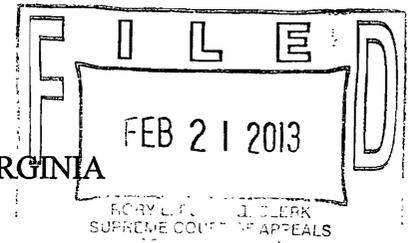


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-1121



STATE OF WEST VIRGINIA,
Plaintiff Below,
Respondent

v.

ETHAN CHIC-COLBERT,
Defendant Below,
Petitioner.

REPLY BRIEF ON BEHALF OF THE PETITIONER

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REPLY BRIEF ON BEHALF OF THE PETITIONER

Comes now the petitioner, Ethan Chic-Colbert, by counsel, Woody Hill and Kelli Hill, and files this reply on behalf of the petitioner in support of petitioner's appeal of the final judgement order entered against him by the Circuit Court of Kanawha County.

A. Petitioner's Request to Set Aside the Illegal Sentence Imposed Under Count Four

In response to petitioner's first assignment of error involving the illegal sentence imposed by the Circuit Court under Count Four of the indictment, Respondent offers a lengthy, circuitous recitation that alternatively presents basically the following three (3) arguments:

*Petitioner's challenge to the "sufficiency" of Count Four and/or petitioner's claim that Count Four of the indictment was "defective" were waived (See Resp. Br. 7, 8 - 10);

*If not waived, petitioner's challenge to Count Four is nonetheless tardy and subject to a more liberal standard of review (See Resp. Br. 7, 10 - 14);

*Petitioner's challenge to the sufficiency of Count Four fails (according to Respondent) because there is a "reasonable construction" of Count Four which Respondent claims would "support" the sentence imposed under West Virginia Code §61-8D-4a(a) (even citation to such statute is not set forth in Count Four nor are the essential elements required by such statute alleged in Count Four) (See Resp. Br. 10- 15).

For the reasons set forth in the following paragraphs, Respondent’s various arguments in opposition to petitioner’s challenge to the illegal sentence imposed by the Circuit Court under Count Four of the indictment should be rejected as such are without legal or factual basis.

- 1. Inasmuch as the petitioner’s challenge to the “sufficiency” of Count Four is limited to petitioner’s contention that Count Four is *insufficient as a matter of law to support the sentence imposed*, such cannot be waived because an illegal sentence is subject to correction at any time.**

Respondent’s mis-characterization of petitioner’s “challenge” to Count Four of the indictment has created confusion as to petitioner’s claim. Petitioner contends that he was charged and convicted under §61-8D-4(a) as *sufficiently* charged under Count Four, but thereafter illegally sentenced under §61-8D-4a(a). Stated another way, Petitioner contends that he was charged in Count Four with one crime [violation §61-8D-4(a)]¹ but convicted of, and sentenced under, a charge, not included in the indictment. Accordingly, *petitioner has not challenged the sufficiency of Count Four* nor has petitioner alleged that Count Four is defective as characterized by the State on this appeal – rather petitioner challenges the constitutionality of the illegal sentence imposed under his conviction upon a constructive amendment (constituting a fatal variance) to Count Four of the indictment.

As recognized by this Court in *State v. Corra*, 223 W.Va. 581, 678 S.E.2d 314 (2009), a “fatal variance” between the charge contained in an indictment and the charge upon which a defendant is convicted and sentenced renders the conviction and sentence unconstitutional. As stated in Syllabus Points 7 and 4 in this Court’s opinion in *State v. Corra*:

7. When a defendant is charged with a crime in an indictment, but the State convicts the defendant of a charge not included in the indictment, then *per se* error has occurred, and

¹See a copy of the indictment at App. vol. I, 5.

the conviction cannot stand and must be reversed.

4. An instruction which informs the jury that it can return a verdict of guilty of a crime charged in the indictment by finding that the defendant committed acts constituting a crime not charged in the indictment is reversible error.
223 W.Va. 573, 575-76, 678 S.E.2d 306, 308-9

Corra's conviction was reversed based upon this Court's finding that "the State's evidence, along with the circuit court's instructions, amended the indictment in violation of the West Virginia Constitution and permitted the defendant to be convicted of an entirely different offense [than that set forth in the indictment]..." 223 W.Va. 573, 577, 678 S.E.2d 306, 310.

