IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Case No.: 18-0207
Circuit Court No.: 16-F-344
Cabell County, West Virginia

HAYDEN DAMIAN DRAKES,

Petitioner.

PETITIONER'S BRIEF

Matthew Brummond
Appellate Counsel
W.Va. Bar No. 10878
Public Defender Services
Appellate Advocacy Division
One Players Club Drive, Suite 301
Charleston, WV 25311
(304) 558-3905
matt.d.brummond@wv.gov

Counsel for the Petitioner

TABLE OF CONTENTS

Statutes

Constitutional Provisions

Other Authorities

ASSIGNMENTS OF ERROR

A jury convicted Petitioner of second degree murder because he punched a man several times at a bar, and the man later died.

I. Second degree murder is a malicious, intentional killing. Did the circuit court err by instructing the jury it could convict Petitioner of second degree murder if it found intent to kill OR to cause great bodily injury?

II. Voluntary manslaughter is an intentional killing without malice; the defense does not need to prove provocation or heat of passion. Did the circuit err by instructing the jury that provocation and heat of passion were elements?

STATEMENT OF THE CASE

A Cabell County jury convicted Petitioner of second degree murder after a man he punched in a bar died.[1] However, it did so after the trial court instructed the jury that it could convict Petitioner of second degree murder even if it did not find intent to kill, and it could not consider voluntary manslaughter as a lesser included offense unless it found the additional elements of provocation and heat of passion.[2]

These are both gross misstatements of the law.[3] The circuit court recognized this,[4] warned the State that it would bear the consequences of reversal,[5] but gave the instructions anyway.[6]

Because these incorrect jury instructions contributed to Petitioner's conviction, and because his case shows an unfortunate trend of courts and practitioners confusing the degrees of homicide, Petitioner appeals.[7]

---

[1] A.R. 680–81.
[2] A.R. 629–31.
[3] *State v. Guthrie*, 194 W. Va. 657, 676, 461 S.E.2d 163, 182 (1995) (second degree murder requires intent to kill); Syl. Pt. 3, *State v. McGuire*, 200 W. Va. 823, 490 S.E.2d 912 (1997) (voluntary manslaughter does not require provocation or heat of passion).
[4] A.R. 605–06, 610; A.R. 594–95.
[5] A.R. 604, 611-12.
[6] A.R. 629–31.
[7] *See* A.R. 592, 606; *see also State ex. Rel. Delgado v. Ballard*, Supreme Court No. 14-0503, 2015 WL 2382105 (W. Va. May 18, 2015) (memorandum decision) (jury instructions permitted

a. Petitioner punched a man several times at a bar for trying to force alcohol and pills on a pregnant woman. The man later died.

The parties below did not materially contest the basic facts.[8] On March 31, 2016, Petitioner and a group of friends went to a bar in Huntington to celebrate Petitioner's birthday.[9] The decedent, a stranger to Petitioner, was also at the bar and approached him and his friends to sell drugs.[10] The group declined, and asked the decedent to leave them alone.[11] The decedent left, but then returned a few minutes later asking if they knew anyone who would buy drugs.[12] They again asked the decedent to leave.[13]

The decedent persisted in approaching them and focused his attention on one group member in particular: Danielle.[14] The group informed the decedent that Danielle was pregnant and on a date with her husband.[15] This warning did not deter the decedent from making advances and trying to ply her with drugs and alcohol.[16]

After the nth time the decedent approached Danielle,[17] and after being warned she was married and pregnant, the decedent tried one more time to get her to drink or buy drugs.[18] He pressed a cup, ostensibly containing alcohol, to her lips without her consent.[19] Her husband then slapped the cup out of the decedent's hand and chased him off.[20] He

---

instantaneous premeditation); *State v. Stewart*, 228 W. Va. 406, 719 S.E.2d 876, No. 10-1179, Petr.'s Br. at 2 (2011) (Prosecutor argued the defendant could premeditate in two seconds); *State v. Rogers*, 231 W. Va. 205, 215-16, 744 S.E.2d 315, 325-26 (2013) (Per Curiam) (Prosecutor conflated premeditation with intent to kill).

[8] *See* A.R. 271, 635, 644.
[9] A.R. 286.
[10] A.R. 299, 315–16; 475–76.
[11] A.R. 476.
[12] A.R. A.R. 476–77, 505.
[13] A.R. 477.
[14] A.R. 312, 316, 477.
[15] A.R. 302, 316–17, 477.
[16] *See* A.R. 316–17, 407, 420, 478.
[17] *E.g.* A.R. 316–17; *see also* A.R. 420–21.
[18] A.R. 317.
[19] A.R. 317, 421.
[20] *Id.*

was furious and wanted to fight the decedent.[21] Petitioner intervened, and convinced Danielle's husband to stand down and let him persuade the decedent to leave the bar.[22]

As shown by security footage,[23] Petitioner goes to the patio to confront the decedent.[24] Petitioner tells him to leave Danielle alone.[25] Petitioner begins posturing to intimidate the decedent into backing down.[26]

