IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

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

HAYDEN DAMIAN DRAKES,

Petitioner.

PETITIONER'S REPLY

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REPLY ARGUMENT

Petitioner punched a man for harassing a pregnant woman and plying her with drugs and alcohol.[1] The man later died, and a Cabell County jury convicted Petitioner of second degree murder.[2] However, it did so only after the court made two crucial mistakes in its jury instructions: I) it eased the State's burden for proving second degree murder by not requiring intent to kill,[3] and II) it shifted the burden of proof for voluntary manslaughter to Petitioner by adding extra elements not required by law.[4]

These errors justify reversal not only because of the extreme injustice in this case but also because they upset the orthodox view of homicide and render West Virginia's murder laws incoherent. The State agrees this Court should grant oral argument and issue a signed opinion to review these important issues.[5]

However, the Response Brief's arguments to affirm are unfounded. Concerning the murder instruction, the Response represents that the common law view of murder that held sway in West Virginia prior to *Guthrie* still controls and that common law malice did not require intent to kill.[6] This argument is fundamentally mistaken. In *Guthrie*, this Court found West Virginia's homicide common law created contradictory jury instructions, gave inconsistent results, and usurped the legislature's primary role in defining substantive offenses.[7] This Court therefore rejected the old common law that the Response now relies upon and redefined both first and second degree murder to require intent to kill as a separate element from malice.[8]

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[1] A.R. 282–84., 635, 823.
[2] A.R. 680–81.
[3] A.R. 611.
[4] A.R. 598–99.
[5] Resp.'s Br. 5.
[6] Resp.'s Br. 4.
[7] *See State v. Guthrie*, 194 W. Va. 657, 672–75, 461 S.E.2d 163, 178–81 (1995).
[8] *Guthrie*, 194 W. Va. at 675–76.

And because intent to kill is a separate element from malice, the Response Brief's discussion of common law malice—A concept this Court called an "arbitrary symbol"[9]—is entirely off point. The Response Brief is fundamentally mistaken about the state of West Virginia's homicide law.

As to voluntary manslaughter, the Response acknowledges that provocation and passion are not elements,[10] and that the court instructed the jury that they were.[11] Nevertheless, it argues that Petitioner did not preserve the issue.[12] This argument depends upon a misreading of the record. Petitioner submitted a correct instruction, argued for it, and opposed the State's incorrect instruction.[13] The court had an opportunity to rule correctly and Petitioner's actions preserved the error when the court did not.

Finally, both errors upset West Virginia's orthodox homicide scheme in which each crime is a lesser included of the ones following it, based on additional mental state elements. The Response argues that this Court can disregard its own legal standards and declare, as a matter of judicial fiat, that offenses are lesser included notwithstanding their elements.[14] However, the argument misreads the relevant caselaw to reach this conclusion. This Court faithfully applies a strict elements test to preserve the integrity of the law.[15] And, consistent with *Guthrie*, the only way to maintain homicide's coherency is for second degree murder to require intent to kill.[16]

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[9] *Guthrie*, 194 W. Va. at 673 (quoting John S. Baker, Jr., Daniel H. Benson, Robert Force, & B.J. George, Jr., *Hall's Criminal Law* 268–69 (5th ed. 1993)).
[10] Resp.'s Br. 31.
[11] Resp.'s Br. 26.
[12] Resp.'s Br. 5.
[13] A.R. 565–66, 594, 598.
[14] Resp.'s Br. 21–22.
[15] *See State v. Wade*, 200 W. Va. 637, 646–47, 490 S.E.2d 724, 733–34 (1997); *State v. Henning*, 238 W. Va. 193, 793 S.E.2d 843 (2016).
[16] *See Guthrie*, 194 W. Va. 674–75.

I. Second degree murder requires intent to kill, and the circuit court erred by instructing the jury it could convict without finding this element.

