

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0745

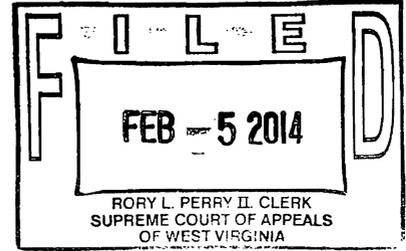
STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

v.

MARCUS PATRELE MCKINLEY,

*Defendant Below, Petitioner.*



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**BRIEF ON BEHALF OF THE RESPONDENT**

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Comes now the respondent, the State of West Virginia by counsel, pursuant to the Revised Rules of Appellate Procedure and an order from this Honorable Court, and files the within response to the petitioner's brief.

**I.**

**STATEMENT OF THE CASE**

The grand jury of Raleigh County indicted the petitioner for first degree murder charging that on or about May 19, 2011, he shot Ayanna Patton. (App. at A1.) A number of pre-trial hearings and orders ensued.

At a proceeding nominally denominated as a Rule 404(b) hearing, the State asserted that the evidence of prior domestic violence between the petitioner and the victim was intrinsic to the offense of murder. (*Id.* at A45.) The proffer was that on March 11, or approximately two months before her murder on May 19, the victim complained that the petitioner dragged her around a room by her neck. The evidence to support that assertion would come from a police officer who investigated the offense

and a videotape of a Family Court Proceeding at which the victim testified under oath. The second incident occurred on April 12, and the petitioner admitted to the police officer that he had pushed the victim down. Further Ayanna had torn clothes, scratches, and blood on her pants. The petitioner also had scratches. (*Id.* at A46.) The State asserted that the evidence would demonstrate an intent to kill and malice. (*Id.* at A47.) The State proffered that the violence arising from the petitioner's jealousy was intertwined with the murder. (*Id.*)

The State presented witnesses in support of its motion to admit the evidence. Officer Ramsey responded to a call involving the petitioner and the victim in 2011. It was reported that the victim was attempting to commit suicide. However, when he responded, he was informed by the victim that she was not trying to kill herself but had been choked by the petitioner. She had red marks on her neck. (*Id.* at A50-51.) The State proffered, without objection, the contents of a DVR of a domestic violence proceeding in which the victim stated that on that date, the petitioner became physical with her, including choking her.

Officer Davis testified that on April 12, 2011, he responded to a domestic complaint. When he arrived he encountered the petitioner and the victim. (*Id.* at A62.) The victim stated she had been pushed by the petitioner. The petitioner admitted pushing Ayanna, but stated he had done so to defend himself. (*Id.* at A63.) The victim's clothes were dirty and she had scratches on her person. (*Id.*) A domestic violence protective order was entered on March 22, 2011, which was in effect on the date of the April incident. (*Id.* at A66.) The State reiterated its position that the incidents were intrinsic to the murder because the acts happened close in time, the parties were the same, and were necessary for the jury's consideration as regards the requisite mental elements of murder. Further,

if the court disagreed with that characterization, the evidence was admissible under Rule 404(b) because it showed motive and intent. (*Id.* at A67-68.)

The court determined that the prior incidents of domestic violence were intrinsic evidence of the murder because they were close in time to the instant offense and were inextricably intertwined with the murder. (*Id.* at A2-3.)

A suppression hearing was held regarding statements made by the petitioner. On June 2, 2011, Officer Whitt of the Bluefield Police Department was involved in bringing the petitioner back from Charlotte, where he fled after killing Ayanna. Officer Whitt was aware the petitioner had previously invoked his right not to speak with officers. (*Id.* at A99.) Officer Whitt, and Officer Ruble did not question the petitioner about the case or the victim during the ride. The petitioner stated that he didn't take the gun up there to shoot her, but rather had the gun for protection. The petitioner wanted to speak to both the police and prosecutors, and Officer Whitt reminded him he had to go through his attorney. (*Id.* at A100-101.) Officer Ruble, who accompanied Officer Whitt on the trip also testified. He confirmed that neither officer questioned the petitioner during the trip. (*Id.* at A109.) Detective Myers was present in Charlotte when the petitioner was picked up. Myers told the petitioner they would be going back to West Virginia and the petitioner said, "Yes. Well, I did it, so I'll talk to you." (*Id.* at A113.) Further, the petitioner had sent text messages to various people asking for their prayers, that he did not want "this" to happen, that he had lost it. (*Id.* at A114.) The petitioner, both before and after his arrest, had spoken to Officer Davis, Terry Williams, Stanley Cuthbertson, and Charlie Hatfield about the incident. (*Id.* at A115.) The judge found all the petitioner's statements, save for one about the gun to be admissible. (*Id.* at A124.)

At another pre-trial hearing regarding a recently discovered conflict of interest regarding the elected prosecutor, the court indicated that the State had made a plea offer which was not acceptable to the family, “therefore, this Court said I wouldn’t accept the plea.” (*Id.* at A158.) An order was later entered reflecting that the victim’s family objected to the terms of the plea agreement, and further found that the plea agreement was not in the public interest. Further, the written order indicated that “the Court believed that the Court’s reluctance to disqualify the Mercer County Prosecuting Attorney’s Office was a motivating factor in the plea agreement.” (*Id.* at A6-7.)

At a pre-trial hearing where the special prosecutor appeared, petitioner’s retained counsel represented that there were other incidents between the victim and the petitioner which he intended to introduce if the State presented the two previously addressed incidents of April and March, 2011. Specifically, retained counsel referred to the incidents that the State was introducing as cherry picking, (*id.* at A176) and indicated that he was not going to object as long as he would be allowed to address “my side of that.” (*Id.*) The court indicated it agreed that if the petitioner had domestic violence cases tending to show “otherwise”, then it was admissible. (*Id.* at A177.)

The defense expert, Dr. Bobby Miller, testified at this hearing. The State objected to Dr. Miller testifying before the jury because “both Dr. Miller and other mental health professionals found that the defendant was competent to stand trial and criminally responsible, and did not suffer from a mental disease or defect.” (*Id.* at A187-88.) Dr. Miller had performed a forensic psychiatric evaluation of the petitioner. At the time of the offense, the petitioner had no psychiatric diagnoses, and he was criminally responsible and competent. He developed depression post-offense. (*Id.* at A 196.)

Dr. Miller seemed to be stating that the petitioner suffered from extreme emotional disturbance. (*Id.* at A196-97.) Dr. Miller testified that the petitioner had the intent to kill and acted with malice. (*Id.* at A.198.) Dr. Miller noted that the petitioner was involved in a violent relationship with the victim. (*Id.*) As to the murder, Dr. Miller determined that after a fight with the victim which apparently resolved, the petitioner awoke at 6 a.m., read texts on the victim's cell phone which indicated she had a sexual relationship with another, got a gun and shot her five times. (*Id.* at A199.) He then apologized to her mother, brother, probation officer, posted on Facebook and texted others. The contention was that he was so "emotionally charged" that he acted without thinking and has regrets. (*Id.* at A199.) Dr. Miller noted that the context of "extreme emotional distress" might go to diminished capacity. (*Id.* at A200.)

Dr. Miller seemingly acknowledged that acting in extreme emotional distress would not necessarily be admissible as to diminished capacity when he stated that West Virginia has not dealt with this "thoroughly." (*Id.* at A203.)

Dr. Miller acknowledged that extreme emotional disturbance was not a DSM-IV diagnosis, and that the DSM-IV was the accepted standard for exhaustively cataloging mental disease and defects. (*Id.* at A204.) Dr. Miller repeated that at the time of the offense the petitioner had no DSM-IV diagnosis. (*Id.* at A209.) The prosecutor noted that physically, one had to pull the trigger each time in order to shoot the gun and the victim was shot three times in the head, once in the torso, and once in the leg. The petitioner fired five times, struck her five times, indicating aimed shots. (*Id.* at A212-13.)