The decedent instead throws his arms around Petitioner and another gentleman.[27] Petitioner pushes the decedent off,[28] and the pair exchange more words.[29] Petitioner then punches the decedent seven or eight times.[30] He never kicks him or uses a weapon.[31] When the decedent falls, Petitioner stops hitting him and leaves with his friends for another bar two blocks down the street.[32] From beginning to end, the physical altercation lasts about ten to twelve seconds.[33]

The police arrested Petitioner.[34] He gave an interview and admitted he fought the decedent.[35] During this interview, the police informed Petitioner how severely he had injured the decedent.[36] In the grand jury proceeding, the State asked the testifying police officer to describe Petitioner's demeanor upon learning for the first time that the decedent may die.[37] The officer believed Petitioner "...was surprised. He didn't think that that had happened."[38]

---

[21] A.R. 303; *see* A.R. 318.
[22] A.R. 303.
[23] *See* A.R. 823.
[24] A.R. 303.
[25] A.R. 318.
[26] A.R. 823.
[27] A.R. 823; *see also* A.R. 304, 311.
[28] A.R. 823.
[29] A.R. 296, 304, 311, 322.
[30] A.R. 823; A.R. 635.
[31] A.R. 304, 319-20.
[32] A.R. 304, 313, 319, 324, 355.
[33] A.R. 823.
[34] A.R. 354.
[35] A.R. 823.
[36] A.R. 7; *see also* A.R. 823.
[37] *Id.*
[38] *Id.*

b. Following the decedent's death, the State prosecuted Petitioner on the theory that his intention to assault constituted second degree murder.

In the absence of a material factual dispute, the parties argued over intent and the degree of homicide.[39] The State argued that Petitioner's anger towards the decedent rose to the level of malice, which, coupled with his intent to commit an assault, constituted second degree murder.[40] During opening, the State referred to the encounter as an "assault" five times. Throughout its case in chief, it often referred to Petitioner's actions as an "assault."[41] And the State objected during opening when Petitioner's lawyer said that the evidence would not show an intent to kill: "Objection. That is not an element[.]"[42]

The defense focused on the reason Petitioner assaulted the decedent and that Petitioner disengaged the moment the decedent fell instead of trying to hurt or kill him.[43] It argued for acquittal, or at least one of the lesser included offenses.[44]

In closing, the State argued that an intent to cause "great bodily injury" sufficed for second degree murder.[45] It could argue this because the circuit court instructed the jury that second degree murder did not require an intent to kill.[46]

c. Over defense objection and the circuit court's own reservations, the court instructed the jury it could convict Petitioner of second degree murder if he intended to cause "great bodily harm" without an intent to kill.

During the instruction conference, the State proposed a path for the jury to convict Petitioner of second degree murder even if he did not intend to kill anyone. The defense asked the court to instruct that "Murder in the Second Degree is the unlawful, intentional killing of another person with malice but without deliberation or

---

[39] *See e.g.* A.R. 277–78, 635.
[40] *See e.g.* A.R. 639-40.
[41] *E.g.* A.R. 400-01.
[42] A.R. 284–85.
[43] A.R. 282–84.
[44] A.R. 666–67.
[45] *E.g.* A.R. 640.
[46] A.R. 628–30.

premeditation."[47] The State objected because the defense instruction required intent to kill.[48] It wanted the jury instructed that "Murder of the Second Degree is committed feloniously, maliciously, but without deliberate or premeditated action and with the intent to kill OR to cause great bodily harm."[49] The State also wanted the jury instructed separately that the "requisite criminal intent" for second degree murder is "... intent to do great bodily harm, OR a criminal intent aimed at life."[50]

After the circuit court read this last proposed instruction it commented, "I don't like that."[51] The court explained, "You are saying you can find him guilty of Second Degree Murder if there is intent to kill or cause great bodily harm."[52] The defense also objected.[53] "Murder requires specific intent to kill, Judge, and you have given that."[54] The court agreed. "I have always felt that it did."[55]

The court asked how voluntary manslaughter could be a lesser included offense if second degree murder did not require intent to kill.[56] The State responded that it had case law on its side.[57] The defense pointed to *Guthrie* and *State ex rel. Gerlach*[58] to assert that, like voluntary manslaughter and first degree murder, second degree murder requires an intent to kill.[59] The court seemed to agree: "All of these require an intent to kill."[60]

---

[47] A.R. 562.
[48] A.R. 591–92.
[49] A.R. 575 (EMPHASIS ADDED).
[50] A.R. 581 (EMPHASIS ADDED).
[51] A.R. 605.
[52] *Id.*
[53] A.R. 612–13.
[54] A.R. 606.
[55] *Id.*
[56] A.R. 591–92.
[57] *Id.*
[58] *Guthrie*, 194 W. Va. at 676 ("... Any other *intentional killing*, by its spontaneous and nonreflective nature, is second degree murder.") (*emphasis added*); *Gerlach v. Ballard*, 233 W. Va. 141, 149, 756 S.E.2d 195, 203 (2013) ("[P]ursuant to *Guthrie*, intent to kill is an element of second degree murder.").
[59] A.R. 592-93.
[60] A.R. 610.

