IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0706

STATE OF WEST VIRGINIA,

Petitioner,

v.

SCOTTY JOSEPH BYERS,

Respondent.

RESPONDENT'S BRIEF

Appeal from the August 14, 2020, Order
Circuit Court of Wood County
Case No. 19-F-125

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ASSIGNMENTS OF ERROR

a. The trial court committed reversible error by refusing to honor Petitioner's request to appear in person at his felony sentencing as guaranteed by W. Va. R. Crim. P. 43(a).

b. The trial court's refusal to allow Petitioner to appear in person for his felony sentencing was a denial of due process as guaranteed by the Fifth Amendment of the United States Constitution and Article III Section 10 of the West Virginia Constitution.

STATEMENT OF THE CASE

A Wood County grand jury indicted the Petitioner for: failure to register, second offense (Count One); failure to appear (Count Two); and, failure to register, second offense (Count Three). A.R. 74-75. The State also filed an information charging the Petitioner with one count of failure to register (Count One) and one count of fleeing from an officer on foot (Count Two). A.R. 113. The Petitioner entered into a plea agreement whereby the Petitioner agreed to plead guilty to: two counts of failure to register, first offense as lesser included offenses to Counts One and Three in the indictment, one count of failure to register, first offense as charged in the information; and, fleeing from a police officer as charged in the information. A.R. 111. In exchange, the State dismissed all other charges in the indictment, did not prosecute the Petitioner for any failure to register offenses occurring before entry of the plea, and did not prosecute the Petitioner under case no. 19-B-396.[1] A.R. 111. The circuit court accepted the Petitioner's pleas. A.R. 52-53.

At sentencing, the Petitioner appeared by Skype videoconference from North Central Regional Jail. A.R. 57. The Petitioner's counsel also appeared by Skype video. A.R. 57. The circuit court judge and the Assistant Prosecuting Attorney were present in the courtroom. A.R. 57. The circuit court advised that another individual was present on the call. A.R. 57. The circuit court

[1]Case no. 19-B-396 was a possession with intent to distribute case that was bound over from magistrate court. A.R. 37-38.

explained that this individual was present and waiting for the next hearing which would occur through the same connection. A.R. 57. This individual's microphone was muted and the circuit court went on to explain that it was the equivalent of the individual physically sitting in the back of the courtroom. A.R. 57. The circuit court informed the Petitioner if there was a time the Petitioner desired to speak with his lawyer that the Petitioner should let the circuit court know and the circuit court would disconnect everyone from Skype except the Petitioner and his lawyer. A.R. 57. In this way, the Petitioner could communicate with his lawyer with no one overhearing the conversation. A.R. 57.

The Petitioner's lawyer proceeded to inform the court that:

> Your Honor, to start off, first I would just like to have noted for the record [the Petitioner's] objection to appearing by video. He obviously wanted to appear in person, but as the Court is aware, because of the pandemic situation, many hearings, including this one, are being done by video. We wanted that noted for the record.

A.R. 59. The circuit court denied the objection:

> The objection is noted for the record. The Court believes that under the system that has been made available by the supreme court [sic] which is the Skype for Business that we are utilizing today, the Court is affording the Defendant the ability to speak privately with his counsel at any time which is needed.
>
> The Court has had that occur in previous cases and it has worked quite well and I am comfortable proceeding by video conference. So the objection is noted, but overruled.

A.R. 59.

The Petitioner's counsel then addressed the circuit court. A.R. 59. He asserted that the Petitioner had a long struggle with substance abuse. A.R. 59. Counsel also asserted that alcohol played a role in one of the Petitioner's prior offenses. A.R. 60. According to the Petitioner's counsel, the Petitioner expressed a great interest in trying to be accepted into a substance abuse treatment program. A.R. 60. The Petitioner's counsel advised the circuit court that the Petitioner

had been accepted at an Anchor Program, although he could not start immediately and was number eight on the wait list. A.R. 60. Therefore the Petitioner's counsel asked that the circuit court give the Petitioner either probation or home confinement. A.R. 60-61. The Petitioner's counsel further asserted that the Petitioner had several factors that would motivate him to maintain sobriety and get his life on track, such as a three year old daughter, parents with health issues, and the fact that the Petitioner had overdosed on drugs and had to be revived by Narcan. A.R. 61. The Petitioner's counsel also argued that the Petitioner had taken responsibility for his criminal offenses. A.R. 62.

