IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0738

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

TREMAINE LAMAR JACKSON,

Defendant Below, Petitioner.

RESPONDENT'S BRIEF

Appeal from August 19, 2021 Order
Raleigh County Circuit Court Case No. 20-F-430

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I. INTRODUCTION

Respondent, State of West Virginia, by counsel, responds to the brief filed by Tremaine L. Jackson ("Petitioner") in support of his appeal from the Raleigh County Circuit Court relating to his convictions for First Degree Murder, Felon in Possession of a Firearm, and two counts of Use or Presentation of a Firearm During the Commission of a Felony, as set forth in the Court's August 24, 2021, order. Petitioner asserts that the circuit court committed reversible error when it refused his offer to stipulate to having been convicted previously of a violent felony, and refusing to allow him to testify as to the guilt of another person during his trial testimony. Because Petitioner has failed to demonstrate that the circuit court committed reversible error, this Court should affirm the judgment of the Raleigh County Circuit Court.

II. ASSIGNMENTS OF ERROR

Petitioner raises two assignments of error in his brief:

1. Did the circuit court commit reversible error when it refused to accept Petitioner's felon status stipulation and instead permitted the State to admit the name and nature of the prior conviction?

2. Did the circuit court commit reversible error when it prohibited Petitioner from testifying in his own defense?

Pet'r's Br. at 1.

III. STATEMENT OF CASE

A. Factual Background and Indictment

Troy Williams was killed by a shot in the chest in Beckley, Raleigh County, West Virginia, after meeting with Petitioner to purchase what Mr. Williams believed to be methamphetamine on May 6, 2020. A.R. 652. After an extensive investigation, Petitioner was identified as the suspect in the shooting. A.R. 886-87, 902-3. During this investigation, officers learned that Petitioner had recently been released from prison and placed on parole for a 2017 conviction for voluntary

manslaughter in Kanawha County, West Virginia. A.R. 476, 1216-17. Per the terms and conditions of his parole, Petitioner was required to maintain regular contact with his supervising parole officer. A.R. 477-48. Although Petitioner had contacted his parole officer on May 6, 2020 shortly before Mr. Williams' murder, he ceased all contact following the incident, and fled the State to North Carolina. A.R. 477-48, 691.

A warrant was issued for Petitioner based upon allegations that he had violated his parole by failing to maintain regular contact with his parole officer. A.R. 477-48. On August 7, 2020, Petitioner was arrested upon the parole warrant in North Carolina. A.R. 691. After an extradition hearing, Petitioner was transported back to West Virginia to answer for his parole violation. A.R. 691.

On September 24, 2020, the Raleigh County Grand Jury returned a four-count felony indictment in case number 20-F-430 against Petitioner, charging him with the following offenses: 1) first degree murder (Count 1); 2) use or presentation of a firearm during the commission of first degree murder (Count 2); felon in possession of a firearm (Count 3); and 4) use or presentation of a firearm during the commission of being a felon in possession of a firearm (Count 4). A.R. 1139.

B. Pretrial Motions and Hearings

Petitioner appeared before the Raleigh County Circuit Court for arraignment in relation to the indictment contained in 20-F-430. A.R. 3. Petitioner advised the court that he had read the indictment returned against him, and entered his plea of not guilty. A.R. 3. Petitioner also orally moved for a speedy trial in the term of indictment. A.R. 4. The Court noted that the State had provided a notice of "open file discovery," and that Petitioner had filed a discovery motion. A.R. 4. Moreover, the Arraignment order specified that the parties were required to "promptly respond to discovery requests," and that "in no event shall discovery be permitted by the State within ten

(10) days of trial nor the defendant within five (5) days of trial without the express approval of the Court." Resp's Supp. App'x[1] at 1.

Following arraignment, both Petitioner and the State engaged in substantial pretrial motions practice. In addition to his omnibus discovery motion, Petitioner filed *Defendant's Request for Production of Rule 404(b) Evidence* ("*404(b) Motion*"), A.R. 1160, and his *Motion for In Camera Hearing Regarding Rule 404(b) Evidence*. A.R. 1162.

The State filed the *State's Response to Defendant's Request for Specific Discovery*, A.R. 1177-79, followed by eleven supplemental discovery disclosures. A.R. 1180-90. The State also responded to Petitioner's *404(b) Motion* on December 17, 2020, with its *Notice of Intent to Use 404(b) Evidence*, and attached thereto a copy of Petitioner's conviction order from his 2017 voluntary manslaughter conviction in Kanawha County, West Virginia. A.R. 1212-17. In its *Notice*, the State argued that the evidence was admissible under Rule 404(b) of the West Virginia Rules of Evidence to prove the Petitioner's *modus operandi* in the commission of first degree murder, as charged in Count 1 of the indictment, and also to show that the murder was not the product of mistake or accident. A.R. 1212-14.

The State also filed a *Motion in Limine to Bar Inadmissible Evidence of Guilt of Another* ("*Malick* Motion") pursuant to Rule 104 of the West Virginia Rules of Evidence, as well as this Court's precedent set forth in *State v. Malick*, 193 W. Va. 545, 457 S.E.2d 482 (1995), and *State v. Zuccaro*, 239 W. Va. 128, 799 S.E.2d 559 (2017). A.R. 1211.

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[1] Respondent has filed, contemporaneously with the foregoing brief, a *Motion for Leave to File Supplemental Appendix*, as well as a copy of the *Respondent's Supplemental Appendix* containing a copy of the Arraignment Order entered by the Raleigh County Circuit Court on October 28, 2020. Respondent will refer to said Supplemental Appendix throughout this brief as "Respt's Supp. App'x."

On February 10, 2021, the parties appeared before the Raleigh County Circuit Court to address, *inter alia*, the State's *Notice of Intent to Use 404(b) Evidence*, and the State's *Motion in Limine to Bar Inadmissible Evidence of Guilt of Another.* A.R. 71. After hearing evidence and argument from both parties, the court took the issue of the State's *Notice of Intent to Use 404(b) Evidence* under advisement, and explained that it would issue a ruling "after checking the authorities cited." A.R. 106.

