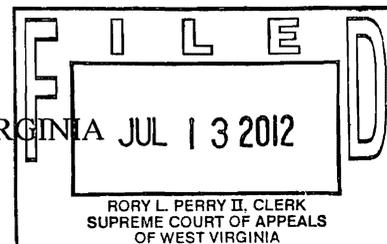


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA

VS.

Supreme Court No. 11-0621

Circuit Court No. 10-F-847
(Kanawha)

CLAYTON ROGERS,

Petitioner.

PETITIONER REPLY BRIEF

Crystal L. Walden
Deputy Public Defender
W.Va. Bar No. 8954
Office of the Public Defender
Kanawha County
Charleston, WV 25330
(304) 348-2323
cwalden@wvdefender.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

REPLY ARGUMENTS

I. The State conceded the Detectives had no intentions of taking Mr. Rogers to the on duty magistrate when they arrived in Charleston as is mandated by the prompt presentment laws of this State. Additionally, the State failed to address why Mr. Rogers was advised of his right to prompt presentment the moment detectives finished taking Mr. Rogers’ statement.....4

II. The State’s analysis of the Conflict in Mr. Rogers case ignores controlling precedent and is wrong..... 8

III. The prosecutorial misconduct complained of in Mr. Rogers’ case was blatant, and pointed intentionally skewing the evidence on the only issue jurors were to decide—intent. Further, it was the last thing jurors heard, and as demonstrated in Mr. Rogers’ brief, it is not the first time this prosecutor has misrepresented the law of first-degree murder before a jury in a high-profile murder case..... 14

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGE</u> |
|---|-------------|
| <i>Hoffman v. Leeke</i> , 903 F.2d 280, 288 (4th Cir. 1990)..... | 12 |
| <i>State v. Boyd</i> , 160 W.Va. 234, 233 S.E.2d 710 (1977). | 15 |
| <i>State v. Deweese</i> , 213 W.Va. 339, 345, 582 S.E.2d 786, 792 (2003) | 6,7 |
| <i>State v. Ellsworth</i> , 175 W.Va. 64, 69, 331 S.E.2d 503, 507–08 (1985) | 6,7 |
| <i>State ex rel. Blake v. Hatcher</i> , 218 W. Va. 407, 624 S.E.2d 844 (2005) | 9,11 |
| <i>State v. Grubbs</i> , 178 W.Va. 811, 814, 364 S.E.2d 824, 827 (1987)..... | 6 |
| <i>State v. Guthrie</i> , 194 W.Va. 657,675, 461 S.E.2d 163,181 (1995) | 15 |
| <i>State v. Shari</i> , 204 P.3d 453 (2009)..... | 9,10,13 |
| <i>State v. Sugg</i> , 193 W.Va. 388, 393, 456 S.E.2d 469, 474 (1995)..... | 14 |

REPLY ARGUMENT

- I. **The State conceded the Detectives had no intentions of taking Mr. Rogers to the on duty magistrate when they arrived in Charleston as is mandated by the prompt presentment laws of this State. Additionally, the State failed to address why Mr. Rogers was advised of his right to prompt presentment the moment detectives finished taking Mr. Rogers' statement.**

The State in its brief conceded that detectives first took Mr. Rogers, **who was under arrest for first degree murder**, to the station, “as a matter of protocol...to allow him an opportunity to give his side of the story.” *State's Brief 12*. The detectives' testimony that Mr. Rogers indicated he wanted to speak to them is false. Not once during the transport¹ did Mr. Roger's state “**I want to tell you what happened**” or “**I want to make a statement.**” The only time Mr. Rogers could have said “I would like to talk to you” that would have given the detectives the right to pass the courthouse, where the magistrate was on duty and available, and instead take Mr. Rogers directly to the sheriff's department for the purpose of taking his statement, was during his transport. **That did not happen.**

The State is now attempting to describe the detectives' actions as something other than taking Mr. Rogers directly to the station **for the sole purpose of interviewing him before** he was taken to the magistrate by calling their actions: “a matter of protocol and to allow him an opportunity to give his side of the story.” *State's Brief 12*. If this was not an attempt by detectives to get Mr. Rogers' statement, why else would be he given Miranda—as Miranda is only required to be given in custodial interrogations? Additionally, just because a procedure is a matter of “protocol” for the sheriff's department does not mean that it complies with the laws of this state.