Almost a quarter century ago, this Court decided *State v. Guthrie*, West Virginia's foremost authority on the state's homicide jurisprudence.[17] Justice Cleckley, writing for the Court, concluded that all murder requires intent to kill.[18] If the defendant reflects upon the intent and still carries out the homicide, it is first degree murder. If the defendant kills reactively, without reflecting upon the intent to kill, it is second degree.[19]

This Court reaffirmed this principal in *Gerlach*.[20] There, the State itself argued that second degree murder required intent to kill, and this Court agreed. "[P]ursuant to *Guthrie*, intent to kill is an element of second degree murder."[21]

Contrary to the orthodox view of homicide announced in *Guthrie*, the circuit court permitted the jury to convict Petitioner of murder without finding intent to kill. Petitioner asks this Court to order a new trial before a properly instructed jury.

A. *Guthrie* overruled the contradictory caselaw relied upon by the Response argument and instead established that premeditated and second degree murder both require intent to kill as a separate element from malice.

Guthrie affected a sea change in West Virginia's homicide law,[22] and Sheparadizing confirms its impact.[23] It is not an "aberration."[24] In *Guthrie*, this Court confronted an absolute mess: decades of piecemeal litigation had created inconsistent and overlapping

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[17] *See State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).
[18] *Guthrie*, 194 W. Va. at 181–82; *see also State v. Frazier*, No. 13-1122, 2014 WL 5529734, at *4 (W. Va. Oct. 30, 2014) (memorandum decision) ("The intent to kill is a required element of both first and second degree murder[.]").
[19] *Guthrie*, 194 W. Va. at 181–82.
[20] *Gerlach v. Ballard*, 233 W. Va. 141, 149, 756 S.E.2d 195, 203 (2013).
[21] *Gerlach*, 233 W. Va. at 147, 149.
[22] *See Guthrie*, 194 W. Va. at 676–77 (new homicide definitions departed from the common law to such a degree that the court ruled it could not apply them retroactively).
[23] *See e.g.*, Syl. Pt. 3, *State v. Hatcher*, 211 W.Va. 738, 568 S.E.2d 45 (2002); Syl. Pt. 16, *State v. Blevins*, 231 W.Va. 135, 744 S.E.2d 245 (2013); Syl. Pt. 5, *State v. Zuccaro*, 239 W.Va. 128, 799 S.E.2d 559 (2017); *State v. Skidmore*, 228 W.Va. 166, 171, n. 7 718 S.E.2d 516, 521, n. 7 (2011); *State v. Greenfield*, 237 W.Va. 773, 787, 791 S.E.2d 403, 417 (2016), all quoting Syl. Pts. 5, 6, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).
[24] Resp.'s Br. at 7.

standards for the degrees of homicide.[25] The Court redefined first and second degree murder, consistent with legislative intent, "[S]o that there might be some clarity and coherence to the law of homicide[.]"[26]

The Court achieved this by rejecting the former theory equating premeditation with intent to kill and instead established the orthodox view in which both degrees require intent to kill. Involuntary manslaughter is an unlawful killing.[27] Voluntary is an intentional unlawful killing.[28] Second degree murder is an unlawful, intentional killing with malice, and first degree murder requires all these elements, plus premeditation.[29] Each is a greater offense than the one preceding it, based on increasingly culpable mental states.

Aware of the significant impact the case would have in West Virginia, the *Guthrie* Court spent considerable time justifying its break with the past.[30] And it determined that it could not apply its rules retroactively.[31] The orthodox homicide theory announced in *Guthrie* was "not *dictated* by precedent existing at the time[;]"[32] It represented a break with the common law that preceded it.[33]

And now, the State seeks to reject *Guthrie's* orthodox view of homicide and return West Virginia's jurisprudence to the chaos that preceded it.[34] The Court should reject that invitation for several reasons.

