

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent**

**VS. W.Va. Supreme Court of Appeals 14-0438
(Raleigh County Circuit Court No. 12-F-53-B)**

**JEREMY LAMBERT,
Defendant below, Petitioner**

**RESPONDENT'S BRIEF IN RESPONSE TO
BRIEF OF PETITIONER**

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RESPONSE TO ASSIGNMENTS OF ERROR

1. The petitioner, Jeremy Lambert (hereinafter Lambert) was not “prosecuted on . . . unindicted theories” of murder because W.Va. Code §61-2-1 provides that “it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused”
 - A. Lambert failed to preserve for appellate review his claim that, due to lack of notice by the State, he was surprised by the alternative theories of murder.
 - B. The trial court did not abuse its discretion in denying Lambert’s motion to force the State to elect among the alternative theories of murder.
2. Lambert failed to preserve or develop his claim that the trial court “improperly instructed the jury as to the elements of murder by lying in wait:” furthermore, the instruction was a correct statement of law.
3. The trial court did not abuse its discretion in refusing a voluntary manslaughter instruction because there was no evidence at trial to warrant such instruction.
4. Lambert failed to preserve for appellate review his claim that the trial court abused its discretion in permitting the State to address a physician - - Dr. Jennifer Osborne - - by the title of “Doctor” and to briefly inquire as to her background: moreover, Lambert makes no claim of error regarding Dr. Osborne’s substantive testimony.

5. Lambert, by counsel, at trial agreed that the State could cross-examine him concerning his interview with his first defense psychiatrist, Dr. Miller. Lambert's only objection was that the recorded interview contained "hearsay" by Dr. Miller, so that he failed to preserve any other claim of error regarding this issue. He also failed to request a limiting instruction and, in fact, refused the trial court's offer to give such instruction. Finally, Lambert has abandoned the hearsay claim on appeal because he has failed to develop the claim.

6. Lambert failed to preserve for appellate review his claim that the trial court "improperly limit(ed) the testimony" of Lambert's psychiatric expert, Dr. Bernstein.
 - A. Throughout trial, Lambert agreed that statements made by him to Dr. Bernstein were for a purely forensic purpose and not for purposes of diagnosis or treatment.
 - B. Lambert's "assignment of error" in this subsection is but a paraphrase of W.Va. Rules of Evidence 703 and thus warrants no response.¹

7. The trial court did not abuse its discretion in "permitting . . . impermissible cross-examination" of Dr. Bernstein.
 - A. Dr. Bernstein was not cross-examined about "medical records and reports that he was not permitted to testify to on direct."
 - B. Lambert failed to preserve for appellate review his claim that cross-examination of Dr. Bernstein regarding Lambert's statements to Dr. Miller and to him exceeded the scope of direct examination.

¹ Under the Argument section, below, the respondent addresses Lambert's arguments concerning limitations on Dr. Bernstein's testimony.

C. The trial court did not abuse its discretion in permitting the State to cross-examine Dr. Bernstein - - who testified that Lambert's mental problems were "chronic" and "ongoing" - - concerning the fact that Lambert's only expressed source of distress in the 2 ½ years since the murder was the quality of jail food.

8. There was no cumulative error because there was no error in this trial: furthermore, given the overwhelming admissible evidence that Lambert was guilty of first degree murder, any error claimed by him in this appeal would be harmless.

STATEMENT OF THE CASE

Cyan Maroney, (Ms. Maroney) was twenty-five years old when Lambert butchered her in her bedroom in Beckley, West Virginia on October 2, 2011.

She had dated Lambert for a few months but by September, 2011 had decided she would no longer do so. A.R.² 374, 403, 410, 1015. A few days before murdering Ms. Maroney, Lambert surreptitiously obtained her cellular phone because he suspected she was involved with another man. On October 2, 2011, Ms. Maroney expressed surprise that Lambert knew that she was seeing another. A.R. 377, 403, 417-419, 1016-1020.

Ms. Maroney - - a professional ballet dancer who performed with West Virginia Dance Company and Theatre West Virginia - - shared a rental home in Beckley, West Virginia, with three other artists. A.R. 370, 373. In addition to her career in dance, Ms. Maroney worked at Tamarack in Beckley. On October 2, 2011 she arrived home from work shortly before 8:00 p.m. A.R. 380. Lambert arrived a few minutes later, parking his vehicle across the street, smoking

² Appendix Record.

cigarettes and waiting and watching for Ms. Maroney. A.R. 380-381, 404, 818, 928, 1037. Ms. Maroney went out to his car, and the two had a conversation. Ms. Maroney went back inside her home, alone and "very upset," going into her bedroom and shutting her door. Moments later, Lambert walked through the closed front door without knocking and went into Ms. Maroney's bedroom. The 14-inch Bowie knife he brought with him to kill Ms. Maroney was hidden from view. A.R. 381-382.

Ms. Maroney's roommates heard her "blood curdling" scream and sounds from her bedroom indicating that Lambert was "beating her up." A.R. 383, 411. Lambert emerged from the bedroom with bloody hands and with the bloody Bowie knife. He warned the roommates to "get the f__k out of the way" and added, "that'll teach the mother f____r to leave me." A.R. 385-387, 393, 412-413. He then walked out the front door and drove away. A.R. 406-407.

Ms. Maroney's roommates found her on her bedroom floor, soaked in blood and struggling to breathe. At 8:38 p.m. one roommate called 911 while another attempted to cover Ms. Maroney's stab wounds. A.R. 414-416, 459. The emergency room physician confirmed that Ms. Maroney died as a result of exsanguination and that she had bled to death even before she arrived in the emergency room. A.R. 451. Dr. James Kaplan, W.Va. State Medical Examiner, confirmed that Ms. Maroney suffered over 23 stab wounds and that she was alive throughout her ordeal. A.R. 579, 590. Ms. Maroney experienced "large incised wounds" on her arm as she "was trying to fend off her assailant by interposing her arm against . . . the blade of the knife." She experienced "large cuts to . . . (her) face and to her scalp" inflicted by "slashing movements of the knife." She experienced a stab wound to her chest, "multiple sawing actions of the blade against (her) neck" and 12 "very large gaping stab wounds" to her back, with the knife penetrating all the way through to her chest and the depth of the stab wounds penetrating up to eight inches through her body. A.R. 579-583, 586. Ms. Maroney's internal organs were

stabbed and severed in the attack, including her thoracic aorta, her esophagus, her stomach, her diaphragm, her lungs, her liver, her kidney and her spleen. Her rib was "fractured from the force of a knife thrust" and the knife also was thrust into her skull. A.R. 589-590. At autopsy Ms. Maroney was 5'2" tall and weighed 84 pounds: Dr. Kaplan explained that her normal weight of 100 pounds had been reduced by exsanguination. A.R. 574-575.³

Dr. Kaplan concluded that the manner of Ms. Maroney's death was "fatal assault by incised wound injury in the setting of domestic violence" and that the "stab wound multiplicity" demonstrated "overkill". A.R. 587-588. The ferocity of the attack signified "an intentional wielding of a sharp and dangerous weapon with the intent to murder." A.R. 580.

After viewing the crime scene and interviewing Ms. Maroney's roommates immediately after the murder, law enforcement officers issued a BOLO - - be on the lookout - - for Lambert. A.R. 460. He was located some three hours later, driving in Fayette County. A.R. 470. Contrary to the claim in the Brief of Petitioner (hereinafter the Brief) (at 4), that Lambert admittedly stabbed Ms. Maroney 23 times but "has no memory of that," and "has never had any memory of the stabbing," on October 2, 2011 Lambert by cellular phone confessed to a friend, Amber Cook, and also to his mother. At 8:53 p.m. he "was calm" as he told Amber Cook that "he was going away for a long time;" that he was covered in blood; that he thought Ms. Maroney was dead and that he had stabbed her. A.R. 523-525. In his call to his mother he told her he had stabbed and killed Ms. Maroney. A.R. 1110-1111. When he was pulled over by Fayette County deputies he was "calm and collected" and never asked any questions or offered any comments. A.R. 468-470.

Raleigh County Sheriff's Office Detectives Lilly and Stump met with Lambert at the Fayette County Sheriff's Office. A.R. 650-652. They photographed his bloody hands and the

³ Lambert was 5'11" tall and weighed 195 pounds. A.R. 654.

bloody long-sleeved black shirt he was wearing. A.R. 653-655. Lambert was “(v)ery calm,” and gave no indication that he was under the influence of alcohol or drugs or confused about his circumstances. A.R. 652, 679. Lambert was advised of his rights and executed a Miranda Rights Form. A.R. 658-660. After answering a few questions, he made equivocal requests for counsel and the detectives stopped the interview. When Lambert was told that he was going to jail, he informed detectives that he wanted to speak with them, and the recorded interview continued and was played to the jury with redactions. A.R. 655-657, 661-664.⁴ S.A. 1-15.⁵

Contrary to Lambert’s version of events in the Brief (at 3-5), he assured detectives that he “didn’t feel bad, there wasn’t any type of anger, depression, or anything like that” when he left his home on October 2, 2011 and drove to the Crossroads Mall in Bradley, West Virginia to drink beer. According to his statement to detectives, he “left the house with absolutely the best possible thoughts in (his) mind,” and felt “very positive, everything was so good” in his relationship with Ms. Maroney. He claimed that on September 28, 2011 he had “obtained” photographs from her phone, supposedly including “topless pictures,” but added that they were sent “to one of her homosexual friends” and that “(i)f a fag wants to look at titties then that’s fine, you know what are they going to do with ‘em.” He also advised that “things were kind of rocky” in his relationship with Ms. Maroney and that he had “questioned her about some things,” including her former boyfriend. S.A. 2, 3, 6. Contrary to his version in the Brief, Lambert made no claim of being “obsessively concerned about the possibility of another man being at Ms. Maroney’s house” and made utterly no mention that on October 2, 2011 he “decided to go to Walmart to buy a knife” and then “sat in his car . . . waiting for Ms. Maroney to let him know

⁴ During the pre-trial hearing the prosecutor proposed that unless the defense wanted the jury to hear Lambert’s references to an attorney, such references would be redacted. A.R. 2118-2119. The redacted recording was played to the jury without objection. A.R. 660-661.