The State contended that existing case law required that the petitioner suffer from a mental disease or defect rendering him incapable of forming one of the elements of the crime and that the

testimony of Dr. Miller and the report of Dr. Clayman were clear that the petitioner did not suffer from any mental disease or defect recognized in the DSM-IV. (*Id.* at A217.)

The trial judge ruled that:

Pursuant to *State v. Joseph*, 590 S.E.2d 718 (W. Va. 2003) and *State v. Ferguson*, 662 S.E.2d 515 (2008), it is clear that the diminished capacity defense is available to permit a defendant to introduce expert testimony regarding ***a mental disease or defect*** that rendered a defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged.

(*Id.* at A10.) Dr. Miller did not find that the defendant had a mental disease or defect that would have contributed to diminished capacity. (*Id.*) Therefore, Dr. Miller’s testimony was excluded. (*Id.*)

The testimony at trial indicated, that after Officer Davis was contacted by the victim’s mother about her daughter being missing on May 19, 2011, he spoke to the petitioner, who said he had not seen the victim, or talked to her, and he was late for work. (*Id.* at A499.) Officer Davis went to the building where Ayanna lived and spotted a car that resembled the one she was driving. (*Id.* at A500.) He found Ayanna’s body lying partially in a fetal position down between a wall and a mattress gap. There was blood splattered on the mattress. (*Id.* at A504.) On cross-examination, it was elicited that upon arrival at the scene, Officer Davis spoke to an older hysterical woman who stated he (Marcus) had killed her baby. (*Id.* at A507.)

Trooper Ellison of the state police was a crime scene officer and had specialized training in processing and documenting crime scenes. (*Id.* at A570.) He identified photographs he took, and noted that there was a bullet hole in and blood splatter on the wall. (*Id.* at A575.) Blood splatter results from a bullet passing through the body and making a pattern on the wall. (*Id.*) He was asked the significance of the splatter, to which trial counsel objected. The objection was overruled, and the trooper answered, “Just like I said just suspected that was the blood that come from the victim

whenever, you know, whenever she was shot.” (*Id.* at A577.) The trooper also identified five shell casings and where they were found in the apartment. (*Id.* at A582-85.) The casings were found by the victim’s foot, two between the bed and the wall, one by a shoe, and one by a window sill. (*Id.* at A589.)

Defense counsel opened the door to questions about positioning of the shooter. On redirect, the officer was allowed to give an opinion that he had to be shooting in the direction of the victim, facing her. (*Id.* at A603.)

Alice Walton lived in the apartment below the victim and heard her arguing the night before her death with a man between 10:45 and 11. (*Id.* at A614.) The next morning she heard two real loud bangs, once, then twice, then a couple of seconds and one more time. She then heard someone running down the back steps. (*Id.*)

Christopher Vance worked for the state police digital forensic unit (*id.* at A620) and examined some telephones pertinent to this case. (*Id.* at A621.) He retrieved messages from the phones including one, “Pray for me. I did not want this to happen. I seen that shit and just lost it.” An additional message was, “I’m so sorry. I loved her more than anything.” (*Id.* at A627-28.) Two additional messages asking for forgiveness were sent from that phone. (*Id.* at A629.)

Brittany Panell identified a message she received from the petitioner the day before Ayanna was murdered in which he apparently was trying to find where Ayanna’s new apartment was. (*Id.* at A660-61.) Ms. Panell testified that Ayanna had told her that she (Ayanna) wasn’t to let anybody know where she was moving to because of the restraining order. (*Id.* at A662.)

Shay Gravely, another friend of Ayanna's testified that Ayanna "don't want nothing else to do with him." (*Id.* at A669.) She received the text from the petitioner asking for prayers, that he didn't mean for this to happen, and he lost it. (*Id.* at A670.)

Cherice Calloway was a coworker and friend of Ayanna's who introduced Ayanna to a domestic violence advocate because Ayanna had been talking about getting away from the petitioner because he was controlling. (*Id.* at A675.)

Sandra Dorsey, although a magistrate at the time of trial, was a licensed social worker, with a specialization in dealing with victims and offenders regarding domestic violence. (App. at B12.) She had been working with such victims since 1996. She began working with Ayanna Patton on February 2, 2011. (*Id.* at B13.) She saw her four or five times before her death on May 19, 2011, with the last occasion being about a month before she died. (*Id.* at B14.) At least some of Ms. Dorsey's testimony was regarding the victim's fear of the petitioner. Upon objection to that testimony as hearsay, the judge found Ayanna's statements were admissible under West Virginia Rule of Evidence 803-3 which is an exception to the hearsay rule, because it was a statement regarding her then existing state of mind. (*Id.* at B19.) Ms. Dorsey testified that Ayanna was concerned that the petitioner would kill her. (*Id.* at B23.) She testified that she received a message from Ayanna that the petitioner was going to kill her. On cross-examination, defense counsel specifically asked Ms. Dorsey if she had written a letter to the prosecuting attorney in which she complained that she didn't feel it was right that both of them got arrested in that incident over the car seat. (*Id.* at B36.) On re-direct, the special prosecutor sought to have Ms. Dorsey read that above-referenced letter, to which defense counsel objected. (*Id.* at B38-39.) Defense counsel stated he had not inquired as to the substance of the complaint, which clearly was not correct. (*Id.* at B39.)

The state's position was that by questioning Ms. Dorsey specifically about the letter, the door to its admission had been opened. (*Id.* at B40.) The court permitted Ms. Dorsey to read her letter. (*Id.* at B46.) A limiting instruction was read at the conclusion of her testimony which told the jury that it could consider the evidence only for the purposes of determining whether the petitioner acted with premeditation, deliberation or malice. (*Id.* at B57.)

The issue of Dr. Miller's testimony was briefly revisited. The defense did not revisit the issue of Dr. Miller's expert testimony on the issue of diminished capacity but sought to admit statements made by the petitioner during the interview to Dr. Miller be admitted through Dr. Miller. Once the court made it explicit that Dr. Miller could not testify to anything, defense counsel did not renew his objection. (*Id.* at B69.)

Detective Shrewsbury was involved in the investigation of Ayanna's death and assisted in locating the petitioner after the shooting. (*Id.* at B80.) At the first "ping" from his cell phone the petitioner's position was on the interstate heading towards North Carolina. (*Id.* at B82.) The phone was tracked through the night until it quit moving, in the area of Charlotte, North Carolina. (*Id.* at B82-83.)

Jamie Nunley was a child protective services worker who became involved with Ayanna, the petitioner, and their child following the incident on April 12, when both were arrested. The petitioner was arrested for violation of a protective order. (*Id.* at B103.) She acknowledged that both parents had different versions of the events involving the hotel (the March incident) and the car seat (the April incident.) (*Id.* at B105.) She stated that both were good parents separately, but together, they were volatile, and that she told the parents she would seek custody of the baby if she saw them together. (*Id.*) She stated that the referral came in when the petitioner violated the restraining order

by taking the baby to Ayanna's mother's house, rather than giving up the car seat. Ayanna told Ms. Nunley that they had an argument, he pushed her down the hill and both were arrested. (*Id.* at B107.) Under the "state of mind" exception, the judge permitted Ms. Nunley to testify that Ayanna said she was scared of the petitioner, that there was a long history of domestic violence, that he would become more violent and try to kill her. (*Id.* at B109-10.) On April 29, 2011, Ms. Nunley saw the two of them eating together, and filed a petition seeking custody on May 4. (*Id.* at B111.) The child stayed with Ayanna's mother, and the petitioner had visitation. The domestic violence petition was still in effect, but was modified so that neither could have contact with each other. The petitioner was told specifically that contact with Ayanna was prohibited. (*Id.* at B113.)