The circuit court then asked if the Petitioner had anything to say:

> THE DEFENDANT: Yes. Just I mean, I am sorry for the things that I done.
>
> I realize now sitting here sober of what I am missing out there. When you're high, you really don't see what is going on. It was more masking my problems and my pain, like my dad and brother drowning.
>
> Now my mother's – the father my mother married, he has a mass on his lung and he is 80 years old so he's not going to last much longer. Me being incarcerated, not [sic] help my mom with him, you know what I mean –
>
> My mom is a lot younger, she's only 51, and I want to be there for her to help with him. She's even got a mass on her lung because they smoke like a freight train.
>
> That is something I did quit. I quit the smoking, just couldn't quit the drugs.
>
> Like I said it was all masking things. It was just masking it. It didn't take it away. So I – I am not saying I want you to release me on probation or something like that. I am asking for – I never been to drug court. I don't know what it is about, but I do hear that they are strict and will keep me off of drugs.
>
> I would like to go to the short-term rehabilitation place as well as another long-term and I hear once you are in there, it is a lot easier to get into a longer term. And with that being said, I am really sorry for doing what I did.
>
> I mean, you seen [sic] my record. You seen [sic] my PSI. I do have a drug problem and alcohol problem.

A.R. 62-63.

The State then had its opportunity to argue its position to the circuit court. A.R. 63. The State first observed that the Petitioner pled guilty to three failure to register charges, which had been pled down from more serious offenses. A.R. 63-64. The State also observed the Petitioner had a litany of failure to register charges as detailed in the PSI. A.R. 64. The State detailed the Petitioner's criminal conduct, pointing out that the Petitioner's first failure to register was in August of 2018. A.R. 64. The Petitioner had another failure to register in October of 2018. A.R. 64. The State asserted, "[l]ooking at the length of time elapsed there coupled with his extensive criminal history,[2] I think that actions speak louder than words and it is clear from the [Petitioner's] actions that he would again commit crime if he were allowed to remain out or if he were allowed back in the community." A.R. 64 (footnote added). The State also objected to granting probation or alternative sentencing based upon the Petitioner having been granted probation in 2002 and violating that probation. A.R. 64-65. The State concluded that while the Petitioner had a substance abuse problem, such a problem needed to be addressed through the RSAP[3] program while the Petitioner was in the custody of the Division of Corrections (DOC). A.R. 65. The State then requested that the circuit court run the sentences to be imposed consecutively to one another. A.R. 65.

The Petitioner then was permitted to inform the circuit court that he had successfully completed two and a half years of parole ending in 2017. A.R. 66.

The circuit court imposed a sentence of one to five years on the first failure to register, first offense, conviction under Count One of the indictment. A.R. 66. The circuit court also imposed a

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[2]The Petitioner's extensive criminal history is detailed in his Presentence Investigation. A.R. 164-167.

[3]"RSAP" appears to be shorthand for the West Virginia Division of Corrections and Rehabilitation Residential Substance Abuse Treatment Program.

one to five year sentence on the second failure to register, first offense, conviction under Count Three of the indictment. A.R. 66. The circuit court sentenced the Petitioner to one to five years incarceration for failure to register, first offense, as charged in Count One of the information. A.R. 66-67. The circuit court sentenced the Petitioner to time served for his conviction under Count Two of the information, fleeing an officer. A.R. 67, 71. The circuit court ordered that "Count One of the Indictment and Count Two of the Information [were] to run concurrently with each other and consecutively to Count Three of the Indictment and Count One of the Information, and Count One of the Indictment and Count One of the Information [were] to run consecutively with each other." A.R. 67, 70-71. The circuit court imposed costs of the proceeding and recommended that the Petitioner be permitted to participate in the RSAP program while in custody of the DOC. A.R. 67. The Petitioner then informed the circuit court that he had previously participated in the RSAP program. A.R. 68-69. The Petitioner was unsure if he could participate a second time. A.R. 69. As such, the circuit court removed the RSAP recommendation given that the Petitioner already completed the program. A.R. 69. The circuit court's sentencing was memorialized in an Amended Order entered August 14, 2020. A.R. 157-159. The Petitioner now appeals challenging the manner in which his sentencing hearing was conducted.

SUMMARY OF ARGUMENT

The Petitioner's claim that sentencing him by video (i.e., when he and the judge were not physically present in the courtroom together) over his objection appears meritorious. Although West Virginia has never addressed the issue, every federal appellate court to address the issue has concluded (or at least assumed upon the representation of the parties) that under Federal Rule of Criminal Procedure 43, video sentencing over objection is not permissible. Because West Virginia Rule of Criminal Procedure 43 is practically identical to Federal Rule of Criminal Procedure 43,

these federal cases interpreting Rule 43 should guide this Court's interpretation of West Virginia Rule 43. But, this Court should also find that Rule 43 violations in general are subject to harmless error analysis and should also specifically find that any error in video sentencing in the pending case was harmless error. As such, the judgment of the circuit court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this 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. It was error to conduct the Petitioner's sentencing through videoconferencing over the Petitioner's objection.