¹ The entire transport was taped and transcribed. *See A.R.834-853.*

Noticeably absent from the State's brief is an explanation as to why Mr. Rogers was advised by detectives that he had the right to prompt presentment - - **immediately** upon completion of his statement, at the Sheriff's Department, which occurred **prior** to his booking on first-degree murder, the charge for which he was under arrest. Detective Scurlock testified during the suppression hearing that it was part of his job to try to get the defendant to give a statement **and** he further testified that once Mr. Rogers was taken to a magistrate the detectives no longer had the right to interview him without his lawyer.

The State **incorrectly** asserts that Mr. Rogers voluntarily gave a statement. *State's Brief* 15-16. This is not true. Mr. Rogers was under arrest, he was in handcuffs in the back of a cruiser. He had no control over where they were going. Detectives chose to by-pass the courthouse in violation of prompt presentment laws of this state and to take Mr. Rogers to the Sheriff's Department. Importantly, at no time during his transport did Mr. Roger's state "**I want to tell you what happened**" or "**I want to make a statement.**" Additionally, he did not initiate any conversation during his transport. Detectives told him numerous times that they were going to talk to him once they **arrived at the station**. Detectives intended to take Mr. Rogers to the sheriff's department from the moment he was put in the cruiser. That choice was not impacted in anyway by what Mr. Rogers said or did. Mr. Rogers' act of being compliant with his situation is far different from voluntarily making a statement.

Moreover, it is apparent, after listening to just a few minutes of the interview, **this was not a defendant voluntarily telling his side of the story**. Instead, this was a situation where **two detectives were trying very hard to get a confession out of a defendant**, so much so, that they are leading him with the facts from the scene. It is apparent during the interview that the

officers have been to the scene and are trying to fill holes in the evidence with the questions that they are asking Mr. Rogers. *See generally A.R. 837-853*

The requirement to have a defendant presented without delay to a neutral magistrate is sound policy that is in place to *protect precious constitutional rights* of a defendant who is under arrest. It is important to recognize that the prompt presentment rule **is not nullified merely because the police read *Miranda* warnings to a suspect who is under arrest.** This Court *strongly and emphatically* rejected this very argument in *State v. Deweese*, 213 W.Va. 339, 345, 582 S.E.2d 786, 792 (2003). The sole purpose of the prompt presentment rule “is to bring a *detached judicial officer* into the process once an arrest ha[s] been made to furnish meaningful protection for a defendant's constitutional rights.” *State v. Ellsworth*, 175 W.Va. 64, 69, 331 S.E.2d 503, 507–08 (1985) (emphasis added). *See also State v. Grubbs*, 178 W.Va. 811, 814, 364 S.E.2d 824, 827 (1987) (The prompt presentment rule “requires an individual to be promptly taken before a neutral magistrate after arrest. This is to insure that the accused is fully informed of his various constitutional and statutory rights.”). **To rule otherwise would make the prompt presentment rule meaningless and avoidable by simply advising defendants of their *Miranda* rights.**

The State asserts that the detectives did much more than read *Miranda* to Mr. Rogers, explaining the detectives had him complete the *Miranda* waiver. *State's Brief 16*. **That does not matter.** Prompt presentment was violated the moment detectives opted to take Mr. Rogers past the courthouse for the sole purpose of interviewing him. Mr. Rogers would have been advised of *Miranda* and various other constitutional rights he held by a neutral, detached magistrate, not the detectives, if prompt presentment had been satisfied in Mr. Rogers' case. **That can be the only proper analysis of the facts in this case.**

The State managed to render the prompt presentment rule meaningless at the trial level based on the trial court's erroneous ruling, and it is attempting to do the same on appeal. The detectives in this case testified that the purpose of the delay in taking Mr. Rogers to the magistrate was to take him while handcuffed and under arrest to the sheriff's department to "let him tell his side of the story" **something he did not ask to do but was informed he was going to do.** *A.R. 834, 837,841,842.* Mr. Rogers' right to prompt presentment was violated, therefore his statement was inadmissible at trial and the trial court's ruling to the contrary was erroneous and should be reversed by this Honorable Court.

