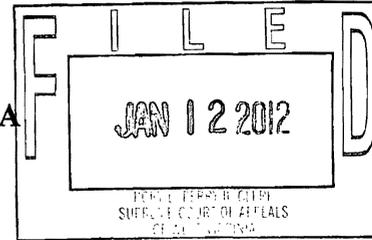


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1273



STATE OF WEST VIRGINIA,

*Plaintiff Below,  
Respondent,*

v.

RODNEY L. HYPES,

*Defendant Below,  
Petitioner.*

---

SUMMARY RESPONSE TO PETITIONER'S PETITION FOR APPEAL

---

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL

JACOB MORGENSTERN  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, Sixth Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 11497  
E-mail: [jhm@wvago.gov](mailto:jhm@wvago.gov)

*Counsel for Respondent*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1273

STATE OF WEST VIRGINIA,

*Plaintiff Below,  
Respondent,*

v.

RODNEY L. HYPES,

*Defendant Below,  
Petitioner.*

---

**SUMMARY RESPONSE TO PETITIONER'S PETITION FOR APPEAL**

---

Comes now the State of West Virginia, by counsel, Jake Morgenstern, Assistant Attorney General, and files the within Summary Response to the Petition for Appeal.

**I.**

**STATEMENT OF THE CASE**

**A. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.**

On March 18, 2009, a Nicholas County Grand Jury returned a two count indictment against the Petitioner, Rodney L. Hypes (hereinafter referred to as "the Petitioner.") Count one of the indictment contained a charge of "operating or attempting to operate a clandestine drug laboratory," a violation of West Virginia Code § 60A-4-411. (App. vol. I at 4.) Count two of the indictment contained a charge alleging that the Petitioner conspired with Ms. Tina M. Keener, the Petitioner's then-girlfriend, to manufacture methamphetamine, a violation of West Virginia Code § 60A-4-401. Ms. Keener was named in the indictment but not indicted as a co-defendant. (App. vol. IV at 4-5.)

On August 13, 2009, the case came to trial, and the trial court dismissed count two at the end of the State's case-in-chief. (App. vol. III at 170-71.) The jury subsequently returned a verdict of "guilty" on count one of the indictment. (*Id.* at 210.) On October 19, 2009, the Petitioner was sentenced to serve two to ten years in prison for his conviction. (App. vol. IV at 16.) The Petitioner was resentenced, (*id.* at 18-19) and subsequently filed a timely appeal.

**B. STATEMENT OF FACTS.**

In the summer of 2007, the Petitioner had been living for some time with his then-girlfriend Ms. Tina Keener at apartment 223 of Dylan Heights Apartments in Summersville, Nicholas County, West Virginia. (App. vol. III at 22-23, 140.) The apartment was leased to Ms. Keener, but the Petitioner had been living there, and had been observed there on numerous occasions over several months, with Ms. Keener in and around their residence. (*Id.* at 22-23.)

On the afternoon July of 30, 2007, Gretchen Roop, the manager of Dylan Heights Apartments, watched the Petitioner leave apartment 223 with a trash bag, which according to Ms. Roop's testimony, he "very carefully" carried from the apartment to a dumpster in the parking lot. (*Id.* at 24, 25, 32.) Ms. Roop testified that "[the Petitioner] was walking slow, abnormal to someone taking out trash. You know, they kind of swing it or drag it." (*Id.* at 24-25.)

After observing the Petitioner's behavior, Ms. Roop retrieved the trash bag carried by the Petitioner. Ms. Roop examined the contents of the Petitioner's trash bag, and discovered peroxide and matchbooks, two items associated with the manufacture of methamphetamine. (*Id.* at 27.) Ms. Roop immediately phoned her husband, a police officer, who then called Shane Dellinger. Ms. Roop, her husband, and Mr. Dellinger went into the maintenance room and examined the bag more closely.

