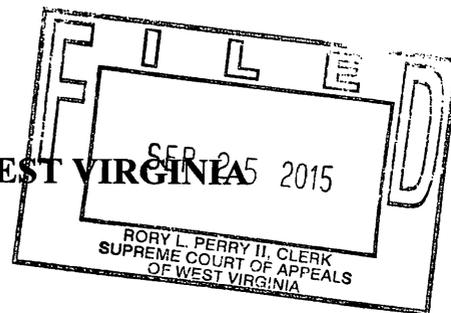


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-0581



STATE OF WEST VIRGINIA,
Plaintiff-Respondent,

v.

Appeal From a Final Order
Of the Circuit Court of Berkeley County
(Case No. 14-F-123)

ALVARO A. VILELA,
Defendant-Petitioner.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. **IT WAS PLAIN AND PREJUDICIAL ERROR AND AN ABUSE OF DISCRETION FOR THE COURT TO ALLOW THE REMAINDER OF PETITIONER'S AUDIO RECORDED STATEMENT INTO EVIDENCE AFTER HE UNEQUIVOCALLY INVOKED HIS RIGHT TO COUNSEL AND THE INTERROGATION CONTINUED.**

2. **IT WAS PLAIN AND PREJUDICIAL ERROR FOR THE COURT TO FAIL TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AT THE CLOSE OF ALL OF THE EVIDENCE, OR IN THE ALTERNATIVE, THE JURY'S VERDICT WAS CONTRARY TO THE EVIDENCE PRESENTED.**

STATEMENT OF THE CASE

This appeal is brought pursuant to the West Virginia Rules of Appellate Procedure from the Sentencing Order entered on the 14th day of May, 2015, by the Circuit Court of Berkeley County, West Virginia. At that time, the Honorable Gray Silver, III, denied the Petitioner's Motions for New Trial and Judgment of Acquittal; affirmed his convictions for Kidnaping with a recommendation of mercy, a felony under West Virginia Code §61-2-10, and Attempted Extortion, a misdemeanor under West Virginia Code §61-2-13; and sentenced the Petitioner to life imprisonment for Kidnaping with parole eligibility in ten (10) years and to one (1) year in the Eastern Regional Jail, to be served before and consecutive to the penitentiary life sentence.

The Petitioner, Alvaro A. Vilela was indicted by the Grand Jury of Berkeley County at the May 2014 Term of Court for Kidnaping, Assault During the Commission of a Felony, Extortion, Attempted Extortion and fifteen (15) counts of Misdemeanor Unlawful Use of a Credit Card. (Appendix Record Pgs. 4-5 hereinafter referred to as A.R.).

A jury trial was had on the 10th, 11th, 12th and 13th days of February, 2015, with the Petitioner being found guilty of Kidnaping, with a recommendation of mercy and Attempted Extortion and

acquitted on all other counts.

Pre-Trial Proceedings

January 6, 2015 Pre-Trial Hearing

Counsel had previously filed a motion to continue the January 21, 2015 trial date because the State had not yet received a copy the purported video confession of the victim, Carol Dyall, which was contained on the Petitioner's iPhone, and because a competency evaluation which was previously scheduled had not been had as the Petitioner was wary about proceeding with it without an interpreter present. (A.R. 66-67 & 75-77). However, during the course of the hearing, the Petitioner changed his mind and told counsel and the Court that he wanted to go forward with the scheduled trial date. (A.R. 77). Counsel informed the Court that he had discussed the motion to continue with the Petitioner as late as last evening and he was in agreement, however, overnight he had second thoughts. (Id.). A brief recess was afforded the Petitioner and his counsel (Manford and Prezioso) and thereafter said counsel informed the Court that the Petitioner wished to withdraw his motion to continue and to proceed with the scheduled trial date of January 21, 2015. (A.R. 86-87).

Whereupon, counsel conducted a dialogue with the Petitioner, for the record, regarding his decision to go forward with the scheduled trial and other matters. Specifically, counsel asked the Petitioner if he understood that if the trial proceeds as scheduled, there will be no psychological or mental competency examination performed that could possibly establish a defense in the case. (A.R. 90). Petitioner stated he understood. Further, counsel inquired if the Petitioner understood that if an evaluation were to disclose a possible defense, then an expert qualified in forensic psychology or a psychiatrist would have to be retained in order to pursue any such defense at trial and that would not occur if the trial goes forward as scheduled. The Petitioner stated he understood. (A.R. 90).

Counsel then informed the Petitioner that accordingly, he would not be presenting any possible mental health defense if the matter proceeded on January 21, 2015, and any such defense would be waived forever and asked if he understood. Again the Petitioner said he understood. (A.R. 90-91). Counsel also inquired if the Petitioner's decision to waive such a defense and proceed to trial as scheduled was his own voluntary decision free from duress or coercion of any kind. To which the Petitioner responded it was his own voluntary decision and he was not pressured in making it and he is making such decision after thoroughly consulting with his two counsel. (A.R. 92-93). Lastly counsel asked the Petitioner was there anything discussed that he didn't understand due to any language barrier (the Petitioner being of Portugese descent with French as his primary language but fluent in English) and the Petitioner stated he understood everything. (A.R. 93-94).

Counsel asked the Court for an additional pre-trial hearing date due to the matter not being continued and informed the Court that the issue of the Petitioner's custodial statement would need to be addressed. Accordingly, the Court set the matter down for January 9, 2015. (A.R. 88 & 108).

January 9, 2015 Pre-Trial Hearing

A second pre-trial hearing was scheduled for January 9, 2015, upon the issues raised in the Defendant's Motion to Determine Admissibility of Defendant's Audio Statement. (A.R. 119-123). The Petitioner set forth in said Motion that the audio recording of the Defendant's custodial statement made to Tpr. Hill at the time of his arrest, revealed that at one point (page 8 on the original transcript attached to said Motion, not prepared by an official court reporter) the Petitioner invoked his right to counsel, however, the interrogation did not then immediately cease. Petitioner asked the Court to review the same to determine whether or not the remainder of the Petitioner's statement after his invocation of counsel should be suppressed or whether the Petitioner may have recanted his

request for counsel and proceeded at his own risk by answering further questions.

At the hearing, Tpr. Hill was called by the State to confirm that the Petitioner was in custody at the time of the statement and that he was properly Mirandized. Then, the audio statement was played for the Court. (A.R. 155-58).

Summary of Petitioner's Recorded Statement to Tpr. Hill (Transcript A.R. 43-61)

In that recorded statement the Petitioner asked Hill why he was being arrested. Tpr. Hill inquired if he knew Carol Dyall. The Petitioner said she was a friend and met her when she engaged him to do some renovations to her home. When asked how well he knew Dyall, the Petitioner said he had been in a prior relationship with her for two years and it was sexual in nature, however, that was no longer the case. He said they were now just friends. The Petitioner told Hill that he picked up Dyall on January 19, 2014, at her house and that she had been at his house voluntarily ever since. Hill asked Petitioner if he had noticed any injuries to Dyall. Petitioner stated that she had gotten hurt when she slipped and fell on the snow at her house and had some bruises on her legs and arms. Tpr. Hill began to lose patience with the Petitioner and accused him of kidnaping Dyall and forcing her to liquidate her assets to get her money. The Petitioner was dumbfounded at such allegation and denied the same.

Hill told the Petitioner to "be a man and you can fess up." The Petitioner stated that Dyall was trying to help him to go back to France. Hill asked him how much did Dyall say she was going to give him and the Petitioner said she didn't say for sure. Hill accused the Petitioner of lying. The Petitioner told Hill that Dyall had done something wrong in her past, that she poisoned a man in San Francisco, Joel Sager thirty (30) years ago. The Petitioner told Hill that he had her video confession on his iPhone underneath his mattress.