The Petitioner contends that the circuit court committed reversible error in overruling his objection to sentencing by Skype. Pet'r Br. at 8. "Where the issue on an appeal from the circuit court is clearly a question of law . . . we apply a de novo standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

"The right of a criminal defendant to be present at every critical stage of the proceedings against him or her has a foundation in common, statutory, and constitutional law." *State ex rel. Redman v. Hedrick*, 185 W. Va. 709, 713, 408 S.E.2d 659, 663 (1991); *see, e.g.*, *State v. Crabtree*, 198 W. Va. 620, 629, 482 S.E.2d 605, 614 (1996) ("Rule 43 of the West Virginia Rules of Criminal Procedure provides a defendant with a parallel right to be personally present at every stage of the trial.");[4] Syl. Pt. 6, in part, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977) ("The defendant

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[4]West Virginia Rule of Criminal Procedure 43 provides:

> (a) Presence required. — The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury

has a right under Article III, Section 14 of the West Virginia Constitution to be present at all critical stages in the criminal proceeding[.]"); Syl. Pt. 2, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975) ("Correlative with the constitutional right of confrontation is the right of presence which requires that an accused charged with a felony shall be present in person at every critical stage of a criminal trial where anything may be done which affects the accused; the right of presence, originating in the common law, is secured to an accused by W. Va. Code 1931,

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and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued presence not required. — The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present:

(1) Is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial); or

(2) After being warned by the court that disruptive conduct will cause his or her removal from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

(c) Presence not required. - A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a technical question of law not depending upon facts within the personal knowledge of the defendant.

(4) At a reduction of sentence under Rule 35.

62-3-2.").[5] Neither this Court nor the United States Supreme Court has ever addressed the contention the Petitioner raises in this case, "whether appearing virtually at sentencing satisfies the right to be present." Pet'r Br. at 5.

While the Petitioner invokes both West Virginia Rule of Criminal Procedure 43 and West Virginia Code § 62-3-2, Pet'r Br. at 5-8, and the West Virginia and Federal Constitutional Due Process clauses, Pet'r Br. at 8-9, federal courts have observed "Rule 43's protections are broader than those afforded both by the Sixth Amendment and by due process[.]" *United States v. Boyd*, 131 F.3d 951, 953 n.3 (11th Cir. 1997); *see also Young v. Herring*, 938 F.2d 543, 557 (5th Cir. 1991) ("Rule 43, however, provides a broader right to be present than the right recognized under the Constitution."); *United States v. Washington*, 705 F.2d 489, 497 n.5 (D.C. Cir. 1983) ("Although rule 43(a) has constitutional underpinnings, the protective scope of rule 43(a) is broader than the constitutional rights embodied in the rule."); *United States v. Christopher*, 700 F.2d 1253, 1261-62 (9th Cir. 1983) ("A defendant is generally required to be present during all stages of the criminal process. Fed. R. Crim. P. 43.6 The protection is broader than the sixth amendment right to confrontation and the fifth amendment due process rights."); *United States v. Alessandrello*, 637 F.2d 131, 138 (3d Cir. 1980) ("[T]he scope of Rule 43 was intended to be broader than the constitutional right."); *United States v. Brown*, 571 F.2d 980, 986 (6th Cir. 1978) ("Although Rule 43(a) does have its constitutional underpinning, the right of presence stated in

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[5]West Virginia Code § 62-3-2 provides:

> A person indicted for felony shall be personally present during the trial therefor. If he refuse to plead or answer, and do not confess his guilt, the court shall have the plea of not guilty entered, and the trial shall proceed as if the accused had entered that plea, and judgment upon the verdict in any such trial shall be entered up as in cases of misdemeanor. The formal arraignment of the prisoner, the proclamation by the sheriff, and the charge of the clerk to the jury, as heretofore practiced, shall be dispensed with.

the Rule is more far-reaching than the right of presence protected by the Constitution."). Therefore, this case should be resolved under Rule 43(a). *State v. Sites*, 241 W. Va. 430, 444, 825 S.E.2d 758, 772, *cert. denied sub nom. Sites v. W. Va.*, 140 S. Ct. 565 (2019).