⁵ Respondent’s Supplemental Appendix.

she had arrived home” In fact, he omitted any mention of his Walmart purchase and his long wait in the Walmart parking lot after he had purchased the Bowie knife and before he drove to Ms. Maroney’s home to use that knife to stab her 23 times. Instead, he told detectives that he drove straight from the Crossroads Mall,⁶ to Ms. Maroney’s home, saw her walking down her porch steps, and then had no memory of anything at all until he found himself driving around and receiving calls on his cellular phone. He confirmed that he had not had “that much to drink” and was “never smashed” from the beer he drank before driving to Ms. Maroney’s home. He insisted that he only “went over there to have a good time.” He denied that he ever carried a knife and claimed that he was “scared too (sic) death of knives.” S.A. 3, 4, 9-10.

Law enforcement officers never located the knife Lambert used to murder Ms. Maroney, but during a search of his vehicle after his arrest, detectives discovered a Winchester Bowie knife box from Walmart. Walmart’s loss prevention manager provided the receipt from Lambert’s October 2, 2011 purchase and the store video and still photographs in which Lambert was wearing the same black shirt that he was wearing at the time he was interviewed and photographed after the murder.⁷ A replica of the 14-inch Bowie knife purchased by Lambert was introduced at trial. A.R. 477-485. The clerk who sold Lambert the knife at 6:42 p.m. on October 2, 2011 testified that Lambert was “completely normal” at the time of the purchase. A.R. 491-493.

The Walmart video confirmed that Lambert parked his vehicle in the parking lot at 6:27 p.m. on October 2, 2011 and chatted on his cellular phone as he headed into the sporting goods

⁶ The Walmart in Beckley, W.Va., where Lambert bought the murder weapon, is a few miles away from the Crossroads Mall in Bradley, W.Va.

⁷ The West Virginia State Police Laboratory DNA analyst confirmed that it was Ms. Maroney’s blood on Lambert’s black shirt, seized by police during their interview with him. A.R. 636, 644-645.

section to buy the Bowie knife and then waited in his vehicle from 6:46 p.m. to 7:37 p.m. before driving to Ms. Maroney's home. A.R. 601-617.

After the State rested, Lambert testified.⁸ On direct examination he explained that he had been a security officer in the Air Force from 2000 and was stationed in Kuwait from December 2002 to May 2003. A.R. 718-724. After his 2006 discharge from the Air Force, he briefly was a Beckley Police Department officer. A.R. 760-762. He then enlisted in the U.S. Army and was a chaplain's assistant in Arizona, where he had conflicts with his superiors and others because he missed work, was drinking to excess and experiencing homicidal thoughts against others. A.R. 767-772. He received an involuntary discharge in 2008 with a PTSD diagnosis and a reference to the fact that he was non-compliant with rehabilitative services. A.R. 795-798.

Lambert testified that he had dated Ms. Maroney for a few months but that by September, 2011, Ms. Maroney had explained to him that due to her work schedule, "there really wasn't much time for a relationship" and that their "intimate relationship" then ceased. Despite the fact that they were no longer intimate, in late September, 2011 Lambert stole Ms. Maroney's cellular phone to search for photographs that he "wanted to question her about." A.R. 807-808, 1016-1020.

On direct examination, Lambert testified that on October 2, 2011 Ms. Maroney expected him to visit her and that he went to Walmart to buy a "big knife" in case another man was in her home. A.R. 814-815. He testified that after buying the Bowie knife he sat in his car, waiting for Ms. Maroney to arrive home and "debating on whether to go over there and search the house." A.R. 816. He testified that he then drove to her home and waited in his vehicle until Ms. Maroney came out. According to Lambert, Ms. Maroney was "upset" because he was

⁸ The defense made a *pro forma* motion for judgment of acquittal at the close of the state's case, offering no argument. A.R. 701. The defense made no motion for judgment of acquittal and no motion for a new trial at the close of all of the evidence.

drinking and driving and smoking. Lambert testified that after he waited and watched Ms. Maroney re-enter her home, he hid the Bowie knife in the small of his back, walked through Ms. Maroney's closed front door and began searching her home, without announcing his presence. A.R. 818-821. He testified that he then entered Ms. Maroney's bedroom, and that she told him to leave. He claimed that he remembered nothing more until he struggled to unlock her bedroom door and knew he had "something" in his hand but "didn't know it was a knife." He testified that he "got in the car and left" and called his mother to say, "I think I might have killed Cyan." A.R. 821-823. He added that he threw the Bowie knife out of his car window along with beer bottles because he "was concerned about a DUI." A.R. 823-824.

On cross-examination Lambert confirmed that he went to Walmart to buy a "big, bad knife" to "assist (him) in any way (he) thought necessary" as he made plans to go to Ms. Maroney's home. A.R. 930. He admitted that his possession of the knife was a secret from Ms. Maroney and that his purpose in being in her home was concealed from her and was a surprise to her. According to Lambert, Ms. Maroney was under the impression that she had "nothing to fear" from him when she agreed to meet with him at her home. A.R. 934-936, 941.

Contrary to his testimony on direct examination, and contrary to the claim in the Brief (at 4), Lambert eventually admitted that he told his first defense psychiatrist that he was "pissed off" as he killed Ms. Maroney, and that his motivation was "jealousy." A.R. 948-949. He also confirmed that his reason for stabbing Ms. Maroney was "rage," not caused by PTSD but resulting from "multiple . . . unfaithful significant others." A.R. 950-951.

Lambert agreed that his second defense psychiatrist, Dr. Bernstein, was wrong in reporting that Lambert was in combat in Iraq.⁹ Lambert conceded that he never was in Iraq and

⁹ Dr. Bernstein's letter report, included in the Defendant's Rule 12.2(b) Disclosure, recited that, according to Lambert, he served "in Iraq" and was a "combat veteran." A.R. 2159.

never saw combat. 975-979. He also confirmed that every time he was referred for counseling in the military, he was advised to stop drinking but declined to do so. A.R. 982-983, 1007.

He agreed that his intention in going to Walmart approximately two hours before killing Ms. Maroney was to buy a deadly weapon in case he found another man in Ms. Maroney's home, in order to "kick his butt." A.R. 1029-1030.

Q: Then - - your plan was to get the most terrifying knife you could get and your plan was to use it, if necessary, if there was a man in Cyan's house; correct?

A: In an extreme case, yes.

Q: Then you sit (sic) in the car at Walmart for about an hour after you buy the Bowie knife?

A: Yes. A.R. 1034-1035.

Lambert then admitted that instead of using the "terrifying" Bowie knife to "kick the butt" of a rival, he used it to butcher Ms. Maroney. A.R. 1046, 1075.

Contrary to the claim in the Brief (at 4), Lambert admitted that as he fled in his vehicle after killing Ms. Maroney, he confessed to Amber Cook and also to his mother, stating "I believe I murdered someone, I believe I killed Cyan." He also confirmed that he made no 911 call to attempt to save Ms. Maroney's life and demonstrated a "complete lack of concern" for her: his sole concern was to rid himself of the bloody knife and beer bottles. A.R. 1048-1052. Nevertheless, after murdering Ms. Maroney he stopped off at a gas station and bought more beer. A.R. 1035-1036.

Dr. Bernstein, a psychiatrist licensed in Pennsylvania, identified himself as "an independent expert doing a forensic evaluation" for the defense. A.R. 1305. Dr. Bernstein erroneously testified that Lambert had been in "armed combat," resulting in his PTSD. A.R. 1323. After Dr. Bernstein attempted to testify to hearsay and unauthenticated records, the trial court focused the defense as follows:

THE COURT: Ultimately . . . you want him to testify that on the . . . night of the event in question - -

MS. DYER: Correct.

THE COURT: - - your client was suffering from a mental state such that he could not form a specific intent to do what he did, premeditation.

MS. DYER: And I think what I'll do, Your Honor, is I'm just going to glaze over everything and just get to that point, because I think the jury's probably had enough. A.R. 1386-1387.

On direct examination Dr. Bernstein opined that Lambert was not legally insane but that on October 2, 2011, as a result of mental diseases or defects, he lacked the capacity to form premeditation or the intent to kill Ms. Maroney. A.R. 1420. He never mentioned malice.