There are two categories of constructive amendments (fatal variances), as explained by this Court in *Corra* – both of which are present in the instant case:

(1) When the evidence produced at trial is different from the charges in the indictment which allows the jury to convict the defendant of a crime for which he was not indicted; [citation omitted] ("[I]f the defendant is misled, is subjected to an added burden of proof, or is otherwise prejudiced, the difference between the proof at trial and the indictment is an actual or a constructive amendment of the indictment which is reversible error"); and (2) When a jury instruction allows the jury to convict the defendant of a crime for which he was not indicted. [citation omitted]
223 W.Va. 573, 577, 681, S.E.2d 306, 314.

Petitioner's challenge concerning Count Four as set forth in the Petition² – and the relief requested on this appeal – is directed to correcting the *illegal sentence* imposed by the Circuit Court under a charge different than the charge contained in Count Four:

The petitioner contends in this appeal that the sentence of imprisonment of not less than three nor more than fifteen years imposed by the Circuit Court under Count Four of the Indictment is an illegal sentence in that said sentence does not conform to the statute alleged to have been violated by the petitioner as set forth in Count Four of the Indictment, that is, West Virginia Code §61-8D-4(a) ...

The petitioner therefore contends that he should have received a sentence of one to three

²See Pet'r's Br., 9 - 15.

years as provided under West Virginia Code, §61-8D-4(a) and requests [] this Court to remand this case and direct the Circuit Court to re-sentence him accordingly as to Count Four. (Pet'r's Br. at 6.)

Accordingly, an accurate characterization of petitioner's challenge to Count Four is not that petitioner challenges "the sufficiency of Count Four as written," but rather that petitioner contends Count Four to be "*insufficient to support the illegal sentence*"³ imposed by the Circuit Court based upon the reasons set forth in the Petition filed herein.

Inasmuch as the gravamen of petitioner's assignment of error concerning Count Four is the *illegal sentence* imposed under Count Four of the indictment, such cannot be waived: imposition of an illegal sentence is subject to correction at any time. W.Va. R. Crim. P. 35(a) This is black letter law which "cuts both ways" (sometimes to the benefit of a defendant, other times to the State)⁴. Moreover, a fatal variance as exists in this case cannot be waived.⁵

³See *State v. Palmer*, 210 W.Va. 372, 557 S.E.2d 779 (2001)(per curium), a case with a procedural history and facts similar to the case at bar wherein the Court found that the indictment was "insufficient" to support the sentence imposed.

⁴As noted by this Court in *State v. Hubbard*, No. 11 - 0690 (W.Va. Supreme Court, February 13, 2012)(memorandum decision).

[T]he State argues that the original sentence issued in 2008 was, in fact, an illegal sentence. As such, pursuant to the language of Rule 35(a), the circuit court was entitled to correct the sentence at any time. ...

[T]he Court finds that the petitioner's original sentence was illegal, because it did not conform with the requirements of West Virginia Code []. ... Because the sentence was illegal, Rule 35(a) of the West Virginia Rules of Criminal Procedure allows for the same to be corrected at any time.

⁵The State attempted to claim waiver in *Corra*, and lost the argument. Contending that Corra waived "any error regarding the constructive amendment" and further argued that he [the defendant] actually "invited" the error [the fatal variance between the charge in the indictment and the more severe charge under which Corra was convicted and sentenced] by "invit[ing] the circuit court to instruct the jury [as later determined to have unconstitutionally amended the indictment]." 223 W.Va. 573, 582, 678 S.E.2d 306, 315. In rejecting the State's waiver

Accordingly, petitioner's challenge to Count Four based upon the illegal (unconstitutional) sentence imposed for a crime (under a statute) not charged in the indictment, cannot be waived.

2. Regardless of the level of review ultimately applied by this Court to petitioner's challenge to the sentence imposed under Count Four, petitioner prevails because Count Four is constitutionally insufficient to support the illegal sentence of imprisonment imposed.

Relying upon (among other cases) this Court's opinions in *State v. Miller*⁶, 197 W.Va. 588, 476 S.E.2d 535 (1996) and *State v. Palmer*, 210 W.Va. 372, 557 S.E.2d 779 (2001)(per curium), Respondent contends that petitioner's failure to make a "timely objection"⁷ concerning

argument, this Court found:

There is no doubt that a substantial variation amounting to a constructive amendment of the indictment occurred in this case. The proof and the jury instructions both added new charges which are not minor discrepancies from the body of the indictment.

The State contends that the defendant waived any error regarding the constructive amendment and invited the circuit court to instruct the jury that beer was the same as alcoholic liquor.

We believe that, even if the record demonstrated that the defendant waived, forfeited or invited error, the jury verdict must be reversed. This is because [o]ur decisions hold that a fundamental principle stemming from Section 5 of Article III of the West Virginia Constitution is that a criminal defendant only can be convicted of a crime charged in the indictment. Incident to this constitutional guarantee is the longstanding principle of our criminal justice system that charges contained in an indictment may not be broadened through amendment, except by the grand jury itself. 223 W.Va. 573, 582, 678 S.E.2d 306, 315.