The court granted the State's *Motion in Limine to Bar Inadmissible Evidence of Guilt of Another.* A.R. 126. The court explained:

> This is a situation that requires a foundation, an evidentiary foundation before we can proceed into it, and I think the foundation is correctly summarized by the State, which is that there must be some evidence—there must be appreciable evidence of a direct action or a direct link to another person with respect to the crime charged here. Absent that foundation, speculative—other evidence about the possible guilt of another would be speculative and inadmissible.

A.R. 126.

On February 24, 2021, a second hearing was convened upon Petitioner's request in order to address, *inter alia*, the State's *Notice of Intent to use 404(b) Evidence*. A.R. 141. Both the State and Petitioner were given the opportunity to address the court and further argue their respective positions as to the Rule 404(b) issue. A.R. 141-50. The court ruled that the evidence of Petitioner's prior conviction was not admissible for the purposes identified by the State under Rule 404(b) to prove any part of the Petitioner's charge of first degree murder as set forth in Count 1 of the indictment. A.R. 173. In explaining its ruling, the court did advise that:

> [T]his is a pretrial motion. We don't know what the evidence will be at trial until we have the trial. We have a pretty good guess, everybody has a pretty good guess, but trials are fluid things as trial lawyers know. If something develops at trial that justifies reconsideration of this present opinion, counsel may certainly be heard, because that's the nature of pretrial motions. It isn't final—it isn't done until it's done, and at trial, that's when we know what the evidence really is other than thinking what it might be and that's when we should and are I think properly called

upon to reconsider a pretrial ruling if the evidence justifies it, but that's where it is now.

A.R. 174.

C. Trial

Jury selection for Petitioner's trial began on March 1, 2021. A.R. 180. On March 2, 2021, the parties gave their opening statements and the State commenced with the presentation of its case-in-chief. A.R. 392.

The State's first witness was West Virginia State Trooper, Nick Boothe. A.R. 426. Trooper Boothe testified that he was off duty in the early evening hours of May 6, 2020, picking up groceries at the Wal-Mart grocery store in Beckley, West Virginia. A.R. 427. Trooper Boothe explained to the jury that it was approximately 6:00 p.m. when he heard a "pop" coming from the direction of a parking lot at the nearby Pet Supplies Plus store. A.R. 428. He then observed several individuals congregating in an area in the parking lot and went to the location to investigate. A.R. 428. Upon arriving, he observed an African American male, later identified as the victim, Troy Williams, laying on the ground with an apparent gunshot wound to his chest, near his right shoulder. A.R. 429. Trooper Boothe called dispatch for assistance, and began to administer medical aid to Mr. Williams. A.R. 423-33.

The jury heard from multiple witnesses that observed various portions of the altercation. Douglas Grubb, an employee of the Wal-Mart near the location of the shooting, told the jury that he was in his truck eating on his lunch break when he saw an altercation between two African American men. A.R. 601. Mr. Grubb described that he saw the one man shoot the other man while standing outside of a vehicle in the parking lot. A.R. 601. The description provided by Mr. Grubb matched the physical characteristics of Petitioner. A.R. 601. Mr. Grubb also testified that throughout the entire altercation, he only saw the two men, although he did see a woman get out

of the car in which the Petitioner eventually fled the scene to get him in the car after the shooting. A.R. 677.

Shayna Hammon told the jury that she was leaving the Pet Supplies Plus Parking lot between 6:00 and 6:15 p.m. on May 6 when she was nearly "t-boned" by a white sedan leaving the area at a high rate of speed. A.R. 463. Believing that the car was fleeing from a hit and run, Ms. Hammons followed the vehicle for a short distance and took photographs of the vehicle and its license plate. A.R. 464.

Ms. Hammons later gave this information to Detective Nick Walters of the Beckley Police Department, who was lead investigating officer of the case. A.R. 466, 870. Detective Walters used the information and compared it to video surveillance footage of the Wal-Mart parking lot. A.R. 870-71. Detective Walters was able to identify the vehicle and the license plate number. A.R. 870-71. After a check of the vehicle's registration, he learned that it was a White Ford Fusion that was being rented to Latoya Carter. A.R. 871. Detective Walters later found that Ms. Carter resided at the Vista View Apartments in Charleston, West Virginia. A.R. 872. With the help of Detective Jonathan Weaver of the Charleston Police Department, Detective Walter's was able to confirm that the white Ford Fusion was parked in the parking lot of the Vista View Apartments, and subsequently obtained an arrest warrant for Ms. Carter. A.R. 873. Detective Weaver obtained a search warrant for Ms. Carter's Apartment. A.R. 873.

Detective Walters and Detective Weaver later responded to Ms. Carter's apartment on May 6, 2020, to execute the arrest and search warrants. A.R. 873. During the search of the apartment, officers located $1,020.00, as well as an extended magazine for a firearm. A.R. 873. Officers also met and spoke with Tohasha Ugbomah, who was present at Ms. Carter's apartment during the execution of the warrants. A.R. 875.

Ms. Carter later became a cooperating witness for the State and testified against Petitioner at trial. A.R. 480-84. Ms. Carter testified that Petitioner reached out to her on May 6, 2020, to ask if she could drive him to Beckley later that day to "finesse" someone. A.R. 488-91. Ms. Carter explained that to "finesse" someone meant to defraud or to trick someone into giving Petitioner money. A.R. 488-91. Ms. Carter agreed to drive Petitioner, and she, Ms. Ugbomah—who was visiting her from Pittsburgh, Pennsylvania—met with Petitioner and his ex-girlfriend, Areana Kersey, and drove to Beckley. A.R. 491.

On the way to Beckley, the group stopped at a Walgreens pharmacy and purchased a bag of rock salt that Petitioner planned to package and sell to Mr. Williams by representing that the rock salt was actually the methamphetamine Petitioner had agreed to sell to him when the meeting was arranged. A.R. 493.

Once at the meeting location, Ms. Carter told the jury that Petitioner asked for her to step out of the car so he could speak with her. A.R. 499. Ms. Carter explained that Petitioner advised her at this time that "if he plays with me, then I might have to shoot him." A.R. 499.