On cross-examination Dr. Bernstein agreed that if the evidence showed that Lambert bought the Bowie knife and intentionally used it to kill Ms. Maroney, then there was no diminished capacity defense:

I mean absolutely, if the facts . . . are as you . . . just spoke them, then my conclusions would be erroneous, that's correct. A.R. 1574.

In rebuttal, the State called forensic psychologist David Clayman, who had evaluated Lambert for competency and criminal responsibility and diminished capacity. A.R. 1721, 1733. Dr. Clayman testified that Lambert did not have a mental disease or defect that caused him to lack the capacity to form the mental elements of first degree murder when he stabbed and killed Ms. Maroney. A.R. 1759-1761. Dr. Clayman noted Lambert's personality disorders, including "substance abuse and his anger and his . . . not very functional lifestyle" and the fact that he "has always been aggressive . . . and he's had trouble with women all through his life" and opined that, even if Lambert had PTSD, such condition did not impact his capacity to premeditate or to form the intent to kill. A.R. 1761-1767, 1777-1778, 1795-1796.

The State also called Dr. Gregory Bowland, the psychologist who performed Lambert's evaluation after Lambert returned from Kuwait and applied for a position with the Beckley Police

Department. Dr. Bowland testified that Lambert's psychological testing was normal and that Lambert reported no psychological problems and no symptoms of PTSD after his military deployment. 1694-1705.

Two men who were deployed with Lambert and lived with him in Kuwait testified that Lambert never saw combat and that the alleged "traumatic" events described by Lambert to Dr. Bernstein and during trial never occurred. A.R. 1644-1653, 1664-1671. They also testified that Lambert's violent episodes after his return from Kuwait were related to his alcohol consumption and that his suicidal expressions were "not anything to do with Kuwait" but resulted from "girl trouble he was having at that time and he started drinking and started feeling suicidal." A.R. 1673-1674.

Dr. Jennifer Osborne, a physician who had dated Lambert in high school - - years before his deployment - - testified that he had surprised her during school and had urged her to run away with him. She testified that he had a gun and a baseball bat with him and threatened to use them if she did not comply or if anyone else tried to stop him. Dr. Osborne noted that long before his deployment, she had observed his "negativity" that "made him react and lash out." A.R. 1631-1635. Dr. Osborne also rebutted Lambert's testimony concerning "psychological events" occurring in 2004. A.R. 754-756. Dr. Osborne explained that Lambert had accompanied her to a concert and that he was "drunk, he was very angry," and punched out the mirror and tail light on a parked car. When Dr. Osborne tried to leave, Lambert choked her with his arm around her neck. When Dr. Osborne later refused to have contact with him, he began calling her "at all hours of the night." He showed up uninvited at her apartment in the middle of the night, armed with a gun, banging on her front door and demanding to be let in to "talk." When Dr. Osborne refused to let him in, Lambert warned her, "(Y)ou stupid bitch, you're going to talk to me." A.R. 1635-1642.

The Brief (at 5, 7, 11, 13, 18, 22, 24, 25) reiterates that Lambert at trial relied solely on a defense of diminished capacity, but includes no mention of the fact that in closing argument his counsel conceded the fallacy of the claim of diminished capacity and withdrew the defense:

The issue here is what this PTSD had to do with this case. That's what I want to talk to you about. Follow along. I may say a few things that surprise you.

First of all, I'm going to agree with Dr. Clayman, and after finally getting a chance to sit and listen to all the evidence in this case and listen to everybody show up and testify, just like you have, I find it difficult to believe he doesn't have the capacity to form the intent to kill or to premeditate. I think Dr. Clayman was right about that.

A.R. 1975-1976.

I tell you right now that if you thought that he bought that knife with the plan, the idea in mind I'm going to go . . . and I'm going to kill her with this, for God's sake, of course, he's guilty of first-degree murder, premeditated and malicious.

A.R. 1977.

On March 6, 2014 the jury found Lambert guilty of first degree murder with no recommendation of mercy and he was sentenced to life imprisonment without eligibility for parole. A.R. 2005, 2009.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary because the facts and arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

- I. LAMBERT WAS NOT "PROSECUTED ON . . . UNINDICTED THEORIES" OF MURDER.

In the Brief (at 9) Lambert erroneously contends that he was “prosecuted on the unindicted theories of felony murder and murder by lying in wait.” It is settled that, pursuant to W.Va. Code § 61-2-1, there are no “unindicted theories” of murder because the “manner in which, or the means by which, the death of the deceased was caused” need not be set forth in the indictment. The indictment puts the accused on notice that he may be prosecuted for any of the alternative “manner or means” of first degree murder.

A. LAMBERT FAILED TO PRESERVE HIS CLAIM THAT HE WAS SURPRISED BY THE ALTERNATIVE THEORIES OF MURDER: FURTHERMORE, THE EVIDENCE - - INCLUDING LAMBERT’S OWN TRIAL TESTIMONY - - PROVIDED NOTICE OF FELONY MURDER AND MURDER BY LYING IN WAIT.

The Brief (at 10) includes the fact that the felony murder and lying in wait instructions given by the trial court in this case were submitted and argued on March 3, 2011, three days before the conclusion of the trial and prior to Dr. Bernstein’s testimony and the State’s rebuttal and the opportunity for defense surrebuttal. Lambert made no request for a recess or a continuance to ameliorate any prejudice from his claimed “surprise” over the felony murder and lying in wait instructions.

In *State v. Rollins*, 233 W.Va. 715, 760 S.E. 2d 529, 553-555 (2014), the petitioner claimed “unfair surprise” and this Court found that he had failed to preserve the error for appellate review because he had failed to request a recess or a continuance. Citing *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E. 2d 788 (1995), this Court held that in order to preserve a claim of error based on “unfair surprise” the petitioner must make an articulable showing of prejudice and demonstrate “that prejudice was uncorrectable despite the request for a continuance or recess.” Syllabus Point 4 of *McDougal* and Syllabus Point 14 of *Rollins* leave no doubt: “In order to preserve for appeal the claim of unfair surprise . . . the aggrieved party must move for a continuance or recess.” Accordingly, Lambert has failed to preserve his claim of unfair surprise related to the felony murder and lying in wait instructions.

Moreover, Lambert cites no authority in support of his notion that the prosecutor in a murder case is obliged to disclose possible “theories” in advance of trial. As discussed above, Lambert’s own trial testimony included his admission to felony murder. His testimony was that, two hours before killing Ms. Maroney, he bought the “terrifying” 14-inch Bowie knife with the intent to search Ms. Maroney’s home and to brandish it and “use it in any manner that would assist” him if he found that Ms. Maroney had another man there. Contrary to the claim in the Brief (at 12), that Lambert was “invited into the house,” the undisputed evidence was that by the time he entered Ms. Maroney’s home, she had retreated behind her closed front door and then into her bedroom, behind another closed door. Lambert, unannounced, then came through each of those closed doors with the Bowie knife hidden in the small of his back.

The Brief (at 10-12) contains an attempt to distinguish the facts of this case from those of *State v. Hughes*, 225 W.Va. 218, 691 S.E. 2d 813 (2010). In *Hughes*, the defendant’s complaint was identical to Lambert’s: that he had not received pre-trial notice that he would be prosecuted both on felony murder and premeditated murder. Lambert concedes that in *Hughes* “the burglary and the murder were intertwined inextricably throughout the factual development of the case” but claims that this “is not a case in which there was an obvious felony committed at the time of the killing.” To the contrary, in *Hughes* the defendant testified at trial that it was the victim who possessed the firearm that discharged, causing her death. In the instant case, Lambert’s own testimony was that he bought the Bowie knife and hid it in his pants and entered Ms. Maroney’s residence with the intent to brandish or assault any man he might find inside. Since he, instead, entered into Ms. Maroney’s bedroom and used it to stab her 23 times, there was sufficient evidence upon which the jury reasonably could have found that his entry through two closed doors after Ms. Maroney’s retreat into her home and then into her

bedroom was with the intent to commit a crime therein.¹⁰ Lambert does not argue that there was insufficient evidence to support the theory of felony murder, but instead asserts that it “was not obvious or apparent under the facts of this case, although from a purely technical prospective, it could be argued.”

In *Hughes* this Court stated that the defendant was not “unfairly surprised because the content of his statement to police and other evidence clearly should have put him on notice of underlying felony conduct.” In the instant case Lambert was provided open file discovery including the statements of Ms. Maroney’s roommates, the Walmart video and stills showing Lambert’s purchase of the Bowie knife approximately two hours before entering Ms. Maroney’s residence and a copy of his interview to police, in which he falsely denied ever entering her residence, despite his bloody hands and shirt. Additionally, the defense was in possession of Lambert’s recorded forensic interviews with Dr. Miller and Dr. Clayman and the reports of their psychiatric and psychological evaluations. Lambert’s counsel also had the September 10, 2013 letter report of Dr. Bernstein, who reported that on October 2, 2011 Lambert was “pissed off” with Ms. Maroney and drank beer and “obsessed” about a suspected other boyfriend; that he argued with Ms. Maroney and then sat in his car outside of her home, retrieved the Bowie knife and entered her home and then her bedroom; that he recalled “pushing” between them and then had a “clear memory that someone was lying on the floor and that he had a knife in his hand,” but supposedly “(h)e was not clear at that point if he had harmed his girlfriend or her ex-boyfriend.” A.R. 2159.¹¹ Dr. Bernstein agreed that Lambert’s version of events to him was that

¹⁰ The felony murder instruction made clear that if it was proven that Lambert burglariously entered Ms. Maroney’s home with the intent to brandish the deadly weapon against any person, including Ms. Maroney, or to assault any person, including Ms. Maroney, then the felony murder doctrine applied. A.R. 1926-1932. There is no claim of error regarding this instruction.