First, the Response argument places undue weight on pre-*Guthrie* cases—including those that stand for the overruled theory equating premeditation with specific intent

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[25] *Guthrie*, 194 W. Va. at 676.
[26] *Id.* at 675–76; *see also Gerlach*, 233 W. Va. at 149.
[27] Syl. Pt. 3, *State v. Lough*, 143 W. Va. 838, 105 S.E.2d 538 (1958); *see also Criminal Law Instructions Manual*, 45.
[28] *McGuire*, 200 W. Va. 823 at Syl. Pt. 3; *see also Criminal Law Instructions Manual*, 46.
[29] *See e.g. Guthrie*, 194 W. Va. at 676; *see also Criminal Law Instructions Manual*, 47–49.
[30] *See Guthrie*, 194 W. Va. at 676.
[31] *Id.* at 677.
[32] *Id.* (cleaned up) (emphasis in the original).
[33] *Id.* at 677.
[34] Resp.'s Br. 8–12 (predominately relying upon pre-*Guthrie* cases and common law).

to kill.[35] The Response relies upon *State v. Starkey*,[36] which says that second degree murder does not require specific intent because that term is synonymous with premeditation.[37] And *Starkey* cites *State v. Hertzog* for this assertion: a case that, as *Gerlach* recognized, *Guthrie* repudiated.[38] The Response even quotes language equating premeditation/deliberation with specific intent to kill despite *Guthrie's* holding to the contrary.[39] And contradictory assertions within pre-*Guthrie* cases[40] explain why this Court rejected so much of its prior caselaw to restore "clarity and coherence to the law of homicide."[41]

The Response cannot invoke *Haddox*, *Starkey* and, by implication, *Hertzog*, for the assertion that second degree murder does not require intent to kill while ignoring the rationale those cases used to reach that conclusion—a rationale overruled by *Guthrie*.[42] *Guthrie* was a watershed case in which this Court discarded its prior, common law approach for a more sound and legally coherent one.[43] The Response argument that bad caselaw controls the caselaw that overruled it—instead of vice-versa—is unpersuasive.

Second, the Response undervalues the role that intent to kill plays in defining murder. The Response tries to limit the issue in *Guthrie* to the definition of first degree

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[35] *E.g.* Resp.'s Br. 19 (citing *State v. Haddox*, 166 W. Va. 630, 632, 276 S.E.2d 788, 790 (1981) (relying upon *State v. Starkey*, *infra* at n. 33)); *see also* n. 120, *supra*).

[36] *See e.g.* Resp.'s Br. 19.

[37] *See State v. Starkey*, 161 W. Va. 517, 523, 244 S.E.2d 219, 223 (1978) ("[T]he distinctive element in first degree murder is the specific intent to take life."), overruled on other grounds by *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

[38] *See Starkey*, 161 W. Va. at 523 (citing *State v. Hertzog*, 55 W.Va. 74, 46 S.E. 792 (1904), abrogation recognized by *Gerlach*, 233 W. Va. 141, 148–49, 756 S.E.2d 195, 202–03. (2013).

[39] *See* Resp.'s Br. 11 (quoting *State v. Dodds*, 54 W. Va. 289, 46 S.E. 228, 232 (1903) "Whenever, then, in cases of deliberate homicide, there is a specific intention to take a life, the offense, if consummated, is murder in the first degree[.]").

[40] *Compare, e.g.*, Resp.'s Br. at 10–11 (Asserting that *Dodds* equates intent to kill with premeditation/deliberation) *with Guthrie*, 194 W. Va. at 673–74 (asserting that *Dodds* requires more for premeditation).

[41] *Guthrie*, 194 W. Va. at 676.

[42] *See id.*; *see also Gerlach*, 233 W. Va. at 148.

[43] *Guthrie*, 194 W. Va. at 675 ("[W]e feel compelled in this case to attempt to make the dichotomy [between first and second degree murder] meaningful by making some modifications to our homicide common law.").

murder.[44] But that is not what this Court said; the Court said that the issue was "*the difference* between first and second degree murder."[45] *Guthrie* foreclosed the possibility of unintentional second degree murder by hinging that difference on the extent to which defendants reflect upon their pre-supposed intent to kill.[46] First degree murder requires that the defendant reflect upon that intent to kill, and second degree requires that the defendant not reflect upon it. *Guthrie* defined both first and second degree murder as flip sides of the same coin, with intent to kill central to both.[47]

Finally, and most crucially, the Response argument misses that this Court intentionally departed from the common law to require intent to kill as a separate element from malice.[48] The Response misconstrues the question presented as whether common law malice required intent to kill,[49] and consequently much of its argument is simply off point.