The Petitioner then told Hill that he knew about this because he prayed and the Holy Spirit revealed to him. Petitioner told Hill that Dyall was astonished and surprised how he would know this. The Petitioner told Hill that after he told Dyall this, she tried to poison him with some herbs she obtained in Tokyo and tried to do it again on the day he left her house. The Petitioner said he told her God knows this and you have to pay for this sin. He told Hill that he was involved to help Dyall pay which meant she had to help him get back to his kids in France. Hill again asked the Petitioner how much did he want from Dyall and he responded four hundred. Hill asked \$400,000? The Petitioner then asked if he can have a lawyer. Hill said yes he can have a lawyer and thanked Petitioner for talking to him and being a man about it. The Petitioner asked Hill to get his iPhone under his mattress. Hill told him to stop. Hill said “you said you wanted a lawyer. If you want a lawyer then I’m not going to go do this stuff. I’m going to stop, stop talking with you. You and I aren’t going to talk anymore. Do you want to talk to me and have me continue to do this or do you want me to get you a lawyer? Its up to you. Do you want to talk to me and have me go up there and deal with this iPhone and continue to listen to your story or do you want your lawyer and you can do everything through him?” The Petitioner said “whatever is easy for me.” Hill then said “well partner I can’t tell you what to do you’re an adult you have to make this decision yourself. We can continue to converse like gentleman or you can converse with an attorney.” The Petitioner said he was going to be in jail forever. Hill said he didn’t know that’s up to a judge. He said all he can do is try to make sense of how this all happened. Hill said “now if you want you story to be told of how this all happened and you want to be up front and honest then I’m your guy. If you want to try to sweep stuff under the rug, you can do that too, alright. I can get up and leave this car.” The Petitioner said “I told you already what I have to tell you.” Hill then asked “can I ask you some

questions or do you want an attorney? The Petitioner said go ahead.

Hill asked “when you picked her up and your brought her here, on the 19th is that when you confronted her at first about the money? The Petitioner stated no it was after but he wasn’t really sure when. Hill then asked “when you were obtaining or trying to get the money transferred around, did she want to do that. Look me in the eyes. Honestly did she want to do it or was she doing it because you were making her do it?” The Petitioner said “no she wanted to do it.” Hill asked “she wanted to give you \$400,000.00 and the Petitioner said yes because she felt guilty - for the murder.

The Petitioner told Hill that something was going to show up if you make an inquiry, i.e., corroborating his story. Hill asked Petitioner if he ever forced her in any way to try to obtain the money and the Petitioner said he didn’t force her. Hill asked him if he physically touched or harmed her while she was here the past ten days and the Petitioner said no.

Hill asked Petitioner if Dyall came out and talked to him about killing this person and he said yes and that her confession is on his iPhone. Hill asked him when did he get this video and the Petitioner said a few days ago. He said he recorded the video in his upstairs bedroom with Dyall present. The Petitioner denied pressuring Dyall into making the confession and told Hill he would like him to watch it. Hill asked him if he felt he was making this statement voluntarily and not under coercion and the Petitioner responded “well there’s always a little psychological pressure from you, of course.”

Pre-Trial Hearing Testimony of Tpr. Hill

At the hearing, Tpr. Hill testified that the Petitioner was already in custody in the back of Tpr. Satterfield’s cruiser upon his arrival at the scene. (A.R. 160-61). Hill admitted that on page 8 of the unofficial transcript the Petitioner asked “can I have a lawyer?” (A.R. 165). Hill stated that he told

the Petitioner he may have a lawyer. (Id.). Hill then admitted that the Petitioner inquired about Hill getting his iPhone hidden under his mattress and Hill told him he wasn't going to get his iPhone if he wouldn't continue to talk. (A.R. 167-68). Hill admitted that the Crime Scene Team was processing the house and would have eventually found the phone or he would have personally followed through with finding and seizing it as evidence in the case. (A.R. 168-69). Hill admitted that the Petitioner believed the iPhone was exculpatory and important for his defense as it had Dyall's video confession on it. (A.R. 170).

Hill was asked "do you think you induced him to change his mind about wanting the lawyer when you said I'm not going to get his - - your phone - - if you're not going to continue talking, I'm not going to go get your phone?" (A.R. 171). Hill said that wasn't his intent, (Id.), but clearly admitted telling the Petitioner "if you want a lawyer, then I'm not going to do this stuff" after the Petitioner had asked him to secure the iPhone. (A.R. 172). Hill testified that he didn't tell Petitioner he wouldn't get his phone, however, he admitted that in the context of the interrogation, the Petitioner could have certainly thought that the phone wouldn't be recovered if he didn't continue to talk to Hill. (Id.). Hill also admitted stating "do you want to talk to me and have me go up there and deal with this iPhone and continue to listen to your story or do you want your lawyer . . . ?" (A.R. 174). Hill then states the Petitioner said "I am going to jail forever." (A.R. 175).

Counsel for Petitioner argued to the Court that Tpr. Hill's stated refusal to the Petitioner to secure or retrieve his phone, which in the Petitioner's mind contained substantial exculpatory evidence essential to this defense, unless the Petitioner continued with the interrogation was a form of coercion given the Petitioner's state of mind and lack of familiarity with the United States Constitutional process. (A.R. 182-83). Counsel also pointed out to the Court that when asked by

Tpr. Hill if he had been coerced into giving his statement, the Petitioner indicated there was some coercion in the form of “a little psychological pressure” from Hill. (A.R. 184). Counsel then argued that under the totality of the circumstances, the Court should exclude the Petitioner’s statements after he unequivocally invoked his right to counsel. (Id.).

The Court deferred ruling on the issue presented on January 9, 2015, but instead issued an Order on January 20, 2015, after receiving an official transcript of the Petitioner’s audio statement, finding that Tpr. Hill “was not refusing to get the defendant’s i-phone unless defendant agreed to continue with giving the statement, but rather the officer was advising him of the method by which the i-phone could be retrieved. The officer testified that the crime scene team was at this time already processing the scene.” (A.R. 139 - Order 01-20-15). The Court also found “upon re-starting the conversation with the officer by asking the question about defendant’s i-phone, and hearing the officer’s response, defendant by stating ‘go ahead’ clearly agrees to continue with the questioning voluntarily and does complete the interview. (A.R. 140). Accordingly, the Court allowed the admission of the Statement as given and recorded.

TESTIMONY FROM TRIAL

Bronwen Elizabeth Porter

Mrs. Porter testified that she had been friends with Carol Dyall for 20 years. (A.R. 586). She and Dyall had arranged to meet for lunch on January 20, 2014, to celebrate Dyall’s birthday and to then attend a financial meeting together. Porter testified that the date of the financial meeting got bumped and so she attempted to contact Dyall of the same to see if she could shift her schedule. Porter testified that she became concerned because Dyall would not respond to her phone calls, texts or emails. Porter said it was very much unlike Dyall not to respond. (A. R. 5547-58).

Porter stated Dyall didn't show for the rescheduled financial meeting and was out of touch for about a week, so she reported the situation to the police. (A.R. 591). Porter said that the police conducted a welfare check at Dyall's home but she wasn't there. (A.R. 592). Porter said she knew Dyall had a close friend or acquaintance known as "Arthur" but she didn't know his last name. Porter thought Arthur might have something to do with Dyall's disappearance. She attempted to find out Arthur's last name from possible places of employment and mutual friends with Dyall but had no success. (A.R. 592-93).