When Mr. Williams arrived, Ms. Carter testified that Petitioner got out of the vehicle and gave Mr. Williams a baggie he had filled with the rock salt purchased earlier at the Walgreens pharmacy. A.R. 505. Mr. Williams then sat in the back seat of Ms. Carter's vehicle, presumably to test the substance prior to paying Petitioner. A.R. 505-6. Acknowledging that she was uncertain as to what happened next, Ms. Carter stated that she was told that Ms. Kersey then pointed a gun at Mr. Williams while he was still seated in the back seat and said "give me the fucking money." A.R. 507. Mr. Williams then attempted to get out of the vehicle. A.R. 507. Petitioner was standing outside the vehicle during this entire altercation. A.R. 507. Shortly after Mr. Williams got out of the car, Ms. Carter recalled that she heard a single gunshot. A.R. 507. The situation quickly

became chaotic, and after getting Petitioner back in the vehicle, the four individuals fled and travelled back to Charleston. A.R. 508-9.

During the drive back to Charleston, Petitioner gave Ms. Carter the $1,020.00 that was later found in her apartment during the execution of the search warrant. A.R. 515. Ms. Carter also testified to overhearing a conversation between Petitioner and Ms. Kersey in the backseat of her vehicle in which Petitioner claimed that he believed he shot Mr. Williams in the chest. A.R. 510. Ms. Carter also testified that the gun that Petitioner used during the shooting was a handgun with an extended magazine. A.R. 513. She testified that after returning to the apartment complex, she took the money, the gun, and the magazine and hid it in her apartment. The magazine was found during the initial search warrant, but the firearm was not located in Ms. Carter's apartment until days later. A.R. 513, 550.

Ms. Ugbomah and Ms. Kersey each reached agreements with the State in which they agreed to testify against Petitioner at trial. A.R. 706, 770-71. Both women corroborated much of Ms. Carter's testimony as to the events of May 6, 2020. Ms. Ugbomah added that after Mr. Williams had sat down in the back seat of the car, that she heard Ms. Kersey cock a gun and say "give me the fucking money." A.R. 727. Ms. Kersey also acknowledged this, and stated that she did so to keep Mr. Williams from testing the substance, knowing that he would discover it was actually rock salt as opposed to methamphetamine. A.R. 788. But both Ms. Kersey and Ms. Ugbomah testified that it was Petitioner who fired the single gunshot. A.R. 728, 791. Ms. Ugbomah testified that the gun was fired from outside the vehicle, and that Petitioner was the only one who was outside at the time of the shooting. A.R. 759. Ms. Kersey testified that after she had pulled the gun on Mr. Williams and he had attempted to exit the vehicle, that Petitioner pushed

him to the ground and held a gun at him and repeatedly demanded that he give him the money. A.R. 791.

All three women's testimony identified Petitioner as the shooter and that only one shot was fired. A.R. 507-12, 728, 791. All three women identified the firearm used by Petitioner. A.R. 503-4, 736, 794. All three women testified to Petitioner giving Ms. Carter a large sum of money after the shooting on the way back to Charleston. A.R. 513, 732, 794. Finally, all three women testified that Petitioner acknowledged shooting Mr. Williams while driving back to Charleston. A.R. 510, 730, 795.

In addition to the eyewitness testimony, the State also presented expert witness testimony which described that the fatal bullet was recovered during Mr. Williams' autopsy, A.R. 649, and that the bullet that was recovered was confirmed to have been fired by the gun Petitioner used in the shooting. A.R. 677. The State also offered various text message exchanges between Petitioner and Mr. Williams in which they were discussing the location and timing of when they would meet to facilitate the transaction. A.R. 900-04. Testimony also revealed that, following the shooting, Petitioner attempted to discard the cell phone he used to communicate with Mr. Williams. A.R. 799. During his own testimony, Petitioner acknowledged to sending various letters and other communications to Ms. Carter and Ms. Kersey attempting to coerce them into implicating another individual as the shooter. A.R. 965. Petitioner acknowledged to sending a letter to one of his accomplices in which he stated "say it was James because it can't hurt him and get me out of jail or don't come, go hide somewhere." A.R. 966-67. Petitioner also read a portion of a letter he wrote in which he stated:

> And if you did rat just hope you don't show up to court on me. The mail you send the jail get to see [sic] so don't put nothing that will get me in some shit on your letter ok, and why won't you put it on James he died it can't hurt him and that [sic] my bro he wouldn't care. Look I'm just wanting out of here so I can live my life.

A.R. 967.

D. Petitioner's Oral Offer to Stipulate to Prior Conviction During Trial

On the second day of trial, the State called its eighth witness, Detective Weaver of the Charleston Police Department, to testify. A.R. 560-64. Detective Weaver was called to testify as to the chain of custody of the firearm used in the shooting, and to also testify as to Petitioner's prior felony conviction to prove an essential element as to the charge of Felon in Possession of a Firearm as set forth in Count 3 of the indictment. A.R. 560-64. During direct examination, the State asked Detective Weaver if "there was a time [ ] when you were involved in a matter for which [Petitioner] received a conviction?" A.R. 564. Petitioner objected and the court called for a sidebar. A.R. 564. Petitioner explained that the objection was due to his belief that the question was an attempt to elicit testimony that the court had previously ordered was inadmissible in its pretrial order relating to the Rule 404(b) issue. A.R. 564-65. The State pointed out that the evidence was not offered to prove anything as it relates to Count 1 or Count 2, and, therefore, was not subject to the Court's 404(b) ruling. A.R. 565. The State also explained that the evidence is offered only to prove the essential element as to Count 3, which requires proof beyond a reasonable doubt that the Petitioner had been previously convicted of a violent felony. A.R. 565. The court and parties engaged in a lengthy and in-depth discussion as to the issue, at which time Petitioner's counsel stated, for the first time throughout the entirety of the proceedings:

> [T]he defense is willing to stipulate that he does have a prior felony conviction and that if this Court were to prove that he had a weapon during the course of this event would be a violation of the statute of a prohibited person. We're willing to stipulate to that without this document coming in.