B. *Gerlach* is good law that stands for the proposition that second degree murder requires intent to kill.

The State argues that *Guthrie* does not necessarily provide an exhaustive definition for second degree murder despite the Court's own characterization of the issue in the case as "the *difference* between first and second degree murder."[50] Besides *Guthrie* itself foreclosing this interpretation, this Court clarified in *Gerlach v. Ballard* that "[P]ursuant to *Guthrie*, intent to kill is an element of second degree murder."[51]

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[44] Resp.'s Br. 15.
[45] *Guthrie*, 194 W. Va. 673 (*emphasis added*).
[46] *See id.* at 675–76.
[47] *See Guthrie*, 194 W. Va. 675 ("[W]e feel compelled in this case to attempt to make the *dichotomy* meaningful [between first and second degree murder] by making some modifications to our homicide common law.") (*emphasis added*).
[48] *See Guthrie*, 194 W. Va. at 675–76; *Gerlach*, 233 W. Va. at 147, 149 (rejecting defense argument that second degree required only intent to harm because *Guthrie* added the requirement of intent to kill.).
[49] Resp.'s Br. 8.
[50] *Guthrie*, 194 W. Va. at 673 (*emphasis added*).
[51] *Gerlach*, 233 W. Va. at 149.

The State does not contest that this Court ruled "intent to kill is an element of second degree murder" in *Gerlach.*[52] However, the Response attempts to distinguish the case and argue that *Gerlach's* ruling is dicta.[53] These arguments are mistaken.

Gerlach is on point. There, the State argued that per *Guthrie*, second degree murder requires intent to kill.[54] This Court agreed and ruled in favor of the State.[55] If intent to kill were merely a sufficient but not necessary element, then the entire second half of this Court's analysis in *Gerlach* would have been erroneous. Instead, the Court held that per *Guthrie* and West Virginia's orthodox homicide law, second degree murder requires intent to kill in addition to malice,[56] and this holding controls Petitioner's case.

Furthermore, this Court's holding that second degree murder requires intent to kill is not dicta. "It is blackletter law that where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum."[57] Else, neither ground would constitute the holding; just as the first ground could stand sufficient without the second, so too could the second stand without the first. The parties to *Gerlach* litigated whether second degree murder required an intent to kill,[58] the Court conducted a full analysis of the issue, and itself said that this was an independent basis for deciding the case.[59] Because the Court's ruling that "intent to kill is an element of second degree murder"[60] is a statement "...that explain[s] why the court's judgment goes in favor of the winner[,]" it is authoritative precedent.[61]

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[52] Resp.'s Br. 12.
[53] Resp.'s Br. 13.
[54] *Gerlach*, 233 W. Va. at 147 ("[T]he State argues that an element of second degree murder is the intent to kill.").
[55] *Id.* at 148–49.
[56] *See Id.*
[57] Bryan A. Garner et al., *The Law of Judicial Precedent* 122 (2016) (cleaned up).
[58] *E.g. Gerlach*, 223 W. Va. at 147 ("The State argues that an element of murder is the intent to kill[.]").
[59] *Id.* at 147.
[60] *Id.* at 149.
[61] Garner et al., *supra,* at 46 (Citing Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1256 (2006)).

Nor did *Gerlach* overstate *Guthrie*; it quoted the holding: "[t]here must be some evidence that the defendant considered and weighed his decision to kill in order for the State to establish premeditation and deliberation under our first degree murder statute. This is what is meant by a ruthless, cold-blooded, calculating killing. *Any other intentional killing, by its spontaneous and nonreflective nature, is second degree murder.*"[62]

Almost twenty-five years ago, *Guthrie* repudiated much of its prior common law and established the orthodox view of homicide.[63] "[P]ursuant to *Guthrie*, intent to kill is an element of second degree murder."[64] The State has previously argued in favor of this view, and this Court has reaffirmed it.[65] Absent a drastic departure from *Guthrie* and a return to the confusion that preceded it, these holdings control this case in Petitioner's favor.