Ms. Nunley was aware that the child had been placed with the petitioner after an incident in which Ayanna injured the petitioner and damaged his wall. (*Id.* at B114.) The petitioner dropped the protective order he obtained as a result of that incident. (*Id.*)

Detective Whitt testified that he was one of the officers who transported the petitioner back to West Virginia, after his arrest in North Carolina. (*Id.* at B118.) There was no questioning during the trip, but the petitioner volunteered that he didn't take the gun up there to shoot her, but rather for protection from her brothers. He stated if his purpose was to shoot her, he would have done it when he got there. (*Id.* at B119.) He stated that he loved her, that he wanted things to work out between them, that he was sorry for what he had done. (*Id.* at B120.)

Officer Ramsey testified that on March 11, 2011, he responded to the Knight's Inn in response to a threat that someone was threatening to jump from the top floor. (*Id.* at B125.) The petitioner told Officer Ramsey that Ayanna was suicidal. Ayanna stated she was not suicidal, but

rather trying to get away from the petitioner because he had been physically harming her. (*Id.*) She had some marks on her neck. (*Id.* at B126.)

Officer Waters was one of the officers who responded to the car seat incident in April, 2011. She was provided a copy of the restraining order against the petitioner which was in effect at the time, and was told by Ayanna that the petitioner had pushed her down a hill, causing a ripped shirt and some scratches on her neck. (*Id.* at B135.) The petitioner admitted pushing Ayanna, but said it was to defend himself. (*Id.* at B137.) Ayanna admitted hitting him. (*Id.* at B138.)

On the day that Ayanna died, her brother, Stanley Cuthbertson, received a call from their mother who was worried because Ayanna had not come home. (*Id.* at B176.) Sergeant Cuthbertson called Ayanna's phone, and the petitioner answered. (*Id.* at B177.) He asked the petitioner where Ayanna was and the petitioner replied "She's gone" and "she's in heaven." (*Id.* at B178.) He later received a text message from the petitioner stating that he was sorry and loved Ayanna. (*Id.* at B180.)

Barbara Reed was a close friend of Ayanna's mother and had known Ayanna her entire life. (*Id.* at B182.) On the day Ayanna died, she was with Ayanna's mother, and answered the mother's cell phone. Someone using Ayanna's phone called that number. It was the petitioner who stated that he hadn't meant to "do it" and asked for forgiveness. Further, when asked why he had killed Ayanna, he did not respond. (*Id.* at B184-85.)

Lieutenant Myers was the lead investigator on the case. He responded to the crime scene. (*Id.* at B191.) He was informed by family members that they were receiving messages from the petitioner. (*Id.* at B196.) Ayanna's cell phone was missing from the apartment, the messages were coming from Ayanna's phone, so the officer assumed that her killer had taken her phone. (*Id.* at

B196-97.) The first ping that came in on the phone was in North Carolina. It was determined that some officers would travel south, hoping to catch up to the petitioner. (*Id.* at B197.) The phone “stabilized” and the officers were in a subdivision in Charlotte, where there were four houses. Charlotte police officers arrested the petitioner at the home of an acquaintance in Charlotte. (*Id.* at B199.) The owner of the house gave Lieutenant Myers permission to search, and he recovered the handgun, two magazines, two cell phones and a jacket. (*Id.* at B200.) He also approached the petitioner outside the house, asked if he were willing to talk, and the petitioner answered, “Well, I did it, so, yeah, so I’ll talk to you.” (*Id.* at B209.) The medical examiner testified via video deposition, which was not transcribed.

There was a substantial amount of discussion among counsel, the judge, and the petitioner about the use (or not using) certain Facebook postings at trial. The court noted that use of some Facebook comments would of necessity open up the door to other Facebook material. (*Id.* at B245.) Defense counsel related that the petitioner, personally was insistent that the Facebook material be used, which counsel stated he could not “in good practice” do. (*Id.* at B248.)

As noted earlier, the judge permitted the State to present evidence about two incidents between the victim and the petitioner that occurred approximately 60 and 30 days before she was killed. The petitioner chose to put on witnesses, and chose to have those witnesses testify about other instances between the couple. Terri Williams was a retired probation officer who related that the petitioner shared “incidents” from their domestic relationship. (*Id.* at B268.) The petitioner related to him on one occasion that he had received a “bloodshot” eye from a physical altercation with Ayanna. (*Id.* at B269.) Ms. Williams testified that the petitioner had contacted the authorities because the victim was “high”. (*Id.* at B275.) The petitioner called Ms. Williams the morning after

the crime. (*Id.* at B276.) The purpose of the calls was to assure Ms. Williams that he wasn't running. (*Id.* at B277.) When asked directly about the shooting, the petitioner stated, "It just happened." (*Id.* at B278.) Ms. Williams said, "That just does not happen," and the petitioner said he just lost it. When asked whether she was asleep or awake, the petitioner paused and said awake. When asked whether it (presumably the shots) were once or more than once, he answered more than once. (*Id.* at B278-79.) Ms. Williams described the relationship as tumultuous and that Ayanna was jealous. (*Id.* at B285.) Ms. Williams was cross-examined about her knowledge of the petitioner, carrying a gun, and engaging in violence (*id.* at B292-95), and no objection was interposed to that line of questioning.

Greg Arnold was also a probation officer and related that he was told by the petitioner that he received a black eye from the victim. (*Id.* at B299.)

Rondah Lowe was a friend of the petitioner's. (*Id.* at B305.) She witnessed two scratches and a black eye on him and the petitioner reported those resulted from a fight with his girlfriend. (*Id.* at B306.) She was cross examined about specific acts of violence that the petitioner may have committed against Ayanna. (*Id.* at B309-10.) No objection was interposed to those questions. Ms. Lewis stated that she did not consider the petitioner violent "even though he shot and killed Ayanna." (*Id.* at B310.)

The petitioner put Officer Willie Rose on the stand. Upon direct examination he was asked if he had occasions to deal with the petitioner and the victim, specifically in the fall of 2010 (outside the timeline of the previously admitted *res gestae* incidents.) The officer said he had responded a few times including one in which Ayanna was kicking a vehicle. (*Id.* at B313.) Officer Rose

believed that on at least one occasion the petitioner was the individual who called 911. (*Id.* at B316.)  
The petitioner never caused a problem for law enforcement. (*Id.*)

Shante McKinley was related to the petitioner and also worked in the social service field dealing with children and families. (*Id.* at B320.) She did not observe directly any problems in their relationship, but did see the petitioner with a black eye at a baby shower. (*Id.*) She related that the victim had punched holes in the wall, broke his guitar, and dented his car. (*Id.* at B321.) Ms. McKinley was asked specific questions on cross-examination about whether she knew that the petitioner had stabbed, choked, hit and kicked the victim, and she said she did not know those things. No objection was interposed to those questions. (*Id.* at B326.)

Sylvia Taylor testified she had known the petitioner for years and that he was polite, courteous and honest, and had a good reputation. She also was cross-examined about the petitioner kicking, choking, and cutting Ayanna. No objection was interposed to those questions. (*Id.* at B329-30.)

Audrey Hairston testified that to her the petitioner was not violent, but rather a calm and honest person. (*Id.* at B336.) She had a good opinion as to his honesty. (*Id.* at B337.) She knew nothing about his relationship with Ayanna. (*Id.*)

Sabrina Granger, a former girlfriend denied any incidents of violence in their relationship. (*Id.* at B340.)

Shirley Meriwether testified that the petitioner was a “wonderful young man.” (*Id.* at B346.) She was heart broken about the charges. She opined that he was always truthful with her. (*Id.* at B347-48.)