Despite Petitioner's objection and its own reservations, the court gave the State's instruction.[61] It had previously warned the State that "[t]he only problem with these things, [this Court] will reverse on instructions quicker than anything else."[62] The court told the State "If you want to give that, I will; but I leave it up to you."[63] The State kept fighting, and the court relented. "Okay. You all want it, you will get it; but you are going to have to lie with it."[64]

d. Over objection, the court instructed the jury not to convict Petitioner of voluntary manslaughter without proof of sudden provocation or heat of passion.

The defense also asked the court to instruct jurors that "'Voluntary Manslaughter' is the unlawful and intentional killing of another without malice" and "...malice [is] the critical distinction between murder and voluntary manslaughter."[65]

The State said that "our instruction is better" because it required "sudden provocation and ... heat of passion."[66] The defense said that "malice is the only difference," to which the court replied, "I think so."[67] The court then said "It is intent to kill without malice, in my opinion. I think that's right. I will give [the defense instruction]."[68]

Later the State revisited this ruling. It again argued that provocation and heat of passion were elements.[69] And again, the defense disagreed.[70] However this time, instead of siding with the defense, the court asked, "Shouldn't it be 'but upon sudden provocation and in the heat of passion?'"[71] The court then reversed its earlier ruling to add provocation and passion to the instruction.[72]

---

[61] A.R. 611.
[62] A.R. 604.
[63] A.R. 607.
[64] A.R. 611.
[65] A.R. 565-66.
[66] A.R. 594.
[67] A.R. 594.
[68] A.R. 595; *see also* A.R. 565-67.
[69] A.R. 596-97.
[70] A.R. 598.
[71] A.R. 598.
[72] A.R. 598-99.

e. The jurors requested further instruction on the homicide degrees. The judge gave them a written copy of the exact instructions it read earlier.

The court instructed the jury that "Murder in the Second Degree is the unlawful, intentional killing of another person with malice but without premeditation or deliberation."[73] Per its concession to the State, it further told the jury that the "requisite intent" described by the instructions is "intent to do great bodily harm OR intent aimed at life."[74] It also instructed the jury that voluntary manslaughter required proof that Petitioner killed the decedent "...unlawfully and intentionally, without premeditation, deliberation, or malice, but upon sudden provocation and in the heat of passion[.]"[75] It also instructed on involuntary manslaughter.[76]

After the jury retired, it asked the court for more assistance. Its note read, "Please submit instructions with definitions of Involuntary Manslaughter, Voluntary Manslaughter, and Murder Two."[77] The court submitted the same instructions, but in writing.[78]

Based on these written instructions, the jury convicted Petitioner of second degree murder, the greatest offense alleged by the State.[79] At sentencing, the court expressed surprise at the verdict, but gave Petitioner the maximum forty-year prison sentence.[80]

Petitioner argues that because the circuit court mis-instructed the jury on second degree murder and voluntary manslaughter, the verdict is not surprising at all. The court's instructions relieved the State from having to prove an element of the charged offense while adding elements to the lesser included offense for the defense to prove. Because both instructions misstate the law,[81] Petitioner appeals.

---

[73] A.R. 628.
[74] A.R. 629-30 (EMPHASIS ADDED).
[75] A.R. 630.
[76] A.R. 631–32.
[77] A.R. 676.
[78] A.R. 679.
[79] A.R. 681.
[80] A.R. 743, 760–61.
[81] *Guthrie*, 194 W. Va. at 676 (second degree murder requires intent to kill); *McGuire*, 200 W. Va. 823 at Syl. Pt. 3 (Provocation and heat of passion are not elements of voluntary manslaughter.).

SUMMARY OF ARGUMENT

In *State v. Guthrie*, this Court established the orthodox view of homicide, in which this Court must ensure meaningful differences between the degrees so that each is a lesser included of the ones following it.[82] Involuntary manslaughter is an unlawful killing.[83] Voluntary manslaughter is an unlawful, intentional killing.[84] Second degree murder is a malicious intentional killing, and first degree murder requires that the defendant premeditated upon the intent to kill.[85] Here, the circuit court's instructions on second degree murder and voluntary manslaughter made a mess of this system. The instructions are contrary to this Court's caselaw, and they render West Virginia's homicide law internally incoherent.

This Court established in *Guthrie* that second degree murder requires intent to kill.[86] The State below offered two theories to justify its instructions, but those theories are as incompatible with one another as they are with *Guthrie's* orthodox view.