⁶In *Miller*, the defendant first raised her objection to the sufficiency of the indictment on appeal; in *Palmer* the issue of illegal sentence was raised post trial with the filing of a motion to correct sentence.

⁷The circumstances under which petitioner's trial counsel discovered and immediately brought such to the attention of the Circuit Court (albeit somewhat "tardy" in that the trial was ongoing, although the jury had yet to commence its deliberations) is clear from the record. (App. vol. II, 605 - 10; Pet'r's Br., 10 - 11) Any contention by Respondent that this was an attempt by

Count Four triggers a more “liberal” scrutiny of the “sufficiency” of Count Four of the indictment. (Resp. Br., 10 - 11)

In *State v. Miller*, 197 W.Va. 588, 599, 476 S.E.2d 535, 546 (1996) (citing *Hamling v. United States*, 418 U.S. 87 (1974)), this Court explained that an indictment passes constitutional muster only if:

[I]t complies with three requirements: (1) the indictment states the elements of the offense charged; (2) the defendant is put on fair notice of the charge against which he or she must defend; and (3) a defendant is able to assert an acquittal or conviction in order to prevent being placed in jeopardy twice.

Also pertinent to the instant case is this Court’s observation in *Miller*:

We start with the basic premise that the definition of the elements of a criminal offense is

trial counsel to “sandbag” the prosecution in a “tactical” move for the purpose of gaining an advantage is not supported by the record (as alluded to in Resp. Br., FN 7). A more credible explanation clearly supported by the record is that petitioner’s trial counsel spent substantial time and effort (pre-trial and during the State’s case-in-chief) defending and attempting to gain dismissal of the factually and legally complex murder and kidnapping counts, an effort finally accomplished at the close of the State’s case.

In any event, the record is crystal clear that the petitioner’s trial counsel brought the issue to the attention of the State and the Circuit Judge immediately upon discovery (App. vol. II, 605); succinctly and correctly explained that Count Four set forth allegations which tracked the language of the statute cited therein [West Virginia Code, § 61-8D-4(a)] but not the more severe statute [§ 61-8D-4a(a)] (App. vol. II, 606 - 8); that missing from Count Four was the “element of ‘under the care, custody and control of the parent, guardian or custodian’” (App. vol. II, 606), that “specifically what is missing from the indictment is that the child who’s neglected be under the care, custody and control of defendant” (App. vol II, 606).

Following this recitation, petitioner’s trial counsel requested the Circuit Court to “construe the indictment validly under the section that is charged, which is not 61 - 8D - 4a, with no parentheses. It’s 61 - 8D - 4(a).” (App. vol. II, 608).

The Circuit Court having declined counsel’s request below, petitioner makes the same request to this Court on appeal.

entrusted to the Legislature. Thus, in determining what must be alleged and what is required to prove a criminal violation, the focus of our inquiry is on the intent of the Legislature. *Id.*

And the further observation that:

Criminal statutes, of course, should be narrowly and strictly construed in favor of a defendant in order to conform to constitutional notions of due process. *Id.*

Particularly instructive under the facts of the instant appeal:

Our decisions hold that *a fundamental principle stemming from Section 5 of Article III of the West Virginia Constitution is that a criminal defendant only can be convicted of a crime charged in the indictment. Incidentally to this constitutional guarantee is the longstanding principle of our criminal justice system that charges contained in an indictment may not be broadened through amendment. Id.* (emphasis added)

This Court's decision in *Miller* provides no support for Respondent's argument. Unlike Count Four in the instant case, the statute under which Miller was indicted, tried and sentenced was correctly alleged. Following review and analysis of Miller's contentions,⁸ the allegations of the indictment and the statute alleged in the indictment to have been violated, this Court – not surprisingly – upheld the sufficiency of the indictment against Miller, stating:

An indictment as drafted is presumed sufficient if it tracks the statutory language, cites the elements of the offense charged, and provides the other essential details, such as time, place, and persons involved, to provide adequate notice to the defendant. The indictment in the present case clearly is sufficient based on these criteria.