¹¹ Dr. Bernstein’s two letter reports contain no mention of Lambert’s purchase of the knife. At trial, Dr. Bernstein testified that this omission was “a mistake.” A.R. 1534-1536.

Lambert “bought the deadly weapon and entered Cyan’s home with the intent to brandish the deadly weapon.” A.R. 1562.

The same discovery and other pre-trial information that placed Lambert on notice of felony murder provided notice of murder by lying in wait. Additionally, on February 24, 2014 the prosecutor’s opening statement included:

Judge Burnside will instruct you in the definition of first degree murder [] and there are different ways that first-degree murder can be proven.

The proof in this case of premeditation will be that after . . . he formed the intent to kill, he then executed that intent by executing young Cyan.

We don’t have to prove alternative ways of committing first-degree murder but we will necessarily in this case also prove that what the defendant did to Cyan was death by ambush.

We will prove the Defendant armed himself with the intent to kill and that he put himself in the position to make what we call a private attack upon Cyan when, if she knew of his presence, she did not know that his purpose was to kill her. A.R. 331, 333.

Despite hearing the prosecutor’s opening remarks describing murder by lying in wait, Lambert made no objection or ever addressed the matter of lying in wait until, on March 3, 2014, he claimed surprise when the State submitted an instruction on this theory of murder.

The testimony of the defense psychiatrist, Dr. Bernstein, also supported the theory of murder by lying in wait. He confirmed that Lambert’s version of events was that he had made arrangements with Ms. Maroney to “just . . . have a talk” at her residence; that he had armed himself with the intention to brandish the Bowie knife if he had felt threatened at her residence; that he never informed Ms. Maroney of his intention in going to her home; that he did not disclose to Ms. Maroney that he was arming himself; that after buying the Bowie knife he had waited for an hour until Ms. Maroney arrived home; that he then entered her home and her bedroom and killed her; that as he walked out of her bedroom he stated, “That will teach the mother f_____r to leave me.” A.R. 1562-1565.

Moreover, as discussed above, Lambert's direct testimony was that on October 2, 2011 he made arrangements to meet Ms. Maroney and that he bought the Bowie knife because he had "discovered photographs" on Ms. Maroney's phone. He stated, "I was thinking, something's not right, I don't have a pistol on me or any weapon, I want to have something in case there's somebody else there to protect myself, and that particular knife was to assist me in any way that I might need it if someone were there that might have - - you know, a fight." Continuing his direct testimony, Lambert admitted that he waited for nearly an hour in the Walmart parking lot, "debating on whether or not to go over there and search the house" before driving to Ms. Maroney's home. He sat in his car, waiting and smoking and watching, until Ms. Maroney came outside. He testified that after she went back into her home he waited again "for maybe a minute or so" and then stood on her front porch and argued with her again. He testified that "there may have been a discussion" about her new boyfriend. He testified that after he "watched her" retreat into her home he went to his vehicle, "grabbed" the Bowie knife, hid it in the small of his back, opened the closed front door and searched through the house, never announcing his presence. He testified that he then went into her bedroom, asked "where was this guy" and searched her closet. He claimed Ms. Maroney told him he "may need to just go home," after which he remembered walking out with "something in (his) hand" and calling his mother to say, "I think I may have killed Cyan." A.R. 808, 814-822.

Further, as discussed above, Lambert admitted that while speaking with his friend, Amber Cook, before going to Ms. Maroney's home, "I believe I mentioned . . . that I was going to maybe have to kick somebody's butt." A.R. 1030. He conceded that if he had been concerned about defending himself, he could have simply declined to visit Ms. Maroney. A.R. 1033. He also agreed that after he surreptitiously searched Ms. Maroney's home, he was in private with her in her bedroom when he attacked her. A.R. 1038. He acknowledged that he had told Dr.

Miller that he took out the knife in Ms. Maroney's bedroom. A.R. 1042-1043. He admitted that his purpose in going to Ms. Maroney's home was concealed from her and that he had not informed her that he was armed with the Bowie knife or that his purpose in visiting her was not "to talk." A.R. 1044. He conceded that when he plunged the knife into Ms. Maroney's body, she felt pain and terror. A.R. 1046. He also confirmed that he then called his mother to say he believed he had "murdered someone," being Ms. Maroney. He admitted that he called Amber Cook to say, "I stabbed her, I think she's dead," and that he "demonstrated a complete lack of concern for Cyan Maroney and her welfare." A.R. 1048-1051.

Given pre-trial discovery and the evidence at trial, including Lambert's own testimony and the testimony of his expert, it is impossible that his two attorneys were unfairly surprised that the prosecutor would submit an instruction on murder by lying in wait. A.R. 1925-1926.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO REQUIRE THE STATE TO ELECT AMONG THEORIES OF MURDER.

Lambert made two summary oral motions for election during trial. A.R. 1164, 1180. On March 3, 2014, his counsel moved for election on the grounds of surprise and a claim that nothing in the trial had made the alternative theories of murder "apparent." Later on the same day, Lambert's counsel said, "just for the record, I would make a motion . . . that the Court require the State to choose between these alternative theories" The Brief (at 13) includes Lambert's assertion that he was unfairly prejudiced because "a diminished capacity defense . . . cannot be pursued under the felony murder or murder by lying in wait theory" This argument lacks merit. A claim of diminished capacity can be asserted as to the "intent to commit a crime therein" (felony murder by burglary) and as to the intent to kill or cause bodily harm (murder by lying in wait). Lambert was not precluded from claiming diminished capacity as to

these alternative theories -- he simply declined to do so. It is inconceivable that Lambert was so mentally disabled that he was incapable of forming the mental elements of premeditated murder but fully capable of forming the mental elements of felony murder and murder by lying in wait.¹²

Furthermore, there was no unfair prejudice to Lambert resulting from the denial of his motion for election because if the trial court had ordered election, the prosecution could have elected to proceed on the theory of felony murder or murder by lying in wait instead of premeditated murder.

In denying Lambert's motion for election, the trial court cited *State v. Hughes*, 225 W.Va. 218, 691 S.E. 2d 813 (2010) and *State v. Berry*, 227 W.Va. 221, 707 S.E. 2d 831 (2011), correctly finding that "the law is clear" that it is not an abuse of discretion for the trial court to decline to order the State to elect among alternative theories of first degree murder. As required by Syllabus Point 2 of *Hughes* and Syllabus Point 5 of *Stuckey v. Trent*, 202 W.Va. 498, 505 S.E. 2d 417 (1998), the theories of murder were distinguished for the jury through court instructions and Lambert was not prosecuted for the underlying felony of burglary. A.R. 1920-1932.

II. LAMBERT FAILED TO PRESERVE AND DEVELOP HIS CLAIM THAT THE TRIAL COURT'S INSTRUCTION ON MURDER BY LYING IN WAIT MISSTATED THE LAW: MOREOVER, THE INSTRUCTION WAS PROPER.

The "question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Syl. Pt. 5, *State v. Prophet*, 234 W.Va. 33, 762 S.E. 2d 602 (2014); Syl. Pt. 1, *State v. Hinkle*, 200 W.Va. 280, 489 S.E. 2d 257 (1996). However, "(d)eference is given to a trial

¹² Dr. Bernstein conceded that Lambert had the capacity to form the mental elements of burglary, the underlying felony for felony murder. Later, he testified that he had no opinion regarding Lambert's state of mind in the commission of felony murder or murder by lying in wait. A.R. 1488-1494, 1560-1561.

court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion." Syl. Pt. 6, *State v. Prophet, supra*; Syl. Pt. 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E. 2d 163 (1995).

Lambert failed to preserve for appellate review the claim in the Brief (at 16) that the lying in wait instruction was not a correct statement of the law. The record reveals that after the trial court invited Lambert's counsel to state any objections to the instruction, the sole initial objections were that the defense was surprised and that the State's "theory (was) contrary to the law" and that counsel did not know if the instruction was correct or not. A.R. 1172-1179, 1185-1187, 1190-1192, 1244. Later, counsel stated that the instruction was a misstatement of law, but never stated distinctly how it was a misstatement or offered any authority in support of such assertion. A.R. 1863-1872. Under W.Va. Rules of Criminal Procedure 30, "no party may assign as error the giving or the refusal to give an instruction . . . unless that party objects . . . stating distinctly the matter to which that party objects and the grounds of his objection." Syl. Pt. 8, *State v. Garrett*, 195 W.Va. 630, 466 S.E. 2d 481 (1995).