It pointed to two cases for support that do not advance its cause: *State v. Haddox* and *State v. Davis*.[87] By relying upon *Haddox*, the state below implicitly argued that second degree murder does not require intent to kill because the term is synonymous with premeditation.[88] This is the homicide theory that the Court overruled fourteen years later in *Guthrie* and it is no longer good law.[89]

By relying upon *Davis*, the State also argued that intent to kill was synonymous with malice.[90] However, *Davis* reversed a second degree murder conviction precisely

---

[82] *See e.g. Guthrie*, 194 W. Va. at 674–75 (Court must ensure meaningful differences between the degrees of murder); *see also McGuire*, 200 W. Va. at 834 ("In West Virginia, there can be no doubt that we also have considered voluntary manslaughter as a lesser included offense of murder.").
[83] Syl. Pt. 3, *State v. Lough*, 143 W. Va. 838, 105 S.E.2d 538 (1958); *see also Criminal Law Instructions Manual*, 45 (Public Defender Services, 7th ed. 2018) (available at: https://pds.wv.gov/Criminal-Law-Research-Center/publications/Documents/Jury%20Instructions%207th%20Edition.pdf).
[84] *McGuire*, 200 W. Va. 823 at Syl. Pt. 3; *see also Criminal Law Instructions Manual*, 46.
[85] *See e.g. Guthrie*, 194 W. Va. at 676; *see also Criminal Law Instructions Manual*, 47-49.
[86] *Guthrie*, 194 W. Va. at 676; *Gerlach*, 233 W. Va. at 149.
[87] *See* A.R. 580–81.
[88] *State v. Haddox*, 166 W. Va. 630, 632, 276 S.E.2d 788, 790 (1981) (per curiam) (citing *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978)).
[89] *Guthrie*, 194 W. Va. at 676; *Gerlach*, 233 W. Va. at 148–49.
[90] *See* A.R. 606.

because the jury believed the offense did not require intent to kill.[91] This Court should not read the case to support the State's argument that intent to kill is not an element.

This Court should also reject the State's construction of second degree murder because its contradictory arguments lead to internally incoherent jurisprudence. If intent to kill is synonymous with malice, per the State's *Davis* argument, then voluntary manslaughter is identical with second degree murder and the offenses collapse.[92] And yet, at the same time, if second degree murder does not require intent to kill, then voluntary manslaughter contains an extra element and is not even a lesser included offense.[93] The State below asserted a homicide theory that is not even intelligible as a matter of formal logic, let alone one that a lay jury could apply.

Turning to voluntary manslaughter, the State below did not point to any authority supporting its assertion that provocation and passion are "definitely" elements.[94] The common law required defendants to prove provocation and passion to avoid execution for murder.[95] But in modern practice, defendants never have to prove elements.[96] This Court rejected the common law approach and decided that voluntary manslaughter is an intentional but non-malicious killing.[97] When the State seeks conviction for voluntary manslaughter, it does not need to prove provocation or passion,[98] and certainly the defense need not prove those elements to establish it as a lesser included offense.[99]

The instructions were incompatible with the orthodox view from *Guthrie*. They also render West Virginia's homicide law unintelligible. Most significant of all, they led to

---

[91] *State v. Davis*, 220 W. Va. 590, 595, 648 S.E.2d 354, 359 (2007) (per curiam).
[92] *Cf. Blockburger v. United States*, 284 U.S. 299, 304 (1932).
[93] Syl. Pt. 1, *State v. Louk*, 169 W. Va. 24, 285 S.E.2d 432 (1981) (overruled on other grounds by Syl. Pt. 6, *State v. Jenkins*, 191 W. Va. 87, 443 S.E.2d 244 (1994).
[94] A.R. 587–88.
[95] *McGuire*, 200 W. Va. at 834; *Hunting the Dragon: Reforming the Massachusetts Murder Statute*, 10 B.U. Pub. Int. L.J. 203, 206–07 (2001)
[96] *In re Winship*, 397 U.S. 358, 364 (1970);
[97] *McGuire*, 200 W. Va. 823 at Syl. Pt. 3.
[98] *Id.* at 835.
[99] *Id.*; *see also Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975).

the injustice below. Petitioner punched a man several times for trying to ply an unconsenting pregnant woman with drugs and alcohol. Now, because the State could cherry pick from contradictory sources, it has labeled him a murderer and imprisoned for forty years.

Petitioner therefore requests that this Court reverse and remand his conviction for a new trial, with a new jury, instructed in accordance with West Virginia's orthodox homicide scheme announced in *Guthrie*.[100]

STATEMENT REGARDING ORAL ARGUMENT

In 1995, this Court clarified its homicide jurisprudence after decades of piecemeal litigation had eroded the difference between the degrees of murder.[101] "[S]o that there might be some clarity and coherence to the law of homicide[,]" the Court held that the difference between the degrees of murder is premeditation; both require intent to kill.[102]

This jurisprudential drift is happening again.[103] And as Petitioner's case shows, it also affects the line between murder and manslaughter.[104] Lower courts need guidance that only this Court can provide.[105]

Therefore, even though it should be well settled that the jury instructions in this case misstated the law,[106] an authored opinion and Rule 20 argument may be appropriate to clarify or overrule the aberrant cases that caused the confusion below.