Turning to the facts of the instant case and applying the constitutional standard enunciated in *Miller* (and the United State Supreme Court in *Hamling* cited therein), Count Four

⁸The defendant Miller, following jury trial, was convicted of first degree murder as charged in a single count indictment. 197 W.Va. 597, 476 S.E.2d 544. As to Miller's unsuccessful challenge to the grand jury's indictment, this Court observed the defendant's (Miller's) "legal analysis ... dubious at best" observing that Miller "cit[ed] to us no authority - let alone any controlling cases of this Court - clearly holding the indictment as written [to be] either prejudicial or defective." 197 W.Va. 600, 476 S.E.2d 547.

does pass constitutional muster *but only insofar as it alleges violation of the statute cited therein*, W.Va. Code § 61-8D-4(a) as previously explained in Petitioner's Brief (Pet'r's Br., 13) and further discussed in the next section of this Reply. Count Four of the indictment *as drafted by the State, presented to and returned by the Grand Jury* – meets all the requirements to pass constitutional muster as just enunciated (“it tracks the statutory language, cites the elements of the offense charged, and provides the other essential details, such as time, place, and persons involved, to provide adequate notice to the defendant”). The constitutional problem lies, however, in the State's/Circuit Court's constructive amendment of Count Four and the illegal sentence imposed by the Circuit Court under §61-8D-4a(a).

Another case relied upon by Respondent, which upon careful reading thoroughly discredits Respondent's already severely weakened argument, is *State v. Palmer*, 210 W.Va. 372, 557 S.E.2d 779 (2001)(per curium). *Palmer* is particularly instructive in that the facts and legal issues addressed therein are strikingly similar to those in the instant case.

Palmer was indicted and convicted of an offense involving a charge of driving while his license was suspended or revoked for DUI. The history and background of the case includes the following:

Palmer was indicted in February 2000 in connection with a July 31, 1998 incident where he allegedly drove an automobile through an intersection and struck another car that was stopped at a traffic light. Palmer's driver's license had been revoked for driving under the influence (“DUI”) since 1992, and he had apparently twice before been convicted of driving while suspended or revoked for DUI. The single-count indictment contained the following charge:

That Herman R. Palmer on or about the ____ [sic] day of July, 1998, in said County of Berkeley and the State of West Virginia, did unlawfully and feloniously drive and operate a motor vehicle, to wit: a blue in color 1992 Dodge Shadow, bearing West Virginia Registration 9C 1381, upon public highways of said County and State at a time when his privilege or driver's license to operate a motor vehicle had been lawfully revoked for

driving under the influence of alcohol, the said Herman R. Palmer *having previously been convicted in the Magistrate Court of Berkeley County, West Virginia, on the 27th day of December, 1995 of driving on a suspended/revoked license, and subsequently being convicted in the Magistrate Court of Berkeley County, West Virginia, on the 2nd day of December, 1997, of driving on a suspended/revoked license, in violation of Chapter 17B, Article 4, Section 3, of the Code of West Virginia, as amended, against the peace and dignity of the State.* 210 W.Va. 374 -75, 557 S.E.2d 781 -82 (emphasis added).

Although the indictment against Palmer failed to identify a specific sub-section of W. Va. Code § 17B - 4 - 3, at Palmer's jury trial on April 11, 2000, the prosecution presented evidence and jury instructions which were given by the Circuit Court (all of which went unopposed by Palmer) on the elements of the *felony third-offense* crime set forth in W. Va. Code § 17B - 4 - 3(b). 210 W.Va. 375, 557 S.E.2d 782. Following trial, Palmer was fined and sentenced on June 6, 2000, to one-to-three years imprisonment and fined \$5,000 – the maximum punishment permitted under W. Va. Code § 17B - 4 - 3(b). *Id.* On August 23, 2000, Palmer's newly appointed counsel raised for the first time an issue concerning Palmer's sentence, filing a motion before the Circuit Court, described as follows:

[A]sserting for the first time that the indictment was insufficient to support sentencing on the felony third-offense conviction because nowhere in the indictment was it alleged that Palmer's previous convictions involved revocations relating to DUI. According to Palmer, the indictment at best only charged him with misdemeanor first-offense driving while suspended or revoked for DUI." *Id.*

The Circuit Court denied (twice) Palmer's motion to correct his sentence, and the matter was appealed to this Court.