C. The Response argument confuses the legal elements necessary to sustain a conviction with the evidence from which jurors may infer the defendant's mental state.

The Response Brief expresses concern that if all felony homicide requires intent to kill, then a defendant who commits a violent act without intent to kill is only guilty of a misdemeanor.[66] First, this argument fails to appreciate the difference between the legal element the State must prove, and the evidence the jury can use to infer it.

In addition to establishing the orthodox view of homicide, *Guthrie* abolished the common law distinction between direct and circumstantial evidence.[67] The extreme limi-

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[62] *Gerlach*, 233 W. Va. at 148 (*emphasis in the original*) (quoting *Guthrie*, 194 W. Va. at 675–76).
[63] *See Guthrie*, 194 W. Va. 676–77 (overruling *State v. Schrader*, 172 W. Va. 1, 302 S.E.2d 70 (1982), repudiating the prior distinction between first and second degree murder, and establishing a homicide theory so new that it could not be applied retroactively.).
[64] *Gerlach*, 233 W. Va. at 149.
[65] *Id.* at 147–49 (acknowledging incompatibility between *Hertzog* and *Guthrie*.).
[66] Resp.'s Br. 25–26.
[67] *Compare* Irene Merker Rosenberg & Yale L. Rosenberg, *"Perhaps What Ye Say Is Based Only on Conjecture"-Circumstantial Evidence, Then and Now*, 31 Hous. L. Rev. 1371, 1390 (1995) *with Guthrie*, 194 W. Va. at 669.

tations the common law placed on circumstantial evidence no doubt led to the proliferation of malice instructions that transformed it into an "arbitrary symbol,"[68] eventually leading to the mess of contradictory homicide instructions and the usurpation of legislative authority that this Court confronted in *Guthrie*.[69] This Court saw fit to fix both: it established the orthodox view of homicide in which each offense is separated from the next by a single mens rea element,[70] and it liberalized the instructions and arguments the State could craft to prove those elements.[71]

So, if a person commits a sufficiently violent act, the jury is not required to take the defendant's word for it vis-à-vis intent. The State is free to argue for the jury to infer intent to kill (or even premeditation) from the act itself.

Second, the Response points to no authority to assert that the legislature did not intend the outcome about which it complains.[72] *Guthrie* has been the law for decades, yet the homicide statute remains unchanged.[73] The Response tries to pass off its own version of the common law as authentic, but it is not. The parties are not asking this Court to pick between equally valid theories in a vacuum. A quarter century ago this Court looked at the authority the Response now relies upon. This Court found it presented contradictory jury instructions, produced inconsistent results, and usurped the legislature's authority to distinguish homicide degrees by collapsing some of them into single offenses. And this Court used *Guthrie* as a vehicle to fix this, by modifying the common law to reflect the orthodox view of homicide Petitioner champions. *Guthrie* defined both the elements of first degree murder and second degree murder. It did so to restore "clarity and coherence" to the law of homicide. This Court should resist the State's invitation to backslide.

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[68] *Guthrie*, 194 W. Va. at 673
[69] *See Guthrie*, 194 W. Va. at 674–75.
[70] *See id.* at 675–76.
[71] *See id.* at 668–69.
[72] *See* Resp.'s Br. 25–26.
[73] W. Va. Code § 61-2-1 (West Law) (last amended in 1991, with no substantive changes affecting *Guthrie*).

II. Voluntary manslaughter is an intentional killing without malice and the circuit court erred by requiring the jury to find additional elements before considering it as a lesser included offense.

In addition to making it easier for the jury to convict Petitioner of the charged offense by not requiring intent to kill for second degree murder, the court's instructions also made it more difficult for the jury to consider lesser included offenses by adding to voluntary manslaughter the elements of sudden provocation and heat of passion.[74]

The Response agrees that provocation and passion are not elements of voluntary manslaughter,[75] and that the court instructed the jury that they were.[76] Instead, the Response argues that Petitioner did not object or explicitly complain about burden-shifting.[77] However, the Response argument misreads the record and confuses the error with the prejudice that results. Petitioner proposed correct instructions.[78] He argued against the State's incorrect instruction.[79] This preserves the error: an incorrect jury instruction. The Petitioner need not separately object to the harm that results, which in this case is shifting the burden to the defendant.

