IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-1102

STATE OF WEST VIRGINIA,

Plaintiff below,
Respondent,

v.

GERALD WAYNE JAKO, JR.,

Defendant below,
Petitioner.

RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The circuit court violated Petitioner's Sixth Amendment right to confrontation by admitting a codefendant's recorded statement even though she did not testify. This violation was predicated on an erroneous finding that Petitioner caused his codefendant's unavailability by wrongdoing.

2. The circuit court violated Petitioner's Sixth Amendment right to conflict-free counsel by not disqualifying Petitioner's counsel who was good friends with the financial victim of the robbery.

3. The circuit court gave the jury a confusing and nonresponsive answer when they asked whether they could convict Petitioner of first degree robbery if they believed the crime was staged. As a matter of plain error, the circuit court should have instructed the jury that a staged crime cannot constitute first degree robbery.

STATEMENT OF THE CASE

A. Procedural History.

The Petitioner, Gerald Wayne Jako, Jr., along with Samantha England and Jeremiah Dunn, was indicted by an Ohio County, West Virginia, Grand Jury under a two Count Indictment charging him with: (1) First Degree Robbery of State Line Café by presenting a firearm and taking State Line Café's property (i.e., United States currency) which was then lawfully in the care, control, and custody of State Line Café's employee, Shauna Cobb, in violation of West Virginia Code § 61-2-12(a)(2); and, (2) the Use or Presentation of a Firearm during the Commission of a Robbery, to wit, the robbery charged in Count 1 of the Indictment in violation of West Virginia Code § 61-7-15a. A.R. 1303-1304. A petit jury convicted the Petitioner of First Degree Robbery, but acquitted him of the Use or Presentation Count. A.R. 1372, 1375. The circuit court sentenced the Petitioner to 100 years of incarceration under the Robbery conviction. A.R. 1400. The Petitioner appealed his conviction to this Court.

B. Pretrial Proceedings

1. *Admissibility of the Samantha England Statement.*

Sometime in early July, 2019, Samantha England's then counsel negotiated a plea agreement with the State. A.R. 51-52. The plea agreement required Ms. England to testify against her co-defendants, the Petitioner and Mr. Dunn. A.R. 52. At the time of the plea, Ms. England was about to turn 21 years old. A.R. 51. The Petitioner and Ms. England had a girlfriend/boyfriend relationship. A.R. 52-53. The Petitioner apparently became aware of the England plea agreement and her July 10, 2019, statement at a pretrial hearing on July 19, 2019. A.R. 20, 1329. Because the plea agreement required Ms. England to testify against her co-defendants, Ms. England gave a recorded statement to the authorities on July 10, 2019. A.R. 53-54.

On July 30, 2019, when Ms. England appeared in circuit court for her plea hearing, she informed her counsel she no longer desired to plead guilty. A.R. 55. Ms. England was asked if she was afraid of the Petitioner and she responded, "absolutely" or "definitely." A.R. 59; 64-65.

Because Ms. England also apparently indicated at the July 30 hearing that she would not testify against the Petitioner, A.R. 1327, on August 7, 2019, the State filed *State's Motion to Admit July 10, 2019 Audio Interview of Samantha England.* A.R. 1326-1331. In this Motion, the State asserted the Petitioner "has sought to silence and succeeding [sic] in silencing his former girlfriend (i.e., Ms. England)." A.R. 1327. The State further asserted "[b]y virtue of his wrongdoing, the [Petitioner] forfeits his right to complain about her absence and his inability to confront Ms. England at trial." A.R. 1328. The State supported its claim by citation to certain telephone calls occurring between the Petitioner and Ms. England. A.R. 1328. Specifically, the State asserted in paragraph 12 of its Motion:

> (A) On July 23, 2019 in the phone call that begins at 1629, the [Petitioner] informs Ms. England that he "has no use" for her. Later, he tells her

"you can be whatever you want to be as long as it's loyal and honest and true to me. (footnote omitted)"

(B) On July 23, 2019 in the phone call that begins at 226, the [Petitioner] tells her that "I told you I would never leave you unless you were disloyal. That is the one line you cannot cross and come back from." Later in that call, when Ms. England tells him that he can't stand the fact that she stood up for herself, he exclaims, "You're so twisted – you think it's a good thing – then your [sic] run your mouth when I am upset. That's hoodrat thinking. It is your job to submit to your husband and not run your mouth. The only time I'm flipping is when you do fucked up shit. Running your mouth is stupid – it's not good. It's destructive."

(C) In the phone call of July 23, 2019 that begins at 2144, the [Petitioner] tells her "You run your fucking mouth all the time....I know who you are. You're driving a wedge between us. Or there will be no us. If you can't stop yourself from doing this hoodrat shit, then you can't be with me because you're going to put me in bad situations. Please for once, be real. Tell me right now, if you're capable or if you are not willing to be what I want. Maybe you're not the one. You continually do this shit that I can't accept. I need you to be honest. Are you or are you not the one?"

(D) On July 24, 2019 in the phone call that begins at 2145, the [Petitioner] tells her "I love you. Do you want to come clean about anything?" to which she responds that she hasn't done anything. The [Petitioner] then states, "You're lying. I know things." Ms. England states, "the only thing I have done in what you heard in Court on Friday [July 19] (footnote omitted). And that's something I regret.

(E) On July 25, 2019 in the phone call that begins at 1631, Ms. England states, "You've been good to me Mr. Jako, what would you like in return? My love is all I have to offer right now." The [Petitioner] replies, "Your loyalty." At the end of the phone call, she tells him, "You've got all my love, my loyalty. I'm all in."

(F) In the very next phone call on July 25, 2019 that begins at 2208, the [Petitioner] tells Ms. England, "Listen. I love you. Do you understand? I want you to be the woman I can count on, the person I can trust, the person I'm gonna spend the rest of my life with, and I can't spend the rest of my life with you if I can't trust you."

(G) On July 28, 2019 in the phone call that begins at 2204, a mere two days before her plea hearing, Ms. England tells him "I'm not gonna do anything stupid. I got you. Seriously." The [Petitioner] replies then "Let me love you already."

A.R. 1328-1330. On August 15, 2019, the circuit court conducted a hearing on the State's motion. A.R. 34. At this hearing, the State submitted its Exhibits 2 and 3 which contained the referenced phone calls. A.R. 46. The circuit court directed the parties to submit supplemental briefs with any additional excerpts from the conversations the parties wished the circuit court to consider. A.R. 81, 1350. On August 16, 2019, the State submitted the *State's Supplement to State's Motion to Admit July 10, 2019 Audio Interview of Samantha England.* A.R. 1343. The Petitioner did not file any pleadings in response to the circuit court's request, but did submit an email asking the circuit court to consider the conversations in their entirety, asserting that the conversations spoke for themselves, and identifying that most of the calls were initiated by Ms. England. A.R. 1353-1354.