One day Porter received a voice mail message from Dyall saying she was alright and not to be worried about her. Her husband emailed the voice mail message to police. (A.R. 593-94). At the end of the voice mail Porter could hear Dyall speaking to someone in the room with her referencing "John" who was Porter's husband. Accordingly, Porter surmised that the person Dyall was speaking to knew both herself and her husband, John, by name and she thought it might be the Petitioner given his recent change in personality. (A.R. 624-25).

Knowing that Dyall was missing and that she had large cash investments, Porter called Dyall's financial planner to alert him to any large transfers that might be requested by Dyall. (A.R. 595-96).

Jeffrey Krinsky

Jeff Krinsky testified that he works for Wells Fargo Advisers (A.R. 830). He originally met Carol Dyall when she was a client of his at Merrill Lynch and has known her for fifteen (15) years. She moved her investments to Wells Fargo when Krinsky became employed there. Krinsky testified that Dyall was a conservative investor and good saver. (A.R. 831).

He testified that he was contacted in January 2014 by a Robin Benjamin about Dyall's

accounts with Wells Fargo and as a result, a security lock on her accounts was initiated. (A.R. 832). Three or four days later, he received phone call from Dyll. He was sure it was her voice. She was directing him to wire all of her funds, in three separate accounts, to her bank in West Virginia. The total value of those accounts was just over \$100,000.00. (A.R. 833). Krinsky suspected she was calling under duress and he said it was uncharacteristic of her to act so rashly with her investments. (A.R. 834). In reply, he told Dyll that federal law required her signature and it just couldn't be "wired to her." She said okay and that she would get back to him. (A.R. 834). Thereafter he immediately called Tpr. Hill of the West Virginia State Police to report the call. (A.R. 835). Hill had previously alerted Krinsky to a possible situation involving Dyll's accounts. (A.R. 836).

Robin Benjamin

Ms. Benjamin testified that she worked for AMJ Financial in Leesburg, Virginia (A.R. 841). Carol Dyll was long-term client of hers having asset invested through AMJ in the approximate amount of \$400,000.00. (A.R. 842). Benjamin testified that in January she was contacted by another client, Bronwen Porter who was looking for Dyll. (Id.). Benjamin stated there was an investment dinner that Dyll was going to attend with Bronwen Porter, however, that dinner had to be rescheduled due to weather. Benjamin said she never heard back from Dyll and that she didn't show on the rescheduled date. (A.R. 843).

With this inquiry, Benjamin began looking through Dyll's contact information. The "Arthur" came up and Benjamin recalled that Dyll had brought Arthur to an event a couple years earlier and there was a picture of them together. (A.R. 844). Benjamin forwarded a copy of this photograph to the West Virginia State Police and put Dyll's accounts on fraud alert. (A.R. 845-46).

Benjamin also testified that during this time period she received a phone call from Carol

Dyall asking to speak to her supervisor. The supervisor wasn't there and Benjamin asked Dyall to call back but she didn't. Benjamin got the phone number from her caller-ID and turned over to Police. (A.R. 847).

Carol Dyall

Carol Dyall testified that she retired from Eastern Airlines as a flight attendant in 2013. She had resided in Harpers Ferry, West Virginia for 24 years. (A.R. 669). She first met the Petitioner in 2009, when she engaged his services as a hairdresser. (A.R. 671). She became a regular customer of his and followed him to Sterling, Reston and Leesburg, Virginia, to have her hair done. (A.R. 672). She turned 75 on January 23, 2015. (A.R. 673).

She had learned from the Petitioner that he renovated houses and she needed the floors in her home re-finished. The two agreed upon a price and the Petitioner was hired him to perform the work. (A.R. 674). She testified that he did an excellent job. (A.R. 675). Dyall also engaged his services to remodel her kitchen and perform other renovations to her home. (Id.).

During this time, the Petitioner was driving daily from Sterling, Virginia, to Dyall's residence in Harpers Ferry. To save time and money on gas, the parties agreed that he would move into Dyall's guest room while completing the work. (A.R. 676). In December 2010, the Petitioner moved into Dyall's residence and was given a key to the house. (A.R. 678).

Dyall testified that she and the Petitioner got along well together until an incident occurred sometime in 2012. She told the jury that she and the Petitioner were going to Home Depot and she was driving. She was in the left-hand turning lane and began to change to the right-hand lane and by accident almost struck another car. She stated the Petitioner became wildly upset, chastising her and accusing her of trying of deliberately trying to kill the occupants of the other car which included

children. (A.R. 679-680). She said this continued on the way back home after they left Home Depot. (A.R. 680). Dyall also admitted to having a romantic relationship with the Petitioner early in their relationship. (A.R. 681).

Dyall then told the jury about another bizarre incident with the Petitioner occurring in October 2012. She said it was a beautiful day and she was outside. She said out of the blue the Petitioner approached her and said that God had sent him to her to take care of her and that she had to confess. He told her that he knew she had poisoned a man and stolen \$100,000 from him. (A.R. 681- 682). He further stated that she needed to confess right away or else she would “have a horrible life when you come back next time.” (A.R. 682). Dyall testified that she denied the allegations but the Petitioner replied “God told me you did it.” (Id.). She then told him to leave her alone and he backed away and went into the house. She testified she could see him through the door prancing back and forth muttering that he hated this job; that this is the third time he’s had to do it; and he didn’t want to do it anymore. (A.R. 683).

Dyall testified that she then immediately left her home and went to the home of Bronwen Porter, her close friend. She told Porter what had happened and Porter advised her not to return. She spent the weekend with Porter and her husband John and then returned to her home on Sunday. (A.R. 683). When she returned home the Petitioner was packed-up and ready to leave. She confirmed that he was leaving and he “flipped back” to being a very normal person. (A.R. 684). A couple of days later the Petitioner returned to finish some cabinets he had been working on and then left for good. (A.R. 685).

Sometime later in 2013 Dyall testified she received an email from the Petitioner. She testified the email stated that he remembered she had poisoned that man in San Francisco and stole

all of his money. He stated that he was going to have to take that money out to San Francisco, find the man's family and return the money because they were probably destitute. He said she would have to pay him to do this because he was desperate for money. (A.R. 688-689). Dyall said she emailed him back denying the allegations and didn't want any contact with him. She said he sent her another email saying "if you don't do it I'm going to tell the police what you did." (A.R. 689). Dyall then said she showed the email to her friend who advised her to report it to the police which she did. (A.R. 690).

Dyall did not see the Petitioner again until January 17, 2014. (A.R. 686). On that day, she ran into him at the Martin's Grocery store in Charles Town, West Virginia at the checkout. (A.R. 686). The two exchanged some pleasantries and he helped her take her groceries to her car. He told her he had moved to Martinsburg and had purchased a new car. After a short time he then left her. (A.R. 687).

On January 19, 2014 Dyall testified she was home in the evening watching TV and having something to eat. She said she heard a loud noise as if something had fallen on the front balcony. She testified she walked to the front door and opened it to look outside and saw a long piece of wood on her front porch. She was puzzled so she opened the door and stepped out onto the balcony. (A.R. 691). She then said that suddenly the Petitioner came flying at her and pushed her to the floor in the living room. She said he started screaming that she was a murderer, that she killed that man, poisoned him and stole all his money and that she thought she was going to get away with it. She said he had a long piece of wood and was "banging" it on both sides of her body and he was on top of her. He was hitting her so hard that he broke a bone in her arm. She said she told him it was not true but he didn't believe her. She said he used tape to secure her hands and feet and then taped them

together behind her back. (A.R. 691-92). She said he then picked her up and placed her on the balcony and because she was screaming put a piece of tape over her mouth. (A.R. 693). She said he asked her how much money she had stolen from the man and she said \$1,000, but when he did not believe her she changed her story to \$100,000. He then retrieved her car keys and got her car out of the garage. She said he then lifted her into back portion of her car, a Honda Element. (A.R. 693).