Upon examination they found a bottle with smoke coming from it. They then removed the bag from the room to the lawn. Mr. Roop then telephoned the Drug Task Force. (*Id.* at 27-28.)

The police arrived shortly thereafter, and as Sergeant Tim Blake would recount in his testimony at trial when examined by the prosecution, he and the Nicholas County Sheriffs's Department Drug Task Force discovered the components of a clandestine drug laboratory.

Q What specifically did you observe in that trash bag?

A There were peroxide bottles, matchbooks that -- like a matchbook that you would open up and a match out and have the striker plate on the back. Well, they were pulled apart; and you had like just the actual matches and part of the book were laying there.

Q Why is that significant? What, if anything, does your police training tell you about the condition of those matchbooks?

A In order to manufacture methamphetamine by the most - common method that we see around here, the striker plate of a matchbook would be taken off to obtain red phosphorus, is what actually causes a match to light when you strike it.

Q What else did you see?

A There were a couple of bottles in there. One had some brownish-red liquid in it. Another one had some coffee filters stuffed in the end of it. It was cut in half and coffee filters stuffed in the end of it.

Q Just general things that, you know, that go along with what we normally see with the manufacture of methamphetamine.

Q Ms. Roop described a smoking bottle of sorts. Did you see anything that matched her description?

A Right. It's what's generally referred to as a gas generator. It has rock salt and another chemical in it that would cause a chemical reaction, and it would fume and smoke.

Q When you arrived did you see a bottle similar tot he one she just described to the jury?

A Yes.

(App. vol. III at 49-50.)

The police then secured the apartment where the Petitioner and his girlfriend were living, and subsequently obtained a search warrant. Upon execution of the search warrant and investigation of the apartment, the police discovered even more evidence of a clandestine drug laboratory. Sgt. Blake further recounted in his testimony at trial when examined by the prosecution.

Q Could you please describe for the jury what's depicted in the State's Exhibit No. 9?

A A Bernzomatic propane bottle, a spatula, and I don't recall what was inside the black bag there.

Q What, if anything, is significant about that propane cannister?

A It's a source of heat.

Q Is that significant in the manufacturing of methamphetamine?

A Yes.

Q How so?

A During the process, you have to have a heat source to achieve one of the synthesis reactions that happens during the cook.

Q State's Exhibit No. 10, please.

A It's a camp fuel container. It was located under the sink.

Q What, if anything, is significant about that?

A It's another chemical that's needed in the manufacture of methamphetamine.

Q State's Exhibit No. 11, please.

A It's a pill bottle belonging to [the Petitioner] that we found in the apartment.

Q State's Exhibit No. 12?

A In a -- They had like their own laundry room or something inside those apartments. It's a brown bottle.

The label say's "Iodine, 7 percent tincture, strong and caution," and all this other stuff. It's inside that room, and it's in that bag right there, if I can get this button -- There we go.

Q Okay, thank you. And that was found in the laundry-room area --

A Yes.

Q -- for lack of a better word. State's Exhibit No. 13?

A The same area where the iodine jug was found. It's a hotplate. Again, it's -- You know, you need a heat source to achieve areas in the methamphetamine production.

Q State's Exhibit No. 14?

A It's a -- It's got [the Petitioner's] name on it. I think it was a check stub or something to that effect. I can't read what the top is.

Q Could it be a medical card?

A Yes.

Q State's Exhibit No. 15?

A It's another piece of mail with [the Petitioner's] name on it that was found in the apartment.

Q No. 16?

A It's Spa Ph. It's typically used in trying to achieve the right pH in pools or hot tubs. Dylan Heights has no pool or hot tub, to my knowledge.

Q Does that have any significance in the manufacturing of methamphetamine?

A Yes. A cook tries to achieve the proper pH during the cook in order for it to be good. So they add something, something like this, perhaps, in order to achieve that pH.

Q State's Exhibit No. 17?

A It is a fire detector. It's removed from the ceiling. One of three, yeah, I believe, that were in the apartment.