On August 20, 2019, the circuit court ruled in favor of the State and entered an *Order Allowing Admission of Co-Defendant England's Statements*. A.R. 1344. The circuit court reiterated and summarized the excerpts that the State had provided to it:

> (A) On **July 23, 2019** in the phone call that begins at 1629, the [Petitioner] informs Ms. England that he "has no use" for her. Later, he tells her "you can be whatever you want to be as long as it's loyal and honest and true to me."
>
> (B) On **July 23, 2019** in the phone call that begins at 2261, the [Petitioner] tells her that "I told you I would never leave you unless you were disloyal. That is the one line you cannot cross and come back from." Later in that call, when Ms. England tells him that he can't stand the fact that she stood up for himself, he exclaims, "You're so twisted - you think it's a good thing – then your [sic] run your mouth when I am upset. That's hoodrat thinking. It is your job to submit to your husband and not run your mouth. The only time I'm flipping is when you do fucked up shit. Running your mouth is stupid – it's not good. It's destructive.
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> (C) In the phone call on **July 23, 2019** that begins at 2144, [the Petitioner] tells her "You run your fucking mouth all the time .... I know who you are. You're driving a wedge between us. Or there will be no us. If you can't stop yourself from doing this hoodrat shit, then you can't be with me because you're going to put me in bad situations. Please for once, be real. Tell me right now, if you're capable or if you are not willing to be

what I want. Maybe you're not the one. You continually do this shit that I can't accept. I need you to be honest. Are you or are you not the one?"

(D) On **July 24, 2019** in the phone call that begins at 2145, the [Petitioner] tells her "I love you. Do you want to come clean about anything? To which she responds that she hasn't done anything. The [Petitioner] then states, "You're lying. I know things. Ms. England then states, "the only thing I have done is what you heard in Court on Friday. And that's something I regret.

(E) On **July 25, 2019**, in the phone call that begins at 1631, Ms. England states, "You've been real good to me Mr. Jako what would you like in return? My love is all I have to offer right now." The [Petitioner] replies, "Your loyalty." At the end of the phone call, she tells him, "You've got my love, my loyalty. I'm all in."

(F) In the very next phone call on **July 25, 2019** that begins at 2208, the [Petitioner] tells Ms. England, "Listen. I love you. Do you understand? I want you to be the woman I can count on, the person I can trust, the person I'm gonna spend the rest of my life with, and I can't spend the rest of my life with you if I can't trust you."

(G) On **July 28, 2019** in the phone call that begins at 2204, a mere two days before the plea hearing, Ms. England tells him, "I'm not gonna do anything stupid. I got you. I love you. Seriously." The [Petitioner] replies then "Let me love you already."

(H) On Exhibit 2, the State directs the Court's attention to and requests that the Court review the **July 23, 2019 call that begins at 1753.** The State specifically directs this Court to listen to the first six (6) minutes of the call. This call is a few days after the July 19, 2019 Pretrial where the [Petitioner] learned of England's plea agreement. The [Petitioner] discusses how he was in Court and heard the plea which he characterized as "bad news". The [Petitioner] states the prosecutor said in court that England took a plea bargain. The [Petitioner] states that he asked England about the plea, pretending not to know about it. He clearly stresses to the person he is talking to that "this in on a recorded line, you hear?". The [Petitioner] stresses how he "needs to keep in contact with my bitch" and that when he doesn't talk to her, she gets weak; and when she gets weak, she starts telling lies on him. The [Petitioner] refers to himself as "her source of strength". He further states that in order for her not to tell lies on him, he needs to keep talking to her and loving on her.

(I) Further on Exhibit 2, in that same **July 23, 2019 call that begins at1753** the State directs the Court to minutes 10:00 to 10:40 wherein the

[Petitioner] states that he knows "Samantha is back at Northern and they can't block the calls no more", meaning Northern Regional Jail. The [Petitioner] asks the person he called if he would be willing to merge his calls with England from here on out, to which the person called agrees.

(J) Exhibit 3 contains all calls between July 30 and August 6, 2019 from co-Defendant Samantha England. They are all 3-way calls wherein England and [the Petitioner] call a mutual third party who merges the calls. On Exhibit 3, in the call that begins on **July 23, 2019** at 1629, the State directs the Court to the beginning of the call through the first 3:35 minute. [sic] At the beginning of the call, England states "I was told to call this number." She discusses with the person she calls that she and the [Petitioner] talk everyday 4:30 and 9:45 and she decides to wait on the line to see if the [Petitioner] calls in to join the call. The [Petitioner] then joins the call after a musical interlude wherein England is on hold until the [Petitioner] is merged at 3:10 and the third party exits the call at 3:35.

(K) On Exhibit 3, with the same call that begins on **July 23, 2019** at 1629, the State directs the Court to 10:58 through 11:44 wherein the [Petitioner] tells England he can be anything she wants to be as long as she is "loyal and honest and true to" him.

A.R. 1351-1353 (emphasis in original).

The circuit court then cited to Syllabus Point 11 of *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), which held, "[u]nder the doctrine of forfeiture, an accused who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." A.R. 1354. The circuit court also recognized the State bears the burden of wrongdoing by a preponderance of the evidence. A.R. 1355 (citing *Mechling*, 219 W. Va. at 381, 633 S.E.2d at 326).

The circuit court concluded the Petitioner was aware as on July 19, 2019, that Ms. England was going to testify against him. A.R. 1355. It also found:

> A series of phone calls between [the Petitioner] and co–Defendant England indicate [the Petitioner] was trying to make co-Defendant England "loyal" again and to keep her mouth shut. [The Petitioner] constantly referred to his love for co-Defendant England and she needed to be loyal and even worthy of his love. When [the Petitioner] finally asked co-Defendant England if she had anything to tell him,

> she indicated that she had not done anything wrong. In response, [the Petitioner] called her a liar and said "I know things."

A.R. 1356.

The circuit court continued:

> [The Petitioner] intentionally reached out to co-Defendant England, knowing not only she was a potential witness against him, but that she was as part of her plea agreement going to testify against him. While the dialogue between [the Petitioner] and co-Defendant England was not one of threats, it appears [the Petitioner] instead used manipulations and emotions. [The Petitioner] clearly attempted to use his knowledge of co-Defendant's feelings for [the Petitioner] and manipulated her and coerced her into backing out of her plea agreement.