Stephanie Graves testified that the petitioner was a sweet, kind person. (*Id.* at B349.) She opined that he was honest, kind, soft spoken and lovable. (*Id.* at B352.)

Diana Hall, the petitioner's mother, testified that he called her the day of the shooting, and asked her not to go to work because he was in trouble. She picked him up, and he would not tell her what the trouble was. (*Id.* at B354.) Later, he called her after she knew what happened, and the petitioner apparently stated he would turn himself in. (*Id.* at B355.)

The petitioner elected to testify. He was asked about the car incident Officer Rose testified to. The petitioner stated that he called 911 for help because she was denting his car. (*Id.* at B377.) When the baby was only 12 days old, Ayanna, because she was jealous, was aggressive toward him. (*Id.* at B378.) There were Domestic violence petitions back and forth between the two of them. (*Id.* at B379.) Quoting from the order entered when the baby was one month old it appears as if the victim "perpetrated substantial domestic violence" against the petitioner. (*Id.*) The petitioner also related an incident where she gave him a black eye when she was pregnant and punched holes in the walls. (*Id.* at B380.)

In relating the events leading to Ayanna's death, the petitioner stated at first, everything was fine. (*Id.* at B396.) Ayanna apparently became jealous over some text messages, and the two fought in the evening. (*Id.* at B398.) He stated that he was carrying a gun because he was threatened by her brother. (*Id.* at B400.) The petitioner stated another fight ensued, which got physical, including him hitting her and kicking her. (*Id.* at B403.) The petitioner stated that he contemplated killing himself, including pulling the gun out, but that "I put the clip back in the gun, and I put the gun back in my jacket pocket." (*Id.* at B406.) The petitioner fell asleep, and in the morning while ostensibly looking for cigarettes, saw the victim's phone, saw that she had messages and looked at the messages. (*Id.*

at B408.) The other message was from a guy, and he woke her up and confronted her. The petitioner looked at the history of the phone and noted that she was texting and meeting other men. (*Id.* at B409.) He shoved her twice, and then when he read a message that was sexually explicit, he pulled the gun out and shot her. (*Id.* at B411.)

The petitioner had stated on direct examination that the first time he struck Ayanna was the night before he killed her and that the other times he pushed her away to keep her from hurting him. He said he never cut her, kicked her, or threatened to kill her. (*Id.* at B420-21.)

The petitioner acknowledged that before he shot Ayanna he had placed the gun in his jacket pocket, and had to cock the pistol before he shot her. (*Id.* at B444.) He acknowledged that he had to pull the trigger more than once. He acknowledged that he had to aim the gun. He acknowledged he shot five times and hit her five times. (*Id.* at B445.)

The interchange between the petitioner and the special prosecutor that petitioner's brief refers to as the prosecutor testifying is at B461. No objection was made to that comment or question.

After the defense rested, the State called Ayanna's mother who testified, among other things, that Ayanna told her the petitioner kicked her when she was pregnant. That was permitted over a defense objection to hearsay, and the court ruled it admissible as a "present sense impression." (*Id.* at B530-31.)

The prosecutor represented that the evidence he was putting on in rebuttal was "evidence that was excluded until the defense opened the door. . . ." (*Id.* at B566.)

Cherice Calloway testified that the Monday before Ayanna was killed, she stated that the petitioner was going to kill her. (*Id.* at B569.) That was not objected to, and Ms. Calloway was cross-examined about her knowledge of the mistreatment that the petitioner suffered. (*Id.* at B571.)

Ms. Dorsey was recalled, and without objection, testified that Ayanna had said she was afraid for her life because the petitioner had previously held a gun to her head and stabbed her. Ms. Dorsey acknowledged that Ayanna admitted hitting the petitioner in his face, had restraining orders against her, and had custody removed by Family Court. (*Id.* at B572-73.)

Stephanie Wright testified that Ayanna told her that Marcus had stabbed her. This conversation apparently took place in 2010. (*Id.* at B577, B579.) The only objection interposed during that line of questioning was to a photograph of the victim apparently showing the injury. (*Id.* at B582.)

Chelsey Richards testified that Ayanna told her about the stabbing, stated the petitioner said he would kill her and saw an injury to her arm. No objection was raised to this testimony. (*Id.* at B586.) Bobbi Tynes testified to the same incident, and again there was no objection. (*Id.* at B592.) She also, without objection, testified that three days before she was killed, Ayanna told her that the petitioner was going to kill her (Ayanna). (*Id.* at B594.) An objection and motion to strike was made during her testimony to “she told me she didn’t want him to know where she was living” and that she had the impression he was controlling. (*Id.* at B601.)

The petitioner was convicted of murder in the first degree, and the jury did not recommend mercy. (*Id.* at B700.) Without objection the judge proceeded to sentencing. The petitioner was sentenced to life in prison, without the possibility of parole. (*Id.* at B713.)

The petitioner, in post-trial motions argued that the admission of the statement that the petitioner made to the officers while standing in the yard in North Carolina was erroneous. That statement was an admission that he shot Ayanna. (*Id.* at B719.) Also raised were the admission of the *res gestae*, and rejecting the plea agreement. (*Id.* at B721-22.) The petitioner raised the

exclusion of the statements made to Dr. Miller, and possibly, though obliquely, raised the exclusion of his testimony about extreme emotional distress. (*Id.* at B722.) The motions challenged the testimony of Sandra Dorsey, as well as the rebuttal statements about the wound. Those motions were denied, an attorney was appointed for the purposes of appeal, and the notice of appeal, appendix and petitioner's brief ensued.

## II.

### SUMMARY OF THE ARGUMENT

The exclusion of Dr. Miller's testimony was not error. While the State agrees that in a proper case, supported by the evidence, testimony about and an instruction on "diminished capacity" is permissible, this was simply not that case. Dr. Miller did not testify that the petitioner suffered from a mental disease or defect that diminished his capacity to formulate the requisite intent to commit murder at the time he shot his victim. Dr. Miller noted that the petitioner at the time of the offense had no psychiatric diagnosis, had the intent to kill and acted with malice. He simply stated that the petitioner had "extreme emotional distress." The petitioner was angry—really angry—that the mother of his child apparently was seeing another man and shot and killed her five times. His anger, his distress, is not a defense to first degree murder. If so, then everyone who shoots another in a road rage incident is automatically excluded from prosecution for murder in the first degree. The petitioner was angry but did not suffer from a mental disease or defect that diminished his capacity to form the requisite intent. Dr. Miller's testimony was properly excluded.

The State sought to admit two prior incidents of domestic violence between the couple as either 404(b) evidence or alternatively, as intrinsic to the crime. Those incidents happened weeks before Ayanna was shot, and were therefore reasonably close in time to the murder, were necessary

preliminaries to the murder, and necessary to a full presentation of the crime. Those incidents were properly admitted.

The petitioner further complains about evidence of domestic abuse that he voluntarily chose to introduce. The petitioner, having decided to introduce that evidence cannot complain that it was error to admit the same. Further, the petitioner elected to present evidence, both through his own testimony and the testimony of a number of other witnesses. Those witnesses were called for the purpose of testifying to the petitioner's reputation for honesty, and also volunteered or were asked that he was loving, peaceful, kind, good-hearted, in fact an all around Boy Scout. Those glowing recommendations opened the door not only to specific question on cross-examination about whether those witnesses so supportive of the petitioner knew of his abuse toward the teenage mother of his child, but also to rebuttal evidence from state's witnesses. None of the questions asked on cross-examination were objected to, and the error, if any in those questions and answers is waived. No objection was raised to the rebuttal witnesses, save for asking that one sentence from one witness be stricken. Again, in the absence of an objection, the error as to those witnesses, if any, is waived.