The Response also argues that adding unnecessary elements to a lesser included that must be proved before the defense can prevail on that theory does not shift the burden of proof to defendants.[80] However, this relies upon a misreading of *State v. Gangwer*,[81] and ignores that due process depends upon practicalities, not formalism.[82]

A. Petitioner preserved this error.

Petitioner intended to pursue a lesser included offense than murder and proposed instructions on the degrees of manslaughter. He asked the court to instruct the jury that

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[74] A.R. 630.
[75] Resp.'s Br. 31.
[76] Resp.'s Br. 26.
[77] Resp.'s Br. 26–27, 30–31.
[78] A.R. 565–67.
[79] A.R. 594, 598.
[80] Resp.'s Br. 33.
[81] *State v. Gangwer*, 169 W. Va. 177, 286 S.E.2d 389 (1982).
[82] *See Wilbur*, 421 U.S. at 699.

"'Voluntary Manslaughter' is the unlawful and intentional killing of another without malice" (Defendant's Instruction 7)[83] and "It is the element of malice which forms the critical distinction between murder and voluntary manslaughter. Malice is not an element of voluntary manslaughter." (Defendant's Instruction 8).[84]

The State opposed these instructions because they did not require provocation or passion.[85] Petitioner argued that voluntary manslaughter does not require those: "malice is the only difference."[86] The court agreed with the defense.[87]

At this point, the Response Brief represents that the court decided to give both instructions and the defense acquiesced:

> "THE COURT: I am going to give another instruction on the elements with that.
> [Defense]: Okay."[88]

The Response Brief supposes the second instruction the court referenced is the State's instruction including provocation and passion, to be read alongside the defendant's one without it: "[The court] indicated it was going to give another instruction which included that language, to which Petitioner did not object."[89] However, the Response misreads the record. The fuller exchange, which the Response truncates, is this:

> "THE COURT: I am going to give another instruction on the elements with that.
> [Defense]: Okay.
> THE COURT: It is intent to kill without malice, in my opinion. I think that is right. I will give No. 7. And I am going to give No. 8 also. It tells the difference between Voluntary and murder -- malice. Malice is not an element of voluntary Manslaughter. I will give that instruction."[90]

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[83] A.R. 565.
[84] A.R. 566–67.
[85] A.R. 594.
[86] A.R. 594.
[87] A.R. 595.
[88] Resp.'s Br. 27 (citing A.R. 594–95.
[89] Resp.'s Br. 28.
[90] A.R. 594–95.

Contrary to the Response argument's interpretation, the court did not indicate it would also instruct on provocation and passion. All it said was that it would give both defense instruction 7, the definition of voluntary manslaughter, and defense instruction 8, an explanation that malice is the sole distinguishing element.[91] There was no reason to object because at this point; the court had ruled entirely in Petitioner's favor.

Later, the State sought to revisit a ruling it considered unfavorable.[92] Here for the first time, the court mentioned the State's instruction as well, and the State expressed concern that the defense instructions did not mention provocation or passion.[93] When the court began considering the State's instruction, Petitioner argued it misstated the law: "The only difference is that it is not malicious."[94] He went on to say "I think it is just pretty clear the jury has to believe there is no malice involved. They don't have to find 'and' –."[95] The court then ruled it would require provocation and passion, and Petitioner said "yes, sir,"[96] acknowledging that the Court had made its final ruling.

This exchange preserves the issue. The court had previously agreed to give defense instructions 7 and 8.[97] Petitioner argued the State's instruction incorrectly stated the law.[98] And he stated his grounds—that the only difference is malice, and no one needs to prove anything affirmative beyond that.[99] Preservation does not require Petitioner to do anything further after the court makes a final ruling.[100] West Virginia abolished exceptions,[101] and it certainly does not require lawyers to be rude to circuit judges to preserve

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[91] *Id.*; *see also* A.R. 565–67.
[92] A.R. 596.
[93] A.R. 596–97.
[94] A.R. 598.
[95] *Id.*
[96] A.R. 598–99.
[97] A.R. 594–95.
[98] A.R. 594, 598.
[99] *Id.*
[100] W. Va. R. Crim. P. 30.
[101] *Cf.* WVRE 103(b) ("Once the court rules definitively on the record--either before or at trial--a party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

error. Petitioner proposed a correct instruction and argued that the State's instruction incorrectly required provocation and passion.[102] Once the court ruled, the error was preserved.