A.R. 1356. The circuit court therefore held, "the State has proven beyond a preponderance of the evidence that [the Petitioner] by his wrongdoing has coerced or manipulated co–Defendant England into renouncing her plea agreement, and thus, wrongfully sought to 'obtain her absence.'" A.R. 1357. Thus, the circuit court ruled that if Ms. England refused to testify against the Petitioner, Ms. England's July 10, 2019, statement could be played for the jury. A.R. 1357.

2. *The Petitioner's counsel's relationships.*

On the morning of trial, the Petitioner's trial counsel advised the circuit court he was not clear who the actual owner of the State Line Café was. A.R. 165. Counsel observed the owner of the real estate is Glessner Enterprises or Gary Glessner. A.R. 166. The owner of the actual business was a Larry Lewis. A.R. 166. The Petitioner's counsel told the circuit court that he knew Mr. Glessner since high school and had taken vacations together. A.R. 166. Trial counsel knew Mr. Glessner "quite well" and had represented him in a legal capacity on a number of occasions. A.R. 166. Petitioner's trial counsel also identified that the he had vacationed with Mr. Lewis along with Mr. Glessner. A.R. 166. The Petitioner's trial counsel informed the circuit court that he became aware of this on the Sunday before Tuesday's start of trial. A.R. 166, 145. The following exchange between the circuit court and the Petitioner's trial counsel ensued:

THE COURT: And do you believe that any of these things you've raised today prevent you from acting ethically in a professional manner in representing your client as best you can in a diligent manner?

[DEFENSE COUNSEL]: Oh, I don't. [The Petitioner] is concerned about that.

THE COURT: Okay. But I'm asking you, though.

[DEFENSE COUNSEL]: No, I don't.

THE COURT: Do you believe that because of these contacts or previous relationships that you've had with these people that you've done things that you should not have done or that you didn't do things that you should have done in this case?

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: Okay. Any other response? All right.

A.R. 167. The circuit court denied the motion for new counsel. A.R. 167.

C. The Trial.

1. *The Testimony.*

Shortly after midnight on August 19, 2018, Ohio County Sheriff's Sergeant Raymond Clouston was called to the State Line Café in response to a reported armed robbery at that establishment. A.R. 376-377. The dispatch stated that two suspects, had robbed the establishment while one was armed with a gun and one was armed with a machete. A.R. 427.

Present when Sergeant Clouston arrived was Shauna Cobb, who was the store manager, and Ms. Cobb's mother. A.R. 378. Ms. Cobb was "very shaken up and nervous, very emotional," A.R. 379, she was "visibly shaken." A.R. 421.

Ms. Cobb related to Sergeant Clouston that she had been working behind the cash register. A.R. 379. A female patron, the only other person in the Café, approached her wanting to break a large bill into change. A.R. 379. The patron said she had to step out to her car which was parked in the

parking lot in front of the Café. A.R. 379-380. As the patron opened the door, two men entered the premises one having a firearm and the other carrying a machete. A.R. 380.[1]

The pair threatened Ms. Cobb with both weapons and forced her to open the cash register and the safe. A.R. 380. The pair also took Ms. Cobb's cell phone. A.R. 380. Ms. Cobb was also placed in zip ties. A.R. 380.

Also arriving on the scene was Ohio County Sheriff's Deputy Branden Brooks. A.R. 424. Ms. Cobb informed Deputy Brooks that she had located a purse in the gaming room in front of one of the video machines that the female patron was playing. A.R. 431. Deputy Brooks located zip ties in the purse and a man's wallet containing a West Virginia driver's license in the Petitioner's name as well as other cards with the Petitioner's name on them. A.R. 431.

Ohio County Deputy Kris Waechter also responded to the robbery. A.R. 477. Deputy Brooks informed Deputy Waechter that a light colored SUV Jeep Liberty was seen leaving the area at the time of the robbery. A.R. 478. Deputy Waechter was unsuccessful in locating the Jeep Liberty. A.R. 478. While looking for the Jeep Liberty, Sergeant Clouston recalled Deputy Waechter to the Café. A.R. 478. Sergeant Clouston had utilized the Find My Iphone application to located Ms. Cobb's cell phone. A.R. 478-479. Deputy Waechter located Ms. Cobb's cell phone just before the I-70 entrance ramp in Claysville, Pennsylvania. A.R. 481. Deputy Waechter fingerprinted the cell phone and sent the prints to the West Virginia State Police Crime Lab. A.R. 489-490. At trial, the State established the Petitioner's fingerprint was on the cell phone. A.R. 986.

Additionally, Ohio County Sheriff's Deputy Andrew Weisal responded to the robbery. A.R. 571. Deputy Weisal began to drive around to see if anyone had observed anything in relation to

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[1]The front door to the Café was secured and entry into the Café could generally only be obtained by ringing a door bell, speaking through an intercom, and being admitted by a store employee. A.R. 519.

the robbery. A.R. 573. Deputy Weisal stopped at the First Shot Last Shot Café approximately one block away from the State Line Café. A.R. 573. Deputy Weisal spoke to the cashier, James Burnside, and informed Mr. Burnside about what had transpired at the State Line Café. A.R. 574. Mr. Burnside related that a vehicle, what he thought was possibly a dark color Jeep Liberty, had pulled into the RM Wilson Company parking lot, A.R. 577, which was directly across the street from the State Line Café. A.R. 577. Deputy Weisal relayed this information to the other Deputies and returned to the State Line Café. A.R. 575.

The State called Amanda Foster who was manager of the State Line Café. A.R. 515. Ms. Foster described Ms. Cobb after the robbery as "pretty shaken, she was pretty upset." A.R. 518. Ms. Foster also testified over $6,000 was stolen during the robbery along with cartons of cigarettes. A.R. 518.

The State called Ms. England. A.R. 533. Ms. England refused to testify and invoked her Fifth Amendment rights. A.R. 534-535.

The State also elicited testimony from Shayla Clelland, who also went by the last name Rodgers. A.R. 619-620. Sometime in August of 2018, Ms. Clelland saw the Petitioner, Ms. England, and Jeremiah Dunn. A.R. 622-623. According to Ms. Clelland, the Petitioner owns a "newer black Jeep." A.R. 624-625. The trio was in Ms. Clelland's kitchen with garbage bags containing money (probably a couple of thousand dollars) and cigarettes. A.R. 625. Ms. Clelland saw a gun in the Jeep which she initially characterized as an "airsoft gun" and saw a machete in her house. A.R. 625-626, 629.

The State further adduced testimony from Ohio County Sheriff's Corporal Nicole Seifert. A.R. 654. Corporal Seifert determined through her investigation that the woman who had come into the State Line Café before the robbery was Samantha England. A.R. 663. Corporal Siefert also

testified that the fingerprints taken by Deputy Waechter matched the Petitioner. A.R. 669. Corporal Seifert also testified that the police reviewed the contents of Ms. Cobb's cell phone and eliminated her as a suspect in the robbery. A.R. 673. Corporal Seifert's investigation also led to another suspect, Kristen Walton, who was an employee of State Line Café and who was believed to be involved in setting the robbery up. A.R. 674.