The essence of Palmer's argument – first presented to the Circuit Court *via* his motion to correct an illegal sentence and subsequently on appeal - was:

[T]he indictment in this case was insufficient to charge him with the crime for which he was ultimately convicted because, *inter alia*, it failed to properly allege as status elements his two prior convictions for driving while suspended or revoked for DUI [essential elements of the felony offense third offense DUI]." 210 W.Va. 376, 557 S.E.2d 783

Agreeing with Palmer and reversing the Circuit Court’s denial of Palmer’s requests to correct the illegal sentence, this Court – citing and applying the constitutional standard of review enunciated in *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996) previously discussed – concluded that “the indictment in this case failed to satisfy the minimum criteria for describing the essential elements of the felony third-offense crime defined by § 17B - 4 - 3(b), and the lower court therefore erred in failing to grant Palmer’s motion to correct sentence under W.Va. R. Crim. P. 35(a). 210 W.Va. 378, 557 S.E.2d 785

Based upon the foregoing, this Court granted the relief requested – thereby confirming Palmer’s contention that the indictment was insufficient to support Palmer’s sentence on the felony third-offense conviction – and remanded the case for re-sentencing.⁹

Applying the *Palmer* analysis to the instant case, this Court should likewise find that Count Four is *insufficient to sustain the sentence imposed upon petitioner* in that such sentence was imposed under a charge [§61-8D-4a(a)] different that the charge which was plead and cited in the indictment [§61-8D-4(a)]. The sentence imposed upon petitioner under Count Four of the indictment is constitutionally unsustainable.

3. **Respondent’s contention that petitioner’s sentence of three to fifteen years imprisonment under West Virginia Code, §61-8D-4a(a) should be upheld despite the fatal variance between the allegations of Count Four is without merit.**

Respondent’s final argument regarding Count Four includes various and sundry legal

⁹The relief ordered by this Court in *Palmer* involved reversal of the circuit court’s denial of Palmer’s Rule 35(a) motion and remand of the case for re-sentencing, noting (in Footnote 8) that “Palmer has not sought to have his underlying conviction vacated on the basis of the defective indictment, but instead has chosen only to challenge the resulting sentence. We therefore confine our directions upon remand to the relief sought.” 210 W.Va. 379, 557 S.E.2d 786.

theories in which Respondent attempts to justify the State's handling of the fatal variance between the charge set forth in Count Four and the charge upon which petitioner was convicted and sentenced. This is a difficult task for Respondent, in that a cursory reading of 1) the charge [§61-8D-4(a)] set forth in Count Four of the indictment (the statute citation and allegations of essential elements) compared with 2) the different charge [§61-8D-4a(a)] set forth within the jury instructions regarding Count Four (which is the same charge under which petitioner was sentenced) clearly demonstrates the fatal variance between the two. The applicability of the case law discussed in the preceding paragraphs cannot honestly be disputed by Respondent.

Therefore Respondent's attempt to justify the constructive amendment – which clearly and impermissibly changed (broadened) the offense (requiring proof of an additional element and carrying a more severe penalty) is simply indefensible. There is no legal authority whatsoever to support the Respondent's contention that “there is a ‘reasonable construction’ of Count IV that would support it charging a violation of West Virginia Code §61-8D-4a(a).” (Resp. Br. 10).

Respondent's attempt to construct a theory to salvage the unconstitutional and illegal sentence imposed upon petitioner in this case is creative and valiant, but utterly without merit. For example, as to the essential element required under §61-8D-4a(a) which was included in the Circuit Court's instructions to the jury [that the defendant “did unlawfully and knowingly neglect Jahlil Clements, *a child under his care, custody and control*” (emphasis added)] – although obviously missing from the words of Count Four – Respondent nevertheless claims “there is a ‘reasonable construction’ of Count IV that would support it charging a violation of West Virginia Code §61-8D-4a(a).” Respondent subsequently, contrary to the obvious requirement that every essential element of an offense be both *alleged in the indictment* as well as proven, argues:

”By charging the Petitioner as, *inter alia*, a “custodian” the essential element of “care, custody or control” was met because West Virginia Code §61-8D-1(4)(emphasis added) defines a custodian as “a person over the age of fourteen years *who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis*, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding.” Resp. Br., 13.

It is readily apparent that this argument is without merit for at least two reasons. First, the essential elements as to a defendant’s status as a “custodian” (a statutorily delineated class of individuals) is separate and distinct from the element of “care, custody and control” as explained in another case relied upon by Respondent, *State v. Longerbeam*.¹⁰ Second, this suggestion is not only unsupported by legal authority, it contravenes cases cited by Respondent in other parts of his brief relating to rules of statutory construction and interpretation. In Syllabus Point 5 of *Foster Foundation v. Gainer*, 228 W.Va. 99, 717 S.E. 2d 883 (2011), this Court explained:

A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute. (citation omitted)

Under Respondent’s theory that the allegation of “custody” would incorporate by reference the element of “within the care, custody or control” would in effect render §61-8D-4a(a) to read: “(a) If any parent, guardian or custodian shall neglect a child ~~under his or her care, custody or control~~ and by such neglect cause the death of said child, then such parent, guardian or custodian shall be guilty of a felony” The additional creative – yet baseless – legal theories