Lambert fails to mention how the lying in wait instruction misstated the law, but only avers that the "trial court erred by incorrectly instructing the jury as to the elements of lying in wait." The claim is "mentioned only in passing but (is) not supported with pertinent authorities" and thus is deemed abandoned. *State v. LaRock*, 196 W.Va. 294, 302, 470 S.E. 2d 613, 621 (1996); *State v. Lilly*, 194 W.Va. 595, 605 n. 16, 461 S.E. 2d 101, 111 n. 16 (1995). Furthermore, the trial court's instruction was an accurate statement of the law of lying in wait as articulated in *State v. Berry*, 227 W.Va. 221, n. 21, 707 S.E. 2d 831, 840 n. 21 (2011). A.R. 1925-1926.

In the Brief (at 16) Lambert apparently contends that the evidence was insufficient to support a conviction of first degree murder by lying in wait, but argues that the "evidence that the defendant secretly bought a weapon, entered the victim's residence with the intent to kill

her, that such intention was hidden from her and that his purpose for being in the bedroom was concealed and a secret is ridiculous, unimaginable, and defies logic." To the contrary, Lambert's abbreviated recitation of the facts is a concession that the evidence supported a conviction of murder by lying in wait.¹³

Lambert is entitled to no relief upon an insufficiency of evidence claim as to murder by lying in wait because he does not make any such claim as to premeditated murder or felony murder. Syllabus Point 4 of *Berry* makes clear that "(w)hen a defendant is prosecuted on alternative theories of first degree murder, a verdict against the defendant will stand if the evidence is sufficient to establish guilt beyond a reasonable doubt on any of the alternative first degree murder theories."

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO INSTRUCT THE JURY ON VOLUNTARY MANSLAUGHTER.

In the Brief (at 17-18), Lambert argues that because Dr. Bernstein testified that Lambert "was incapable of premeditation or forming the intent to kill," a voluntary manslaughter instruction was warranted. As Lambert apparently concedes, there was no evidence that, due to a mental disease or defense, Lambert lacked the capacity to form malice, being the element that distinguishes murder from manslaughter.¹⁴ During argument over instructions, Lambert's

¹³ This Court in *Berry* quoted with approval: "If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait." *State v. Leroux*, 326 N.C. 368, 390 S.E. 2d 314, 320 (1990).

¹⁴ Lambert's counsel repeatedly confirmed that Lambert's capacity to form premeditation was the only issue raised by his diminished capacity defense:

MR. DYER: The distinction in my mind, Your Honor, it's not - - certainly we're not suggesting that he's not guilty of one of the lesser-included offense of second and even, I guess, remotely potentially manslaughter.

And that's the issue here. It's the capacity or likelihood is diminished that he had the capacity to premeditate his act and wherefore a jury may - - may conclude that it's removed from the parameters of first degree murder. That is - - that is only it, not that he was - - you know, he's incapable of intending to have committed this heinous act.

I mean it's a form of - - of the *mens rea*, but it's exclusively premeditation, and by conceding up front and admitting on the stand we're the killer, that clarifies the issue for the jury. A.R. 910-911.

During the pre-trial hearing concerning the admissibility of Dr. Bernstein's testimony, Lambert's counsel explained:

"Well, the issue here is whether or not this is a planned, a premeditated murder.

This would be my opening: The issue for you, ladies and gentlemen on the jury, is this a planned, a premeditated murder, or is this an impulsive aggressive act of passion and acting out, an overreaction to some sort of trigger . . ." A.R. 2046.

counsel initially agreed that there was no evidence that Lambert was incapable of forming malice. A.R. 1837-1838. During later argument, Lambert's counsel stated: "this is not the typical manslaughter case, there is no direct evidence of provocation and I just want to create a record that . . . given the expert testimony and other circumstantial evidence . . . that it could be - - the argument can be made that there is circumstantial evidence of provocation" Counsel again stated that this is "not your classic case of provocation, but, to preserve a record, we are compelled to take the position that he is entitled to the manslaughter instruction based upon the availability of a claim for (sic) contention that the jury may circumstantially infer that there was provocation, and that's it." When the trial court inquired if Lambert's contention was that the "absence of evidence" of provocation would justify an inference of provocation, Lambert's counsel responded, "The absence of any evidence in conjunction with the evidence of PTSD." Accordingly, the trial court did not abuse its discretion in rejecting Lambert's argument that a voluntary manslaughter instruction could "be supported by the absence of evidence" and in refusing the instruction. A.R. 1896-1899. The Brief includes no citation to any authority that the absence of evidence of provocation entitled Lambert to a voluntary manslaughter instruction: "(i)nstructions must be based upon the evidence and an instruction which is not supported by evidence should not be given." Syl. Pt. 4, *State v. Collins*, 154 W.Va. 771, 180 S.E. 2d 54 (1971).

Lambert makes no claim that Dr. Bernstein opined that due to a mental disease or defect, Lambert was incapable of forming malice. In *State v. Skeens*, 233 W.Va. 232, 241, 757 S.E. 2d 762, 771 (2014), the defendant contended that he was entitled to a voluntary manslaughter instruction because the defendant's intent at the time he killed his victim was "irrational." Skeens argued on appeal that his psychiatrist's testimony concerning his mental illnesses warranted such instruction. In rejecting the claim, this Court held that the refusal of a

voluntary manslaughter instruction “was a matter properly within the discretion of the circuit court” and that the circuit court’s conclusion that such instruction was not warranted by the evidence was not an abuse of discretion.

In *State v. Bowling*, 232 W.Va. 529, 541, 753 S.E. 2d 27, 39 (2013), the defendant assigned as error the trial court’s refusal to give a voluntary manslaughter instruction. His defense was that he had killed his wife by accident as a result of a malfunction of his gun. This Court held that the circuit court did not abuse its discretion by refusing to give a voluntary manslaughter instruction “because during trial, no evidence was presented to show that Mr. Bowling intended to shoot his wife without malice.”

In the instant trial, no evidence was presented to show that, without malice, Lambert intentionally stabbed Ms. Maroney 23 times. On redirect examination Lambert’s counsel gave him an opportunity to make such a claim, but Lambert declined to do so:

Q: Jeremy, did you kill this young lady?
A: Yes, I did. I don’t remember doing it but, yes, I did.
Q: Why? Why did you do that?
A: I don’t know. She did nothing to me that I know of. A.R. 826.

IV. LAMBERT FAILED TO PRESERVE HIS CLAIM OF ERROR REGARDING A STATE’S REBUTTAL WITNESS, DR. JENNIFER OSBORNE, AND MAKES NO CLAIM OF ERROR AS TO HER SUBSTANTIVE TESTIMONY.

The Brief (at 18-19) contains Lambert’s sole complaints about Dr. Osborne. He complains that the prosecutor referred to the witness, a physician, as “Dr. Osborne” and briefly inquired about her background. At trial, Lambert never objected when the State used the title of “Doctor.” The objection concerning brief background questions was made only after the witness had testified that she is a medical school graduate, a fellow in pulmonary critical care and board certified in internal medicine. A.R. 1628-1644. When defense counsel finally objected, the sole ground was: “(s)he’s not testifying as an expert. It’s not relevant. We’re

interested in moving this case on.” A.R. 1628-1629. The claim in the Brief (at 19) that the State attempted to “bolster Dr. Osborne’s testimony and that Lambert was prejudiced thereby” never was made during trial. Pursuant to W.Va. Rules of Evidence 103 (a)(1), Lambert’s new claim of error concerning Dr. Osborne is precluded from appellate review. *State v. DeGraw*, 196 W.Va. 261, 272, 470 S.E. 2d 215, 226 (1996). Further, since Lambert makes no claim of error concerning Dr. Osborne’s substantive testimony, he could not have been unfairly prejudiced by her testimony that she is a physician.

V. LAMBERT’S TRIAL OBJECTION REGARDING HIS RECORDED INTERVIEW WITH DR. MILLER WAS THAT IT CONTAINED “HEARSAY.” LAMBERT FAILED TO PRESERVE HIS NEW CLAIMS OF ERROR AND ALSO HAS ABANDONED HIS HEARSAY CLAIM.

Dr. Miller interviewed Lambert on November 9, 2011 “pursuant to request by his attorney, Joe Noggy.”¹⁵ Lambert “was informed . . . that the interview should not be considered confidential . . . that no doctor-patient relationship existed . . . that he had the right to refuse the evaluation or to answer specific questions . . . that the report may help, hurt or have no effect on his case . . . (that) the interview may be audio or video taped . . .” Lambert “voluntarily agreed to proceed” with the interview. S.A. 16-17. In his original report and in an addendum, Dr. Miller concluded that Lambert was competent and criminally responsible and never opined that, due to a mental disease or defect, Lambert lacked the capacity to form premeditation or the intent to kill or malice. Dr. Miller opined that while Lambert’s “PTSD was chronic the circumstances surrounding the offense did not mimic or trigger his illness in a manner that induced (or provoked) his actions.” S.A. 24, 30.