The "testimony" of the prosecutor was not objected to. The testimony of Sandra Dorsey, specifically the letter, was admitted on redirect, after defense counsel specifically opened the door by asking her about the contents of the letter in cross examination. Further, even if the letter (or its contents) should not have been read to the jury, any error in its admission was harmless based upon the overwhelming evidence of malice, intent, premeditation and deliberation that the petitioner himself testified to in recounting the events of the evening.

A criminal defendant has no right to a plea offer, and any plea must be accepted by the court. A court may reject a plea agreement if it believes such plea is not in the interest of justice. As noted

in the petitioner's brief, the entire circumstances of the rejection of the plea are not provided in the record. However, the objection of the victim's family to a plea is in and of itself sufficient for a court to find that the plea agreement would not be in the interest of justice.

Finally, the evidence of the trooper regarding blood spatter, even if error, was harmless. The gist of his testimony was that the victim was shot five times and that the blood sprayed because she was moving when she was shot. The petitioner acknowledged that in his cross examination.

The petitioner complains that Facebook evidence was provided late. What was that evidence? What would it have shown? The petitioner states that he was prejudiced because trial strategy changed and a rift developed with the client. Those claims are not supported by the Appendix, and further in the absence of a proffer as to what the evidence would have shown and how it helped the petitioner's case, the petitioner has failed to provide this Court with evidence to support this conclusory assertion of error.

The petitioner raises the doctrine of cumulative error. The respondent asserts that as a significant number of the so-called errors were waived by failing to object below, invited by the trial strategy of the petitioner by introducing additional acts of domestic violence in his case in chief, and further invited by presenting evidence of his truthful and loving character, were not error at all, or if error harmless.

The petitioner received a fair trial, and his conviction and sentence should be affirmed.

### **III.**

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The respondent asserts that as to the legal issues presented, the facts and arguments are adequately presented in the briefs and appendix, and the decisional process would not be aided by

oral argument. This matter is appropriate for a memorandum decision. Should this Honorable Court believe oral argument necessary for any reason including the severity of the sentence or any other issue, the respondent would wish to participate.

#### IV.

#### ARGUMENT

- A. **The two incidents of prior domestic violence offered by the State—that is the April and March incidents before the victim was murdered in May, 2011, were properly admitted as *res gestae*. The defense then voluntarily chose to admit evidence of other acts of domestic violence, and such evidence proffered by the defense is not grounds for reversal. The defense also voluntarily elicited character evidence as to the petitioner’s reputation for honesty and his character for peacefulness. Therefore, the questions asked of those character witnesses as to specific acts by the petitioner were relevant on cross examination. The victim’s statements were not testimonial, and therefore not violative of *Crawford*. Her state of mind was relevant to the case at bar.**

The petitioner never denied shooting the victim, and in fact, conceded that he was guilty of at least voluntary manslaughter. Therefore, since the physical acts—the shooting and the death were conceded, the burden then rested on the State to prove the mental elements of first degree murder. That is, the State had to prove that petitioner not only shot and killed the victim, but acted with premeditation, deliberation, intention, and malice. Where as here, the victim had been abused during the relationship, courts have generally permitted the admission of previous acts of domestic violence either as Rule 404(b) “other conduct” evidence, or as evidence intrinsic to the event itself.

As noted in Syllabus Points 7 and 8 of *State v. Dennis*, 216 W. Va. 331, 607 S.E.2d 437 (2004), “Events, declarations and circumstances which are near in time, causally connected with, and illustrative of transactions being investigated are generally considered *res gestae* and admissible at

trial.” Syl. Pt. 3, *State v. Ferguson*, 165 W. Va. 529, 270 S.E.2d 166 (1980), *overruled on other grounds by State v. Kopa* 173 W. Va. 43, 311 S.E.2d 412 (1983).

Other criminal act evidence admissible as part of the *res gestae* or same transaction introduced for the purpose of explaining the crime charged must be confined to that which is reasonably necessary to accomplish such purpose.” Syl. Pt. 1, in part, *State v. Spicer*, 162 W. Va. 127, 245 S.E.2d 922 (1978).

The crimes in *Dennis* were other acts of domestic violence that occurred in the *three* month period preceding the indicted offense, and were used to show the turbulent and violent nature of the relationship between the victim and the defendant, particularly his abusive and controlling nature.

As the opinion in *Dennis* goes on to note,

while the acts were not part of a “single criminal episode” or “necessary preliminaries” to the charged offenses, it is difficult to conclude that the evidence was not necessary “to complete the story of the crimes on trial” or otherwise provide context to the crimes charged. *Id.* This is especially true in light of the domestic violence overlay to the pattern of behavior. Even if we were to conclude that the trial court erred in finding the prior act evidence to be *res gestae*, we believe the evidence would still be admissible under Rule 404(b). The incidents from Appellant’s recent past would have satisfied a number of acceptable purposes set forth in Rule 404(b), including proving motive, opportunity and knowledge. In either case, it seems doubtful that this case could have been appropriately presented without such background information.

*State v. Dennis*, 216 W. Va. 331, 352, 607 S.E.2d 437, 458 (2004).

This case is easily distinguishable from the evidence introduced by the State in *State v. Bowling*, 2013 WL 5583473 (W. Va. 2013) in which the evidence occurred two, or three years and more than six months before the murder. Here, as in *Dennis*, the incidents occurred within weeks of the homicide and were necessary to complete the story of the crime and to prove context. Further,

the evidence certainly was admissible under Rule 404(b). The evidence was necessary and admissible to prove the state's case.

The petitioner went forward with evidence. Among the witnesses and testimony proffered by the petitioner were Terri Williams, who testified about an occasion when Ayanna gave the petitioner a black eye and other domestic difficulties. (App. at B268-69.) Greg Arnold testified about the petitioner receiving a black eye. (*Id.* at B299.) Rondah Lowe testified about the black eye and scratches the petitioner received from Ayanna. (*Id.* at B306.) Willie Rose, a police officer, testified about an incident where Ayanna kicked a car and the petitioner called the police. (*Id.* at B313, B316.) Shante McKinley testified about the black eye, and about Ayanna's violent behavior in punching holes in the wall and damaging the petitioner's personal property. (*Id.* at B321.)

As testimony by each of those witnesses regarding the turbulent nature of the relationship was elicited by defense counsel during presentation of the case in chief, that testimony is not error. "Invited error" is a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from that error. The idea of invited error is not to make the evidence admissible but to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences. In Syllabus Point 1 of *State v. Compton*, 167 W. Va. 16, 277 S.E.2d 724 (1981), we stated: "An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case." Syl. pt. 2, *State v. Bowman*, 155 W. Va. 562, 184 S.E.2d 314 (1971)." *State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996).

The admission of the state's two incidents of domestic violence as intrinsic to the crime was not error, and did not "force" the petitioner to bring in other evidence of bad conduct. Further, the clear tenor of the questions put by defense counsel to petitioner's witnesses was to demonstrate that the victim was the individual who acted badly in the relationship, including engaging in physical violence, and that the petitioner did not.

Further, in presentation of his case, the petitioner elected to ask questions of his witnesses regarding his character. The questions were asked about his reputation for truthfulness (and specifically about the petitioner's interaction with the witness) but also asked, in general terms, about what sort of individual the petitioner was.

Rondah Lowe was asked whether the petitioner was honest and truthful. (App. at B307.) She answered in the affirmative and on cross examination was questioned whether this honest and truthful person had told her about specific acts of violence committed by him against Ayanna including kicking her and stabbing her. There was no objection to those questions. (*Id.* at B309.) She did not consider him to be a violent person, even after learning he had shot Ayanna 5 times and killed her. (*Id.* at B310.) Shante McKinley testified about acts of violence committed by Ayanna against the petitioner, and was asked on cross examination about the aforementioned stabbing, kicking and choking. (*Id.* at B326.) Those questions and answers did not elicit an objection.