Corporal Siefert also testified she was able to connect phone calls occurring between the Petitioner's telephone and Mr. Dunn's telephone beginning at 11:00 p.m. on August 19, 2018. A.R. 678-679. Corporal Seifert was also able to establish that Ms. Walton had direct telephone contact with Mr. Dunn just prior to the robbery and shortly thereafter. A.R. 681-682. After obtaining a warrant to search Ms. Walton's phone, Corporal Siefert found information regarding the robbery of State Line Café on Ms. Walton's phone. A.R. 685. Corporal Siefert testified that she confirmed Mr. Dunn's role in the robbery in that he was the one armed with the machete, he took the money out of the cash registers. A.R. 685-686.

During Corporal Siefert's testimony, the July 10, 2018, interview of Ms. England was admitted into evidence, A.R. 692, and played for the jury. A.R. 693. This interviewed recording detailed the plot and the robbery of State Line Café including Ms. England opening the door for the Petitioner and Mr. Dunn to enter the Café to rob it, *see also* A.R. 694-695, and that "J.J." referred to the Petitioner.

The State also called Kristen Walton. A.R. 960. Ms. Walton was an employee of the State Line Café in August of 2018. A.R. 963. She entered a plea to a conspiracy charge in regard to the State Line Café robbery. A.R. 963. According to Ms. Walton, Mr. Dunn (who also goes by the name "J Rock," A.R. 964), sent her text messages about the robbery. A.R. 964. The first message was sent at 11:23 p.m. on August 18, 2018, and read, "'Hey love bug we're getting ready to do this shit.

Please say a prayer for me. I will text you when it's over with." A.R. 966. The second text message was sent from Mr. Dunn to Ms. Walton at 12:02 a.m. on August 20, 2018, and read, "'we did it my nigga.'" A.R. 966. The final text message was from Mr. Dunn to Ms. Walton at 1:10:50 a.m. on August 20, 2018, and said, "'Jj [sic] girl left her purse in there dumb ass bitch.'" A.R. 966-967. Ms. Walton testified she had no knowledge Shauna Cobb had anything to do with the robbery. A.R. 967.

Shauna Cobb offered testimony for the State. A.R. 993. Ms. Cobb was working at the State Line Café on August 19, 2018. A.R. 995. Around 11:30 p.m., Ms. Cobb was beginning to close down. A.R. 995-996. As Ms. Cobb was getting ready to close, a woman who Ms. Cobb had never seen before arrived at the Café and Ms. Cobb admitted her to the Café. A.R. 997. The woman was on her cell phone, but Ms. Cobb was unable to hear what was said in part due to the fact that the woman was speaking in a "whisper, almost as if she didn't want [Ms. Cobb] to hear what she was saying." A.R. 1000. After five or ten minutes, the woman approached Ms. Cobb and asked for change. A.R. 1000-1001. The woman then said that she needed to run out to her car. A.R. 1001. Ms. Cobb turned away from the woman and next heard someone yell, "'Move.'" A.R. 1003. Ms. Cobb turned around and saw a firearm and started to get down on the ground, as she had always been told in her previous jobs if she saw a firearm "you get down." A.R. 1003. The robbers were covered up from head to toe, but Ms. Cobb was able to identify them as male by their voices. A.R. 1005. Ms. Cobb observed a firearm and a machete. A.R. 1006. The pair took money from the cash register and the safe. A.R. 1006-1007. The pair put the spoils of the robbery into trash bags. A.R. 1008. Ms. Cobb was also tied up by the robbers. A.R. 1007. After getting out of the zip ties, Ms. Cobb discovered the purse with the Petitioner's ID in it. A.R. 1017. The purse was sitting in the same chair that the woman who had left earlier was sitting in. A.R. 1017. Ms. Cobb knew it

belonged to that woman because she had earlier cleaned the room and the purse was not there before the woman arrived. A.R. 1017. Ms. Cobb denied having anything to do with the robbery. A.R. 1018.

The State rested. A.R. 1045.

The Defense's only witness was Corporal Siefert. A.R. 1060. The purpose of calling Corporal Siefert was to try to paint Ms. Cobb as a part of the robbery. *See* A.R. 1124-1125.

2. *The Jury Question.*

During jury deliberations, the jury asked the circuit court, "[i]f there is belief the crime was staged, can we still find the defendant guilty of robbery in the first degree?" A.R. 1149. The circuit court responded, without objection, that "[t]he Court cannot answer this question specifically. You are to be guided solely by the application of the law already given to you to the facts as you find them.'" A.R. 1151.

3. *The Verdict.*

The jury convicted the Petitioner of First Degree Robbery, but found in a special interrogatory relating to the use of a firearm that the Petitioner did not use, present or brandish a firearm during the commission of a robbery. A.R. 1163.

SUMMARY OF THE ARGUMENT

The Petitioner raises three assignments of error, none of which entitle him to relief.

First, the Petitioner claims the circuit court erred in admitting Samantha England's July 10, 2019, statement into evidence against him at his trial. Because the Petitioner's wrongdoing, however, was the cause of Ms. England not testifying against him, the circuit court properly invoked the forfeiture by wrongdoing doctrine to conclude the Petitioner forfeited his right to cross-examine Ms. England on her statement.

Second, the Petitioner claims that his trial counsel had a conflict of interest because of his friendships with the owner of the real estate upon which the State Line Café was situate and with the owner of the State Line Café. Because the Petitioner has not shown that there was any actual conflict of interest in this relationship and has also failed to show how any relationship adversely affected trial counsel's representation, the Petitioner's claim should be denied.

Finally, the Petitioner invokes the plain error doctrine to assert that the circuit court's response to the jury's question was grounds for reversing his conviction. Because the circuit court properly declined to answer the jury's question, there was no error. In the absence of any error, plain error holds no sway. Consequently, the Petitioner's conviction should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

There is no need for oral argument in the case as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

ARGUMENT

A. The Petitioner's Sixth Amendment right to cross-examine Samantha England was not violated as the circuit court correctly found that the Petitioner forfeited such right by wrongdoing.