Dyall testified that later she found out that the Petitioner also took her iPhone, iPad and computer from her home with him as well as her financial documents. (A.R. 717). He also took her purse with all of her credit cards and a change of clothing. (A.R. 663-64). Dyall testified they then drove out of her subdivision to an ATM at the Bank of Charles Town. She stated he then came to the back of the car and demanded her ATM card. She told him that she did not have an ATM card. They continued to drive for a while and finally stopped at a house. Dyall testified that the Petitioner then went inside and came out with a blanket, wrapped it around her and carried her inside. Once inside he took her to the attic. (A.R. 695). Dyall testified she remained in his house for ten days until January 29. (A.R. 695).

Dyall said the Petitioner would check on her daily but that he would screw the attic door open and shut with an electric drill. (A.R. 666). The Petitioner did bring her computer to her in the attic so she could watch movies but there was no keyboard. (A.R. 708). She said for the first few days he would come to her and say she was going to confess, that he had done this before and that "they always confess." (A.R. 696). Dyall said he told her not to lie to him because if she lied to him, she was lying to God and God won't settle for that. He told her if I have to kill you no big deal we all have to die sometime. (A.R. 696). Dyall testified the Petitioner said God wants once justice and he's going to get justice. He was holding a club in his hand and had a big roll of saran wrap. She said he

told her that he would beat her and then wrap her head in the saran wrap so she couldn't breathe. She said he told her he would then throw her body in the front lawn and someone would eventually come by and say "oh she's an old woman no big deal she probably had a heart attack." (A.R. 697). She said he eventually tied her hands in front so she could sleep. (A.R. 698).

Dyall said the Petitioner brought her a pen and paper and told her to write down her confession to poisoning the man she was living with in San Francisco. (A.R. 698). Dyall admitted to the jury that she did live in San Francisco for a couple of years when she worked for the Tom Dooley Foundation. (A.R. 699). Dyall testified the Petitioner also accused her of poisoning him on two prior occasions and wanted to know how she did it. He also accused her of casting spells and using voodoo on him. (A.R. 699-700). She recalled an incident in 2012 when he came out of his room holding his head saying "what are you doing to me I think you're casting a spell on me." (A.R. 700).

Dyall testified that in the ensuing days he would make her write multiple versions of her confession. She said he made her write the statements over and over again because she did not have enough detail in them. (A.R. 701-02). He told her she had to name the man from San Francisco and she remembered an old boyfriend from her days in San Francisco named Joel Sager. (A.R. 708-09). She said she then made up a story that she wanted to break up with the boyfriend, Joel Sager, but he wouldn't leave. She told the Petitioner she used rat poison to poison her boyfriend and after a few days he became very groggy. She said the story was made up just to appease the Petitioner. (A.R. 703). She told him when her boyfriend became sick, she saw her chance to get away so she packed her suitcase and took \$100,000 from his trousers and left. (A.R. 703-04). She then told Petitioner she rented a car and started driving across country to the East Coast. She told him that she's stopped

at a hotel along the way and burned half of the money flushing it down the toilet. She testified that she went on to fabricate how she continued to drive to the East Coast. (A.R. 705).

Dyall then testified that the Petitioner got online to look for Joel Sager's obituary from San Francisco in the early 1970's. She said he then told her he could not find it and she was unable to explain the discrepancy. She said he then asked her if Sager had any relatives and she told him she knew only of a cousin. She said he found a phone number for a person with a matching name and made her call this individual to find out if Joel Sager was still alive. The person she spoke with did not know what she was talking about and the Petitioner eventually became tired of searching records and gave up. (A.R. 707).

Dyall testified that at one point he came to her and videotaped a confession on his iPhone. He told her he wanted to record it because if the police were to ever catch him he would show them the video and they would see that she was a murderer and that she stole the money from Joel Sager and they would arrest her and throw her in jail for the rest of her life and he would be set free. (A.R. 707-08). Dyall said she went ahead with the video taped confession believing that any law enforcement viewing the same would see she was under duress and not telling the truth. (A.R. 708).

Dyall testified that she did in fact she have a relationship with Joel Sager in San Francisco which ended naturally and she then returned to the East Coast to go back to work at Eastern Airlines. (A.R. 710).

Dyall testified she was forced to go to the bathroom while in the attic on the top of a large orange bucket with a hole in the lid. It was the type of bucket you can buy at Home Depot. She said the Petitioner would lift her up and onto the bucket so she could go to the bathroom. (A.R. 713). She testified that the Petitioner did give her food and water and cooked for her. (A.R. 715 & 817). She

said he gave her cream to put on her bruises. (A.R. 716).

Dyall testified that the Petitioner found out about all her finances from her bank statements taken from her home. (A.R. 717). She said he told her that he wanted money to leave this country and go back to France and that she was going to have to pay for his airfare. (AR 717-18). She said he told her she had to pay all of his expenses because she was the reason he had to come to this country to begin with. (AR 718). Dyall said the Petitioner blamed her for failing to pay his child support for ten years to the mother of his children in France. She said he told her that a complaint for failure to pay child support had been filed against him in France so the minute he got off the plane the police would arrest him as a wanted man. She said he needed ten years worth of child support money to pay so he could get out of jail the next day. (A.R. 718). Dyall said the Petitioner also told her he would also need money for housing once he got to France and would have to buy a car. (A.R. 719). She said he knew she had large amounts of money invested because he reviewed her bank statements. She also testified that she had substantial investments from her earnings over the years as a flight and also from inheritance from her mother's estate. Dyall said he told her that God said he could take \$400,000 from her. (A.R. 719).

Dyall testified that on Wednesday, January 29th, he brought her downstairs and told her she was going to call her financial institutions and tell them that she wanted to buy a house and needed liquidate her accounts. (A.R. 720). She testified that he found the number of her financial advisor Jeffrey and had her call him. Dyall testified that when she called Jeffrey he had already been alerted to her possible abduction by police and that Jeffrey told her the police were looking for her as a missing person. (A.R. 721). She also testified she told Jeffrey that she wanted to close her accounts but he told her it would take a few days because the funds were tied up in stocks and bonds. (A.R.

727).

Dyall also testified that she received emails from friends of her inquiring if she was all right. She testified the Petitioner made her read these emails on her iPad. Dyall stated that he directed her to emailed back her friends to let them know she was alright and to make up a story that she was in Maryland visiting a friend whose daughter was sick and that she was sorry for all the trouble she had caused not letting anyone know where she was. (A.R. 722-23). Dyall also testified during this time she spoke on the phone with a Tpr. Hill of the West Virginia State Police, although she couldn't remember who initiated the call. She assured Tpr. Hill she was fine and in Maryland with friends. (A.R. 723). She also called John and Bronwen Porter. They were not home so she left a voice mail saying that she was fine and not to worry about her. She testified that she was using the Petitioner's phone she wasn't familiar with how to turn it off. (A.R. 725-25). She said the phone was still on while she had a brief conversation with the Petitioner about calling John which was caught on the voice mail. (AR 725).

Dyall next testified that near the end of the week she and the Petitioner engaged in a religious ceremony that went on for hours wherein he told her he had power from God to forgive her sins if she would confess and they spent the whole day praying and speaking in a language she did not know, which could have been in tongues. (A.R. 726 & 808). Dyall also testified that towards the end of the week, she was allowed to go up and down the stairs freely in the residence. (A.R. 799-800).