"[T]he decisions of this Court have indicated that, to aid in defining the meaning and scope of this state's individual . . . rules of procedure, this Court often gives substantial weight to federal cases interpreting virtually identical federal rules." *Pristine Pre-Owned Auto, Inc. v. Courrier*, 236 W. Va. 720, 726, 783 S.E.2d 585, 591 (2016) (cleaned up); *see also State v. Sutphin*, 195 W. Va. 551, 563, 466 S.E.2d 402, 414 (1995) ("[W]e have repeatedly recognized that when codified procedural rules . . . of West Virginia are patterned after the corresponding federal rules, federal decisions interpreting those rules are persuasive guides in the interpretation of our rules."). "We have pointed out in a number of our cases that our Rules of Criminal Procedure are patterned after the Federal Rules." *State ex rel. Reed v. Douglass*, 189 W. Va. 56, 57, 427 S.E.2d 751, 752 (1993). West Virginia Rule of Criminal Procedure 43 is specifically modeled on Federal Rule of Criminal Procedure 43. *Sites*, 241 W. Va. at 444, 825 S.E.2d at 772.

In construing Federal Rule of Criminal Procedure 43 "every federal appellate court to have considered the question has held that a defendant's right to be present requires physical presence and is not satisfied by participation through videoconference." *United States v. Salim*, 690 F.3d 115, 122 (2d Cir. 2012) (assuming without deciding that this is the rule). *See United States v. Williams,* 641 F.3d 758, 764 (6th Cir. 2011) ("The text of Rule 43 does not allow video conferencing" and the "structure of the Rule does not support it"); *United States v. Torres-Palma*, 290 F.3d 1244, 1248 (10th Cir. 2002) (under Rule 43,"video conferencing for sentencing is not within the scope of a district court's discretion."); *United States v. Lawrence*, 248 F.3d 300, 301 (4th Cir. 2001) ("Because 'presence' in Rule 43 means physical presence, we must vacate

Lawrence's sentence and remand the case to the district court for further proceedings consistent with this opinion."); *United States v. Navarro*, 169 F.3d 228, 239 (5th Cir. 1999) ("We conclude that sentencing a defendant by video conferencing does not comply with Rule 43 because the defendant is not 'present.'").

Most courts have analyzed the issue in a similar way. For example, in *United States v. Lawrence*, 248 F.3d 300 (4th Cir. 2001), a defendant objected to being sentenced by video conferencing claiming such a procedure violated both Rule 43 and the United States Constitution. The Fourth Circuit found merit to the Petitioner's claim on the Rule 43 issue, and in light of this, did not address the constitutional claim. *Lawrence*, 248 F.3d at 303 n.1. The Court first concluded that the plain meaning of presence means physical presence as gleaned from dictionary definitions of presence and present *Lawrence*, 248 F.3d at 303. The Court then addressed the context and structure of Rule 43 and articulated that they, too, supported a requirement of physical presence. *Lawrence*, 248 F.3d at 303–04. The Court also found practical considerations at play. "The rule reflects a firm judgment . . . that virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." *Lawrence*, 248 F.3d at 304; *see also Williams*, 641 F.3d at 764–65 ("Being physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly absent when communicating by video conference.").

In light of the above authority, the circuit court's decision to sentence the Petitioner by video over the Petitioner's objection was erroneous.

B. The error in sentencing the Petitioner via video is harmless.

While all federal appellate courts that have addressed the issue have agreed that video sentencing is erroneous, there is a split of authority as to whether harmless error can apply to obviate a remand. *Compare Torres-Palma*, 290 F.3d at 1248 (video sentencing is per se prejudicial and not subject to harmless error analysis) *with Williams*, 641 F.3d at 765 (emphasis added) (internal citation omitted) ("In harmless-error analysis, the United States bears the burden and 'must demonstrate to the Court *with certainty* that the error at sentencing did not cause the defendant to receive a more severe sentence.'"); *see* Pet'r Br. at 6 n.38 (recognizing this split of authority and observing that most federal courts apply the harmless error standard). Federal courts have generally concluded that Rule 43 violations are subject to harmless error analysis. *See, e.g.*, *Rogers v. United States*, 422 U.S. 35, 40 (1975) ("a violation of Rule 43 may in some circumstances be harmless error"); *United States v. Hellems*, 866 F.3d 856, 864 (8th Cir. 2017) ("A violation of Rule 43 of the Federal Rules of Criminal Procedure may be subject to harmless error analysis."); *United States v. Evans*, 352 F.3d 65, 68 (2d Cir. 2003) ("Rule 43 violations are analyzed under the traditional harmless error rule provided by Federal Rule of Criminal Procedure 52(a)."). This recognition by federal courts is consistent with the observation of this Court that "[t]he remedial doctrine[] . . . of . . . harmless error [is] firmly established by statute, court rule and decisions as salutary aspects of the criminal law of this State." Syl. Pt. 4, in part, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975); *see, e.g.*, Syl. Pt. 2, in part, *State v. Smith*, 119 W. Va. 347, 193 S.E. 573 (1937) ("And because a perfect trial is rarely, if ever, possible, necessity and common sense have evoked the rule of harmless error, as to error which does not prejudice."); W. Va. Code Ann. § 62-2-11 ("Judgment in any criminal case, after a verdict, shall not be arrested or reversed upon any exception to the indictment or other accusation, if the offense be charged