The Petitioner claims the State failed to establish his wrong-doing and, thus, admission of Samantha England's July 10, 2019 statement deprived him of his Sixth Amendment confrontation rights. Pet'r Br. at 7. This Court reviews the Petitioner's Confrontation Clause claim under a multi-faceted standard of review: "Three separate levels of scrutiny apply to Confrontation Clause claims: The circuit court's order is reviewed for abuse of discretion; its factual findings are reviewed for clear error; and its legal rulings are reviewed de novo." *State v. Martin*, No. 13-0112,

2013 WL 5676628, at *2 (W. Va. Oct. 18, 2013) (memorandum decision).[2] Because the circuit court did not abuse its discretion in admitting Samantha England's July 10, 2019, statement against the Petitioner at his trial, the judgment of the circuit court should be affirmed.

The Sixth Amendment to the United States Constitution provides, in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The confrontation right includes the right of cross-examination. "The Sixth Amendment to the United States Constitution guarantees an accused the right to confront the witnesses against him. The Sixth Amendment right of confrontation includes the right of cross-examination." Syl. Pt. 1, *State v. Mullens*, 179 W. Va. 567, 568, 371 S.E.2d 64, 65 (1988). The right of confrontation is not absolute and may need to give way when faced with other sufficiently important competing interests. *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) ("It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests."). One of these competing sufficiently important interests is maintaining the integrity of the judicial system. Thus, a defendant forfeits the right of cross-examination if the defendant by wrongdoing obtains the absence of a witness. "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways

[2]The Petitioner claims that "[w]hether the Petitioner forfeited his constitutional right to confrontation is a question of law reviewed *de novo*." Pet'r Br. at 8. He cites *State v. Arbaugh*, 215 W. Va. 132, 135, 595 S.E.2d 289, 292 (2004) (per curiam) in support of this conclusion. Pet'r Br. at 8 & n.48. *Arbaugh* was not a confrontation clause case, but was an appeal of a denial for reduction of sentence under West Virginia Rule of Criminal Procedure 35(b). *Arbaugh*, 215 W. Va. at 133, 595 S.E.2d at 290 ("Tony Dean Arbaugh, Jr. (hereinafter "Mr. Arbaugh") appeals the denial of his W. Va. R. Crim P. 35(b) motion by the Circuit Court of Pendleton County, West Virginia.").

that destroy the integrity of the criminal-trial system." *Davis v. Washington*, 547 U.S. 813, 833 (2006). Consequently, "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds[.]" *Crawford v. Washington*, 541 U.S. 36, 62 (2004). Thus, "[u]nder the doctrine of forfeiture, an accused who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." Syl. Pt. 11, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006). This forfeiture by wrongdoing rule is codified in West Virginia Rules of Evidence 804(b)(6), "[t]he following are not excluded by the rule against hearsay if the declarant is unavailable as a witness. . . [a] statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result." The forfeiture by wrongdoing rule prevents "abhorrent behavior which strikes at the heart of the system of justice itself." Fed. R. Evid. 804(b)(6), adv. comm. note (citation and internal quotation marks omitted). "The U.S. Supreme Court has suggested that the government must meet a preponderance-of-the-evidence standard to establish forfeiture[.]" *Mechling*, 219 W. Va. at 381, 633 S.E.2d at 326.

The Fourth Circuit has encapsulated the forfeiture by wrongdoing rule as follows:

> Before applying the forfeiture-by-wrongdoing exception, a trial court must find, by a preponderance of the evidence, that "(1) the defendant engaged or acquiesced in wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness."

United States v. Dinkins, 691 F.3d 358, 383 (4th Cir. 2012) (quoting *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005)). "[F]ederal courts have broadly construed the elements of the forfeiture-by-wrongdoing exception." *United States v. Dinkins*, 691 F.3d 358, 383 (4th Cir. 2012). *See also United States v. Cazares,* 788 F.3d 956, 975 (9th Cir. 2015) (quoting *United States v. Gray*, 405 F.3d 227, 242 (4th Cir. 2005)) ("The federal courts 'have sought to effect the purpose of the forfeiture-by-wrongdoing exception by construing broadly the elements required for its

application.'"); *State v. Hallum*, 606 N.W.2d 351, 356 (Iowa 2000) (observing "[t]he broad scope of conduct that may give rise to a forfeiture").

Wrongdoing, of course, includes criminal conduct, but it is not limited to criminal conduct. Fed. R. Evid. 804(b)(6), adv. comm. note ("The wrongdoing need not consist of a criminal act."). The Petitioner, therefore, is incorrect when he asserts in his Brief that "'[m]anipulation and emotions' as presented in this case, do not constitute wrongdoing, and in the absence of threats, are insufficient to abrogate fundamental constitutional protections." Pet'r Br. at 10. "The weight of the case law both here and elsewhere is thus clear: wrongdoing, for purposes of application of the forfeiture exception, need not take the form of an overt threat of harm." *State v. Maestas*, 412 P.3d 79, 88 (N.M. 2018). "Misconduct sufficient to give rise to a forfeiture is not limited to the use of threats, force or intimidation." *State v. Hallum*, 606 N.W.2d 351, 356 (Iowa 2000). Rather, "'any significant interference' with the declarant's appearance as a witness, including the exercise of 'persuasion and control' or an instruction to invoke the Fifth Amendment privilege, amounts to wrongdoing that forfeits the defendant's right to confront the declarant." *United States v. Gray*, 405 F.3d 227, 242 (4th Cir. 2005) (quoting *Steele v. Taylor*, 684 F.2d 1193, 1201 (6th Cir. 1982)). As observed by the Virginia Court of Appeals, "[s]ome of our sister states have held that wrongful acts include not only crimes, such as murder, assault, threats, and other forms of intimidation, but also *declarations of love* . . . when they are clearly intended as inducements for the witness not to testify." *Cody v. Commonwealth*, 812 S.E.2d 466, 481 (Va. Ct. App. 2018) (emphasis added). *See also United States v. Jonassen*, 759 F.3d 653, 662 (7th Cir. 2014) (finding of forfeiture by wrongdoing based upon a defendant's conduct "directed at a young woman who was susceptible to his manipulation"). The circuit court's ruling fits well within this long line of compelling precedent.

The circuit court found:

> A series of phone calls between [the Petitioner] and co–Defendant England indicate [the Petitioner] was trying to make co-Defendant England "loyal" again and to keep her mouth shut. [The Petitioner] constantly referred to his love for co-Defendant England and she needed to be loyal and even worthy of his love. When [the Petitioner] finally asked co-Defendant England if she had anything to tell him, she indicated that she had not done anything wrong. In response, [the Petitioner] called her a liar and said "I know things."

A.R. 1356.[3]

The circuit court continued:

> [The Petitioner] intentionally reached out to co-Defendant England, knowing not only she was a potential witness against him, but that she was as part of her plea agreement going to testify against him. While the dialogue between [the Petitioner] and co-Defendant England was not one of threats, it appears [the Petitioner] instead used manipulations and emotions. [The Petitioner] clearly attempted to use his knowledge of co-Defendant's feelings for [the Petitioner] and manipulated her and coerced her into backing out of her plea agreement.