Sylvia Taylor was asked about the petitioner's reputation for being honest and forthright, and answered that he had a good reputation and she "never heard anything negative about him." (*Id.* at B329-30.) The same line of questions about other incidents ensued; no objection was made. (*Id.* at B330-31.)

Other witnesses, while not cross-examined about specific instances of petitioner's conduct testified that the petitioner was "calm, respectable, honest" and not violent (*id.* at B336), not violent towards a former girlfriend (*id.* at B341); a wonderful young man, (*id.* at B346), a sweet, kind person (*id.* at B349.).

The petitioner testified that he never struck Ayanna until the night before he killed her, and that the only other times he was physical with her was to push her away in self defense. He specifically stated he never cut her, kicked her, or threatened to kill her. (*Id.* at B420-21.) During cross, the prosecuting attorney did comment, seemingly without asking a question, about domestic violence in general. No objection was made. (*Id.* at B461.)

In rebuttal, several witnesses testified that Ayanna told them the petitioner had kicked her when she was pregnant. That statement was objected to as hearsay, and overruled as a permissible present sense impression. Further, the prosecutor specifically stated that his rebuttal evidence was not admissible until the door was opened during presentation of the defense case. Then, several witnesses testified as to statements Ayanna made to them about her fear the petitioner would kill her, that she said the petitioner had stabbed her, and that he was controlling. The only objection to those witnesses was to a photograph showing the stab wound.

The petitioner acknowledges that trial counsel objected to one witness as hearsay, and was overruled. However, no objection was raised to the other witnesses.

The petitioner having placed his character for being a wonderful young man, kind, non-violent, and honest into evidence was subject to having his good character impeached. The petitioner chose to present evidence of his general good, non-violent character, and of his reputation for truthfulness. The trial court determined, over the prosecution's objection that the evidence was

admissible under Rule 404(a) as a pertinent trait of his character offered by the accused. Therefore, under Rule 405 of the West Virginia Rules of Evidence: “On cross-examination, inquiry is allowable into specific instances of conduct.”

No objection was interposed to the cross-examination of the character witnesses, and therefore, the objection is waived.

Additionally, objection was raised only to one of the rebuttal witnesses, on the grounds that her testimony was hearsay. Although the petitioner’s brief proffers that such testimony is violative of the Confrontation Clause, it is axiomatic that the admission of hearsay—even the erroneous admission of hearsay does not implicate Constitutional Rights. In the case at bar, the petitioner does not posit that the statements by Ayanna were testimonial, but merely that they were irrelevant as her state of mind was irrelevant. However, her statements that the petitioner stated he would kill her was illustrative not only of her state of mind, but his, and therefore admissible to show premeditation and deliberation. In *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995), the court examined the propriety of threats made to the victim, which she related to her father and stated:

we believe the threat is a manifestation of the defendant’s state of mind as it relates to the issue of premeditation and is therefore an exception to the hearsay rule under W.Va.R.Evid. 803(3). Despite the lapse of three months between the threat and its fulfillment, the record convinces us that the day of the shooting was the first time since the threat was made that the victim attempted to commit the underlying act which would trigger the threat—leaving the defendant.

*State v. Sutphin*, 195 W. Va. 551, 562, 466 S.E.2d 402, 413 (1995).

This Honorable Court cogently noted in *State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995), that “the failure of a litigant to assert a right in the trial court likely will result in a procedural bar to an appeal of that issue.” The *Miller* Court, in accord with the United States

Supreme Court, distinguished “waiver” and “forfeiture.” Waiver is the intentional relinquishment of a known right, and when there is a knowing waiver, there is no error. However, forfeiture of a right--the failure to assert such right in a timely fashion--does not extinguish the error. Plain error may be corrected in circumstances where a miscarriage of justice would otherwise result. The error must indeed be plain, which means obvious. If there is “plain” error, to which no timely objection was raised, a determination must be made as to whether that error actually affected substantial rights of the defendant. That means that the error must have been prejudicial and affected the outcome of the proceedings. Further, the defendant bears the burden of persuasion with respect to prejudice. *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129.

The Court noted in Syl. Pt. 4 of *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988), that the plain error doctrine

enables this Court to take notice of error . . . occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.

Additionally, this Court stated in Syl. Pt. 7 of *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996):

In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

The failure of a litigant to assert a right in the trial court will likely result in the imposition of a procedural bar to an appeal of that issue. *State v. Miller*, 104 W. Va. 3 at 17, 459 S.E.2d 114 at 129 (1995).

“One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result’ in the imposition of a procedural bar to an appeal of that issue.” *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128, quoting *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir.1994) (en banc), cert. denied, 513 U.S. 1196, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995). Our cases consistently have demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights. Recently, we stated in *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996): “The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.” (Citation omitted.) When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complain at a later time. The pedigree for this rule is of ancient vintage, and it is premised on the notion that calling an error to the trial court’s attention affords an opportunity to correct the problem before irreparable harm occurs. There is also an equally salutary justification for the raise or waive rule: It prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result). In the end, the contemporaneous objection requirement serves an important purpose in promoting the balanced and orderly functioning of our adversarial system of justice.

*State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996).

Therefore, if deemed error at all, the questions on cross-examination and the presentation of the rebuttal evidence, was waived and does not rise to the level of plain error, particularly in view of the overwhelming evidence (to be discussed *infra*) of the petitioner’s guilt of the crime of murder in the first degree.

**B. The admission of the testimony of Sandra Dorsey in the referenced letter was not error, and if error, was harmless.**

The testimony of Ms. Dorsey as to Ayanna’s fear of death at the hands of the petitioner—a fear most regrettably founded in reality—was admissible as an exception to the hearsay rule. (Please see above section, which will not be repeated here.) Additionally, on cross-examination, presumably to show that Ms. Dorsey was a biased, and therefore unreliable witness, Ms. Dorsey was specifically

asked about the contents of the letter she wrote to the prosecutor, essentially complaining that both of them were arrested in regards to the car seat incident and that such was not fair. (App. at B36.) On re-direct, the prosecutor sought the admission of the entire contents of the letter stating that the door had been opened. Defense counsel erroneously stated that he had not inquired as to the contents of the letter. (*Id.* at B39.) The court determined that the letter was admissible, subject to a limiting instruction which was given. (*Id.* at B57.)

Presumably, although not cited, the prosecutor believed that the questioning of Ms. Dorsey about an expressed opinion in said letter about the impropriety of a joint arrest rendered the whole writing admissible under West Virginia Rule of Evidence 106, which states “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously.” Although the letter in question does contain Ms. Dorsey’s personal opinion, by inquiring into part of the letter, the defendant “opened the door.” As stated in part in Syl. Pt. 10 of *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

“The curative admissibility rule allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has “opened the door” by introducing similarly inadmissible evidence on the same point.” Additionally, as will be discussed *infra*, if the admission of the entire letter was improper, the evidence of the petitioner as to his guilt on all of the elements of first degree murder was overwhelming, therefore admission of the letter harmless.

**C. The testimony of Dr. Miller was properly excluded.**

Syllabus Point 3 of *State v. Joseph*, 214 W. Va. 525, 590 S.E.2d 718 (2003) does indeed state that:

The diminished capacity defense is available in West Virginia to permit a defendant to introduce expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged. This defense is asserted ordinarily when the offense charged is a crime for which there is a lesser included offense. This is so because the successful use of this defense renders the defendant not guilty of the particular crime charged, but does not preclude a conviction for a lesser included offense.