therein with sufficient certainty for judgment to be given thereon, according to the very right of the case."); W. Va. R. Crim. Pro. 52(a) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."); As such, the harmless error doctrine would apply to presence errors at sentencing.

In addressing harmless-error analysis when a defendant was sentenced via video, the Court of Appeals for the Sixth Circuit has recognized that the Government bears the burden to "'demonstrate to the Court *with certainty* that the error at sentencing did not cause the defendant to receive a more severe sentence.'" *Williams*, 641 F.3d at 765 (emphasis in original) (quoting *United States v. Gillis*, 592 F.3d 696, 699 (6th Cir. 2009) (internal quotation marks and citation omitted)).[6] In the instant case, the facts developed at sentencing demonstrate that the Petitioner's

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[6]Harmless error encompasses both constitutional and non-constitutional errors. "[T]he standard of review in determining whether an error is harmless depends on whether the error was constitutional or nonconstitutional." *State v. Guthrie*, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 (1995) "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." Syl. Pt. 20, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974); *see also Chapman v. California*, 386 U.S. 18, 24 (1967) ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"). "It is generally thought that a constitutional error, because it involves a more fundamental right, carries greater potential for harm than does a nonconstitutional error." *State v. Atkins*, 163 W. Va. 502, 509, 261 S.E.2d 55, 60 (1979). Thus, where non-constitutional error occurs, this Court applies a less stringent harmless error test, "'[i]f one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.'" *State v. Blake*, 197 W. Va. 700, 709, 478 S.E.2d 550, 559 (1996) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). It is not clear if the *Williams'* court's harmless error review is constitutionally based or rules based. In any event, if an error is harmless under the constitutional harmless error test, it is perforce harmless under the less onerous non-constitutional harmless error standard. *Smith v. Dixon*, 996 F.2d 667, 697 (4th Cir. 1993) (Wilkins, J., concurring in part and dissenting in part), as amended (July 19, 1993), *on reh'g en banc*, 14 F.3d 956 (4th Cir. 1994). Consequently, the State will assume that the higher constitutional test for harmless error applies in this case.

appearance by video at sentencing was harmless beyond a reasonable doubt as his physical appearance at sentencing would have yielded no less a sentence than the circuit court imposed.[7]

At the Petitioner's sentencing, the Petitioner's counsel's primary argument was that the Petitioner's history of criminal misconduct was the result of his substance addiction. A.R. 59-61; *see also* A.R. 61-62 ("I think the time that he has been incarcerated has given him a chance to reflect on his life and the poor choices he made. That is why I think the substance abuse aspect is so important."). The Petitioner echoed his counsel's sentiments concerning the Petitioner's substance abuse issues. A.R. 62-63; *see also* A.R. 63 ("I mean, you seen my record. You seen my PSI. I do have a drug problem and alcohol problem."). The State agreed that the Petitioner had a substance abuse problem, but that any help for him had to come while he was in custody of the DOC through the RSAP program, A.R. 65, a program that the Petitioner had already completed once. A.R. 68-69. The circuit court would not have been swayed by the Petitioner's physical presence at sentencing in light of the undisputed fact that the Petitioner had undergone substance abuse treatment in the past that was unsuccessful.

Further, the State asked that all sentences be run consecutively. A.R. 65. The State's request was not followed by the circuit court. A.R. 66-67; 70-71; 157-59. The circuit court also gave the Petitioner a time served sentence on Count Two of the information, fleeing an officer. A.R. 67, 71. The circuit court analyzed the sentencing issues in this case and the Petitioner's physical presence would not have altered the circuit court's sentence of him. Accordingly, the judgment of the circuit court should be affirmed.

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[7]*See supra* fn. 6.

CONCLUSION

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

Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

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CERTIFICATE OF SERVICE

I, Scott E. Johnson, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, February 19, 2021, and addressed as follows:

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