A.R. 1356.[4]

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[3]The Petitioner claims Ms. England initiated contact with the Petitioner. Pet'r Br. at 9. The circuit court addressed this contention in footnote 1 of its Order:

> Contrary to [the Petitioner's] assertion, the evidence indicates that [the Petitioner] did reach out to co-Defendant England first. For example, there is a phone call on July 22, 2019 where [the Petitioner] contacted the "merger" named "Hood." During that phone call, [the Petitioner] expressed his need to speak with co-Defendant England and he needed "Hood's" help with this. Then, the first call on July 23, 2019, co-Defendant England calls the same "merger" named "Hood" and she says " I was told to call this number," then asks the "merger" named "Hood" "has [the Petitioner] called yet?" Within a few seconds, the "merger" merged/conferenced in [the Petitioner] on the call.

A.R. 1356.

[4]The Petitioner claims the circuit court's ruling was based on an antiquated and sexist argument that women are "weak, emotional creatures in need of greater protections." Pet'r Br. at 11. He points out that in *Davis v. Washington*, 547 U.S. 813 (2006), the United States Supreme Court rejected the proposition that domestic violence cases require "greater flexibility in the use of testimonial evidence[.]" *Davis*, 547 U.S. at 832. Pet'r Br. at 11. This statement, however, was nothing more than a rejection of the argument brought to the Court in that case that what constitutes "testimonial" evidence should vary with the nature of the crime being tried. *See, e.g., Brief of*

For the foregoing reasons, the judgement of the circuit court should be affirmed.

B. The Petitioner has not shown a conflict of interest on his trial counsel's part.

The Sixth Amendment to the United States Constitution provides, in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Where there is a right to counsel, there is a corollary right to counsel that is free from conflicts of interest. *E.g.*, *Wood v. Georgia*, 450 U.S. 261, 271 (1981); Syl. Pt. 2, *Cole v. White*, 180 W. Va. 393, 376 S.E.2d 599 (1988). In the present case, the Petitioner contends that his counsel was laboring under a conflict of interest because he was friends with the owner of the real estate where the State Line Café was situate and was friends with the actual owner of the Café itself. Pet'r Br. at 13. Because there was no conflict, the Petitioner is not entitled to relief.

Amici Curiae the National Network to End Domestic Violence, Indiana and Washington Coalitions Against Domestic Violence, Legal Momentum, et al. in Support of Respondents, *Davis v. Washington*, 547 U.S. 813 (2006) (Nos 05-522A, 05-5705), 2006 WL 284229 (arguing for, inter alia, a narrow definition of testimonial so prosecutions can proceed in the domestic violence arena). But that rejection has nothing to do with the forfeiture by wrongdoing doctrine which *Davis* specifically reiterated. *Davis*, 547 U.S. at 833. Thus, the declarant's circumstances and the relationship of the defendant to the declarant remain perfectly permissible factors for courts to consider in making a forfeiture decision. *See Giles v. California*, 554 U.S. 353, 377 (2008) ("The domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine."). And domestic violence is not the only time that the relational context is pertinent to a finding of forfeiture. *See*, *e.g.*, *Hallum*, 606 N.W.2d at 352 (declarant was a minor and the defendant's half-brother); *United States v. Jonassen*, 759 F.3d 653, 662 (7th Cir. 2014) (finding of forfeiture by wrongdoing based upon a defendant's conduct "directed at a young woman [defendant's daughter] who was susceptible to his manipulation").

1. *The Petitioner has not shown a conflict of interest.*

The Petitioner on appeal claims that his trial counsel labored under a conflict of interest. This is not correct; the Petitioner's trial counsel had no conflict of interest. As such, the circuit court should be affirmed.

Normally, one claiming ineffective assistance of counsel must show that defense counsel's conduct fell below a reasonable standard of professional competence and he was prejudiced thereby. Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). This Court has recognized, however, that "[u]nder state and federal constitutional law, 'a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.'" *State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 203, 691 S.E.2d 183, 194 (2010) (per curiam) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349–350 (1980)). In determining if a conflict exists, "a mere theoretical division of loyalties" is insufficient. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002). *See Cuyler*, 446 U.S. at 350 (holding "that the possibility of conflict is insufficient to impugn a criminal conviction"). The burden of proving an actual conflict rests with the Petitioner, as does the burden to show adverse affect. *See, e.g., Fullwood v. Lee*, 290 F.3d 663, 689 (4th Cir. 2002) (quoting *Cuyler*, 446 U.S. at 348) ("On a conflict-of-interest claim, petitioner must show (1) that his attorney had 'an actual conflict of interest' and (2) that the conflict of interest 'adversely affected his lawyer's performance.'"). "[A]n adverse effect is not presumed from the existence of an actual conflict of interest." *United States v. Nicholson*, 475 F.3d 241, 249 (4th Cir. 2007).

"The question of whether counsel labored under an actual conflict of interest that affected counsel's performance is a mixed question of law and fact that we review de novo." *Williams v. French*, 146 F.3d 203, 212 (4th Cir. 1998). Because the Petitioner has not carried his burden to

show an actual conflict existed or that any such conflict adversely affected counsel's representation, his conviction should be affirmed.

On the day of trial, the Petitioner's trial counsel informed the court that he (trial counsel) was good friends with the owner of the property upon which the State Line Café was situate and had done legal work for the real estate owner. Defense counsel was also good friends with the actual owner of the Café. A,R, 166-167. The following exchange then occurred between counsel and the circuit court:

> THE COURT: And do you believe that any of these things you've raised today prevent you from acting ethically in a professional manner in representing your client as best you can in a diligent manner?
>
> [DEFENSE COUNSEL]: Oh, I don't. [The Petitioner] is concerned about that.
>
> THE COURT: Okay. But I'm asking you, though.
>
> [DEFENSE COUNSEL]: No, I don't.
>
> THE COURT: Do you believe that because of these contacts or previous relationships that you've had with these people that you've done things that you should not have done or that you didn't do things that you should have done in this case?
>
> [DEFENSE COUNSEL]: No, Your Honor.
>
> THE COURT: Okay. Any other response? All right.

A.R. 167. The circuit court denied the motion for new counsel. A.R. 167. The circuit court ruled properly.