A.R. 569. The State advised that it was unwilling to accept Petitioner's offer to stipulate at that time, and informed the court that it had "attempted to elicit a stipulation before today and was

unsuccessful." A.R. 570. Petitioner did not object or otherwise note any disagreement with the State's contention as to its pretrial attempts at negotiating a stipulation as to this subject matter. A.R. 570-71.

The court explained that it could not "participate in negotiating stipulations." A.R. 571. The court also recognized that the evidence was not "offered as evidence of a specific act that triggers or is relevant to . . . the whole 404(b) stuff. This is relevant to State's claim in Count 3." A.R. 574-75. The court then confirmed with the State that the reason for its preference of proceeding with the admission of the Petitioner's conviction order was "because of a stipulation that would have previously been accepted." A.R. 575. The court then overruled Petitioner's objection, and allowed the State to proceed with seeking the admission of Petitioner's conviction order into evidence. A.R. 576-77. In reaching this conclusion, the court explained:

> [W]hat the Court is faced with is this, what you're all faced with: The State is correct, this evidence that is relevant and admissible as to Count 3. The Defendant is correct that the introduction of this evidence could have an impact, it could waive the protection of 404(b).
>
> The Defendant' isn't quite as correct as the State. The reason the Defendant isn't quite as correct is because this is not event specific. It is crime specific. It identifies the offense for which he was convicted; it does not describe the event upon which he was convicted. The offense is described as voluntary manslaughter which is—we know what that is.
>
> In the absence of—well, we're in the territory now where the Court has to give a limiting instruction that this is admissible as to one count and not as to another. The jury is to disregard as to one but they may accept it in consideration of Count 3, and I think Count 4.

A.R. 576-77. The court also noted:

> That's where we have to be. The point is a stipulated event and, if you don't, it's none of my business; if you do, tell me what it is and we'll go from there. The Court cannot participate in those negotiations. You all know that.
>
> A concession of a defendant as to Count 3, which is also to Count 4, I suppose, mostly Count 3, is so closely the equivalent of a plea of guilty, with the

effect of a plea of guilty that the colloquy is necessary and is not something that we'd be able to do during a jury trial.

A.R. 578. The court finally recognized that "you are where you are and you've chosen to do what you've chosen to do for reasons that you each find satisfactory." A.R. 578-79.

The State then moved for the admission of the conviction order, and the court gave the following limiting instruction to the jury:

> Ladies and gentleman of the jury, it's necessary now that the Court give you a special instruction here during the trial as well as a repeat of this instruction later.
>
> As you may recall and I hope you recall from the beginning of this matter, there are four charges in this indictment.
>
> Count 3 is a charge, as I explained earlier, that the Defendant was in possession of a firearm and prohibited from doing so.
>
> . . .
>
> It's primarily as to Count 3 and Count 3 contains within it—I mean Count 4 contains a reference to the presentation of a firearm as part of Count 3, so those two run together, but the subject matter of Counts 3 and 4 is related completely to the claim that the defendant was in possession of a firearm and prohibited from doing so.
>
> This piece of evidence is admitted only as to Count 3 and by its extension to Count 4 and may be considered only for that. This evidence may not be considered by the jury with respect to Count 1 or Count 2. It is only as to Count 3 and Count 4.
>
> And that instruction will be repeated, if asked to do so, at a later time during the trial, but that's the limitation that I place upon you now as to the reason that this evidence is admitted.

A.R. 582-83.

E. Court's Ruling Prohibiting Petitioner's Testimony as to Guilt of Another

Petitioner testified in his own defense at trial. A.R. 941. During his direct testimony, Petitioner claimed that he did not shoot Mr. Williams. A.R. 948. He was asked if he "know[s] who pulled that trigger." A.R. 948. Petitioner responded by saying "yes" and the State objected.

A.R. 948. The court called a sidebar, during which, the State reminded the court that it had raised this precise issue in its pretrial *Motion in Limine to Bar Inadmissible Evidence of Guilt of Another*, and that its motion was granted by the court. A.R. 948. The State further noted that if "they intended to put on proof of this crime being committed by another person, they had to put us on notice. They haven't done it." A.R. 948.

Petitioner claimed that he was "putting up a defense that he didn't do it and he's also rebutting a witness that was put on by the State as to whether or not he was the person who shot." A.R. 948-49. Petitioner's counsel also advised the court that Petitioner had not disclosed this information to him until just before his testimony. A.R. 949. Upon inquiry from the court, Petitioner's counsel acknowledged that it was aware of the prior order as to this type of evidence, and that the order required that the State be notified of any intention to offer such evidence, and that no notice was provided. A.R. 950. The court explained:

> [T]he defendant may not deviate from the terms of the pretrial orders and motions that are granted. If for some reason he waited until just now to tell anybody about this, including his own lawyer, then that's a difficult situation, but there's a requirement of pretrial disclosure of this and I conclude from what has been said just now the pretrial disclosure was not given.

A.R. 951. The court announced that "the defendant may not offer evidence that someone else committed the act charged unless a sufficient advance notice had been given of that in accordance with the Court's pretrial orders." A.R. 952.

F. Verdict and Sentencing

After the presentation of evidence and deliberation, the jury returned a verdict of guilty as to each of the four counts charged in the indictment. A.R. 1197-98. As it related to the charge of first degree murder in Count 1, the jury recommended that Petitioner receive life in prison with the possibility of parole. A.R. 1197-98. At Petitioner's sentencing hearing, the court imposed the

following sentences: life in prison with the possibility of parole as to the charge of first degree murder in Count 1; a determinate prison term of ten years as to the charge of use or presentation of a firearm during the commission of first degree murder in Count 2; a determinate prison term of five years as to the charge of felon in possession of a firearm in Count 3; and a determinate prison term of ten years as to the charge of use or presentation of a firearm during the commission of being a felon in possession of a firearm in Count 4. A.R. 1207. Each sentence was ordered to run consecutively to one another, and also to run consecutively to Petitioner's sentence related to his prior voluntary manslaughter conviction. A.R. 1208.