Because Dr. Miller’s opinions, disclosed pursuant to W.Va. Rules of Criminal Procedure 12.2 and 16(b)(1)(C), had no relevancy to the issue of diminished capacity, the trial court granted

¹⁵ Mr. Noggy is Chief Public Defender in Raleigh County and represented Lambert until he retained his present counsel, Thomas Dyer and Mary Dyer.

the States' motion in limine to preclude his testimony on that issue.¹⁶ A.R. 2187. The State never objected to Lambert calling Dr. Miller for any other purpose, but Lambert did not attempt to do so. S.A. 67. Lambert's claim in the Brief (at 21) that he was "not able to cross-examine Dr. Miller as to the statements he made during the interview" is barred from appellate review because Lambert never attempted to call Dr. Miller. Lambert did not object to the trial court's ruling disallowing Dr. Miller's testimony concerning diminished capacity and does not assign this ruling as error.

Lambert's claim of error is not that he was cross-examined concerning his statements to Dr. Miller. Indeed, Lambert's counsel stated that there was no defense objection to such cross-examination. A.R. 834, 917-920. The defense objection was that the recorded interview contained Dr. Miller's hearsay statements. A.R. 829-833. The prosecution proposed a limiting instruction, directing the jury to disregard any comments made by Dr. Miller during the interview. The trial court offered to give a limiting instruction, but Lambert's counsel refused the offer. A.R. 920-922.¹⁷

In the Brief (at 21-22) Lambert makes a claim never raised at trial, that Lambert's statements to Dr. Miller were inadmissible pursuant to *State v. Jackson*, 171 W.Va. 329, 298 S.E. 2d 866 (1982). During trial, Lambert never made such objection and thus waived appellate review of this new claim as provided by W.Va. Rules of Evidence 103(a)(1).

To preserve an issue for appellate review, a party must articulate it with sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. Syl. Pt. 2, *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E. 2d

¹⁶ Although Dr. Miller never supplemented his original report and addendum, Lambert's counsel represented that counsel spoke with him by telephone a few days before trial and that Dr. Miller said he would agree with Dr. Bernstein. S.A. 70-72.

¹⁷ Lambert made no claim at trial, and makes no appellate claim, that statements of Dr. Miller during the interview violated *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In Syllabus Point 4 of *State v. (Jason Paul) Lambert*, 232 W.Va. 104, 750 S.E. 2d 657 (2013), this Court held in part: "Where the out-of-court statements of a non-testifying individual are introduced into evidence solely to provide foundation or context for understanding a defendant's response to those statements, the statements are offered for a non-hearsay purpose . . ." A.R. 833-834.

162 (1996); Syl. Pt. 10, *State v. Shrewsbury*, 213 W.Va. 327, 582 S.E. 2d 774 (2003).¹⁸

In *State v. DeGraw*, 196 W.Va. 261, 272, 470 S.E. 2d 215, 226 (1996) this Court recognized that where an objection is based upon a specific ground “the objection is then limited to that precise ground” and “specifying a certain ground of objection is considered a waiver of other grounds not specified.”

Presumably there was no defense objection based on the grounds first raised on appeal because Lambert’s counsel recognized that Lambert’s interview with Dr. Miller was not offered by the prosecution in its case in chief but only after Lambert claimed on direct examination that he had no memory of killing Ms. Maroney - - a claim rebutted by his admissions to Dr. Miller, that he was “pissed off” when he killed Ms. Maroney and that his motive was “jealousy.” He also initially claimed on cross-examination that he could not recall making such admissions to Dr. Miller. A.R. 828. Even if Lambert had preserved a claim that his statements to Dr. Miller were inadmissible - - which he did not - - those statements were admissible on cross-examination. A defendant who testifies at trial may be cross-examined about his voluntary pre-trial statements even when those statements are inadmissible in the State’s case in chief. Syl. Pt. 15, *State v. Jenkins*, 229 W.Va. 415, 729 S.E. 2d 250 (2012); Syl. Pt. 1, *State v. DeGraw*, 196 W.Va. 261, 470 S.E. 2d 215 (1995).

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury . . . Having voluntarily taken the stand, . . . (the appellant is) under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. *State v. Knotts*, 187 W.Va. 795, 803, 421 S.E. 2d 917, 925 (1992), citing Syl. Pt. 4, *State v. Goodman*, 170 W.Va. 123, 290 S.E. 2d 260 (1981), adopting *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971).

¹⁸ Even if Lambert had preserved an objection based on *State v. Jackson*, his claim of error would fail. As discussed above, Dr. Miller was not a State agent and Lambert voluntarily spoke with him after being advised that he could refuse to answer any questions.

The Brief (at 22) includes the conclusory claim that Lambert's interview with Dr. Miller "contained numerous incriminating statements," but fails to develop this claim in any detail.¹⁹ Accordingly, as discussed above, Lambert's "undeveloped argument" of this issue constitutes waiver. *State v. McKinley*, 234 W.Va. 143, n.13, 764 S.E. 2d 303, 319, n.13 (2014). Lambert fails to articulate what "incriminating statements" were made during his interview with Dr. Miller or how any such statements affected the jury verdict. Even if Lambert could establish that the trial court abused its discretion in allowing the jury to hear his interview with Dr. Miller, Lambert fails to "meet his . . . burden of demonstrating that substantial rights were affected" by such alleged error. *State v. Blake*, 197 W.Va. 700, 705, 478 S.E. 2d 550, 555 (1996).

- VI. LAMBERT FAILED TO PRESERVE HIS CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION BY LIMITING THE TESTIMONY OF DR. BERNSTEIN, THE DEFENSE PSYCHIATRIST: MOREOVER, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING SUCH TESTIMONY TO COMPLY WITH W.VA. RULES OF EVIDENCE 702, 703, 803(4), 803(6) and 901.

As discussed above, Lambert's counsel during closing argument disavowed the diminished capacity defense. A.R. 1975-1976. The jury was instructed that although closing arguments are not evidence, "one of the functions of the lawyers is to point out those things which they believe are most significant or most helpful to their side of the case and, in doing so, to call to your attention certain facts which might otherwise escape your notice." A.R. 1908. This Court regularly considers defendants' claims that remarks made during closing arguments have influenced the resulting verdicts. *State v. Sugg*, 193 W.Va. 388, 456 S.E. 2d 469 (1995). Accordingly, as Lambert by counsel in closing argument conceded the fallacy of his diminished capacity defense, he must not now be permitted to complain that the trial court abused its discretion in its rulings concerning that admittedly false defense.

¹⁹ Lambert also omitted from the Appendix Record the transcript of his interview with Dr. Miller.

Lambert's initial W.Va. Rules of Criminal Procedure 12.2(b) disclosure of the forensic evaluation performed by Dr. Bernstein included no finding of diminished capacity. A.R. 2156-2165. The State filed a motion in limine to bar Dr. Bernstein from testifying in support of a diminished capacity defense because he had not opined that, as a result of a mental disease or defect, Lambert lacked the capacity to form the mental elements of first degree murder and because his proposed testimony did not meet the requirements of W.Va. Rules of Evidence 702. A.R. 2170-2171. During pre-trial hearing held ten days before trial, Lambert's counsel equivocated about whether or not Dr. Bernstein's opinion supported a diminished capacity defense. A.R. 2042, 2044, 2047, 2053-2054, 2065-2066. Lambert's counsel erroneously argued that Dr. Bernstein should be permitted to testify about Lambert's purported PTSD and other mental conditions whether or not such conditions rendered him incapable of forming the mental elements of first degree murder at the time he killed Ms. Maroney. Counsel was wrong. "The existence of a mental illness is not alone sufficient to trigger a diminished capacity defense. It must be shown by psychiatric testimony that some type of mental illness rendered the defendant incapable of forming the specific intent elements." *State v. Simmons*, 172 W.Va. 590, 600, 309 S.E. 2d 89, 99 (1983); *State v. Joseph*, 214 W.Va. 525, 532, 590 S.E. 2d 718, 725 (2003).²⁰

Contrary to the claim in the Brief (at 22) that the trial court "gave the Defendant the opportunity to file a supplemental report," the court only allowed Lambert's counsel to brief the issue. A.R. 2082-2084. A few days later, Lambert's counsel submitted a "Supplemental 12.2(b) Disclosure" containing Dr. Bernstein's new opinion in support of a diminished capacity defense. A.R. 2166-2169. The State objected to the late disclosure but, fearing appellate

²⁰ In *State v. Lockhart*, 208 W.Va. 622, 634-635, 542 S.E. 2d 443, 455-456 (2000) this Court held that the trial court properly excluded defense psychiatric testimony offered in support of an insanity defense. "Basically, Dr. Coffey's opinion constituted little more than a diagnosis that Mr. Lockhart suffered from DID. Such a diagnosis alone, without more, is insufficient to support an insanity defense . . ."

Similarly, in *State v. McKinley*, 234 W.Va. 143, 764 S.E. 2d 303 (2014), when the defendant claimed diminished capacity, this Court held that the trial court properly excluded defense psychiatric testimony concerning the defendant's "extreme emotional disturbance."

“problems down the road if his entire testimony was suppressed,” waived the objection and agreed that Dr. Bernstein’s new opinion should be incorporated into his original letter report for the trial court’s consideration of the State’s motion in limine. Lambert’s counsel expressed “apprecia(tion)” for the State’s concession. S.A. 66-70.

Contrary to the contention in the Brief (at 23), that the trial court precluded Dr. Bernstein from testifying as to his opinions, the trial court repeatedly ruled that, pursuant to W.Va. Rules of Evidence 703, Dr. Bernstein could testify about those opinions whether or not the underlying facts or data were admissible. The trial court also repeatedly explained that Rule 703 does not mean that otherwise inadmissible evidence becomes admissible simply because an expert witness has relied upon such facts or data in forming his or her opinion. A.R. 1332-1338, 1340, 1354-1358, 1398-1399.