Courts have recognized that "friendship alone is not an actual conflict of interest[.]" *Rudd v. Scully*, 199 F.3d 1323 (2d Cir. 1999). *See, e.g., Hooper v. State*, No. 76316-COA, 2019 WL 2158325, at *1 (Nev. App. May 15, 2019) (". . . Hooper claims the district court erred by denying his claim there was a conflict of interest between him and counsel because his counsel was a

lifelong friend of the victim. Hooper failed to demonstrate there was an actual conflict of interest."). The South Carolina Supreme Court rejected a claim similar to the one now brought by the Petitioner. *See Padgett v. State*, 484 S.E.2d 101 (S.C. 1997). In *Padgett*, eight months prior to Padgett's guilty plea to burglary, trial counsel sought to be relieved. *Id.* at 103. Padgett was present at the motion hearing. *Id.* At the hearing, counsel informed the trial judge that two of the burglary victims, Gustin and Lambridge, were his friends and he was representing the sheriff in a civil matter. *Id.* Counsel stated that he disclosed these concerns to Padgett. *Id.* Upon questioning by the trial judge, counsel stated that he did not believe his representation of Padgett would be influenced by his representation of the sheriff. *Id.* The trial judge then denied the motion, indicating petitioner could move on his own behalf to have counsel removed. *Id.*

At a habeas hearing, counsel testified his friendships with Gustin and Lambridge did not affect his representation of Padgett. *Id.* Padgett testified that while he was present at the motion to be relieved, he was not told he could seek to have counsel relieved. *Id.* The South Carolina Supreme Court ruled that Padgett failed to establish his counsel had an actual conflict of interest because "[c]ounsel specifically denied his relationships with two of the victims or his representation of the sheriff affected his representation of [Padgett]." *Id.* Because the Petitioner's counsel was not laboring under a conflict of interest, the Petitioner is not entitled to relief.

Moreover, to invoke the presumed prejudice rule a petitioner must establish that counsel's actual conflict adversely affected the representation. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002). The adverse affect must be traceable to the conflict itself. *United States v. Burgos-Chaparro*, 309 F.3d 50, 53 (1st Cir. 2002) ("some adverse action or inaction is required that can be traced to the conflict in loyalty."). *See also Mickens v. Taylor,* 240 F.3d 348, 361 (4th Cir. 2001) ("the petitioner must establish that the defense counsel's failure to pursue [an alternate] strategy or tactic was

linked to the actual conflict."), *aff'd*, 535 U.S. 162 (2002); *Perillo v. Johnson*, 79 F.3d 441, 449 (5th Cir. 1996) ("Following the approach of our sister circuits, we hold that to show adverse effect, a petitioner must demonstrate that some plausible defense strategy or tactic might have been pursued but was not, because of the conflict of interest."). "Merely to speculate that the divided loyalty could have caused such a step is not enough." *Burgos-Chaparro*, 309 F.3d at 53. The Petitioner provides a laundry list of counsel's actions and inactions as a basis to show adverse affect. Pet'r Br. at 13-14. But the Petitioner does not provide any basis at all to establish that these actions or inactions of counsel were attributable to the claimed conflict from which defense counsel allegedly labored.[5] Consequently, the Petitioner has failed to carry his burden.

For the above- reasons, the judgment of the circuit court should be affirmed.

2. *The Petitioner is not entitled to relief under State v. Reedy, 177 W. Va. 406, 352 S.E.2d 158 (1986).*

The Petitioner also seeks relief under *State v. Reedy*, 177 W. Va. 406, 352 S.E.2d 158 (1986). Pet'r Br. at 14. Because *Reedy* is not applicable to the facts of the Petitioner's case, *Reedy* gives him no solace.

In *Reedy*, this Court held,

> The existence of a family relationship between a defense counsel and the crime victim must be disclosed to the accused at the earliest opportunity, so that the accused can make an intelligent decision whether to waive his right to assistance of counsel free from potential conflict, or to demand or retain different counsel.

Syl. Pt. 3, *State v. Reedy*, 177 W. Va. 406, 352 S.E.2d 158 (1986). Facially, Syllabus Point 3 of *Reedy* does not apply here because there was no family relationship between the Petitioner's trial

[5]Nothing would preclude the Petitioner from pursuing a claim in a habeas arguing that these alleged actions or inactions otherwise met the *Miller* general standard for ineffective assistance of counsel. The State takes no position, of course, on the merits of any such potential claims.

counsel.[6] Moreover, in *Reedy*, there was no dispute that victim was the prosecuting witness. *Reedy*, 177 W. Va. at 409 n.1, 352 S.E.2d at 161 n.1. In the Petitioner's case, neither the real estate owner nor the owner of the Café was called as a witness. Finally, there was also no dispute in *Reedy* that the relationship was not disclosed prior to trial. *Id.*, 352 S.E.2d at 161 n.1. Here, defense counsel's relationships with the real estate owner and the Café owner were disclosed prior to the trial commencing (albeit on the day was scheduled to start).[7]

Reedy is readily distinguishable from the case at bar and does not provide a basis to reverse the Petitioner's convictions.

3. *Because this is a claim of ineffective assistance of counsel it should be addressed in a habeas corpus proceeding and not a direct appeal.*

Conflict of interest is a species of ineffective assistance of counsel. *See, e.g., In re Sepulvado*, 707 F.3d 550, 555 n.10 (5th Cir. 2013) (citing *United States v. Infante*, 404 F.3d 376, 389 (5th Cir.2005) (quotation and citations omitted)); *Brooks v. Bobby*, 660 F.3d 959, 963 (6th Cir. 2011); *People v. Garner*, 381 P.3d 320, 330 (Colo. Ct. App. 2015). This Court has held that ineffective assistance of counsel cases are generally best brought in a post-conviction proceeding. *See, e.g., State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992) ("It is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective

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[6]The Court in *Reedy* pointed out that the victim was both related to and a friend of defense counsel. *Reedy*, 177 W. Va. at 409 & n.1, 352 S.E.2d at 161 & n.1. This friendship was not of substantial significance to the Court in *Reedy* as it was not elevated as a condition of the new syllabus point in that case. *Cf. JWCF, LP v. Farruggia*, 232 W. Va. 417, 425, 752 S.E.2d 571, 579 (2013) (declining to rely on a statement in a prior opinion that was not elevated to a syllabus point).

[7]Defense counsel explained that he first became aware of the relationships on the Sunday before the trial (which was set to start on Tuesday) by reading "every little line" in discovery. A.R. 167. According the defense counsel, discovery only mentioned the property owner and the business owner once. A.R. 167.

assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim."). To the extent the Petitioner's claims cannot be resolved in this direct appeal, the Petitioner's claim of ineffective assistance of counsel should be brought in a habeas corpus proceeding. *See, e.g., United States v. Majeed*, 27 F. App'x 192, 193 (4th Cir. 2001) (per curiam) (pro se appellant claimed ineffective assistance of counsel because of conflict of interest and court of appeals held such a claim should be brought in a post-conviction motion to vacate sentence under 28 U.S.C. § 2255).