It is from this order that Petitioner now appeals.

IV. SUMMARY OF ARGUMENT

Petitioner's oral offer to stipulate to his prior felony conviction in the middle of trial was legally invalid as it did not comply with Rule 42.05 of the West Virginia Trial Court Rules that provides "stipulations must be in writing, signed by the parties making them or their counsel, and promptly filed with the clerk." Moreover, Petitioner refused the State's pretrial attempts at negotiating a stipulation, and, instead, chose to wait until the State was in the middle of its case-in-chief, about to introduce the conviction order into evidence, to express his desire to stipulate. Because the circuit court has broad discretion in managing the procedures and conduct of trial, *State v. Davis,* 232 W. Va. 398, 414, 752 S.E.2d 429, 446 (2013), its refusal to accept Petitioner's offer to stipulate was an appropriate exercise of its discretion. In the event that this Court finds that such refusal was in error, such error is harmless beyond a reasonable doubt as the evidence presented at Petitioner's trial in support of his guilt was overwhelming. Therefore, Petitioner's first assignment of error is without merit.

Petitioner has no right to present whatever evidence he chooses in support of his defense. *State v. Zaccaro*, 239 W. Va. 128, 144, 799 S.E.2d 559, 575 (2017). The right to present a defense is tempered by the court's pretrial orders, as well as general foundational requirements for the admission of certain types of evidence. Not only did Petitioner violate the court's pretrial discovery orders by failing to provide notice to the State of its intent to offer evidence as to guilt of another, he likewise failed to lay the appropriate foundation for the admission of such evidence pursuant to this Court's holding in *State v. Malick*, 193 W. Va. 545, 457 S.E.2d 482 (1995). Therefore, Petitioner's second assignment of error is without merit.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rules 18(a)(3) and (4) of the West Virginia Rules of Appellate Procedure, oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record in this case. This appeal is appropriate for resolution by memorandum decision in accordance with Rule 21 of the West Virginia Rules of Appellate Procedure.

VI. ARGUMENT

A. Standard of Review

Petitioner appeals his convictions on the basis that the circuit court erred in its evidentiary rulings both allowing, and excluding certain pieces of evidence offered at his trial. Pet'r's. Br. at 1. Petitioner bears a heavy burden in demonstrating his entitlement to relief in this regard. "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syl. Pt. 12, *State v. Rollins*, 233 W. Va. 715, 760 S.E.2d 529 (2014) (citation and quotation marks omitted). Trial courts have broad discretion in "making evidentiary and

procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court." Syl. Pt. 1, in part, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995). "Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." *Id.*

B. The circuit court did not abuse its discretion when it refused to accept Petitioner's offer to stipulate to his prior felony conviction in the middle of trial.

Petitioner's first assignment of error alleges that the circuit court committed reversible error by refusing to accept his offer to stipulate to his prior violent felony conviction during the presentation of the State's case-in-chief just as the State was about to introduce a copy of the conviction order to prove an essential elements as to the charge of being a felon in possession of a firearm as charged in Count 3 of the indictment. Pet'r's Br. at 5. Petitioner's argument is misplaced. First, his offer to stipulate in the middle of trial was legally invalid as it was not in compliance with the West Virginia Trial Court Rules. Second, trial courts have broad discretion to manage their courtroom, including the procedure and conduct of trial. Thus, the circuit court was under no obligation to accept Petitioner's offer to stipulate when made in violation of the West Virginia Trial Court Rules, and when such offer was opposed by the State due to its pretrial attempts to negotiate such a stipulation. Finally, even if this Court finds that such ruling was in error, it is harmless beyond a reasonable doubt as the evidence elicited against Petitioner during his trial was overwhelming, and the removal of such evidence would have had no impact on whether there was reasonable doubt as to his guilt.

1. *Petitioner's Offer to Stipulate was Invalid*

Rule 42.05 of the West Virginia Trial Court Rules provides that "[u]nless otherwise ordered, stipulations *must* be in writing, signed by the parties making them or their counsel, and promptly filed with the clerk." (emphasis added). "Typically, the word 'must' is afforded a mandatory connotation." *Ashby v. City of Fairmont*, 216 W.Va. 527, 532, 607 S.E.2d 856, 861 (2004). There is nothing in the record to indicate—nor does Petitioner argue—that his offer to stipulate was ever reduced to writing, signed by himself or his counsel, and filed with the clerk. To be sure, the record demonstrates that Petitioner's first mention of stipulating to his prior felony conviction was only a few questions before the State planned to move for the admission of his prior conviction order for voluntary manslaughter.

Although it is true that this Court has found that oral offers to stipulate are binding and enforceable, those circumstances are limited to those in which there is an *agreement* between the parties and there is *action* upon the stipulation in question. *See Lawyer Disc. Bd. v. Sidiropolis*, 241 W. Va. 777, 785, 828 S.E.2d 839, 847 (2019) ("Stipulations or agreements made in open court by the parties in the trial of a case and acted upon are binding and judgment founded thereon will not be reversed." (citing Syl. Pt. 1, *Butler v. Smith's Transfer Corp.,* 147 W. Va. 402, 128 S.E.2d 32 (1962))). Thus, before Petitioner's offer to stipulate could be deemed binding and enforceable, or to otherwise impose any obligation upon the court in accepting it, there must have been some agreement as to the stipulation, and the parties must have acted upon such. *Id.* Because that did not occur, Petitioner's offer to stipulate was invalid and the court committed no error in refusing to accept it.