Further, the holding was reiterated in *State v. Ferguson*, 222 W. Va. 73, 662 S.E.2d 515 (2008).

However, explicit in both those cases is the fact that the petitioner must suffer from a mental disease or defect that renders him incapable of forming a mental state that is an element of the offense. In the case at bar, petitioner's expert simply did not opine that the petitioner suffered from a mental disease or defect that rendered him incapable of forming the requisite mental state to commit murder in the first degree.

As noted in the court's order denying the motion for a new trial, neither Dr. Miller, nor Dr. Clayman, the state's expert held the opinion that on the date of the crime the petitioner suffered from any mental disease or defect. Although Dr. Miller's report is not included in the Appendix, he did testify at a pre-trial hearing. Dr. Miller stated specifically "at the time of the offense he had no psychiatric diagnoses." (App. at A196.) He characterized the petitioner as having had "extreme emotional disturbance" which was an "evolution of the previous affirmative defense of heat of passion." (*Id.*)

In other words, the petitioner became extremely angry when he believed the mother of his child was cheating on him, pulled a gun from his pocket, aimed it at her, fired it at her five times, pulling the trigger each time, striking her body five times, killing her—after having previously abused her—and left her body there while he went to North Carolina. Dr. Miller further described "extreme

emotional disturbance as instances for which there is a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in a defendant's situation under the circumstances that the defendant believed that to be." (*Id.* at A196-97.)

With all due respect to Dr. Miller, what the last quoted statement means is that the petitioner's actions of prying into the victim's cell phone and finding information about her relationships with others and then killing her was a reasonable explanation or excuse viewed from the petitioner's point of view. That is, if the victim does something that really, really upsets one, and really, really makes one angry, and maybe even really, really hurts one's feeling, then slaughter is appropriate. That is ridiculous and not the standard for diminished capacity in West Virginia.

Dr. Miller found that the petitioner acted with intent and malice and found it debatable whether there was time for deliberation and premeditation. (*Id.* at A198.) He also transformed himself into a ballistics and firearms expert in opining that the firing of the five shots took perhaps one second. (*Id.* at A199.) He minimized the petitioner's deliberate action in prying through and accessing the victim's private cell phone messages—which the petitioner himself testified to at trial by stating the petitioner "noticed" those texts. Dr. Miller noted that the petitioner's contention that he was so emotionally charged that he acted without thinking—and is now sorry—is entirely self-serving and too convenient. (*Id.* at A200.) So, Dr. Miller "suggests" diminished capacity would be appropriate provided the context of extreme emotional distress would be allowed. (*Id.*) Additionally, Dr. Miller stated that he does not claim that psychiatric diagnosis from the DSM-IV is relevant to this petitioner's diminished capacity. Further he stated that this was something done in extreme emotional distress and that may be relevant not as a defense, but more as an explanation. (*Id.* at A202.)

Dr. Miller acknowledged that extreme emotional disturbance was not a DSM-IV diagnosis. Dr. Miller throughout his testimony acknowledges that the “extreme emotional disturbance” category of excuse was not universally accepted in either the legal or psychiatric community.

The petitioner did not suffer from a mental disease or defect. He was angry, and jealous, the respondent will agree, even extremely angry, and jealous when the mother of his child, a woman he had abused within 30 and 60 days of her murder, had the audacity to exchange text messages with other men. All of us become angry, disturbed, jealous when others don’t perform as we demand they do. Accepting Dr. Miller’s theory of “extreme emotional disturbance” as viewed from the defendant’s point of view of being sufficient to result in diminished capacity means that every act of road rage that results in death is automatically nothing more than voluntary manslaughter, and that the time-dishonored excuse that the cheating cuckold deserved to die is back on the table. Dr. Miller’s testimony talks about the fact that he did not believe the petitioner acted in a “cold and calculating” manner. However, cold and calculating are not requisite mental states for murder in the first degree. The individual must act with intention, and malice, which Miller concedes. The individual must act with premeditation and deliberation. As this Honorable Court is well aware, the requirement for finding that an individual acted with premeditation and deliberation requires that there be some interval between the thought and the action.

Syllabus Points 5 and 6 of *Guthrie, supra*, hold that

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

And, . . .

murder in the first degree consists of an intentional, deliberate, and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder.

Absent any information about the prior domestic violence, here's what the petitioner testified that he did: The petitioner was not told by Ayanna where her new apartment was, but determined it by a bit of subterfuge involving Brittany Panell, and later from Ayanna herself "eventually." (App. at B395.) They argued. (*Id.* at B396.) They argued because she was jealous of messages that he was receiving from a female. (*Id.*) Ayanna attacked him. However, she calmed down, and they talked. (*Id.* at B398-99.) He was carrying a loaded gun because he feared reprisal from Ayanna's brother, who was in federal prison at the time. (*Id.* at B400.) Later, another fight ensued, in which the petitioner and Ayanna hit each other. (*Id.* at B403.) The petitioner said he was really upset, pulled his gun out and contemplated killing himself. (*Id.* at B405.) They talked, and "So, I uncocked the gun, I put the bullet back in the gun and the clip, and I put the clip back in the gun, and I put the gun back in my jacket pocket." (*Id.* at B406.) This occurred a matter of several hours before he killed her. They fell asleep. He awoke, got cigarettes out of her pocket, and her phone fell out. There were messages on the phone, one apparently from another man. (*Id.* at B408.) He woke her up and asked her about the message. He then looked through the historical text messages, and she wanted the phone back, which he refused. (*Id.* at B409.) He pushed her to the floor, and then to the bed, and then found what appears to be a sexually explicit message. So "I put the phone in my pocket and

I pulled the gun out, and I shot her.” (*Id.* at B411.) He made some phone calls, and sent messages, which did express regret and drove to North Carolina. On cross examination, he denied all of the acts of violence. The petitioner stated that he had cocked the gun to commit suicide, but then took the bullet from the chamber and put it back in the magazine, and put the gun away. (*Id.* at B444.) In order to shoot and kill Ayanna, he had to pull the gun out of his jacket pocket, had to point it at her, had to pull the trigger, and then had to pull the trigger again with every shot. He shot five times and hit her five times. (*Id.* at B445.) The petitioner acknowledged that the shot that went into Ayanna’s thigh, based upon the position her body ended, had to occur before she ended up where she died. In short, she was moving as he was shooting her. (*Id.* at B451.)

Although diminished capacity certainly is a valid defense where it is supported by evidence, in this case, the evidence, even if looked at from the petitioner’s vantage, is that based upon petitioner’s self-serving statements to Dr. Miller, he got mad and killed a young woman. He did not suffer from a mental disease or defect that rendered him incapable of premeditating and deliberating and Dr. Miller’s testimony was properly excluded.

**D. The court did not err in rejecting a plea agreement.**

The petitioner’s brief acknowledges that this assertion of error is difficult to analyze because the full parameters of the plea agreement, and the complete reasons for its rejection are not spread upon the record. For purposes of argument, the respondent accepts that the State offered a plea to murder in the second degree, and the court rejected it based upon its concerns about the perceived or actual conflict of interest that Mr. Ash had in prosecuting the case, but far more relevantly, the victim’s family objected to the plea agreement. (App. at A158.) Additionally a written order

reflected the family's objection, the issue of disqualification and found that the plea was not in the public interest. (*Id.* at A607.)