---

[100] *See Criminal Law Instructions Manual*, 43 *et. seq.*
[101] *Guthrie*, 194 W. Va. at 676.
[102] *Id.* at 675–76; *see also Gerlach*, 233 W. Va. at 149.
[103] *See e.g. State ex. Rel. Delgado v. Ballard*, Supreme Court No. 14-0503, 2015 WL 2382105 (W. Va. May 18, 2015) (memorandum decision) (jury instructions permitted instantaneous premeditation); *State v. Stewart*, 228 W. Va. 406, 719 S.E.2d 876, No. 10-1179, Petr.'s Br. at 2 (2011) (Prosecutor argued the defendant could premeditate in two seconds); *State v. Rogers*, 231 W. Va. 205, 215-16, 744 S.E.2d 315, 325-26 (2013) (Per Curiam) (Prosecutor conflated premeditation with intent to kill).
[104] *See* A.R. 628–30.
[105] *See e.g.* A.R. 606; *Cf.* A.R. 597, 630–31 (Circuit court instructed jury that manslaughter requires heat of passion, *but see McGuire*, 200 W. Va. 823 at Syl. Pt. 3.
[106] *Gerlach*, 233 W. Va. at 149; *McGuire*, 200 W. Va. 823, Syl. Pt. 3.

ARGUMENT

This should be a simple case. In West Virginia, second degree murder requires intent to kill.[107] Voluntary manslaughter does not require provocation or passion.[108] Here, the circuit court mis-instructed the jury on both, making it easier for the jury to convict for the charged offense, and harder to consider the lesser included.[109] Therefore, this Court should reverse.[110]

Unfortunately, aberrant case law misled the State below. The confusion caused the court to give a manslaughter instruction of which it was equivocal,[111] and to disclaim responsibility for a second degree murder instruction it knew was wrong.[112] Petitioner urges this Court to reverse his conviction, reassert meaningful distinctions between the degrees of homicide, and give needed guidance to trial courts and practitioners.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits criminal conviction without "...proof beyond a reasonable doubt of every fact necessary to constitute the crime...charged."[113] Jury instructions must give full effect to this requirement by accurately stating the elements the jury must find.[114] "The trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error."[115] If the elemental instructions are erroneous, the jury's verdict likely will be erroneous as well.[116]

---

[107] *Gerlach*, 233 W. Va. at 149.
[108] *McGuire*, 200 W. Va. 823 at Syl. Pt. 3.
[109] A.R. 628–30.
[110] *See* Syl. Pt. 1, *State v. Miller*, 184 W. Va. 367, 400 S.E.2d 611 (1990).
[111] *Compare* A.R. 595 *with* A.R. 599.
[112] A.R. 605, 611.
[113] *Winship*, 397 U.S. at 364; *see also* U.S. Const. Amend. XIV; W. Va. Const. Art. III, § 10.
[114] *See Sandstrom v. Montana*, 442 U.S. 510, 521 (1979).
[115] *Miller*, 184 W. Va. 367 at. Syl. Pt. 1.
[116] *See State v. Romine*, 166 W. Va. 135, 136, 272 S.E.2d 680, 682 (1980).

"Ultimately, the responsibility to ensure in criminal cases that the jury is properly instructed rests with the trial court."[117] This Court reviews whether the circuit court correctly instructed the jury on the elements *de novo.*[118]

Here, the circuit court committed reversible error. It cannot wash its hands of the responsibility to ensure that the jury instructions accurately convey the elements by shifting the blame to the State for offering them. If the instructions misstate the law, the court has an obligation to correct them.

It did not do so. The court instructed the jury that it could convict Petitioner of second degree murder if Petitioner merely intended an assault—removing intent to kill, an element required by law.[119] And without explanation, it changed its ruling on the voluntary manslaughter instruction to include provocation and passion—adding elements not required by law.[120] Then, when the jury requested assistance understanding the instructions, the court compounded the problem by giving it a written copy of those instructions—the same ones that caused the jury to ask for guidance, and which the court itself considered inaccurate.[121]

The result is a verdict unworthy of any confidence.[122] As instructed, the jury could have convicted Petitioner of murder even if it did not believe he intended to kill. And it may have disregarded voluntary manslaughter because the defense had not proved sudden provocation or heat of passion. On a *de novo* standard of review, this Court should reverse for a new trial by a properly-instructed jury.

---

[117] *State v. Lambert*, 173 W. Va. 60, 63, 312 S.E.2d 31, 34 (1984).
[118] Syl. Pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996).
[119] A.R. 628–30.
[120] *Compare* A.R. 595 *with* A.R. 599.
[121] *Compare* A.R. 677–79 *with Davis*, 220 W. Va. at 592 ("the trial court's response supported the jury's erroneous belief that a showing of intent was necessary for voluntary manslaughter, but not for second degree murder.").
[122] *See Romine*, 166 W. Va. at 136.

I. The court erred by instructing the jury it could convict Petitioner of second degree murder without finding intent to kill.

State v. Guthrie, West Virginia's foremost case defining homicide, clarified decades of confusion by declaring that all murder requires intent to kill.[123] "Of importance to the case at bar is the fact that *Guthrie* made it clear that intent to kill is an element of second degree murder."[124] The circuit court erred by instructing the jury otherwise.