2. *The court's refusal to accept Petitioner's offer to stipulate was an appropriate exercise of its broad discretion in managing the procedure and conduct of trial.*

The general premise upon which Petitioner's argument relies is accurate: an accused's offer to stipulate to having been previously convicted of a felony when such is necessary to prove an

essential element of a crime charged, the circuit court must accept the stipulation and preclude the introduction of evidence from either party to either prove or disprove such stipulated fact. *See* Syl. Pt. 5, in part, *State v. Herbert*, 234 W. Va. 576, 767 S.E.2d 471 (2014) ("When a defendant is charged with a crime in which a prior conviction is an *essential element* of the current crime charged . . . and *stipulates* to having been previously convicted of a crime, the trial court shall inform the jury that the defendant stipulated to the conviction. The jury shall . . . not be informed of the name or nature of the defendant's prior convictions." (emphasis in original)). But the utility of a stipulation is to determine, prior to trial, what evidence will be conceded, and, thus, relieve either party of the need to prove or disprove such facts, as well as to remove the need to prepare that part of their case for trial. *See Vander Linden v. Hodges*, 193 F.3d 268, 279 (4th Cir. 1999) ("[A] stipulation, by definition, constitutes '[a]n express waiver made . . . *preparatory to trial* by the party or his attorney conceding for the purpose of trial the truth of some alleged fact." (emphasis added)). The ability to stipulate to some fact is not—nor should it be construed as—a tool solely for the benefit of the defendant, to be used only when such conduct would benefit the defendant's chances at trial. As the United States Supreme Court in *Old Chief v. United States* recognized, a "criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." 519 U.S. 172, 188 (1997); *see also State v. Crystal W.*, No. 17-0913, 2020 WL 261716, *5, n. 4 (W. Va. Sup. Ct., Jan. 17, 2020) (memorandum decision) (responding to petitioner's assertion that she offered to stipulate to evidence admitted at trial, noted that "the State was not required to accept this stipulation. *See Old Chief v. U.S.,* 519 U.S. 172, 186-87 1997)("[A] criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.")); *State v. Gates*, No. 17-0905, 2018 WL 6131292, *2 (W. Va. Sup. Ct., Nov. 21, 2018) (memorandum

decision) (declining to find the circuit court abused its discretion in refusing petitioner's attempt to suppress certain 404(b) evidence by conceding to the issue of identity, and noting *Old Chief's* acknowledgement that a defendant may not "stipulate his way out of the full evidentiary force" of the case against him.).

As this Court recognized in *Matter of Starcher*, a binding stipulation "prevent[s] the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing the evidence to establish the admitted fact." 202 W. Va. 55, 61, 501 S.E.2d 772, 778 (1998). Therefore, while a stipulation may certainly benefit an accused by keeping certain information from the jury, it also serves to benefit the State by relieving it of its obligation to produce evidence to prove such element beyond a reasonable doubt, and concomitantly, the need to prepare that aspect of its case. When an accused, as did the Petitioner in the instant proceedings, decides to withhold agreeing to such stipulation until the middle of trial, while the State is in the process of attempting to elicit the information of which the accused seeks to stipulate, it completely strips from the State the benefit of the stipulation, and serves to solely benefit the accused.

Petitioner's assertion that the Court must accept a stipulation to a prior conviction that is an essential element to a crime charged is an unwarranted expansion of the case law upon which he asserts supports his position. One of the cases upon which Petitioner relies is this Court's holding in *State v. Herbert*, 234 W. Va. 576, 767 S.E.2d 471 (2014). The facts in *Herbert*, however, have little to do with stipulations, and more to do with *bifurcation*, and any mention of *stipulation*, is an ancillary matter relevant to the holding in that particular case. *Id.* at 591-92, 767 S.E.2d at 486-87. In *Old Chief v. United States*, the United States Supreme Court found that the circuit court erred in refusing to accept petitioner's offer to stipulate to his prior felony conviction when such offer to stipulate was made prior to trial and reduced to a written motion. 519 U.S. at

647-48. To further distinguish the facts of *Old Chief* from those at issue in the present case, the government refused to accept petitioner's offer to stipulate for no reason other than its assertion of its right to present its case however it deemed appropriate. *Id.* at 648. *Compare with* A.R. 570 (State informing the court that it had attempted to negotiate a stipulation prior to trial but Petitioner refused). In *State v. Nichols*, while it is not specified when the stipulation was made, the Court was faced with facts that indicated that, despite the petitioner's stipulation to prior DUI convictions, the lower court misapplied this Court's holding in *State v. Hopkins,* 192 W. Va. 483, 453 S.E.2d 317 (1994), and required the State to present evidence as to the prior convictions.[2] 208 W. Va. 432, 441-42, 541 S.E.2d 310, 319-20 (1999) *overruled on other grounds by State v. Johnson*, 238 W. Va. 580, 797 S.E.2d 557 (2017).

Petitioner also direct this Court's attention to *State v. James,* a Tennessee Supreme Court case in support of his position. Pet'r's Br. at 8-9. However, the facts in that case also involve an offer to stipulate made *prior to trial. State v. James*, 81 S.W.3d 751, 755-56 (2002). Petitioner also relies on *People v. Walker*, an Illinois Supreme Court case, which also involves an offer to stipulate made *prior to trial.* 812 N.E.2d 339, 341 (2004).

At no point in his brief does Petitioner point to any legal authority in support of his contention that a court must accept an offer to stipulate made in the middle of trial, in the midst of the State's attempt to offer the same evidence to which Petitioner seeks to stipulate.

It should also be noted that Petitioner was aware of the allegation set forth in Count 3 of the indictment that he was a felon in possession of a firearm and the predicate felony the State used in charging such crime was his prior voluntary manslaughter conviction. A.R. 1139. This is clear,

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[2] The decision also rested upon the distinction between a prior conviction that acts as a "sentence enhancer" verses a conviction that is an essential element of the charged crime, an issue that is not pertinent to the instant appeal. *Nichols,* 208 W. Va. at 445, 541 S.E.2d at 323.

because the indictment specifically identifies "voluntary manslaughter" as the predicate felony upon which Count 3 was based. A.R. 1139.

Despite this fact, Petitioner filed no motion related to the admissibility of such evidence as to Count 3 or Count 4 of the indictment. While he did argue that the evidence should be prohibited to prove any element as to Counts 1 and 2, Petitioner raised no issue as to its admissibility for any other purpose at any point until the middle of trial.