C. There was no error in this case, much less plain error.

During jury deliberations, the jury asked the circuit court, "[i]f there is belief the crime was staged, can we still find the defendant guilty of robbery in the first degree?" A.R. 1149. The circuit court responded, without objection, that "[t]he Court cannot answer this question specifically. You are to be guided solely by the application of the law already given to you to the facts as you find them.'" A.R. 1151. The Petitioner claims that this answer constituted plain error. Pet'r Br. at 16. Because the Petitioner has failed to meet the high threshold for plain error, he is not entitled to relief.

"It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely." *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996). "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." *Id.*, 470 S.E.2d at 170. Normally, therefore, this Court will refuse to address error that was not preserved at trial. "This Court's general rule is that nonjurisdictional questions not raised at the circuit court level will not

be considered to the first time on appeal." *State v. Jessie*, 225 W. Va. 21, 27, 689 S.E.2d 21, 27 (2009). *See, e.g.*, Syl. Pt. 1, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334 (1971) ("In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken."). "[T]here is an exception to this rule known as the plain error doctrine[.]" *State v. Little*, No. 11-0342, 2012 WL 2914873, at *2 (W. Va. Feb. 14, 2012) (memorandum decision). "The 'plain error' doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made." *State v. Miller*, 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995). The plain error doctrine is inapplicable in this case.

"To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). "[T]he four-pronged plain error analysis is conjunctive," *Spencer v. United States*, 991 A.2d 1185, 1192 (D.C. App. 2010), and the Petitioner carries the burden of satisfying all four prongs before he is entitled to relief. *E.g., United States v. Tarabein*, 798 F. App'x 576, 580 (11th Cir. 2020) ("In plain error review, it is the defendant who bears the burden to show all four prongs of this demanding standard."); *United States v. Pinkham*, 896 F.3d 133, 136–37 (1st Cir. 2018) ("A party who claims plain error must carry the devoir of persuasion as to all four of these elements."); *United States v. Hall*, 625 F.3d 673, 684 (10th Cir. 2010) ("The defendant has the burden of establishing all four elements of plain error."); *United States v. Clarke*, 767 F. Supp. 2d 12, 24 (D.D.C. 2011) ("The defendant bears the burden of proving each element of the plain error standard."). This is no mean feat as "[m]eeting all four prongs is difficult, 'as it should be.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009) (quoting *United States v. Dominguez Benitez*,

542 U.S. 74, 83, n.9 (2004)). Thus, "[t]he plain error doctrine is utilized sparingly and only in extreme circumstances." *State v. Keesecker*, 222 W. Va. 139, 148, 663 S.E.2d 593, 602 (2008). Because the Petitioner has failed to show error, he is not entitled to a reversal under the plain error doctrine.

The Petitioner likens the circuit court's response in his case to that given in *State v. Davis*, 220 W. Va. 590, 648 S.E.2d 354 (2007) (per curiam). Pet'r Br. at 17-18. However, *Davis* is not analogous to the case at bar and provides no basis for this Court to apply the plain error doctrine.

In *Davis*, Davis was tried by jury for first degree murder and malicious wounding. *Davis*, 220 W. Va. at 592, 648 S.E.2d at 356. During its deliberations, the jury sent a note to the trial court asking it to verify (1) whether second degree murder was with malice and unlawful, but without intent and (2) whether voluntary manslaughter was without malice, but with intent. *Id.*, 648 S.E.2d at 356. The trial court responded to the question by reading to the jury its previous instructions on the elements of second degree murder and voluntary manslaughter. *Id.* at 592-593, 648 S.E.2d at 356-357. After he was convicted of second degree murder, Davis sought relief on the grounds that the trial court failed to properly instruct the jury that "intent" was an element of second degree murder. *Id.* at 593, 648 S.E.2d at 357. This Court found "[i]t [wa]s quite clear from the jury's question that they [sic] did not understand the trial court's initial charge, which defined malice as including the element of intent." *Id.* at 595, 648 S.E.2d at 359. Therefore, the jury "convicted Mr. Davis of second degree murder upon the erroneous belief that this crime did not require an intent to kill." *Id.* at 597, 648 S.E.2d at 361. This Court, thus, found plain error.

In the case at bar, the jury's question to the circuit court did not evidence its misunderstanding as to an element of the crime nor did it allow the jury to convict the Petitioner without the State having proved all the essential elements of the crime as occurred in *Davis*; rather, the jury wanted

the judge to tell it how to rule on a certain set of facts if the jury found those facts existed. This was not within the judge's purview and the judge's answer to the jury's inquiry, far from being plain error, was not an error at all.

In answering jury questions, "'the court must be careful not to invade the jury's province as fact finder.'" *United States v. Ellis*, 121 F.3d 908, 925 (4th Cir. 1997) (quoting *United States v. Blumberg*, 961 F.2d 787, 790 (8th Cir. 1992)). A trial court cannot answer the jury's question if such an answer would give "the court's imprimatur on the factual conclusions proffered by appellant at trial." *Id. See also People v. Hasselbring*, 21 N.E.3d 762, 772 (Ill. Ct. App. 2014) (quoting *People v. Boose*, 627 N.E.2d 1276, 1280 (Ill. Ct. App. 1994)) ("'a judge should not answer a question from a jury that calls for the judge to make a conclusion on the issues at trial.'").

The case at bar is similar to *Des Jardins v. State*, 551 P.2d 181 (Alaska 1976). In *Des Jardins*, after jury deliberations had commenced, a juror sent a message to the trial judge that read:

> The material allegations state that a metal bar was used. If I believe the state has not proved this point, is that sufficient doubt to say not guilty? Is this compounded with equal opportunity of another to do the act sufficient to give a not guilty?

Des Jardins, 551 P.2d at 189-190. The Alaska Supreme Court found it was quite proper for the trial judge not answer the question. "The judge, quite properly, did not answer this question. The question asked the judge to decide for the juror whether he had a reasonable doubt about Des Jardins' guilt; that decision, although perhaps difficult, was the juror's alone." *Id.* at 190. The circuit court committed no error in its response to the jury's question in this case, much less plain error. Consequently, the judgment of the circuit court should be affirmed.

The judgment of the circuit court should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Ohio County, West Virginia, should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By counsel,

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CERTIFICATE OF SERVICE

I, Scott E. Johnson, Assistant Attorney General and Counsel for the Respondent, do hereby certify that I served the foregoing *Respondent's Brief* upon the Petitioner's counsel by causing a true and correct copy thereof to be placed in the United State Mail, first class postage prepaid, on this 1st day of May, 2020, addressed as follows:

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