Q That brings me to No. 18.

A Right. The same thing a different room.

Q No. 19?

A The same thing, a different room.

Q So, three fire smoke detectors have been taken down from the ceiling?

A Correct.

Q No. -- I'm sorry -- No. 20?

A It is a garbage bag. Again, you can see the matchbooks there with the striker plate peeled off.

Q And finally, State's Exhibit No. 21?

A It's a duffle bag containing plastic tubing, a glass soapy bottle which we tend to see in a lot of methamphetamine production because they're good to make gas generators out of, and a spatula for scraping.

Once you break down the pill from Sudafed to get the pure ephedrine, they'll scrape the Pyrex dish; or, whatever they may use to do it, they'll use a scraper like that.

(App. vol. III at 62-65.)

Finally, the police found a book describing in detail how to manufacture methamphetamine. This book, *Secrets of Methamphetamine* Uncle Fester's 7th Edition, was also found in the apartment.

(*Id.* at 66.)

According to Ms. Keener, she had never made methamphetamine, knew nothing about it, and knew nothing about the needed ingredients. (*Id.* at 144-47.)

On April 3, 2009, Nicholas County Deputy Sheriff Michael A. Hanks served warrants on the Petitioner for misdemeanor Sudafed purchases. (App. vol. IV at 7.) After being taken into custody,

the Petitioner executed a waiver of his Miranda rights. (*Id.*) Deputy Hanks asked the Petitioner a series of questions about his knowledge of methamphetamine manufacture. (*Id.* at 159-63.) This exchange was recounted at trial by Deputy Hanks.

The next question was: Is there anything else that could help me understand?

[The Petitioner's] answer was: You can check on the internet. **I got my information and my start with Uncle Fester's cookbook**, I have always been interested in chemistry.

**You actually get addicted just cooking the dope more than using the dope. I could set in jail for ten years, [and] I would still be addicted to cooking meth.**

That's the end of the statement. It's signed by [the Petitioner].

(*Id.* at 162.) (Emphasis added.)

Upon hearing all of the evidence as outlined above, a Nicholas County jury took less than 30 minutes to return a verdict of "guilty" on count one of the indictment, "operating or attempting to operate a clandestine drug laboratory," in violation of West Virginia Code § 60A- 4-411. On October 19, 2009, the Petitioner was sentenced to serve two to ten years in prison for his conviction. (App. vol. IV at 16.) The Petitioner was resentenced, and subsequently filed a timely appeal.

## II.

### ARGUMENT

#### A. **THE TRIAL COURT COMMITTED NO ERROR IN DENYING THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL, AS THE WEIGHT OF EVIDENCE WAS SUFFICIENT TO SUPPORT A GUILTY VERDICT ON THE CHARGE OF WHICH THE PETITIONER WAS FOUND GUILTY.**

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

Rule 29 Motion For Judgment Of Acquittal And Standard of Review.

West Virginia Rules of Criminal Procedure 29(a) provides, in relevant part, that “[t]he court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.”

In *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995) this Court held that:

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

(*Id.* at Syl. Pt. 1.)

This Court further held in *Guthrie*:

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

(*Id.* at Syl. Pt. 3.)

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

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

## **2. Operating or Attempting To Operate Clandestine Drug Laboratory.**

The Petitioner was convicted of by a jury of his peers of operating or attempting to operate a clandestine drug laboratory in violation of West Virginia Code § 60A- 4-411. Section 60A-4-411 provides, in pertinent part, as follows:

(a) Any person who operates or attempts to operate a clandestine drug laboratory is guilty of a felony and, upon conviction, shall be confined in a state correctional facility for not less than two years nor more than 10 years . . . .

(b) For purposes of this section, a “clandestine drug laboratory” means any property, real or personal, on or in which a person assembles any chemicals or equipment or combination thereof for the purpose of manufacturing methamphetamine . . . .