"[P]ursuant to *Guthrie*, intent to kill is an element of second degree murder."[125] The Court reached that conclusion to resolve a conflict between two lines of cases. In *Schrader*,[126] the Court conflated premeditation with intent to kill, such that any intentional killing was first degree murder.[127] However in *Dodds* and *Hatfield*,[128] the Court separated the elements.[129] Under the *Dodds/Hatfield* formulation, both degrees require intent to kill; second degree murder is an unreflective intentional killing, whereas first degree entails premeditating upon the intent before carrying out the act.[130]

Guthrie resolved this conflict in favor of *Dodds/Hatfield* and overruled *Schrader*. "[T]here must be some evidence that the defendant considered and weighed his decision to kill in order for the State to establish premeditation ...Any other *intentional killing*, by its spontaneous and nonreflective nature, is second degree murder."[131]

Therefore, intent to kill is an element of second degree murder, not an optional disjunctive. The circuit court erred by instructing the jury that "... intent to do great bodily harm" would suffice.[132] And this Court should reverse Petitioner's conviction.

---

[123] *Guthrie*, 194 W. Va. at 676.
[124] *Gerlach*, 233 W. Va. at 148.
[125] *Id.* at 149.
[126] *State v. Schrader*, 172 W. Va. 1, 302 S.E.2d 70 (1982).
[127] *Guthrie*, 194 W. Va. at 674 (quoting *Schrader*, 172 W. Va. at 6); *Haddox*, 166 W. Va. at 632 (citing *Starkey*, 161 W.Va. at 523).
[128] *State v. Dodds*, 54 W. Va. 289, 46 S.E. 228 (1903); *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982).
[129] *See Guthrie*, 194 W. Va. at 673–74.
[130] *Id.*
[131] *Guthrie*, 194 W. Va. at 675–76 (*emphasis added*).
[132] A.R. 581 (EMPHASIS ADDED).

A. The State below equated intent to kill with premeditation, even though *Guthrie* overruled this theory.

The State's argument that second degree murder does not require intent to kill is not well-founded. It relied upon dicta in a per curiam opinion that *Guthrie* overruled fourteen years later.[133]

The State below cited *State v. Haddox* as authority for its instruction.[134] However, *Haddox* is a per curiam opinion relying upon *State v. Starkey* for the assertion that second degree murder does not require intent to kill because that term is synonymous with premeditation.[135] This is precisely the homicide theory *Guthrie* overruled.[136] "*Schrader* wrongly equated premeditation with intent to kill[.] To the extent that ... opinion is inconsistent with our holding today, it is overruled."[137] That holding also applies to *Haddox* and *Starkey*.

This Court has even explicitly recognized that like *Schrader*, the *Haddox* line of cases is no longer good law.[138] *Haddox* relied on *Starkey*,[139] and *Starkey* relied on *State v. Hertzog*.[140] In 2013, this Court decided *State ex. Rel. Gerlach v. Ballard*, which removed all doubt concerning the status and import of *Guthrie* within this Court's homicide jurisprudence: "[P]ursuant to *Guthrie*, intent to kill is an element of second degree murder."[141] This Court so ruled after noting and rejecting prior caselaw inconsistent with *Guthrie*—including *Hertzog*.[142]

---

[133] *See Haddox*, 166 W. Va. at 632.
[134] A.R. 581.
[135] *See Haddox*, 166 W. Va. at 632 (citing *Starkey*, 161 W.Va. 517).
[136] *Guthrie*, 194 W. Va. at 676.
[137] *Guthrie*, 194 W. Va. at 676.
[138] *Gerlach*, 233 W. Va. at 148.
[139] *See Haddox*, 166 W. Va. at 632.
[140] *Starkey*, 161 W. Va. at 523 (citing *State v. Hertzog*, 55 W. Va. 74, 46 S.E. 792 (1904), abrogation recognized by *Gerlach*, 233 W. Va. at 148).
[141] *Gerlach*, 233 W. Va. at 149.
[142] *Id.* at 148.

B. The State's other theory, that intent to kill and malice are synonymous, is also mistaken.

At the same time the State argued intent to kill was not an element by equating the term with premeditation, it argued that intent to kill *was* an element, but superfluous, by equating the term with malice.[143] However, it based this argument on a misreading of *State v. Davis*, another per curiam opinion that does not advance the State's position.[144]

In *Davis*, this Court reversed a second degree murder conviction because the circuit court failed to correct the jury's misapprehension that second degree murder did not require intent to kill.[145] The instructions were technically correct, but the jury expressed confusion and asked whether second degree murder required intent to kill.[146]

This Court ruled that the circuit court committed plain error by giving the jury the same instructions that had confused it the first time, similar to what happened here.[147] In *Davis*, though, the written instructions were at least technically correct.[148] Here, the court's instructions did not state the law accurately.[149]