Even if you do consider the executed Miranda waiver, the situation still falls within *State v. Deweese, 213 W.Va. 339, 345, 582 S.E.2d 786, 792 (2003)* and *State v. Ellsworth, 175 W.Va. 64, 69, 331 S.E.2d 503, 507-08 (1985)* **The prompt presentment violation does not disappear.** The Miranda waiver was executed after prompt presentment was violated. Additionally, there is nothing neutral and detached about the reading and signing of a Miranda Waiver in the presence of two detectives who are making light of the forms as Mr. Rogers is initialing so he does not give much thought to the forms. "It means we didn't twist your arm to get you to talk to us or anything; all right?" *R. 859.* Additionally, Mr. Rogers was so emotional at this point that Detective Scurlock asked him ". . . You all right? I understand it is hard." *AR 859* Mr. Rogers responded "I can't even spell my name right." *Id.*

The State correctly points out that it was not alleged, on appeal, that Mr. Rogers' statement was involuntary. That issue was not available to counsel as it was not preserved at the trial level. However, this Honorable Court, in considering the police's intentional violation of the prompt presentment rule should further consider the coercive conditions to which Mr. Rogers was subjected, which raises serious questions as to the voluntariness of his statement. There are

numerous factors this Court could consider in looking at the voluntariness of Mr. Rogers statement.

Mr. Rogers was visibly emotional on the video, breaking down on several occasions. Even during his transport, Detective Snuffer can be heard asking Mr. Rogers: “are you getting relaxed a little bit, buddy?” *A.R. 851*. Playing on his emotions, the officers continuously told him that they want to help him...they want to be able to go to the prosecutor and tell him that it was an accident, Mr. Rogers is a good guy who just made a mistake and he has been honest with us.² *A.R. 841 853,858*. “Honesty is the biggest thing..I know it’s tough buddy.” *A.R. 853*.

The detectives also catered to Mr. Rogers, offering him left over pizza and when he turned it down the detectives asked him what he would like to eat. Still during the transport, Mr. Rogers stated he would eat a burger from Wendy’s so the detectives called another deputy and told them to deliver the Wendy’s meal and a frosty **to a particular interview room at the sheriff’s department** for Mr. Rogers. The officers told him cost was not an issue. They also remarked how nice it was for them to have food delivered for Mr. Rogers. *A.R. 844-46,860, 880*. It did not stop there as detectives again bought Mr. Rogers food on the way to the courthouse after they had taken him to Saint Albans to look for the knives.³

II. The State’s analysis of the Conflict in Mr. Rogers case ignores controlling precedent and is wrong

The State did not discuss why this Court’s opinions and those of the Fourth Circuit, cited by counsel were not applicable in Mr. Rogers Case. Furthermore, the State represented Mr. Rogers was fully aware of the conflict situation and consented to counsel Parmer’s continued representation—which is not true. *State’s Brief 26-27*.

² They say this to Mr. Rogers numerous times during his interview. They also keep telling him that honesty is the best policy and he will feel as though a huge weight has been lifted once he tells his side of the story.

³ The State **incorrectly** states that the knives were recovered. The knives in question **were not recovered**.

As trial counsel explained, the Office of the Public Defender represented both Mr. Hubbard, the State's key lay witness, and Mr. Rogers at the time of Mr. Roger's trial. *A.R.* 237. Mr. Hubbard's case was recent, he had entered a plea two months prior to Mr. Rogers trial. In fact, he was in prison on that charge at the time of trial and had to be transported from prison in order to testify. Additionally, his trial counsel stated a Rule 35 was not out of the question on his case. *A.R.* 239. Therefore, trial counsel for Mr. Rogers had no option but to file a motion to withdraw notifying the trial court of a direct conflict of interest that impacted a heavily publicized first-degree murder case.⁴

The State correctly asserted the Office of the Public Defender does have a screening policy in place. *State's Brief at 23 n.26*. However, as the Chief Deputy Defender George Castelle explained to the trial court, screening is **used only in less serious cases**. *A.R.* 252-53. In serious cases, such as first-degree murder, the conflict rules are followed to a T in order to protect the clients' interest. *A.R.* 252-53, 258-59. The office's reputation, and the reputation and integrity of the legal system are also legitimate concerns that should be considered by the trial court. The case the State cited in support of its position that there was no conflict in Mr. Rogers case, *State v. Shari, 204 P.3d 453 (2009)*, actually supports Mr. Rogers' argument. In *Shari*, a similar screening policy is in place; however instead of individual public defender offices operating independently of each other as we have in this state, the Colorado system has one central office and several other regional offices. That is a **key fact** in understanding the holding of the court in *Shari*.

⁴ In *State ex rel. Blake v. Hatcher, 218 W. Va. 407, 624 S.E.2d 844 (2005)*, this Court developed a non-exhaustive list of considerations to assist lower courts in making this type of decision:(1)the potential for use of confidential information by defendant's counsel when cross-examining the State's witness; (2) the potential for a less than zealous cross-examination by defendant's counsel of the State's witness; (3) the defendant's interest in having the undivided loyalty of his or her counsel; (4) the State's right to a fair trial; and (5) the appearance of impropriety should the jury learn of the conflict. These factors are to be considered in light of the individual facts and circumstances of each case.