Rule 11 of the West Virginia Rules of Criminal Procedure govern pleas. In Rule 11(e)(2), it is stated that the court may accept, reject or defer decision on the acceptance or rejection of a plea. Therefore, it is clear that the trial court is under no legal obligation to accept any plea deal the parties reach. The Rules, therefore, give a trial court discretion to refuse a plea bargain. Syl. Pt. 2, *Myers v. Frazier*, 173 W. Va. 658, 319 S.E.2d 782 (1984). Further, "There is no absolute right under either the West Virginia or the United States Constitutions to plea bargain. Therefore, a circuit court does not have to accept every constitutionally valid guilty plea merely because a defendant wishes so to plea." Syl. Pt. 2 *State ex rel. Brewer v. Starcher*, 195 W. Va. 185 1995, 456 S.E.2d 185 (1995). Syl. Pt 3 of *Brewer* states that

Although the parties in criminal proceedings have broad discretion in negotiating the terms and conditions of a plea agreement, this discretion must be permissible under the West Virginia Rules of Criminal Procedure. Similarly, the decision whether to accept or reject a plea agreement is vested almost exclusively with the circuit court.

The modifier "almost" was explained further in the Opinion that, "We say 'almost' because all plea agreements must be constitutionally acceptable and in compliance with procedural rules this Court mandates." (*Id.* at 912, 456 S.E.2d at 192.)

In the case at bar, although the information may be somewhat limited, it is clear the trial court did not abuse its discretion in rejecting the proposed plea. The court rejected the plea agreement because it was suspicious that the disqualification issue was a motivating factor for the plea. However, and again far more importantly, the court found that the proposed plea was not in the public interest, not least because the victim's family objected. The petitioner has not shown that the

plea was rejected for any arbitrary, capricious, illogical or illegal reason, and the court's discretion in rejecting this plea should be affirmed.

**E.&F. Any testimony from Trooper Ellison about blood spatter, if error at all, was harmless. The exclusion of the Facebook evidence or its late discovery was equally harmless, particularly in view that the contents of those postings were not proffered to the lower Court nor included in this Appendix for review.**

Although Trooper Ellison was asked, in general, about his training, he was not qualified as an expert in the analysis of blood pattern evidence. Defense counsel objected when the trooper was asked the significance of the spatter. However, the trooper's reply was as follows: "Just like I said just suspected that was the blood that came from the victim whenever, you know, whenever she was shot." (App. at A577.) The petitioner's brief does not even posit how this testimony, even if technically inadmissible, was harmful to the petitioner. Essentially, the trooper testified that the gun was in a certain place when the shells were ejected, and that the blood came from the victim when she was shot. As the petitioner ultimately testified that the victim had to be moving when he shot her, and the testimony regarding the blood was only testimony that the victim bled when she was shot, the testimony was harmless. Equally, some Facebook postings were apparently provided at some point to the petitioner. The petitioner is not positing a violation of discovery, but merely posits that the late disclosure caused a change in strategy and a rift between lawyer and client. There is nothing to show what the Facebook postings were and how they helped, hurt, or even were relevant to the petitioner's case. The failure to vouch the record with the Facebook material makes intelligent review meaningless, and the trooper's testimony was utterly harmless. Further, there is no information as to how strategy changed and how the petitioner was prejudiced.

“To permit this Court to review an error assigned by an appellant, a record of the assigned error must be submitted for this Court’s consideration.” *Skidmore v. Skidmore*, 225 W. Va. 235 at 247, 691 S.E.2d 830 at 842 (2010). Further, litigants are required to present a record upon which the Court may consider the error:

[a]n appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.

Syl. pt. 5, *Morgan v. Price*, 151 W. Va. 158, 150 S.E.2d 897 (1966). *Accord State v. Honaker*, 193 W. Va. 51, 56, 454 S.E.2d 96, 101 (1994). (“This Court has held that the responsibility and burden of designating the record is on the parties and that appellate review must be limited to those issues which appear in the record presented to this Court.” (Footnote and citation omitted)). *See also* II Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* 497-98 (1993) (“The designation of the record is important. A court of record speaks only by its record is the general rule . . . Not only must the significant portion of the record relating to th[e] alleged error be identified, the precise part of the record must be designated. Otherwise, the error will be treated as nonexistent.” (Citations omitted)).

When the alleged error is not apparent from the record designated for appellate consideration, we lack a basis upon which to determine whether error has occurred. “[T]he Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below *and fairly arising upon the portions of the record designated for appellate review*.

*Skidmore* at 247, 691 S.E.2d at 842.

The Court will not consider an error which is not properly preserved in the record. *State v. Allen*, 208 W. Va. 144, 539 S.E.2d 87 (1999).

If this Court finds error in the late disclosure, or in the trooper’s testimony, quoting the United States Supreme Court, this Court noted in *Guthrie* that:

given “the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such

a trial.” *U.S. v. Hasting*, 461 U.S. at 508-09, 103 S.Ct. at 1980, 76 L.Ed2d at 106. Thus, the Supreme Court has held that an appellate court should not exercise its “[s]upervisory power to reverse a conviction . . . when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error.” *Hasting*, 461 U.S. at 506, 103 S.Ct. at 1979, 76 L.Ed2d at 104.

*State v. Guthrie*, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 (1995). This Court examines two issues to determine whether error was harmless: 1) the sufficiency of the proper evidence and 2) the prejudicial effect of the improper evidence. Syllabus Point 2, *State v. Sharp*, 226 W. Va. 271, 700 S.E.2d 331 (2010). The Court explained in *Sharp*:

Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury. Syllabus Point 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979).

As noted above in dealing with the exclusion of Dr. Miller’s testimony, there was ample, even overwhelming evidence of the petitioner’s guilt. He admitted he was guilty of, at least voluntary manslaughter. The petitioner was engaged in an abusive, turbulent and volatile relationship with the mother of his child, punctuated by two instances of domestic violence within two months of her death. He controlled her, and she feared, all too rightly, her death at his hands. The petitioner carried a gun to protect himself from an apparently non-existent threat—that is, the victim’s incarcerated brother. The petitioner tracked down where the victim had moved to, went to her home, argued with her throughout the night, rummaged through her private cell phone messages, woke her up to confront her about those messages, became increasingly angry at a sexually explicit

message, got his gun from his pocket, cocked the gun, aimed at Ayanna, and fired at her. Hitting her the first time, the petitioner cocked the pistol, aimed at Ayanna and fired at her. Hitting her with a second bullet, the petitioner cocked the pistol, aimed at Ayanna, and fired at her. Hitting her with a third bullet, the petitioner cocked the pistol, aimed at Ayanna and fired at her. Hitting her with a fourth bullet, the petitioner cocked the pistol, aimed at Ayanna and fired at her. Hitting her with a fifth bullet, he left her alone to die and drove to North Carolina.

The evidence is overwhelming as the petitioner's intent and malice, and premeditation and deliberation.

**G. There was no cumulative error justifying reversal.**

The Petitioner states in conclusory fashion that his cited errors rise to the level of cumulative error, and therefore his conviction should be reversed. In brief, none of the errors alleged by the Petitioner—although not substantiated by the Petitioner's brief and the appendix—require reversal either standing alone or in any combination. This Petitioner received a fair trial and his convictions should be upheld.

**V.**

**CONCLUSION**

Therefore, based upon the foregoing statement of facts and arguments of law, the respondent respectfully requests this Honorable Court to affirm the jury verdict of the Circuit Court of Mercer County, and further affirm the sentence imposed by the Circuit Court of Mercer County, sentencing the Petitioner to a term of life in prison without the possibility of parole upon his conviction for murder in the first degree, a felony.

Respectfully submitted,

STATE OF WEST VIRGINIA  
*Plaintiff Below, Respondent*

By counsel

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**CERTIFICATE OF SERVICE**

I, LAURA YOUNG, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *BRIEF ON BEHALF OF THE RESPONDENT* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 5th day of February, 2013, addressed as follows:

To: Paul R. Cassell, Esquire  
Cassell & Crewe, P.C.  
340 West Monroe Street  
Whytheville, VA 24382

  
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LAURA YOUNG