The evidence adduced at trial clearly shows that the materials and substances found in the trash bag carried by the Petitioner as well as the materials and substances found in the residence inhabited by the Petitioner are key ingredients or precursors for producing methamphetamine. Sergeant Tim Blake and the Central West Virginia Drug Task Force (App. vol. III at 45) discovered and seized numerous matchbooks with the strike plates missing. Sgt. Blake testified that the strike plates on matches contain red phosphorus, which is a key ingredient that methamphetamine producers use to make the drug. Also discovered in the Petitioner’s trash bag were peroxide bottles, coffee filters, and several bottles with brownish-red liquid, one of which had coffee filters stuffed in the end of it. Sgt. Blake testified that these were “things that, you know, that go along with what we normally see with the manufacture of methamphetamine.” (*Id.* at 50.) The Petitioner’s trash bag was further found to have contained what Sgt. Blake described as a “gas generator,” which contained rock salts and other chemicals to cause a chemical reaction. (*Id.*) The police discovered in the Petitioner’s trash bag “blister packs” of a nasal decongestant, which Sgt. Blake testified “more than likely that had Sudafed in them.” The police further found a HEET bottle, which as Sgt. Blake testified is a key component in the manufacture of methamphetamine. (*Id.* at 55).

Then there was Ms. Tina Kenner's residence. When Ms. Roop saw Ms. Keener, she normally saw the Petitioner as well (App. vol. III at 22), and Ms. Keener testified that the Petitioner lived with her. (*Id.* at 24, 140.) Found inside this residence were not one, not two, but three dismantled smoke detectors. Further, the police discovered plastic tubing, a large jug of peroxide, a propane bottle, camping fuel (*id.* at 62), glass jars, bottles, and more matches with the strike pads missing. (*Id.* at 62-65.) Sgt. Blake testified that these were all key ingredients in the manufacture of methamphetamine. Finally, the police found a book, *Secretes of Methamphetamine Uncle Fester's 7<sup>th</sup> Edition*, describing in detail how to manufacture methamphetamine. (*Id.* at 66.) Chemical tests conducted on the materials found in the apartment revealed the presence of phosphorus, iodine, acetone, and hydrochloric acid. (*Id.* at 118-20.) All of the aforementioned items were found on July 30, 2007, immediately after the Petitioner and Ms. Keener left said apartment. (*Id.* at 25, 28.) The police explained that they guarded the door, and no other person came in or came out of the apartment while a search warrant was obtained. (*Id.* at 58.)

Finally, the Petitioner gave a signed statement to the police, indicating his love of and "addiction" to cooking methamphetamine. In this statement, the Petitioner discussed red phosphorus. (*Id.* at 159.) Red phosphorus was found in the apartment. (*Id.* at 119.) The Petitioner discussed iodine, which was also found the apartment. (*Id.* at 159-60.) The Petitioner discussed Sudafed, similar to what is found in the blister packs that were found in the apartment. (*Id.* at 162.) In short, the Petitioner's statement discussed many of the items found in the apartment. (*Id.* at 159-62.)

On appeal, the Petitioner argues that no evidence was presented at trial showing any intent on the part of himself to operate a drug laboratory. The Petitioner's intent can be inferred from the circumstances and a reasonable inference is that the jury inferred intent when it convicted the

Petitioner. *See State v. Walker*, 109 W. Va. 351, 353, 154 S.E. 866, 867 (1930) (“Intent, being a state of mind, is rarely susceptible of direct proof, but must ordinarily be inferred from the facts.”). *See also State v. Copen*, 211 W. Va. 501, 507, 508, 566 S.E.2d 638, 644, 645 (2002) (“Although the issue of intent was in question in the case, in this Court's opinion, there was ample circumstantial evidence from which the jury could have inferred intent.”).