The *Shari Court* held that just because the state witnesses had been represented by the public defender did not mean there was an automatic conflict, especially when the representation was **out of different central offices** and the cases were closed. Importantly, the *Shari Court* explained a situation like Mr. Rogers' **would be deemed a conflict and immediately reassigned**: "the policy includes provisions requiring withdrawal where attorneys within the same regional office are currently representing both a defendant and a witness against that defendant." *Id. at 456* As discussed at length in petitioners brief, this result is the typical, throughout the jurisdictions. However, the policies in place to achieve it vary greatly.

The State asserts Mr. Rogers' counsel did not have anything confidential concerning Mr. Hubbard, the State's key witness. That is not accurate. The Public Defender Office's Managing Deputy stated the office makes every effort to screen lawyers when this situation happens, and counsel Parmer stated he would not seek Mr. Hubbard's file. This screening system is not fool proof nor is it the only factor to be considered. However, Mr. Parmer did state to the court he felt he should be able to impeach Mr. Hubbard with anything that an investigator could uncover in an investigation of Mr. Hubbard. **This would clearly involve material that is not of public record.** It also brings into the consideration two additional issues: that of using common staff⁵ and investigating a current client with the intent to gather information that would be damaging [information that would call into question the client's creditability] to be used against that client for the benefit of the second client. Clearly, this is a violation of the attorney-client privilege.

⁵ Another issue that was discussed with the trial court during the motion to withdraw hearing was the problem that common staff caused in the screening process. Here there is no screening process for investigators, therefore there is no way to prevent the same investigator who worked with Mr. Hubbard's lawyer from being assigned to Mr. Rogers' case. The screening process only applies to lawyers in the Public Defenders Office. Additionally, the investigator staff is much smaller than the lawyer staff. Therefore, it could be quite possible that the investigator due to being involved in Hubbard's case, would have confidential information and unknowingly use that information improperly on behalf of Mr. Rogers while conducting the investigation Mr. Rogers' counsel requested.

Importantly, Mr. Hubbard was never approached by the trial court and questioned whether he waived his attorney client privilege. He too held an attorney-client privilege in this situation and also had valid concerns in protecting that privilege because any newly found information that would damage his creditability would also have the potential to adversely affect any Rule 35 motion his attorney would file.

The State's argument, that Mr. Hubbard was "impeached" by the State regarding his prior criminal record at trial and therefore there was no prejudice to Mr. Rogers because his counsel did not cross-examine Mr. Hubbard regarding his prior record, is **disingenuous and wrong**. The questions quoted by the State do discuss Mr. Hubbard's record, but as this Court and everyone else involved is well aware, these questions are nothing close to what a good zealous cross-examination regarding these issues should have entailed. Not surprisingly, this is one of the concerns this Court cited in *Hatcher* that is to be heavily weighted when a circuit court is considering a conflict situation. In a conflict situation, counsel is torn between two interests.

The potential for harm the conflict creates is whether counsel will forgo cross-examination or not cross-examine zealously so as to protect the client on the stand to the detriment of the client on trial. That is exactly what happened here. There was absolutely no cross-examination regarding Mr. Hubbard's prior criminal record. This was prejudicial to Mr. Rogers because several offenses were impeachable offenses [one of which he was in custody on at the time of trial] that should have been used and could have been used to call into question Mr. Hubbard's credibility before the jury. Not surprisingly, the decision as to whom the jury believed between Mr. Rogers and Mr. Hubbard came down to credibility. The lack of vigorous cross-examination by defense counsel was highly prejudicial to Mr. Rogers. Jurors seeing the

State kindly discuss Mr. Hubbard's criminal record with him instead of defense counsel confronting him with his past obviously painted a much nicer picture for the jury.