The *Davis* Court did find that the malice instruction covered the requisite intent,[150] but the Court limited this ruling to the facts of the case. The Court ruled that, per *Hatfield*, second degree murder requires specific intent.[151] As given, the malice instruction entailed specific intent to kill, and so as a whole the entire instruction covered all the elements.[152] That is not the case here, where the court instructed the jury it need not find intent to kill. The Court reversed in *Davis* precisely because the jury made that same mistake.[153]

---

[143] *See* A.R. 606.
[144] *Davis*, 220 W. Va. 590.
[145] *Id.* at 597.
[146] *Id.* at 595.
[147] *Id.* at 597.
[148] *Id.* at 595.
[149] *Guthrie*, 194 W. Va. at 676; *Gerlach*, 233 W. Va. at 149.
[150] *Id.* at 594.
[151] *See Davis*, 220 W. Va. at 594 n. 6.
[152] *Id.*
[153] *Id.* at 597.

The State below misplaced its reliance in language from *Davis* appearing to universalize this rule beyond the immediate facts of the per curiam case. In the passages the State below no doubt found useful, *Davis*, too, relied on *Haddox*, and by implication *Starkey* and *Hertzog*.[154] *Guthrie* overruled their homicide interpretation, as recognized by *Gerlach*, and the court below erred by relying upon the State's bad and misread law.

C. The State's theory renders the statutory scheme internally incoherent.

The State below based its arguments on overruled legal theories from *Haddox* and a misreading of *Davis*. This Court should also reject its homicide scheme because the State's inconsistent arguments lead to internally incoherent jurisprudence.

The legislature divided general homicide into four separate degrees, with each degree a lesser-included offense of the ones preceding it based upon mental state.[155] And it is this Court's responsibility to define those offenses to give full effect to the legislature's intent to separate them.[156] For an offense to be lesser included, it cannot entail an additional element not required by the greater one.[157] At the same time, the greater offense must have at least one element that the lesser does not, because if they have the same functional elements then they collapse into the same offense.[158]

The State's theory, which this Court already rejected in *Guthrie*, makes a mess of West Virginia's homicide system. If second degree murder does not require specific intent to kill, per *Haddox*, then voluntary manslaughter is a lesser included offense of first degree murder, because both require intent to kill, but it is not a lesser included offense of second degree.

---

[154] *See Davis*, 220 W. Va. at 596–97.
[155] *See* W. Va. Code § 61-2-1 *et. seq.*
[156] *Guthrie*, 194 W. Va. at 674–75; *McGuire*, 200 W. Va. at 833.
[157] *Louk*, 169 W. Va. 24 at Syl. Pt. 1 (overruled on other grounds by *Jenkins*, 191 W. Va. 87 at Syl. Pt. 6).
[158] *Blockburger*, 284 U.S. at 304.

But, if malice and intent to kill are synonymous, per its reading of *Davis*, then voluntary manslaughter and second degree murder have *identical* elements. The State's theory does not merely alter the relationships between the homicide degrees, it renders them internally incoherent. Voluntary manslaughter cannot be both the same offense as second degree murder yet so different that it is not even a lesser included—but that is the inexorable result of the contradictory arguments the State below advanced.

A court's instruction on the law should be clear enough that a lay jury can, with support, apply the law to the facts.[159] The homicide instructions advanced by the State below cannot even clear the hurdle of logical coherency. The only solution is for this Court to reassert the orthodox view from *Guthrie* by reversing Petitioner's conviction.

II. The court erred by instructing the jury it could not convict Petitioner of voluntary manslaughter as a lesser included offense without proof of sudden provocation and heat of passion.

In addition to making it easier for the jury to convict Petitioner of the charged offense by not requiring intent to kill, the court's instructions also made it more difficult for the jury to consider lesser included offenses by adding to voluntary manslaughter the elements of sudden provocation and heat of passion.[160]

This Court has already rejected that these are elements.[161] Adding elements to voluntary manslaughter disrupts the orthodox view of homicide because it would no longer be a lesser included offense of murder.[162] Worst of all, when the State is pursuing a greater offense and the defense a lesser, adding elements to the nominal lesser offense impermissibly shifts the burden of proof to defendants.[163]

Without authority, the State below insisted that the court instruct on provocation and passion because these were "definitely" elements of voluntary manslaughter, despite

---

[159] *See State v. Miller*, 194 W. Va. 3, 15–16, n. 20, 459 S.E.2d 114, 126–27, n. 20 (1995).
[160] A.R. 630.
[161] *McGuire*, 200 W. Va. 823 at Syl. Pt. 3.
[162] *See Louk*, 169 W. Va. 24 at Syl. Pt. 1.
[163] *See Wilbur*, 421 U.S. at 704.