On the last day of her captivity she testified that while she was sitting at the kitchen table there was a knock at the front door. She said the Petitioner went to the front door and exclaimed there are police outside. He then took the electric screwdriver and unscrewed the front door. (A.R. 729). She testified that when the police entered she mouth the words "please keep him away from

me” and the officer gave her a thumb’s up. (A.R. 729-30). She said the police then escorted her from the residence and to the hospital by ambulance. (A.R. 730). At the hospital an x-ray was taken which confirmed that her arm was broken. (A.R. 731). She had bruises up and down the sides of her body on her arms and her legs. (Id.).

Dyall also testified that she later received bills from her credit card companies showing charges have been made during that time in the approximate aggregate amount of \$656. (A.R. 732). She testified she had not made any of those charges nor given authorization or permission to the Petitioner to use her credit cards as listed in the statements. (A.R. 734).

Dyall also testified that her car was found back at her house and she surmised that the Petitioner must have drove her car back to her house and then got his car out of the garage and swapped it. She, however, did not actually see this happen or knew when it occurred. (A.R. 742). On cross-examination Dyall testified that initially the Petitioner was a good person and a gentleman who did excellent work for her. (A.R. 746).

Dyall did testify that Arthur would experience severe changes in personality without warning. (A.R. 747 & 775). Toward the end of her relationship with him, she noticed these personality changes on almost a monthly basis. (A.R. 776). She said she first noticed the change in personality with the Home Depot incident. (A.R. 747-48). She felt the Petitioner’s actions regarding this incident were irrational, (A.R. 748), but that after that, things went back to normal and she just let it go. (A.R. 751). Dyall said the Petitioner seemed fine until that day in October 2012 when he accused her of poisoning Joel Sager when he “flipped.” (A.R. 752). She said that was also the first time the Petitioner had accused her of poisoning him. (A.R. 753). Dyall stated Arthur told her he knew she was trying to poison him because God had told him. (A.R. 753-54). She admitted inviting

him to dinner after the October 2012 incident but that he declined because God told him she was going to poison him again. (A.R. 758). The witness admitted that she had been to Tokyo when she worked for American Airlines, (A.R. 760-62), and that she did purchase herbs from an old man selling them from his cart. She testified that she brought the herbs home and kept it in her drawer but never use them. She did admit to telling Arthur she got the herbs from Tokyo and tried to poison him with them, but that was all fiction. (A.R. 763).

Dyall admitted telling the police that Arthur truly believed that he was on a mission from God to cleanse people who were killers, (A.R. 809), and that she thought he was delusional. (A.R. 815).

Dyall denied falling at her home between the 17th and 19th of January which could have caused the bruising she received. (A.R. 714).

Lastly Dyall admitted to telling law enforcement that she wanted the Petitioner to be allowed to return to France rather than go to prison. (A.R. 823).

Sr. Tpr. Derek W. Satterfield

On January 29, 2014. Sr. Tpr. Derek Satterfield received call from Tpr. Hill regarding an investigation of a missing person. Hill requested Satterfield to go to a location in Martinsburg for a welfare check. (A.R. 634). Upon his arrival, Tpr. Satterfield looked in front door and saw a female at a table and a male coming to the door. Tpr. Satterfield then heard the sound of a power drill and later learned that the male was unscrewing screws out of the front door to open it. (A.R. 636). Satterfield said that while speaking to male, the female was silently “mouthing” the words help me. (Id.). Satterfield then made contact with the female as city officers escorted the male outside. The female had bruising to her arms and abrasions to her wrists and ankles. (Id.) Satterfield testified the Petitioner was then handcuffed and placed into the backseat of his cruiser. (Id.).

Satterfield said he noticed all the windows and doors at the residence had been screwed shut and the windows were covered by plywood. (A.R. 646). Satterfield said the Petitioner told him that the female was his girlfriend. (A.R. 638). Dyall was sitting at the kitchen table when Satterfield looked in through the front door and she was unrestrained. (A.R. 643).

Sgt. D.E. Boober

Sgt. David Boober testified that he is in charge of digital forensic analysis of computers and cell phones at the Martinsburg WVSP Detachment. (A.R. 653). He testified that he examined the Defendant's iPhone seized in the investigation and recovered a video of Carol Dyall from it. (A. R. 654-55). That video was admitted as State's Exhibit No. 2 and was played for the jury. (See Video Transcript A.R. 263-284).

Video Taped Confession of Carol Dyall

(Transcript A.R. 263-284)

The confession is in the first person by Dyall and the Petitioner can be heard asking Dyall questions in the background. The reported date is January 23, 2014 and Dyall gives her address. (A.R. 264). She states she is making a confession. (Id.). She states in 1975 she was in San Francisco working for the Tom Dooley Foundation. Her boyfriend from the east coast came out to stay with her. She said he soon became physically aggressive with her. She said he would hit and punch her. The Petitioner asked where did he punch you and she responded in her face one time. The Petitioner asked why didn't you go to the police? She responded because she was afraid of him. She said she eventually told her boyfriend she would be returning to the east coast and he said he would accompany her. His name was Joel Sager. She said she put some mice poison in his food for a couple of days for a total of two to three times. She said on the third day he collapsed. She said

his heart was barely beating. She said she packed her suitcase and went through his pants pockets and took his money. Petitioner asked her how much did she take and she said there were two rolls of money that's all she knew. She said she then caught a bus to a rental car company and rented a car. She then described her route of travel to the east coast and the states she drove through and the places she stopped at. She also said she burned much of the money she took from Sager. She said when she left Joel Sager, she didn't call 911 so she didn't know if he was alive or dead. She said he was close to her own age. She said she rented an apartment in Chevy Chase, Maryland and started working. The Petitioner then asked her questions about their own relationship. Dyall confirmed that the Petitioner had helped her and made renovations at her house. She referred to the Petitioner in the third person through out her statement. The Petitioner also prompted her responses. She admitted to trying to poison the Petitioner after they had an argument and because he knew about what she had done in San Francisco and that he might to go the police. So she said she had some poison herbs she had gotten from Tokyo when she was a flight attendant and she admitted to putting those herbs in Petitioner's food. She admitted the Petitioner got very sick as a result. She also admitted to having her friend who was learning voodoo put spells on the Petitioner. The Petitioner also stated that God had revealed to him that she had poisoned Joel Sager and Dyall said she was amazed over that. After being confronted with the knowledge that she had tried to poison him, she left for three days. She said when she came back she invited the Petitioner to dinner and was going to try to poison him again with the herbs, but the Petitioner wouldn't agree. Lastly Dyall says she is so grateful to God for sending Petitioner to help her save her soul.

Cpl. Jeannette D. See

Cpl. Jeanette See testified she was a member of the West Virginia State Police and was

assigned to the crime scene team at the Martinsburg Detachment. She took photographs of Dyall's injuries at the hospital on January 29, 2014, which were admitted into evidence as State's Exhibits 84-94. (A.R. 852-53 & 1369-1378).

Tpr. C. J. Hill

Tpr. Hill testified that on January 24, 2014, he was contacted by Bronwen Porter concerning the whereabouts of Ms. Dyall. (A.R. 862). As a result, Hill went to her house to conduct a welfare check. (Id.). Hill found Dyall's house to be secure with no signs of forced entry or struggle. (Id.). Hill obtained Dyall's cell phone and conducted a ping which came back to Avery and High Streets in Martinsburg. He also obtained her phone call record. (A.R. 862). Hill then called the numbers on the list and found out Dyall had missed several appointments in the past week. (A.R. 862-63).