The State asserts that current counsel was less than honest regarding the trial court's discussion of the conflict issue with Mr. Rogers and **that is not true.** *State's Brief 25* . The right to conflict free counsel is a constitutional right that cannot be waived **without full knowledge of what is in fact being waived.** The case law is clear on this issue. Waiver of conflict free counsel is possible; however, that is a decision that must be made on a case by case basis, and, above all, the record must demonstrate the waiver was made voluntarily, knowingly, and intelligently. *Hoffman v. Leeke, 903 F.2d 280, 288 (4th Cir. 1990).* **There was no in-depth discussion on the record between the trial court and Mr. Rogers regarding this issue.** Furthermore, the State's reliance on Mr. Rogers' response to the court's line of questioning, quoted in its brief and ending with a question asking if he was satisfied with counsel's representation thus far as Mr. Rogers' waiver of his right to conflict free counsel, is incredible. *State's Brief A. R. 268.*

The State represents that "it is clear from this discussion that counsel Parmer discussed the conflict issue with the Petitioner and he understood the situation." *State's Brief at 27* Counsel Parmer stated to the trial court : "I have spoken to him about the matter. . .**I cannot speak for him and I don't know whether I should.... I don't know whether that directly addresses the issue of how to remedy the conflict...I think he understands. . . the problem...I just said the Court will rule how the Court rules and we will proceed accordingly.**" *A.R. 267.* Nothing about this statement clearly defines what was discussed or what Mr. Rogers understood. Furthermore, nowhere in the record does the Court specifically

and directly ask Mr. Rogers, as is required, if he is knowingly and willingly waive his right to conflict free counsel.

Again in *Shari* there is a good example of what should have occurred on the record between the trial court and the defendant to deem that a defendant **did in fact waive his right to conflict free counsel:**

The Court: ...That means, they have an obligation to dig up whatever they can on these people and use it in whatever way they can to try to discredit them in front of the jury. It would be digging up information and discrediting these people, whom the Public Defender's [O]ffice, apparently even including some of the other Public Defenders here in the Golden Office have represented in the **past**. Do you feel comfortable in those circumstances having these people represent you?

The Defendant: Yes

The Court: The alternative is that the Court can **and would** appoint another counsel, someone, one or more lawyers, who have previous experience and ability in murder cases to represent you. Someone who has no prior contact with these three witnesses and that would be at state expense, no charge, now what is your thought about this?

The Defendant: I am fine with these two

Id. at 460 (emphasis added).

In Mr. Rogers case, Mr. Hubbard, the State's key witness, was a current client. Additionally, the trial court in Mr. Rogers' case told him she was inclined to keep the Public Defenders Office on the case prior to him answering the questions the court did pose to him.

A.R.

This Court should also consider Mr. Rogers IQ, which according to the court-ordered evaluation, is 83 and is described in the report as low.⁶ *A.R. 5*. While it is true Mr. Rogers was in the courtroom the entire time the conflict issue was being discussed, the subject was not easily communicated or followed. This is demonstrated by the number of people it took from the Public Defender's Office to fully discuss the issue with the trial court during the hearing on trial

⁶ The report states that Mr. Rogers I.Q. could be as low as 78 or as high as 98 based on his score of 83. *A.R. at 5*.

counsel's motion to withdraw. Furthermore, some lawyers, let alone a lay person, would not understand what a "Rule 35 motion" was, the only description of it given during the hearing, nor would it be apparent why the motion should be considered in a conflict situation.

That is why case law requires the subject to be discussed thoroughly with the defendant on the record to ensure that he/she understands the issues and how the issues could impact their own case before a valid waiver can be deemed to have occurred---that did not happen in Mr. Rogers' case. That a hearing was held on the issue [discussed in front of the defendant] and a decision made based on that hearing **is not enough** to prove that Mr. Rogers knew what the issues were, knew how the conflict could impact his case, and with this knowledge agreed to waive his **constitutional right to conflict free counsel**. That simply did not happen in this case.

III. The prosecutorial misconduct complained of in Mr. Rogers' case was blatant, and pointed intentionally skewing the evidence on the only issue jurors were to decide—intent. Further, it was the last thing jurors heard, and as demonstrated in Mr. Rogers' brief, it is not the first time this prosecutor has misrepresented the law of first-degree murder before a jury in a high-profile murder case.

Prosecutorial remarks that have a significant "tendency to mislead the jury and to prejudice the accused[,]'" require reversal. *Id.* (quoting *State v. Sugg*, 193 W.Va. 388, 393, 456 S.E.2d 469, 474 (1995)). The prosecutor's ability to exercise great influence over the jury was especially true in Mr. Rogers case for two reasons:

1. Mr. Rogers case was a high profile murder case. Despite the fact that jurors are instructed not to listen to the news or read anything regarding the case, the fact that news casters the jurors are familiar with were in the courtroom on a daily basis makes a statement about the case.
2. The prosecutor was making these remarks, during the trial, as the elected prosecutor of Kanawha County. Mr. Plants typically makes appearances in high profile cases, therefore, his appearance alone as "the top law enforcement officer of Kanawha County" was also making a statement of the importance of the case to jurors.