On appeal, the Petitioner also asserts that there is no evidence connecting him with the items found in the trash bag that he was carrying, nor in the apartment in which he was residing. The Petitioner thus argues that because he was not in possession of these items he cannot be guilty of assembling them to make methamphetamine. It is true that the Petitioner was not in actual possession of the items found in the trash bag or the items found in the apartment. However, there is plenty of circumstantial evidence showing that he had constructive possession of these items. “The offense of possession of a controlled substance also includes constructive possession, but the State must prove beyond a reasonable doubt that the defendant had knowledge of the controlled substance and that it was subject to defendant's dominion and control.” Syl. Pt. 3, *State v. Chapman*, 178 W. Va. 678, 363 S.E.2d 755 (1987) (quoting Syl. Pt. 4, *State v. Dudick*, 158 W. Va. 629, 213 S.E.2d 458 (1975)).

Sgt. Blake and the Central West Virginia Drug Task Force did not discover some discarded pill packs, a used pack of matches, and some other unrelated refuse in the trash bag carried by the Petitioner and in the apartment in which the Petitioner resided. What the police found in the trash bag were numerous matchbooks with the strike plates missing, peroxide bottles, blister packs of a nasal decongestant, coffee filters, a used HEET bottle, and several bottles with brownish-red liquid, one of which had coffee filters stuffed in the end of it. As Sgt. Blake testified at trial, these were all items normally associated with the manufacture of methamphetamine. The apartment was found to

have three disabled smoke alarms as well as various chemicals and numerous other items associated with the manufacture of methamphetamine. (App. vol. III at 64-65.) All of these items were found in an apartment inhabited by Petitioner, or in a trash bag carried “very carefully” by the Petitioner from this apartment to a dumpster.

Perhaps most damning of all was a book the police found in the Petitioner’s apartment, a book titled *Secrets of Methamphetamine Uncle Fester’s 7<sup>th</sup> Edition*. This book described in detail how to manufacture methamphetamine. The Petitioner would later state that “I got my information and my start with “*Uncle Fester’s Cookbook*; I have always been interested in chemistry.” (*Id.* at 162.) Here, the Petitioner acknowledged his deep passion for the manufacture of methamphetamine, as well as his familiarity with the book found in the apartment where he was residing. (*Id.*) The Petitioner would go on to state that he could “actually get addicted just cooking the dope more than using the dope.” (*Id.*) The Petitioner stated, “I could set in jail for ten years, [and] I would still be addicted to cooking meth.” (*Id.*)

All of this evidence clearly shows that the Petitioner had constructive possession of the items found in the apartment where he was living and in the trash bag which he removed from said apartment. The Petitioner had knowledge of these items and they were subject to his dominion and control.

As for Ms. Keener, the Petitioner’s then-girlfriend, there is nothing in the record to connect her to the items seized by the police. As noted in the Respondent’s and the Petitioner’s “Statement of the Facts,” Ms. Keener had never made methamphetamine, knew nothing about it, and knew nothing about the needed ingredients.

III.

CONCLUSION

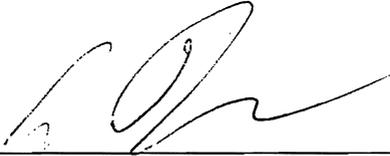
For the foregoing reasons, the State respectfully requests that the Court dismiss the petition and deny any and all relief requested by the Petitioner.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Plaintiff Below, Respondent*

*By counsel,*

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL



---

JACOB MORGENSTERN  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, Sixth Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 11497  
E-mail: [jhm@wvago.gov](mailto:jhm@wvago.gov)

*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, Jake Morgenstern, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "*SUMMARY RESPONSE TO PETITIONER'S PETITION FOR APPEAL*" was served upon the following by depositing the same, postage prepaid in the United States, on this the 12th day of January, 2012, addressed as follows:

To: Gina Stanley, Esq.  
Cabell County Public Defenders Office  
320 9<sup>th</sup> Street  
Huntington, WV 25701



---

JACOB MORGENSTERN