Hill testified that Dyall's friends had expressed concerns about a gentleman she previously associated with named Arthur, who was French. (A.R. 863). Hill testified that in the course of his investigation he contacted a Robin Benjamin of AMJ Financial about Arthur. She told him that she had a photograph of Arthur and emailed it to Hill, however, she had no last name for Arthur. (Id.). Hill also contacted Jeff Krinsky, another financial advisor of Dyall's, and advised him to contact him if he heard from Dyall. (A.R. 864). Email was forwarded to him from Dyall's email account. Hill also testified to obtaining an email that been forwarded to him, although he couldn't recall who sent it. It was an email from Dyall to a friend nicknamed "Moo" and stated that something urgent had come up she (Dyall) had to take care of. The email stated she was fine and was sorry to worry everyone and law enforcement. (A.R. 866).

Hill testified that on January 28th received call from Dyall. She advised she was with a friend in Chevy Chase, Maryland who was in from the West coast and was sick. (A.R. 867). Hill said

Dyall was very quick on the phone and quick to hang up. Hill attempted to call Dyall back but the call was disconnected. He then had a ping run on the new number and came back to Martinsburg, not Chevy Chase. (A.R. 867). Hill also retrieved a call list for this cell phone. One number found was for Aspen Dental in Hagerstown, Maryland. Hill contacted that office and a scan was run of their client data base. A client's name was found associated with the number, Alvero Arthur Vilela. (A.R. 868). Hill then had dispatch run this name against their motor vehicle data base which disclosed a vehicle registration with an address of 114 North Center Street, Martinsburg. (A.R. 868).

At the time Hill was in Charles Town and contacted Tpr. Satterfield of the Martinsburg Detachment who immediately went to the Center Street address. (A.R. 869). When Hill arrived on scene after the Petitioner was already in custody. (Id.). Hill Mirandized the Petitioner and took his recorded statement in the back of Tpr. Satterfield's cruiser. (Id.). From there, Hill went to Berkeley Medical Center to interview Dyall. (A.R. 870). A search warrant was then obtained for the Center Street residence and photographs were taken and admitted at trial as State's Exhibits 4 through 83. (A. R. 871).

Inside Hill found belongings of Dyall including her computer, clothing, jewelry, financial statements and mail. (A.R. 880-81). Hill also found handwritten notes corresponding with the video taped confession given by Dyall to the Petitioner. (A.R. 889-90). Also, Hill found notes on the dining room table containing information relative to Dyall's financial accounts and amounts of funds on deposit. (A.R. 892).

The Petitioner's Recorded Audio Statement was then played for Jury. (A.R. 898, Transcript A.R. 43-61, State's Exhibit 103). All prior objections made at the Pre-Trial hearing were preserved on the record.

Hill next testified that he checked with the Bureau of Vital Records in San Francisco looking for a death certificate for a Joel Sager. He testified that he even spelled the name several ways trying to find a match, however, he found no record of death for such an individual. (A.R. 899). Hill also confirmed that Dyll's automobile found at her house. (A.R. 903). Hill testified that the Petitioner had no known criminal history or outstanding warrants. (A.R. 941-42).

Motion for Directed Verdict of Acquittal

The State then rested its case-in-chief and Petitioner moved the Court for a Judgment of Acquittal pursuant to Rule 29 of the West Virginia Rules of Criminal Procedure. Petitioner pointed out the inconsistencies and obvious biases in the testimony of Carol Dyll and the State's other witnesses. Petitioner argued the State, even in the light most favorable to the prosecution, had not presented a *prima facie* case and that no rational jury could find the Petitioner guilty of any of the crimes alleged beyond a reasonable doubt. (A.R. 915-935). The Court denied Petitioner's Rule 29 Motion finding that in the light most favorable to the State, a *prima facie* case had been laid. (.R. 932-35).

Carol Dyll in Defendant's Case-in-Chief

Dyll was recalled for the Petitioner's case-in-chief and testified that on the last day or so of her captivity she was allowed to take a shower in the downstairs bathroom. (A.R. 982). She also admitted to being allowed to watch a movie with the Petitioner in the down stairs living room on the last day. (A.R. 983). She also confirmed that at this same time (last day or two) she was allowed to use the downstairs bathroom. (A.R. 985).

Alvaro Arthur Vilela

The Petitioner took the stand in his own behalf. He testified that he was born in Lisbon,

Portugal and was fifty (50) years of age. (A.R. 998). He moved to France at age six (6) where he lived until 2004. (A.R. 999). The Petitioner was employed as a train conductor in France where he worked for 13 years. (Id.).

He testified that he met his now now ex-wife on line and she eventually came to visit him in Paris and he visited her in Washington, D.C. (A.R. 999). The couple were married January 29, 2004, and decided to live in Sterling, Virginia. (A.R. 1000). While in the United States, the Petitioner testified that he went to school for hairstyling and was licensed in Maryland, Virginia and West Virginia. (A.R. 1001-02).

He told the jury that he was not a United States Citizen, but was legally here holding a green card. (A.R. 1002). He testified that a person cannot obtain a green card to work in the U.S. having any prior criminal record. (A.R. 1003). He said that he had never been convicted of any crime except for three speeding tickets in the U.S. (A.R. 1003).

He said he divorced his wife in 2009. After that, since he had some experience in carpentry, he began to earn a living flipping houses. (A.R. 1005). He also worked in Sterling, Virginia as a hair stylist at a salon known as Flair for Hair. The owner of the salon decided to open a shop in Charles Town and he commuted there three (3) days a week to cut hair. (A.R. 1007). Dyall was already a customer there and one day he cut her hair and she liked it and he became her stylist. (A.R. 1008). He eventually left the Charles Town salon and went back to the Sterling salon and Dyall then went to Sterling to he could continue to do her hair. (A.R. 1009).

During the course of their business association the Petitioner found out Dyall was looking for someone to refinish her floors (at her home in Harpers Ferry, West Virginia) and he told her he could do that for her. She came to his house in Sterling to see what kind of work he did and liked

it. He went to her home in West Virginia to look at her floors and give Dyall an estimate. (A.R. 1009-10).

He got the job, did the floors and she liked his work. (A.R. 1010). Also remodeled her kitchen and cabinets and again she was very pleased with his work. (A.R. 1011). He testified that it was Dyall's idea for him to stay at her house to complete the renovations due to the distance and cost of his daily commute from Sterling. (A.R. 1013). He told the jury that until that point, their relationship was strictly business, but eventually the relationship grew into a romantic, sexual one. (A.R. 1013). He said their romantic relationship began in late 2010 and continued for approximately two years. (A.R. 1014).

The Petitioner testified that Dyall was very conservative and didn't like public displays of affection explaining why Bronwen Porter didn't think they were romantically involved as she testified. (A.R. 1016).

He next told the jury that one day Dyall cooked a very spicy meal for him and that it tasted completely different. A few hours later he became very sick; his heart was pounding and he had problems breathing. (A.R. 1023). He said he thought she poisoned him because he never experienced these symptoms before. (A.R. 1024). He testified that Dyall had told him previously that she had planned to poison that other man, Joel Sager, so he saw the parallels. He confronted her about this and she got scared and ran away for three days. (A.R. 1025-29). He also testified that he had a revelation from God that she poisoned the man in San Francisco. In those three days he decided to move out and packed all of his tools and belongings. (A.R. 1030). He came back, however, a few days later, not to finish cabinets, but to get his table saw. (A.R. 1031). At that time Dyall invited him to stay and have dinner with her, but he declined being fearful that she would try

to poison him again. (A.R. 1031-32).

The Petitioner admitted to running into Dyall at Martin's Grocery Store in Charles Town but said it was just a simple coincidence. (A.R. 1033). He said he helped her load her groceries and showed her his new car. (Id.).