In addition to all of this, the mere voicing of an intent to stipulate to a fact is not the end of the issue. This Court has held that "the record must reflect a colloquy between the trial court, the defendant, defense counsel, and the State indicating precisely the stipulation and illustrating the stipulation was made voluntarily and knowingly by the Defendant." Syl. Pt. 2, in part, *State v. Evans*, 210 W. Va. 229, 557 S.E.2d 283 (2001); *see also* Syl. Pt. 3, *Nichols*, 208 W. Va. 432, 541 S.E.2d 310 (requiring a colloquy between the trial court and parties to ascertain nature of the stipulation, and to ensure that the stipulations are knowingly and voluntarily made).

In the instant case, when the Petitioner made his offer to stipulate, the court correctly recognized this, and indicated that going through with the colloquy "not something we'd be able to do during a jury trial." A.R. 758. Thus, the court was well within its discretion in refusing to accept Petitioner's stipulation. To do so would have required the court to instruct Petitioner's counsel to draft a written stipulation due to the State's refusal to agree, to hear any discussion as to how the stipulation should be read, and to conduct the requisite colloquy; all while in the middle of the taking of testimony of an out-of-county witness. This is precisely the type of "broad discretion" this Court recognized in *Davis*, at 414, 752 S.E.2d at 446.

Finally, any reliance Petitioner places on the court's 404(b) ruling is misplaced. First, the ruling was only related to the State's proffered use of the prior conviction to show *modus operandi*,

and lack of accident or mistake as it related to Counts 1 and 2. The court's ruling had nothing to do with the admissibility of such evidence for any other purpose. Furthermore, this Court has recognized that:

> It is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by it's potential for unfair prejudice; and (4) the trial court gave a limiting instruction.

Syl. Pt. 4, *State v. Blickenstaff*, 239 W. Va. 627, 804 S.E.2d 877 (2017). Here, all four factors have been met: the evidence was relevant and offered for the proper purpose of establishing proof of an essential element as to Count 3 in the indictment, the court made a determination of the evidence prejudicial impact to the defendant and determined that such did not warrant exclusion for the offered purpose, and the court promptly gave the jury a limiting instruction regarding the evidence. A.R. 564-79.

Whether Petitioner believed that such evidence was prejudicial to him, his failure to raise such an objection to the evidence for the purpose of establishing Count 3 should not be imputed to the State. To be sure, Petitioner could have moved to sever such charge prior to trial, but chose not to do so. The Petitioner was aware of the underlying facts that the State was required to prove in order to meet its burden as to Count 3 in the indictment. Petitioner refused to agree to the State's offer to negotiate a stipulation prior to trial, A.R. 570, and instead waited until the State was in the process of admitting the very evidence to which he was asked to stipulate to voice his acceptance. A.R. 570. The court is under no obligation to accept a stipulation on such short notice, especially when one considers the fact that the information had been available and known to Petitioner for months prior to trial. Therefore, Petitioner's argument that the lower court committed reversible error in denying his stipulation is without merit, and should be rejected.

3. *Harmless Error*

Assuming, *arguendo*, that this Court determines the circuit court did err in refusing to accept Petitioner's stipulation, such error is harmless beyond a reasonable doubt. When determining whether an error is harmless, this Court views the State's case without the challenged evidence, and "a determination is made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt." *State v. Atkins*, 163 W. Va. 502, 511, 261 S.E.2d 55, 61 (1979). If the evidence is deemed to be sufficient without the evidence in question, the analysis then turns to determining whether the error had any prejudicial impact on the jury. *Id.* In answer this second question, this Court has explained that "if 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). In other words, the error "must have affected the outcome of the proceedings in circuit court." *State v. Miller*, 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995).

The evidence presented at trial clearly shows, with fair assurance, that the jury's determination as to the guilt of Petitioner was not swayed by the presentation of his prior conviction order. Despite Petitioner's self-serving testimony that he was not the shooter, the evidence presented at trial pointed directly at Petitioner, and only Petitioner. At least four eye witnesses testified to either Petitioner, or an African American male matching the description of the Petitioner as the one who shot and killed Mr. Williams. Testimony as to the firearm that Petitioner used was later determined to be the firearm that shot the fatal bullet into Mr. William's chest. The evidence showed that it was Petitioner who was in contact with Mr. Williams and arranged the transaction, and it was Petitioner who asked or informed the others of the meeting and the purpose behind it. All witnesses testified to Petitioner being the one who gave Mr.

Williams the baggie with rock salt, and all witnesses testified that there was a single shot fired outside of the vehicle. Testimony revealed that Petitioner ceased contact with his parole officer after the shooting, attempted to discard the cell phone he used to communicate with Mr. Williams, and fled the state until his capture approximately three-months later. Moreover, the jury was provided communications Petitioner had sent to various individuals in which he appeared to threaten them to not testify against him, and to implicate another individual as the shooter, when there is no indication that other individual knew of or was present at the time of the transaction and shooting.

The evidence presented against Petitioner in support of his guilt was overwhelming. There can be no dispute that the evidence presented at trial, even if assumed that the Petitioner stipulated to his prior conviction, would have resulted in the same outcome. Therefore, any error in this regard is harmless beyond a reasonable doubt.

C. The trial court did not abuse its discretion in prohibiting Petitioner from testifying as to the guilt of another person relating to the crimes for which he was charged.