Mr. Plants told jurors first-degree murder could be a **spontaneous event** in the final moments of trial and he was not corrected by the trial court. He further ended his argument, inciting the jury against Mr. Rogers, by telling jurors that Mr. Rogers would be able to enjoy three meals a day while Amos would not. This statement had nothing to do with the trial and everything to do with emotion and clearly violated Mr. Plants' duty to seek justice and his elevated duty to deal fairly with Mr. Rogers due to the severity of the facts involved. *Syllabus Points 3 and 4, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977)*.

Justice Cleckley, writing for this Court in *State v. Guthrie, 194 W.Va. 657,675, 461 S.E.2d 163,181 (1995)*, explained that premeditation **cannot be instantaneous nor deliberation momentary to prove first-degree murder**. Thus, "murder in the first-degree is a calculated killing as opposed to a spontaneous event." *Id. at 674, 461 S.E.2d at 180*. Because, the evidence of first-degree murder in Mr. Rogers' case was open to serious question, the prosecutor's serious misrepresentations of the evidence and his assumptions that were not supported by the evidence were extremely prejudicial to Mr. Rogers' case. Importantly, these improper statements bolstered the State's case at a time when defense counsel could not respond.

The prosecution further misled jurors as the State was aware of Dr. Miller's conclusion the Mr. Rogers was likely operating under an alcoholic blackout at the time of the incident but still chose to **portray Mr. Rogers as a liar who "conveniently" did not remember the crime, but did remember other facts and who also "conveniently" told others about what he did before he "forgot everything."** *A.R. 783-788*.

The State argued that the Court sustained defense counsel's objections counsel made during closing but that is not the case. *State's Brief at 29 n.28*:

Mr. Parmer: Your honor, I object. I don't think the evidence was that he walked across the room. I don't think anyone knows how—

The Court: That's —

Mr. Plants: And Approached the victim. And whether it was five feet or two feet, he approached the victim. My point is - - Can I keep going? Okay.

The Court: Just make sure it comports with what the evidence was.

Mr. Plants: Certainly...

...

Mr. Parmer: The evidence was not. . .

The Court: The jury will recall

Mr. Plants: The other. . . one was severed partial

Mr. Parmer: It was incised

A.R. 790-91

Mr. Parmer: Your Honor, that, that's not - -

The Court: I am going to let the jury recall if - - he's making argument based on the evidence. The jurors can figure out what the experts —

Mr. Parmer: But if the expert can't say that, then I do not know why he is allowed to. Because the expert did not say that that's where - - you know that's a pocket knife. He didn't say that because he couldn't. So I do not know how we can let on closing argument, you know, make all of these assumptions.

The Court: Your objection is noted. And you know where the line is.

A.R. 792-793. As demonstrated above, the court did not sustain all of counsel's objections to the improper arguments made during the final minutes of closing, and even if it had the improper assumptions were out there and the jury had them to consider so the damage was done.

The prosecutor's remarks in closing argument do require reversal in Mr. Rogers' case. Intent was the only issue the jurors were to decide in this case. The prosecutor misrepresented the evidence, made assertions not supported by the evidence, appealed to the jurors emotions, and most importantly, grossly misstated the law of first-degree murder in a high profile, widely publicized case telling jurors it could be committed in a moment. Importantly, these statements were made moments before jurors began deliberations, therefore the prosecutor's misstatements were the last thing the jurors heard and were even more prejudicial based on that fact. Counsel had no way to correct, or blunt these misrepresentations, unsupported assertions, the improper appeal to jurors' emotions, and most importantly, the flagrant misstatement of the law. It is for

all the above reasons Mr. Rogers' conviction should be reversed based on prosecutorial misconduct.

Respectfully Submitted,

CLAYTON ROGERS
By Counsel

A handwritten signature in cursive script that reads "Crystal L. Walden". The signature is written in black ink and is positioned above a horizontal line.

Crystal L. Walden
Deputy Public Defender
W. Va. Bar No. 8954
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330
(304) 348-2323
cwalden@wvdefender.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 13th day of July, 2012, I hand delivered a copy of the foregoing *Petitioner's Reply Brief* to counsel for respondent, Benjamin F. Yancey, III, Assistant Attorney General, Office of the Attorney General, State Capitol , Building 1, Room W-435, Charleston, WV 25305.

A handwritten signature in cursive script, appearing to read 'C. L. Walden', written over a horizontal line.

Crystal L. Walden
Counsel for Petitioner