He next testified that he went to her house on the 19th of January. He denied throwing a stick or piece of wood on her front porch. Instead, he testified that he knocked on the front door and she answered. (A.R. 1034). He said he went there because he was concerned about what she had done to the man in San Francisco. He wanted her to confess it and come clean to God. He was concerned for her soul. (A.R. 1034-35). He adamantly denied hitting her with a stick or anything else. (A.R. 1035). He stated that Dyall fell down the basement stairs, he didn't see it but heard it and had nothing to do with it, it was an accident. (A.R. 1036). He went to her aid and asked if she was alright. She complained about her arm. (A.R. 1037). He asked if she wanted to go to the hospital and she declined. (A.R. 1038).

He testified that Dyall then voluntarily decided to come with him to his house in Martinsburg. (Id.). Petitioner testified that because it was going to take more than one evening to confess her sins, she grabbed a change of clothes. (A.R. 1038-39). He said she came back up the stairs she had fallen down and volunteered to take her car to his house. (A.R. 1039). He testified that Dyall also fell on the snow covered ground before getting into the car. (A.R. 1040). He drove because he used to always drive her car. (A.R. 1041).

He said they then drove to Martinsburg and took her computer so they could watch movies. (A.R. 1042). On the way, he decided to stop at Bank of Charles Town because he thought she might need some money but she didn't have an ATM card. (A.R. 1043). He testified that on the ride to

his house, Dyall was was not restrained in any fashion, not bound with tape or anything else and no tape was across her mouth. He said when they arrived at his house, Dyall she went upstairs to the attic bedroom. (A.R. 1044). He told her it was too late at night to begin the confession tonight so they would begin tomorrow. (A.R. 1045). He denied using a blanket to cover her and carry her into the house. (Id.).

He testified that he put the bucket in her room because of her fall she was having trouble going up and down the stairs, so it was just there if she needed to go to the bathroom during the night. (A.R. 1046). He said there was only bathroom in the house and it was on the first main floor. (Id.). He denied screwing her door shut. (A.R. 1048). He did admit to using the plywood to cover the windows of his house to prevent theft of his property. He said he already had his AC unit stolen and the window didn't lock. (A.R. 1048). He said he screwed the front and basement doors to keep thieves out. (A.R. 1048).

The next morning Petitioner testified that he and Dyall had breakfast downstairs in the kitchen and that she was not restricted in anyway inside the house. (A.R. 1056).

He said the second day they prayed and sang hymns and they had a spiritual connection. A.R. 1058). He had her write out her confession and video taped it so that he wouldn't have problems like he was having now. (A.R. 1058). He testified that he did not coerce her confessions. (A.R. 1058-59).

She confessed on the third day. (A.R. 1029).

He said they were getting along pretty well and she decided to stay more days. (A.R. 1060). He cooked for the next day and bought some cream for her bruises. Also had to go to the grocery store for food. She volunteered her credit card for him to make these purchases. (Id.). The Petitioner

testified that he never took any money from her and used her credit cards with her consent. (Id.).

On the 28th, he took her car back and picked up her financial documents at her request. (A.R. 1041).

On cross, he admitted that when he thought Dyall poisoned him but didn't seek any medical attention or report the incident to the police because he didn't want to incriminate her. (A.R. 1085). He told the jury that Dyall told him if he didn't go to the police, she would help him. (A.R. 1092). He said he hid his iPhone underneath his mattress so Dyall wouldn't find it and destroy the video. (A.R. 1112).

The Petitioner then rested his case and the State chose not to present any rebuttal. The Petitioner renewed his prior Rule 29 Motion for a Directed Verdict of Acquittal reminding the Court of the higher standard to apply and the Court again denied the same. (A.R. 1114-15).

Instructions were agreed upon by the parties and read to the jury by the Court. Closing arguments were presented. The jury retired and began its deliberations ultimately returning the verdict above reference.

SUMMARY OF ARGUMENT

The Appellant argues that the Trial Court committed plain and prejudicial error by (1) not suppressing that portion of the Petitioner's custodial audio statement that was had after he unequivocally invoked his right to counsel; and (2) by failing to grant Petitioner's Motion for Directed Verdict of Acquittal at the close of the state's case-in-chief and at the close of all of the evidence, or in the alternative, the jury's verdict was contrary to the evidence presented.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

None of the issues presented are of first impression to the Court. The facts and legal

arguments appear to be adequately presented in the briefs filed and the record presented. Therefore oral argument under Rev. R.A.P. 18(a) may not be necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision. Nevertheless, the Appellant would request being allowed to present an oral argument to the Court.

ARGUMENT

1. **IT WAS PLAIN AND PREJUDICIAL ERROR AND AN ABUSE OF DISCRETION FOR THE COURT TO ALLOW THE REMAINDER OF PETITIONER’S AUDIO RECORDED STATEMENT INTO EVIDENCE AFTER HE UNEQUIVOCALLY INVOKED HIS RIGHT TO COUNSEL AND THE INTERROGATION CONTINUED.**

Syllabus Point 1 of *State v. McNeal*, 162 W.Va. 550, 251 S.E.2d 484 (1978) provides:

Once a suspect in custody has expressed his clear, unequivocal desire to be represented by counsel, the police must deal with him as if he is thus represented. Thereafter, it is improper for the police to initiate any communication with the suspect other than through his legal representative, even for the limited purpose of seeking to persuade him to reconsider his decision on the presence of counsel.

State v. Bradley, 163 W.Va. 148, 255 S.E.2d 356 (1979) provides at Syllabus Points 1, 2 and

- 3:

Syl. Pt. 1: When a criminal defendant requests counsel, it is the duty of those in whose custody he is, to secure counsel for the accused within a reasonable time. In the interim, no interrogation shall be conducted, under any guise or by any artifice. Citing West Virginia Constitution Article 3, §§5 and 14.

Syl. Pt. 2: If after requesting counsel an accused shall recant his request, there is a heavy burden upon the state to prove his waiver of right to counsel.

Syl. Pt. 3: There can be no interrogation of a person accused of committing a crime after he requests counsel, until counsel is provided except if the suspect recants his request before counsel can be provided with reasonable dispatch, interrogation may be conducted.

In *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, *reh'g denied*, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981), the United States Supreme Court held that once an accused asks for counsel during a custodial interrogation, he is not subject to further interrogation by law enforcement until counsel has been made available to him, unless the accused initiates further communication, exchanges or conversations with the police. 451 U.S. at 484-85, 101 S.Ct. At 1885, 68 L.Ed.2d at 386.

State v. Bowyer, 181 W.Va. 26, 380 S.E.2d 193 (1989), further commented on the *Bradley* decision:

We also recognized in *State v. Bradley*, 163 W.Va. 148, 255 S.E.2d 356 (1979), that it was possible for an accused “after requesting counsel [to] recant his request, [but] there is a heavy burden upon the state to prove his waiver of right to counsel.” Syllabus Point 2, in part. It is clear, however, that under *Bradley* the police may not induce the recantation by talking with the accused after he has asserted his right to counsel. This would violate *Edward's* constitutional premise that requires the police to cease interrogation unless the defendant initiates a further dialogue.

Tpr. Hill induced the Petitioner's recantation by telling him that if he wanted a lawyer he could have one but that he (Hill) wasn't going to look for his iPhone. Hill said “[d]o you want to talk to me and have me go up there and deal with this iPhone and continue to listen to your story or do you want your lawyer and you can do everything through him?” It is abundantly clear from the Petitioner's audio statement and the fact that he recorded the confession of Carol Dyall that he believed the video of her confession was exculpatory evidence for him, the type that would ensure he wouldn't be convicted of any crime against her. The Petitioner didn't know that the iPhone would, nevertheless, be seized in the investigation. For all he knew the officer could intentionally dispose of it as it was clear to him Tpr. Hill had great disdain for and exhibited an antagonistic attitude toward him. The trial court's error allowing the remainder of the statement to be admitted

wasn't harmless. The Petitioner goes on to make this damning statement which would the jury would certainly afford significant prejudicial weight "I will be going to jail forever." The jury could easily discount the Petitioner's defense with this admission.