In his second assignment of error, Petitioner asserts that the circuit court deprived him of his right to present a meaningful defense by refusing to allow him to answer a question as to who he believed killed Mr. Williams. Pet'r's Br. at 9. While it is certainly true that a defendant has a fundamental right to a fair trial pursuant to Article III, Sections 10 and 14 of the West Virginia Constitution, *see* Syl. Pt. 3, *State v. Britton*, 157 W. Va. 711, 203 S.E.2d 462 (1974), such right does not confer upon a defendant the ability to "introduce whatever evidence he wishes." *State v. Zuccaro*, 239 W. Va. 128, 144, 799 S.E.2d 559, 575 (2017) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

As with any evidence a party seeks to introduce into evidence at trial, the evidence must be admissible and relevant to some material issue involved in the matters being tried. Rule 401 of the West Virginia Rules of Evidence provides that the test for relevant evidence requires one to ascertain whether the evidence offered "has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." But even though a particular piece of evidence may be relevant, it may nonetheless be excluded from trial under Rule 403 of the West Virginia Rules of Evidence when it presents a "danger of unfair prejudice, confusion, or undue delay [that is] disproportionate to the value of the evidence." Syl. Pt. 5, *State v. Trail*, 236 W. Va. 167, 778 S.E.2d 616 (2015). Thus, Rule 403 of the West Virginia Rules of Evidence confers upon trial courts broad discretion to exclude otherwise relevant evidence when "its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *See also* Syl. Pt. 8, *Rollins*, 233 W. Va. 715, 760 S.E.2d 529 ("As to the balancing under Rule 403 [of the West Virginia Rules of Evidence], the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's decision will not be overturned absent a showing of clear abuse.").

Petitioner's second assignment of error, however, presents two additional issues beyond the general relevancy and admissibility requirements of Rules 401 and 403 of the West Virginia Rules of Evidence. Specifically, a defendant's offer of evidence as to the guilt of another requires, in addition to the general relevancy and admissibility requirements:

> a determination of whether the testimony tends to directly link such person to the crime, or whether it is instead purely speculative. Consequently, where the testimony is merely that another person had a motive or opportunity or prior record of criminal behavior, the inference is too slight to be probative, and the evidence is therefore inadmissible. Where, on the other hand, the testimony provides a direct link to someone other than the defendant, its exclusion constitutes reversible error.

State v. Parr, 207 W. Va. 469, 475, 534 S.E.2d 23, 29 (2000) (citing Syl. Pt. 1, *State v. Harman*, 165 W. Va. 494, 270 S.E.2d 146 (1980)); *see also* Syl. Pt. 2, *State v. Malick*, 193 W. Va. 545, 457 S.E.2d 482 (1995).

The second issue in Petitioner's second assignment of error is that his attempt to offer such testimony at trial was in violation of the lower court's pretrial orders. The State filed a pretrial motion asking the trial court to specifically bar Petitioner from offering any such testimony unless the foundation set forth in *Malick*, *Parr*, and *Harmon*, *supra*, had been laid. A.R. 951 Moreover, as the court noted, Petitioner was required to provide the State with notice of its intent to offer such evidence prior to trial, A.R. 951, while also remaining in compliance with the court's arraignment order limiting the defendant's ability to engage in discover to no later than five days prior to trial. Resp's Supp. App'x at 1.

Petitioner argues that the court applied a "non-existent notice rule to preclude Petitioner's testimony." Pet'r's Br. at 4. Petitioner also argues that this Court's decision in *Malick* says nothing about a notice requirement as to an accused's intent to offer testimony as to guilt of another. Pet'r's Br. at 11. This argument is misplaced for two reasons: First, the court's order was only partially based upon Petitioner's failure to provide the State with pretrial notice; and second, the court specifically stated when it granted the State's motion following the pretrial hearing that the Petitioner could not offer such evidence unless the appropriate foundation is laid that shows the testimony provides a direct link to the guilt of someone else. A.R. 126. At trial, the court noted its pretrial order, and reminded the parties that they were bound by the court's pretrial orders unless "evidence is correctly admitted into the record that justifies reconsideration of the orders." A.R. 953.

As it relates to the court's notice requirement, such issue has little to do with the holding in *Malick*, and has much more to do with a trial court's authority to regulate the conduct and procedure of trial. This Court has recognized that "a circuit court is given 'broad latitude' in its selection of an appropriate remedy" for discovery violations, and "when a circuit court has promulgated specific discovery orders and guidelines for certain discovery requests and those guidelines are ignored or violated," Rule 16(c)(2) of the West Virginia Rules of Criminal Procedure allows the court to exclude the evidence. *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 140, 454 S.E.2d 427, 434 (1994); W. Va. R. Crim. P. Rule 16(d)(2). Thus, the circuit court absolutely had the discretion to impose a notice requirement for the production of certain pieces of evidence or testimony that either party sought to elicit at trial. The trial court also had the discretion to enforce those orders, and to impose the appropriate sanction that it deemed appropriate in light of the particular discovery violation.

Simply put, Petitioner committed a discovery violation by failing to provide notice as required by the court. Moreover, the court's arraignment order clearly and unambiguously stated that, unless given express approval from the court, Petitioner was not entitled to engage in discovery within five days of trial. Resp's Supp. App'x at 1. Petitioner's attempt to seek permission to offer this testimony on the fourth day of trial is in clear violation of the court's lawful pretrial orders, and the court appropriately exercised its discretion in refusing to allow Petitioner to testify to evidence that was not disclosed in compliance with such orders.

Second, Petitioner did not lay the appropriate foundation pursuant to *Malick* prior to seeking to offer testimony as to the guilt of another person. The testimony Petitioner sought to offer was nothing more than a self-serving, speculative, and completely unsupported attempt at deflecting blame from himself. As this Court noted in *Parr*, when "the testimony is merely that

another person had the motive or opportunity [to commit the crime] . . . the inference is too slight to be probative, and the evidence is therefore inadmissible." *Parr,* 207 W. Va. at 475, 534 S.E.2d at 29. In other words, Petitioner's right to present a meaningful defense does not entitle him to offer whatever testimony or evidence he desires. *Zucaro*, 239 W. Va. at 144, 799 S.E.2d at 575. The testimony Petitioner sought to offer fell precisely within the confines of what this Court determined was inadmissible in *Parr*, and, therefore, Petitioner's claim in his second assignment of error is without merit.

VII. CONCLUSION

For these reasons, the August 24, 2021, order of the Raleigh County Circuit Court should be affirmed.

Respectfully Submitted,

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By Counsel.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0738

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

TREMAINE LAMAR JACKSON,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, William E. Longwell, counsel for Respondent, hereby certify that on January 27, 2022, I served the foregoing ***"Respondent's Brief"*** on the below-listed counsel by depositing a true and accurate copy of the same in the United States mail, postage prepaid, in an envelope addressed as follows:

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