. . . (C)ourts must serve a gate keeping function with respect to Rule 703 opinions to ensure the expert is not being used as a vehicle for circumventing the rules of evidence. Rule 703 was not intended to abolish the hearsay rule and to allow a witness, under the guise of giving expert testimony, to in effect become the mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion. The rule was never intended to allow oblique evasions of the hearsay rule. 2 Cleckley, Palmer and Davis, *Handbook on Evidence* §703.02 [1] (2014 Supp.)²¹

Although Lambert’s attorneys repeatedly claimed that they did not understand the trial court’s explanation of Rule 703, they made no specific objection that the trial court’s rulings violated Rule 703.²² Additionally, the trial court repeatedly offered Lambert’s counsel an opportunity for an *in camera* hearing to proffer Dr. Bernstein’s proposed testimony and to

²¹ In *O’Connell v. State*, 294 Ga. 379, 754 S.E. 2d 29 (2014) the defendant, who killed her adoptive mother, called two expert witnesses who testified that the defendant suffered from PTSD as a result of childhood abuse. The trial court allowed the opinion testimony but refused to allow the experts to disclose to the jury the defendant’s statements upon which they had relied. In affirming the defendant’s murder conviction, the Court held: “That appellant’s experts based their opinion, in part, on her statements to them regarding her childhood did not render this evidence admissible. Although a testifying expert can base his or her opinion in part on hearsay, an expert cannot be used as a conduit to introduce inadmissible hearsay evidence.”

²² Lambert’s counsel agreed that the statements of Lambert’s mother to Dr. Bernstein, upon which he relied in part in forming his opinions, would constitute inadmissible hearsay. A.R. 2073.

determine the admissibility of the underlying facts or data upon which Dr. Bernstein relied, but counsel declined to take advantage of the offers. A.R. 361-362, S.A. 73-74.

A. LAMBERT CONCEDED THAT HIS INTERVIEW WITH DR. BERNSTEIN WAS FOR A PURELY FORENSIC PURPOSE.

Lambert, by counsel and also by Dr. Bernstein, repeatedly confirmed that Dr. Bernstein's evaluation was for a purely forensic purpose rather than for purposes of diagnosis or treatment pursuant to W.Va. Rules of Evidence 803(4). A.R. 364-365, 1305, 1333, 2074. Even before Lambert submitted his original Defendant's Rule 12.2(b) Disclosure, his counsel identified Dr. Bernstein as a "forensic psychiatrist" retained to assist with "the defendant's anticipated theory of defense" and to "assess the defendant respecting possible . . . mental defense theories" in anticipation of a "competent defense which will also likely lead to the opportunity for more meaningful plea negotiations as well." S.A. 33-34. Accordingly, the Brief (at 24) misstates the record in claiming that the "trial court never stated the basis upon which it believed that Dr. Bernstein had performed a forensic evaluation." Indeed, Lambert repeats in the Brief (at 24, 25) that Dr. Bernstein "was retained by the defense for the purpose of providing expert testimony" at trial.

Lambert does not contend that the trial court abused its discretion in applying W.Va. Rules of Evidence 803(4) and applicable case law distinguishing statements made for the purposes of medical diagnosis and treatment from hearsay statements made for a purely forensic purpose. Lambert erroneously argues that Dr. Bernstein's evaluation was not a forensic evaluation, but does not contend that the trial court abused its discretion in applying Rule 803(4)

to Dr. Bernstein's testimony in a manner consistent with Syllabus Points 4, 5 and 6 of *State v. Payne*, 225 W.Va. 602, 694 S.E. 2d 935 (W.Va. 2010).²³

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN APPLYING W. VA. RULES OF EVIDENCE 703 TO DR. BERNSTEIN'S TESTIMONY.

Lambert failed to preserve and has abandoned his claim of error, that the trial court abused its discretion in limiting Dr. Bernstein's opinion testimony under W.Va. Rules of Evidence 703, because (a). he did not make a specific objection at trial; (b). he now fails to specify what admissible evidence was excluded and (c). he forfeited any claim that he was unfairly prejudiced by the trial court's rulings concerning Dr. Bernstein's testimony when, by counsel, he conceded the fallacy of the diminished capacity defense in closing argument.

In the Brief (at 24-25) Lambert contends that the "defense of diminished capacity is a serious and material defense that must be established by medical testimony" and erroneously argues that the "trial court committed reversible error by restricting the Defendant's expert witness' testimony to facts within his knowledge" As discussed above, the Brief includes no citations to Lambert's specific objections concerning the trial court's application of W.Va. Rules of Evidence 702 or 703 because none were made. Also as discussed above, Lambert forfeited the claim that he was unfairly prejudiced by the trial court's application of Rule 703 to Dr. Bernstein's testimony because Lambert's counsel argued to the jury that, in fact, there was

²³ The two part test for admitting hearsay statements pursuant to W.Va. R. Evid. 803(4) is, (1)the declarant's motive. . . must be consistent with the purposes of promoting treatment, and(2)the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis.' Syl. Pt. 5, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E. 2d 123 (1990).

[] '(T)he therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule . . . if the declarant's motive in making the statement is consistent with the purposes of promoting treatment The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes.' Syl. Pt. 9, *State v. Pettrey*, 209 W.Va. 449, 549 S.E. 2d 323 (2001), cert. denied, 534 U.S. 1142, 122 S.Ct. 1096, 151 L.Ed. 2d 994 (2002).

[] In determining whether the statement was made for promoting treatment, such testimony is admissible if the evidence was gathered for a dual medical and forensic purpose, but it is inadmissible if the evidence was gathered strictly for investigative or forensic purposes.

no merit to his diminished capacity defense and that the State's witness, Dr. David Clayman, was correct in his rebuttal of Dr. Bernstein's testimony. Lambert fails to explain what admissible evidence Dr. Bernstein was precluded from offering and such "casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal." *State v. Lilly*, 194 W.Va. 595, 605 n. 16, 461 S.E. 2d 101, 111 n. 16 (1995).

Lambert in the Brief (at 25-26) also cites *State v. Duell*, 175 W.Va. 233, 332 S.E. 2d 246 (1985), which held that an expert should be permitted to state the facts and data upon which he relies, including records *whose reliability have been reasonably established and which have been kept in the regular course of business.*" (italics added). Although *Duell* was decided a few months after the February 1, 1985 adoption of the W.Va. Rules of Evidence, the opinion contains no references to Rules 702, 703, 803(4), 803(6) and 901. The other authority cited in the Brief is *State v. Myers*, 159 W.Va. 353, 222 S.E. 2d 300 (1976), decided several years before the adoption of the Rules. Nevertheless, even this "pre-Rules" case requires that records must be authenticated before being introduced into evidence through an expert witness. Lambert made no attempt to authenticate the medical and military records relied upon by Dr. Bernstein in order to permit them to be admitted into evidence pursuant to W.Va. Rules of Evidence 803(6) and 901. A.R. 1374-1377, 1386. See *State v. McKenzie*, 197 W.Va. 429, 446-447, 475 S.E. 2d 521, 538-539 (1996); *State v. Brooks*, 214 W.Va. 562, 568, 591 S.E. 2d 120, 126 (2003).

The Brief (at 27-28) cites one of many discussions between the trial court and counsel, containing no defense objection to the trial court's analysis of Rules 702 and 703. The trial court did not limit Dr. Bernstein's testimony concerning his opinions, but only his disclosure of "underlying facts and data" never introduced into evidence for jury evaluation. The trial court, without objection, ruled that Dr. Bernstein could discuss in his testimony any evidence that Dr. Bernstein heard in the courtroom. A.R. 1337-1340. The sole complaint contained in the Brief (at

28, n.3) is that this would have been too expensive, confirming that any limitations upon Dr. Bernstein's testimony resulted from Lambert's cost-benefit analysis and not from the trial court's rulings.²⁴

Nevertheless, Dr. Bernstein testified at length about Lambert's purported diminished capacity. He testified that Lambert "got his PTSD" from "armed combat," even though the evidence, including Lambert's own testimony, confirmed that he never saw combat. Dr. Bernstein testified that he diagnosed Lambert with PTSD and "impulsive aggressive" behaviors consistent with Lambert's military and medical records; that he was treated by the "VA system" with various drugs and that he had a history of "delusional thoughts." A.R. 1323-1329. Dr. Bernstein opined that Lambert's actions may have been the result of "irrational thinking" and that he had a "dissociative event" when he killed Ms. Maroney. A.R. 1341-1343. He testified that Lambert had a personality disorder and a "chronically dysfunctional way of interacting with other people," causing him to be deemed unfit for military service. Dr. Bernstein also testified that Lambert's personality disorder was "associated with unplanned aggression;" that he had a "depressive disorder" and engaged in "self-medication" with alcohol, which would have worsened his personality disorder, and that Lambert's disorders could have caused him to commit "an impulsive violent act." A.R. 1409-1414. He concluded that Lambert's disorders made him "incapable of formulating homicidal intent or premeditation." A.R. 1419-1420. Lambert, by counsel, agreed that the defense "got (Dr. Bernstein's) diagnosis in." A.R. 1363.

