BRUTAL HOMICIDE.

C. THE RESPONDENT'S CLAIMS THAT THE JURY WAS MISLED ABOUT THE ISSUES OF PREMEDITATION AND DELIBERATION, AND THAT THE PROSECUTOR'S REMARKS ABOUT THE PURPORTED "SUICIDE NOTE" WERE REVERSIBLE ERROR, ARE ERRONEOUS.

The prosecutor correctly argued to the jury that the great weight of the evidence showed that the Petitioner got angry when her husband would not reconcile with her, went home to get a gun, and came back to the hospital to kill her husband. But the prosecutor was also well within the evidence and the law, and his right to respond, to dispute the Petitioner's counsel's erroneous suggestion that only a fully formed intent to kill her husband "when the Petitioner entered the hospital" could

support a first degree murder conviction.

The prosecutor properly told the jury that even if the jury concluded that the Petitioner had not fully decided to kill her husband until a few seconds before she did so, this period of time could be sufficient for a first degree conviction – if the jury found that under all of the circumstances, sufficient deliberation had occurred. This is the law of West Virginia, *see* discussion *infra* and Respondent’s original Response Brief at 36-39.

Contrary to what the Petitioner argues at page 16 of the Pet’r’s Supplemental Br., it was and is not a “clear misstatement of the law” for the prosecutor to say that premeditation can occur in a few seconds. (In fact, many a premeditated murder probably meets this standard. For example, it does not take more than a few seconds to see a person, pull out a gun, and fire.)

It certainly was not plain error for the judge, in response to the jury’s question seeking the court’s guidance on whether a few seconds was sufficient for deliberation and premeditation to occur, to adhere to the Court’s previous (and unobjected-to) instructions. Anything other than those instructions would have been an unauthorized departure from this Court’s settled jurisprudence.

The Petitioner’s argument in the instant case echoes an argument that was made – and rejected by this Court – in *State v. Hutchinson*, 215 W. Va. 313, 321-322, 599 S.E.2d 736, 744-745 (2004):

The appellant also maintains that there was insufficient evidence of premeditation and intent in order to justify a conviction of first degree murder. He says,

The State's case was short on evidence of premeditation. The entire event *lasted only a few seconds*, during which time the decedent and Randy Toler made insulting comments toward the defendant. There was not ample time for deliberation and premeditation of the sort that justifies a first degree murder conviction.

215 W. Va. at 321-322, 599 S.E.2d at 744-745 (emphasis added).

This Court, rejecting the appellant's argument in *Hutchinson* that "a few seconds" could not provide time enough for premeditation and deliberation, stated that:

[T]he presence of premeditation is a question of fact reserved for the jury, [and] we believe the facts of this case could lead any reasonable juror to justifiably find premeditation. Although the shooting itself may have occurred quickly, the record before this Court demonstrates that the incidents leading up to the appellant's conduct accumulated and escalated throughout the course of the day. . . . Moreover, our well-established jurisprudence holds that:

Although premeditation and deliberation *are not measured by any particular period of time*, there must be *some period* between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed.

Syl. Pt. 5, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Additionally, we explained in *Guthrie*:

In criminal cases where the State seeks a conviction of first degree murder based on premeditation and deliberation, a trial court should instruct the jury that murder in the first degree consists of an intentional, deliberate, and premeditated killing which means that the killing is done after a period of time for a prior consideration. *The duration of that period cannot be arbitrarily fixed.* The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed. *Any interval of time* between the forming of the intent to kill and the execution of that intended, *is sufficient to support a conviction for first degree murder.*

Syl. Pt. 6 (in part), *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

State v. Hutchinson, 215 W. Va. at 322, 599 S.E.2d at 745 (emphasis added).

In the instant case, the Petitioner went home and got a gun that she brought concealed to the victim's hospital room. The jury was entitled to look at the "incidents leading up to the appellant's

conduct . . . throughout the course of the day” (*Hutchinson, supra*) in determining whether the Petitioner’s conduct in killing her husband amounted to first-degree murder.

It took no “imagination” by the jurors to conclude from the evidence that while the Petitioner *may* have had evolving, contradictory, or mixed feelings about whether she should use the gun to shoot herself or her husband – that when “push came to shove,” the Petitioner finally came down on the side of deliberate murder – as the eyewitness nurse testified.

The prosecutor was therefore *entirely correct* in saying that the Petitioner’s final decision to kill her husband could have taken place in just a few seconds. The trial judge would have been entirely *incorrect* in telling the jury – as the Petitioner argues the judge should have done (Pet. at 45) – that a period of only a few seconds could not comprise sufficient time for her final decision to pull the trigger, and end her husband’s life.³

On the issue of the prosecutor’s remarks about the patently bogus “suicide note,” the Respondent will stand on its original Response Brief.

VI.

CONCLUSION

For the foregoing reasons the jury’s verdict should be upheld.

³ Additionally, the prosecutor’s statement was well within the boundaries established in the case law of other jurisdictions. *See, e.g., Downing v. U.S.* 929 A.2d 848, 862 (D.C. 2007) (“Both premeditation and deliberation may be inferred from the surrounding facts and circumstances, and may occur in only a few seconds.”); *Kidd v. U.S.*, 940 A2d 118, 127-128 (D.C. 2007) (“Deliberate premeditation would have been present even if the killing followed reflection by only a few seconds.”) *Com. v. Basch*, 437 N.E.2d 200, 203 (1982) (“Both premeditation and deliberation may be inferred from the surrounding facts and circumstances, and may occur in only a few seconds.”); *Simpson v. State*, 993 So.2d 400, 409 (Miss. 2008) (“[D]eliberate design to kill a person may be formed very quickly, and perhaps only moments before the act of consummating the intent.”).

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



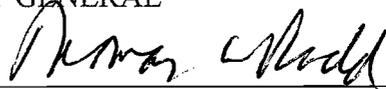
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CERTIFICATE OF SERVICE

I, Thomas W. Rodd, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "SUPPLEMENTAL RESPONSE BRIEF OF THE RESPONDENT STATE OF WEST VIRGINIA" was served upon the following by depositing the same, postage prepaid in the United States Mail, on this the 7 th day of July, 2011, addressed as follows:

To: Gregory L. Ayers
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