¹⁰*State v. Longerbeam*, 226 W.Va. 535, 703 S.E.2d 307 (2010) involved W.Va. Code, §61-8D-5(a), a statute similar to §61-8D-4a(a). This Court observed, as part of its detailed analysis of whether the evidence at trial supported the conviction in that case:

Not only does the statute require proof that the alleged abuser fell within the specified class of delineated individuals, but the offense requires that the act of abuse must occur with “a child under his or her care, custody or control.” 226 W.Va. 541, 703 S.E.2d 313 (2010)

offered by Respondent likewise fail for the same reasons.¹¹

Respondent has not, and cannot, credibly demonstrate that Count Four of the indictment alleges the essential elements of the statute under which petitioner was unconstitutionally and unlawfully sentenced, §61-8D-4a(a). Count Four sets forth a charge under the statute cited therein [§61-8D-4(a)] and - contrary to Respondent’s valiant efforts to argue otherwise – alleges the essential elements of the statute cited therein [omitting the essential element of “care, custody or control” required under §61-8D-4a(a)].

Inasmuch as Count Four correctly and sufficiently alleges violation of the statute cited therein [§61-8D-4(a)], petitioner’s conviction and punishment under Count Four is limited to that provided in said statute as charged in Count Four [§61-8D-4(a)].

B. Petitioner’s Request to Set Aside the Convictions Under Counts Five and Six

The petitioner contends that the evidence in this case is insufficient as a matter of law to support petitioner’s conviction as to Counts Five and Six, specifically the essential element of the offense that petitioner “voluntarily accept[ed] a supervisory role” regarding Andrew (Count Five) or Tyrel (Count Six) required to sustain a conviction. In opposition, Respondent asserts “The State adduced sufficient evidence to prove the Petitioner neglected Andrew Proctor and Tyrel

¹¹Respondent asserts that since Count Four alleges “neglect” and since that term is defined to include “supervision” and since “supervision (i.e. a “supervisory role”), is a synonym for “care, custody or control” (citing *Longerbeam*) - then (according to Respondent’s form of statutory construction and interpretation) the missing essential element is nonetheless deemed to be included. (Resp. Br., 14.)

Another argument offered: that “the use of the word ‘custodian’ in Count IV (i.e. “ETHAN SAMUEL CHIC-COLBERT, being the parent, guardian and custodian of Jahlil Clements”) sets forth the elements of care, custody or control[.]” because (according to Respondent) “[c]ustodian by its common meaning, means “care” and “control”. ... (Resp. Br., 15).

Coffman on the late evening and early morning of March 3/4, 2012.” R. Brief 16.

Based upon the evidence presented at the trial, however, no *rational* jury could have found that all the essential elements for the crimes charged were proven beyond a reasonable doubt *as to the alleged neglect of Andrew and Tyrel*. It is obvious that the jury believed the petitioner was guilty of causing the situation that resulted in the death of a child and that it did not understand the instructions presented pertaining to Counts Five and Six. However, "[t]he 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 reviewing 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." Syllabus Point 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).” *Syl. pt. 1, State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

No evidence was introduced during the trial to support the proposition that the petitioner neglected Andrew and Tyrel. The respondent cited many cases in the Response Brief that defined the term “neglect.” None are applicable or helpful to the Respondent’s position in this case. It is uncontroverted law that to be guilty of child neglect, one must have voluntarily accepted a supervisory role towards the child victim. Evidence in this regard is completely absent in the record. The only witnesses who were called to testify who were in a position to shed light on whether the petitioner “voluntarily accepted a supervisory role” concerning Andrew or Tyrel were Ms. Woodson, Andrew and Tyrel. Ms. Woodson provided no testimony that the

petitioner voluntarily accepted any “supervisory role” toward Andrew or Tyrel. *See* App. vol. II at 404 - 466. The respondent admits in the Reply that the only evidence introduced at the trial that is even in the ballpark was when Ms. Woodson stated the petitioner “helped to keep an eye on [Andrew and Tyrel]” while at the Grand Prix. R. Brief p. 19, App. vol. II at 417. Such testimony falls woefully short of establishing the essential element of accepting a “supervisory” role.