Accordingly, the trial court's ruling allowing the remainder of the Petitioner's statement to be admitted after he clearly and unequivocally invoked his right to counsel was plain error and an abuse of discretion which had a direct impact upon the Petitioner's defense. As a result, the Petitioner was deprived of a fair trial and his conviction should be set aside and a new trial granted.

2. IT WAS PLAIN AND PREJUDICIAL ERROR FOR THE COURT TO FAIL TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AT THE CLOSE OF ALL OF THE EVIDENCE, OR IN THE ALTERNATIVE, THE JURY'S VERDICT WAS CONTRARY TO THE EVIDENCE PRESENTED.

The standard upon which the Court is to consider this assignment of error can be found in the case of *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), and is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. In *Guthrie*, at page 174, S.E.2d edition, the Court summarized the standard for determining when a verdict of guilt should be set aside on the grounds that it is contrary to the evidence, relying heavily upon the United States Supreme Court case of *Jackson v. Virginia*, 443 U.S.307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979):

In summary, a criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. As we have cautioned before, appellate review is not a device for this Court to replace a jury's finding with our own conclusion. On review, we will not weigh evidence or determine credibility. Credibility determinations are for a jury

and not an appellate court. On appeal, we will not disturb a verdict in a criminal case unless we find that reasonable minds could not have reached the same conclusion. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent with our decision announced today, they are expressly overruled.

The *Guthrie* Court, at page 176, went on to comment upon the requirements of the beyond a reasonable doubt standard:

The beyond a reasonable doubt standard does not require the exclusion of every other hypothesis or, for that matter, every other reasonable hypothesis. It is enough if, after considering all the evidence, direct and circumstantial, a reasonable trier of fact could find the evidence established guilt beyond a reasonable doubt.

At page 173 of the opinion the Court also stated: “Appellate courts can reverse only if no rational jury could have found the defendant guilty beyond a reasonable doubt”.

The Petitioner argues that even in the light most favorable to the State, i.e., giving the State the benefit of any evidence in doubt, and crediting the State with all inferences and credibility assessments which the jury could have drawn from the evidence, reasonable minds could have not reached the same conclusion as to the Petitioner’s guilt as to the charges of kidnaping and attempted extortion against him.

No rational jury could conclude beyond a reasonable doubt that the Petitioner intentionally took the victim, Carol Dyall, against her will from her residence on the night in question given the evidence and inferences therefrom as argued in closing. Dyall’s testimony that she was threatened and beaten by a stick or other piece of wood both at her residence and the Petitioner’s home was not corroborated by any such implement being seized by police in their investigation. Surely, given her allegations against the Petitioner and her injuries, police would have been looking for the weapon but it was never recovered or hinted to during the trial. (A.R. 1185-86). Nor did the Petitioner have

any opportunity to dispose of this “weapon” as the police arrived at his residence unannounced. This fact goes to the credibility of the victim’s testimony in a case where the jury had to decide who was telling the truth, the victim or the Petitioner.

Additionally, the victim testified that she was bound and gagged by duct tape for several days, however, the photographs taken of her in the hospital on the “day of her liberation” show no injuries from such bondage. Duct tape (assuming it was duct tape which fact never actually came out at trial but it is a logical assumption) would have left some sort of obvious marks on the victim’s hands, ankles and most especially her mouth if she was bound and gagged for several days as she testified. (A.R. 1188).

Another fact disproving the victim’s testimony that she was bound and held against her will is that the Petitioner hid his iPhone under his mattress. Why? The only logical conclusion would have been to keep it safe from the victim. It contained her confession and in the Petitioner’s mind he would be fearful that if she found it she would attempt to destroy or erase the incriminating video evidence. This could only be the case if she were not bound and free to move around the house as the Petitioner testified to at trial. (A.R. 1189-91).

The victim’s confession was so detailed it had to be true. (A.R. 1194). She also refers to the Petitioner in the third person when he is right in the room with her taping the confession which the defense argued was done intentionally by the victim to bring into questions of her own mental health should the video ever fall into the hands of the police.

The victim also embellished or lied about being thrown in the trunk of her car. She drove a hatchback which didn’t have a trunk but a carpeted space that was obviously enlarged to accommodate her by folding the back seat down. Otherwise she would not have fit. Of course the

Petitioner denied she was so situated in her vehicle. Also she testified that the Petitioner didn't cook for her during her captivity when she said the opposite to the police in her statement. (A.R. 1196 & 1197). In the Petitioner's case, she admitted she was free to get a shower, go to the downstairs bathroom and that she watched movies on the couch with the Petitioner (Id.) . Why would she be free to roam around the house without the Petitioner first getting her money if she were in fact kidnaped? (A.R. 1196-97). She could escape when he wasn't looking or call for help, etc., and he wouldn't have gotten a dime.

Additionally, the victim really wouldn't admit to having a romantic relationship with the Petitioner despite her obvious admissions to the same to law enforcement. (A.R. 1197).

Dyall said the Petitioner took her financial records with him when she was abducted. The evidence supported the Petitioner's testimony that he only got the said records on January 28th when he returned her car to her residence. (A.R. 1198).

The fact that the victim was alone unrestrained in the Petitioner's house when he went to the grocery store on January 28th and didn't make any attempt to escape or alert anyone to her plight also was pointed out to show reasonable doubt. (A.R. 1202-03).

The Petitioner also pointed out other details in closing suggesting problems with credibility of the victim not the least of which was her confession both in writing and on the video. The jury's verdict on Counts 2, 3 and 5 - 19 of not guilty clearly demonstrates their disbelief of the majority of the victim's trial testimony and their reliance upon the Petitioner's perception of the facts presented. But for the age of the victim and the sympathy she obviously garnered, they would have undoubtedly acquitted the Petitioner of kidnaping if they were acting rationally without sympathy or passion.

When all of the above is viewed, even in the light most favorable to the State, no reasonable jury could have also concluded from the evidence the Defendant's guilt on Counts 1 and 3.

Accordingly, the Court should have (1) granted the Defendant's Rule 29 Motion and not allowed the offense of kidnaping to go to the jury at the conclusion of all of the evidence at trial; (2) the Court should have granted the Petitioner's Motion for New Trial given the weight of the evidence of his innocence presented which would have lead a rational jury, not tainted by passion or prejudice against the Petitioner charged with a crime against an elderly victim, to acquit him; and (3) the Court should have granted the Petitioner's Motion for New Trial for his conviction for attempted extortion given the lack of evidence against him and the jury's acquittals on 2, 3, and 5 - 19.

CONCLUSION

WHEREFORE, the Petitioner, Alvaro A. Vilela, argues that for all of the above recited assignments of error, he was denied a fair trial and respectfully prays that this Court to reverse the Judgment of the Circuit Court of Berkeley County, West Virginia, affirming his convictions for kidnaping and attempted extortion and remand the matter for new trial, and for such other relief as the Court may deem just, necessary and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, B. Craig Manford, hereby certify that on this 25th day of September, 2015, true and accurate copies of the foregoing **Appellant's Brief** were personally hand-delivered to the Office of the Prosecuting Attorney for Berkeley County, West Virginia, Pamela Games-Neely, 380 W. South Street, Suite 1100, Martinsburg, West Virginia 25401.

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