Petitioner's objection that the only requirements are intent without malice.[164] However, this Court already rejected the same argument advanced by the State below when a criminal defendant insisted they were necessary elements.[165]

In *McGuire*, a jury convicted the defendant of voluntary manslaughter.[166] The defendant appealed, arguing that the circuit court had failed to instruct the jury it needed to find "gross provocation" and "heat of passion."[167] This Court affirmed the appeal, in part because adding extra elements would negate the legislature's intent that manslaughter be a lesser included offense of murder.[168] "In West Virginia, there can be no doubt that we also have considered voluntary manslaughter as a lesser included offense of murder. ... It is intent without malice, not heat of passion, which is the distinguishing feature of voluntary manslaughter."[169]

One reason that greater offenses must entail every element of any lesser offense is that adding elements to a nominally lesser offense impermissibly shifts the burden of proof for those elements to defendants. In *Mullaney v. Wilbur*, the United States Supreme Court considered whether Maine's homicide scheme survived the Supreme Court's recent decision in *Winship*.[170] Maine's statutory scheme deemed any unjustifiable, intentional killing to be "felonious homicide," and the jury had to decide whether it was murder, if accompanied by malice, or manslaughter, if accompanied by provocation or heat of passion.[171]

The State in *Wilbur* sought refuge in pedantry, arguing that under its statutes, malice, provocation, and passion were not true elements in the sense that *In re Winship*

---

[164] A.R. 598.
[165] *See McGuire*, 200 W. Va. 823 at Syl. Pt. 3.
[166] *Id.* at 826.
[167] *Id.* at 832–33.
[168] *Id.* at 834 (discussing *U.S. v. Quintero*, 21 F.3d 885 (9th Cir.1994)).
[169] *Id.* at 834–35; *see also Id.* at Syl. Pt. 3.
[170] *Wilbur*, 421 U.S. at 684–85; *See supra* at n. 96.
[171] *See Wilbur*, 421 at 691–92.

meant to cover.[172] However, "*Winship* is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the operation and effect of the law as applied and enforced by the state, *and to the interests of both the State and the defendant as affected by the allocation of the burden of proof.*"[173] The Supreme Court rejected Maine's argument and ruled that per *Winship*, the defense never has the burden of proving elements.[174]

The State's manslaughter theory in this case creates a similar problem. Although the court instructed jurors that the State always bears the burden of proof,[175] this is a hollow formalism—just as the United States Supreme Court rejected in *Winship* and *Wilbur*—when the State does not *want* to prove the elements. In this case and others where voluntary manslaughter is a "lesser offense" than the one pursued by the State, adding elements shifts the burden of their proof to the defendant. The State is trying to prove malice. It has no practical interest in trying to prove provocation or passion.

West Virginia's orthodox view of homicide solves all these problems. Involuntary manslaughter is an unlawful killing.[176] Voluntary manslaughter is an intentional unlawful killing.[177] Second degree murder is an intentional killing with malice, and first degree murder requires that the defendant premeditated upon the intent to kill before carrying out the act.[178] Each is a greater offense than the one preceding it, based on easy to explain mental states. The State below posited a counter theory that goes against this Court's caselaw, is internally incoherent, and cannot be explained intelligibly to a lay jury. The circuit court committed reversible error by instructing upon the latter.

---

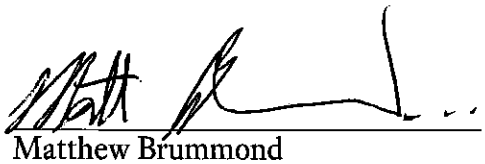
[172] *See id.* at 696–97.
[173] *Id.* at 699 (cleaned up) (*emphasis added*).
[174] *Id.* at 703–04.
[175] A.R. 621.
[176] *Lough*, 143 W. Va. 838 at Syl. Pt. 3; *see also Criminal Law Instructions Manual*, 45.
[177] *McGuire*, 200 W. Va. 823 at Syl. Pt. 3; *see also Criminal Law Instructions Manual*, 46.
[178] *See e.g. Guthrie*, 194 W. Va. at 676; *see also Criminal Law Instructions Manual*, 47–49.

CONCLUSION

Twenty-three years ago, this Court stepped in to correct a jurisdictional slide that had made a mess of West Virginia's homicide law. That slide is happening again, and lower courts and practitioners need guidance from this Court.

Petitioner therefore urges the Court to reassert the orthodox view of homicide by reversing his conviction and overruling the incompatible dicta relied upon by the State. *Guthrie* provides cogent law, Public Defender Service's *Criminal Law Instruction Manual*[179] provides a practical model, and Petitioner's case provides a just opportunity for restoring meaningful differences between the degrees of homicide.

Respectfully submitted,
Hayden Drakes,
By Counsel



Matthew Brummond
W. Va. State Bar No. 10878
Appellate Counsel
Public Defender Services
Appellate Advocacy Division
One Players Club Drive, Suite 301
Charleston, W. Va. 25311
Phone: 304-558-3905
Fax: 304-558-1098
matt.d.brummond@wv.gov
Counsel for Petitioner

[179] *Criminal Law Instructions Manual*, (Public Defender Services, 7th ed. 2018) (available at: https://pds.wv.gov/Criminal-Law-Research-Center/publications/Documents/Jury%20Instructions%207th%20Edition.pdf).