The respondent cites to Black’s Law Dictionary throughout the Respondent’s Brief, and therefore must agree that it is an authoritative source for providing definitions of legal terms. Black’s defines “voluntary” as “Done by design or intention. Proceeding from the free and unrestrained will of the person. Produced in or by an act of choice.” No evidence was presented to the jury that showed the petitioner intended or chose to accept any form of responsibility for Andrew and Tyrel. Cases cited by the Respondent in the Response provide profound insight into the issue of “voluntarily accepting responsibility.” The State had a burden at trial to prove beyond a reasonable doubt that the petitioner voluntarily accepted responsibility to supervise or protect Andrew and Tyrel. “If this burden is not effectively borne, a verdict finding the defendant guilty must fall.” *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850 (1967) (cited by the Respondent in the Response). “Constitutional sufficiency might well be viewed as a paradigmatic ‘general rule.’ To comport with due process, no conviction may be obtained ‘except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime . . . charged.’” *Policano v. Herbert*, 453 F.3d 79, 92 (2006) (cited by the Respondent in the Response).

The Respondent cites a case from Virginia to support the contention that there is no need for an explicit parental delegation of supervisory responsibility. *Snow v. Virginia*, 33 Va. App.

766, 537 S.E.2d 6 (2000). In that case, the Court of Appeals of Virginia found the evidence was sufficient to prove the defendant was responsible for the care of juveniles, his nephews, and that he was neglectful. The Court cites the Virginia Code, similar to our own, and comments that it requires proof of a “custodial” or “supervisory” relationship over the victim. Accordingly, the Court said a “custodial or supervisory relationship” includes those individuals who have a relationship with the child victim such as teachers, athletic instructors, and baby sitters. *Id.* at 773, 10. “The child in each instance has been entrusted to the care and control of the supervising adult.” *Id.* The State called the children in question as witnesses and certainly could have called their parents to testify. No evidence was introduced, whatsoever, that the petitioner was entrusted to supervise these children. In fact, the children provided testimony to the opposite. The petitioner was merely along for the ride, intending to spend time with his son and Jahlil who he had a relationship with. Andrew and Tyrel were strangers to him. The Respondent cited *Hawkins v. Texas*, 910 S.W.2d 176 (1995), for the proposition that acts, words, or conduct may cause a reasonable person to infer a defendant has accepted responsibility for a child. That case involved a man that was living with the mother that was abusing her children. The defendant also claimed her children as his own and the mother took the defendant’s last name though they were not married. The petitioner agrees wholeheartedly with the proposition set forth by the respondent that actions speak louder than words. The children in question that testified on behalf of the state said the petitioner was “doing his own thing” with his son Ethan Jr.

Counsel for the Respondent provides the most compelling and applicable case – supporting petitioner’s argument and undermining Respondent’s own argument – by citing *Cabot Oil & Gas Corp. v. Daugherty Petroleum, Inc.*, 479 Fed Appx. 524 (2012) in the Response

for the proposition that “Offer and acceptance may be manifested through ‘word, act[,] or conduct that evince[s] the intention of the parties to contract.’” There is absolutely no evidence in the record that supports a finding that the petitioner accepted responsibility for Andrew and Tyrel on the night in question. This issue is not a matter of credibility regarding the testimony of the petitioner versus the witnesses for the State. The testimony at trial was that the petitioner accompanied Ms. Woodson to wherever she wanted to go in order to spend time with his son Ethan Jr. All of the cases cited by the Respondent pertaining to the essential element of “voluntarily accepted a supervisory role” have a defendant that is a relative, paid caretaker, teacher, or other person that takes some form of affirmative action to be with the child victim. The authoritative source cited by the Respondent, Black’s Law Dictionary, defines a “supervisor” as an “individual having authority.” The crux of the petitioner’s argument pertaining to Counts Five and Six is that the record is completely devoid of any evidence that he had authority over Andrew and Tyrel. The majority of the Response provides the standard for which this issue must be judged. The only testimony remotely on point was when Ms. Woodsen said the petitioner helped keep an eye on the boys. Even if this is construed as true, it does not show the petitioner had any authority over the boys, which by the Respondent’s own admission is an essential element.

The true issue currently before the Court regarding Counts Five and Six, whether the petitioner was in a position of trust¹², has been addressed in another case cited and relied upon by

¹²Out of the forty-two cases cited by the Respondent (see Resp. Br., iii - iv), not one has demonstrated a sustained conviction under a statute that requires the defendant to be in a position of trust or custodial relationship where the defendant was a complete stranger to the child victim as in the case currently before the Court. Accordingly the relationships involved in the cases cited by the Respondent are as follows: 1) *Hawkins v. State*, petitioner lived with a mother and her two children and was convicted of injury to a child by omission (watching the mother hurt