Accordingly, Lambert's contention in the Brief (at 28) that "there was little (Dr. Bernstein) could testify to" is contradicted by the record. If the jury had believed Dr. Bernstein's testimony that, due to mental diseases or defects, Lambert was incapable of forming

²⁴ Lambert never requested the trial court to admit Dr. Bernstein's references to inadmissible evidence relied upon him under the limited admissibility rule of W.Va. Rules of Evidence 105. "In the absence of such a request or offer, we deem the argument on limited admissibility forfeited." *LaRock, supra*, 196 W.Va. 294, 306, n. 15, 470 S.E. 2d 613, 625 n. 15.

premeditation and the intent to kill when he bought the Bowie knife and used it to stab Ms. Maroney 23 times, then Lambert would not have been convicted of premeditated first degree murder.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY "PERMITTING . . . IMPERMISSIBLE CROSS-EXAMINATION" OF DR. BERNSTEIN.

A. DR. BERNSTEIN WAS NOT CROSS-EXAMINED ABOUT "REPORTS THAT HE WAS NOT PERMITTED TO TESTIFY TO DURING DIRECT."

In the Brief (at 28) Lambert misstates the record by claiming that Dr. Bernstein "did not testify to the contents of (the) report" submitted to him by Hudson Forensics. In fact, Dr. Bernstein testified on direct examination that he had ordered the testing and read the results to the jury:

His responses suggest that he is an individual who is easily angered, has difficulty controlling his anger, and is perceived by others as having a hostile, angry temperament. When he loses control of his anger, he is likely to respond with more extreme displays of anger, including damage to property and threats to assault others. However, some of these displays may be sudden and unexpected, as he may not display his anger readily when it is experienced. A.R. 1310-1311.

B. Dr. BERNSTEIN TESTIFIED ABOUT LAMBERT'S INTERVIEW WITH DR. MILLER ON DIRECT EXAMINATION AND THERE WAS NO DEFENSE OBJECTION TO THE CROSS-EXAMINATION OF DR. BERNSTEIN CONCERNING LAMBERT'S STATEMENTS TO DR. MILLER.

Dr. Bernstein testified that as part of his forensic evaluation he had listened to the recording of Dr. Miller's interview with Lambert and also had read the transcript. A.R. 1304-1306, 1496-1499, 1533, 1548-1550. The only State's objection to his direct testimony was when Lambert's counsel asked for Dr. Bernstein's opinion as to whether Dr. Miller's suggestions to Lambert would "invalidate," the interview. Lambert's counsel then withdrew the question, stating "I think the jury gets the point." A.R. 1306-1309. Lambert did not object to the cross-

examination of Dr. Bernstein concerning Lambert's statements to Dr. Miller. A.R. 1496-1498, 1548-1550.

Lambert also complains that the State cross-examined Dr. Bernstein about Lambert's statements to him. Dr. Bernstein testified that "to a large part," his opinion as to Lambert's state of mind was "predicated" on what Lambert told him. A.R. 1546-1547. Pursuant to W.Va. Rules of Evidence 705, the State cross-examined Dr. Bernstein concerning the statements of Lambert upon which he relied in forming his opinion. There were no objections to this cross-examination based upon the new appellate claim that the cross-examination exceeded the scope of the direct examination permitted by the trial court. A.R. 1527-1565. There was no claim that Dr. Bernstein's cross-examination should be limited to what Dr. Bernstein heard in court. There was no objection that in its cross-examination concerning Lambert's statements to Dr. Bernstein, the State "attempt(ed) . . . to get other evidence before the jury," and the Brief never develops this claim by specifying what "other evidence" was elicited by Dr. Bernstein on cross-examination. Accordingly, Lambert failed to preserve his claim of error in this regard and fails to develop the claim on appeal.²⁵

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING CROSS-EXAMINATION OF DR. BERNSTEIN CONCERNING THE FACT THAT LAMBERT'S ONLY EXPRESSED SOURCE OF DISTRESS IN THE 2 ½ YEARS SINCE THE MURDER WAS THE QUALITY OF JAIL FOOD.

On direct examination Dr. Bernstein testified that Lambert's PTSD was "chronic" and "(l)ongstanding, ongoing and not likely no stop anytime soon." A.R. 1326-1327. Dr. Bernstein's only pre-trial contact with Lambert was when he interviewed him for two hours and 15 minutes at the Southern Regional Jail. Dr. Bernstein agreed that by the time of trial Lambert had been

²⁵ Even if Lambert's voluntary statements to Dr. Bernstein were otherwise inadmissible, since Dr. Bernstein's opinion was based "in large part" upon them, the State was permitted to cross-examine Dr. Bernstein concerning such statements. Syl. Pt. 3, *State v. DeGraw*, 196 W.Va. 261, 470 S.E. 2d 215 (1996).

in the jail for 2 ½ years. On cross-examination Dr. Bernstein was asked if he had obtained Lambert's jail records and he answered "I don't believe I've seen his jail records."

He also confirmed that he had never inquired of defense counsel as to whether Lambert's "chronic" symptoms had continued during his 2 ½ years of incarceration. He was asked whether his opinion that Lambert's mental disorders were "chronic" would be affected by the fact that Lambert's one and only complaint while in the Southern Regional Jail was about the food quality, specifically the lack of "real roast beef or corn on the cob." The defense objection was to the "form of this question" and that "its facts not in evidence," but Lambert's counsel added, "(I)f it would have been in a hypothetical form, it wouldn't have been objectionable. . . ." ²⁶ Lambert made no objection that the cross-examination exceeded the scope of direct examination, and he makes no such claim on appeal. Since Dr. Bernstein on direct examination opined that Lambert's PTSD was "chronic" and "ongoing," the door was opened to cross-examination regarding Lambert's complaints and symptoms - - or lack thereof - - during the 2 ½ years since he murdered Ms. Maroney. "A witness may be cross-examined on matters which are raised on direct examination." *State v. Justice*, 191 W.Va. 261, 269, 445 S.E. 2d 202, 210 (1994).

This Court has held:

The extent of the cross-examination of a witness is a matter within the sound discretion of the trial court, and in the exercise of such discretion . . . its action is not reviewable except in case of manifest abuse or injustice. Syl. Pt. 3, *State v. Prophet*, 234 W.Va. 33, 762 S.E. 2d 602 (2014); Syl. Pt. 4, *State v. Carduff*, 142 W.Va. 18, 93 S.E. 2d 502 (1956).

²⁶ There was no claim at trial, and there is none on appeal, that defense counsel was not in possession of Lambert's jail records or that the state misquoted Lambert's handwritten statement comprising his complaint. "It is permissible in West Virginia to assume facts in the questioning of a witness where the facts are undisputed and the assumption is not unfair to the witness." 1 Cleckley, Palmer and Davis, *Handbook on Evidence* §611.02 [4][b][v].

Although Lambert complains that the cross-examination of Dr. Bernstein was “improper,” he fails to show or even to assert that the trial court’s exercise of its discretion in permitting such cross-examination constituted “manifest abuse or injustice.”²⁷

VIII. THERE WAS NO CUMULATIVE ERROR BECAUSE THERE WAS NO TRIAL ERROR.

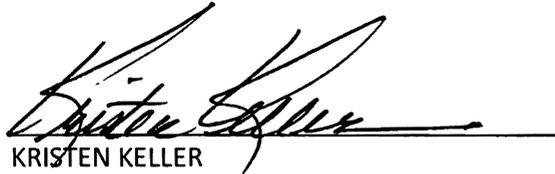
Even assuming *arguendo* that any of Lambert’s claims of error have merit, all of them are “of a non-constitutional nature” subject to harmless error analysis to determine whether, in the absence of such error, the evidence was sufficient to prove Lambert’s guilt beyond a reasonable doubt and to determine whether any such error unfairly prejudiced him. Syl. Pt. 10, *State v. Mills*, 219 W.Va. 28, 631 S.E. 2d 586, (2005). Further, “(i)n order to invoke the cumulative error doctrine, there must be more than one harmless error.” *State v. McKinley*, 234 W.Va. 143, n. 22, 764 S.E. 2d 303, 327 n. 22 (2014). Upon the overwhelming proof that Lambert committed the first degree murder of Ms. Maroney, any error claimed by him is harmless.

CONCLUSION

Following a fair and error-free trial, Lambert was convicted of first degree murder without a recommendation of mercy because he had no defense to the overwhelming proof that he was guilty of the particularly heinous first degree murder of an innocent young woman. Accordingly, his conviction and sentence should be affirmed.

²⁷ The absence of “manifest abuse or injustice,” is highlighted by the fact that Lambert’s counsel at trial conceded that his diminished capacity defense was without merit.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "Kristen Keller", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Respondent's Brief in Response to Brief of Petitioner* has been served upon counsel for the Petitioner, Thomas Dyer and Mary Dyer, Attorneys at Law, PO Box 1332, Clarksburg, West Virginia 26302, by United States Mail, postage pre-paid, this 23rd day of January, 2015.

A handwritten signature in black ink, appearing to read "Kristen Keller", written over a horizontal line.

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