Respondent – *State v. Longerbeam*, 226 W. Va. 535, 703 S.E.2d 307 (2010) – even though a careful reading of the case does nothing to support Respondent’s argument. The *Longerbeam* Court reviewed a case involving the conviction of sexual abuse by a parent, guardian, custodian, or a person in a position of trust with regard to a child. The appellant argued that he did not meet the definition of any of the specified classes. The Court agreed and reversed the denial of appellant’s motion for acquittal by the trial court. Mr. Longerbeam was tried and convicted of inappropriately touching his wife’s niece while he was at her house with his wife. The Code under which Mr. Longerbeam was convicted¹³ imposes severe and enhanced penalties for sexual abuse committed by the four specific classes of individuals. 226 W. Va. at 538, 703 S.E.2d at 310. The Court readily found that Mr. Longerbeam was not a parent or guardian so it analyzed the requirements of a defendant to be considered a custodian or a person in a position of trust. As in the case before the Court, the status of a defendant when the crime occurred is of central

her children). Petitioner claimed the children as his own and their mother used the petitioner’s last name; 2) *People v. Sorrendino*, violation of custody order. Father and son relationship; *Pozek v. State*, charged was sexual activity with a child by person in custodial authority. Evidence showed the petitioner had custodial relationship with victim. Victim appeared at petitioner’s residence and petitioner took victim to a friend that eventually became the child’s guardian. That act demonstrated the victim trusted the petitioner to place her with someone who was a stranger to her. Victim was willing to take the petitioner’s advice, as a child will heed a parent or guardian. The child later lived with the petitioner who provided her with food and clothing and took her to school; *Snow v. Commonwealth*, petitioner was the uncle of child victims and was traveling with one of the children’s custodial father, his brother. He voluntarily took custody when his brother was arrested; *State v. Collins*, sexual abuse by custodian who previously dated victim’s aunt and came over to victim’s house numerous times to take her riding on his four wheeler; *State v. Halbesleben*, child injury case where victim was the son and stepson of the married petitioners; *State v. Longerbeam*, petitioner was married to the victim’s aunt and conviction was overturned because not in a position of trust; *State v. Stephens*, whether a baby sitter can be a custodian is a question for the jury; *State v. Thompson*, child neglect resulting in death case where relationship was father and son.

¹³West Virginia Code § 61-8D-5(a)

importance.

Similar to the petitioner in this case, the record in *Longerbeam* made clear that the appellant did not have actual physical possession of the child victim on a full time or temporary basis, and therefore could not have been considered a custodian under the law. The record in the case currently before the Court is completely void of any evidence that the petitioner had possession of Andrew or Tyrel at any time. Finally, the *Longerbeam* Court addressed the statutory requirements for a person in a position of trust. The State, in *Longerbeam*, argued that Mr. Longerbeam was in a position of trust based upon his familial relationship of being an uncle by marriage. 226 W. Va. at 541, 703 S.E.2d at 313. The Court held that “the relationship must still play a part of the actual incident of abuse to come within the meaning of [the code]” and that a familial relationship is not tantamount to being in a position of trust. *Id.* Likewise, the record is completely void of any evidence that the petitioner in the case currently before the Court had any form of a relationship with Andrew and Tyrel. The evidence introduced by the State at the trial showed only that the petitioner was along for the ride and accompanied Ms. Woodson and her guests in order to spend time with his son, Ethan Jr.

As previously noted in Petitioner’s brief, which bears repeating here: under Respondent’s interpretation, West Virginia Code §61-8D- 1(6) would impose duties upon *any person* in the presence or vicinity of a child. (See Pet’r’s Br, 21) A criminal conviction must be based upon *evidence*. Reviewing the evidence in this case as to the element discussed in the preceding paragraphs, in the light most favorable to the State, a *rational trier of fact* could *not* have found the essential elements of the crime proved beyond a reasonable doubt. In order to sustain a conviction under West Virginia Code §61-8D-4(e) there must be *actual evidence* that the person

in question in some way, shape or form “voluntarily accepted a supervisory role” as to that specific child. Such was not adduced in this case. The jury’s verdicts as to Count Five and Count Six of the Indictment must be set aside and judgment of acquittal entered in favor of the petitioner because the evidence presented by the State was insufficient to support the jury’s verdicts

CONCLUSION

For all the foregoing reasons, the petitioner respectfully requests this Honorable Court to remand this case for re-sentencing as to Count Four as requested in the Petition filed here and to find that the evidence in this case, viewed in the light most favorable to the prosecution, is insufficient to sustain the petitioner’s convictions as to Count Five and Count Six, as also requested in the instant Petition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Woody Hill, counsel for the Petitioner herein, do hereby certify that I have served a true copy of the *Reply Brief on Behalf of the Petitioner* upon counsel for the Respondent by mailing said copy on this 21st day of February, 2013, to the following address:

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