And Petitioner preserved the entire instructional error. The Response argues that Petitioner only complained that the instruction misstated the law; he did not go on to say that the instruction shifted the burden of proof for voluntary manslaughter to him.[103] However here, the Response Brief confuses the error with the harm that flows from it. Shifting the burden of proof to the defendant is a consequence of adding elements to lesser included offenses. When Petitioner proposed a correct instruction and argued against the State's incorrect one, he preserved the issue and now can argue the resulting prejudice.

B. Adding extra elements to a nominally lesser included offense pursued by the defense unconstitutionally shifts the burden of proof to defendants.

The State sought a second degree murder conviction. Petitioner intended to argue for a lesser included offense, possibly voluntary manslaughter, which should not have had any additional elements to keep the burden on the State. When the court instructed the jury that it had to find provocation and passion to consider voluntary manslaughter, it shifted the burden of proof to the defense.

In *Mullaney v. Wilbur*,[104] the United States Supreme Court ruled that Maine violated the Due Process Clause of the Fourteenth Amendment by requiring defendants to prove provocation to be guilty of manslaughter instead of murder.[105]

The Response Brief argues that *State v. Gangwer* stands for the proposition that this does not hold in West Virginia because a proper malice instruction does not shift the

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[102] A.R. 594–95, 598.
[103] Resp.'s Br. 30.
[104] *Mullaney v. Wilbur*, 421 U.S. 684 (1975).
[105] *Wilbur*, 421 U.S. 703–04.

burden of disproving malice to the defense.[106] But a closer reading of *Gangwer* shows this not to be the case. There, the defendant sought an instruction on his specific theory of the case: that he acted upon heat of passion and sudden provocation, and that these mental states are incompatible with malice.[107] The circuit court denied this instruction.[108] In fact, it did not read *any* instruction mentioning passion or provocation as elements,[109] likely because they were not elements of manslaughter even then.[110] This Court affirmed because provocation/passion is only one of several mental states incompatible with malice.[111] So an instruction to acquit the defendant of murder if the State does not prove malice necessarily entails that the jury should acquit if it finds provocation/passion.[112]

This does not compare to Petitioner's case. The court instructed the jury it could not consider voluntary manslaughter as a lesser included offense unless it found that Petitioner acted "upon sudden provocation and in the heat of passion."[113] And by including these unnecessary elements in a lesser included sought by the defense and opposed by the State, the instruction shifted the burden of proof to Petitioner as a practical matter.

The Due Process Clause is concerned with practicality, not formalism.[114] And the best indication of this instruction's impact arises from the parties' positions. The Petitioner opposed adding elements because they made it more difficult for the jury consider the lesser included offenses. And the State fought for it because it made its own task easier. Not only did the instruction misstate the law of West Virginia, under *Mullaney v. Wilbur*, it shifted the burden of proof to a criminal defendant.

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[106] Resp.'s Br. 33.
[107] *See Gangwer*, 169 W. Va. at 185.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 187 ("[I]t is the element of malice which forms the critical distinction between murder and voluntary manslaughter in West Virginia.").
[111] *See Id.*
[112] *See id.*
[113] A.R. 630.
[114] *See Wilbur*, 421 U.S. at 699.

III. The circuit court's errors concerning the elements of second degree murder and voluntary manslaughter disrupt the orthodox view of homicide in West Virginia.

The circuit court's departure from the orthodox view of homicide returns West Virginia's homicide scheme to the contradictory morass that prompted this Court to abandon much of its common law murder jurisprudence in the first place.

A. The Response concedes that its view would disrupt West Virginia's homicide law and usurp the legislature's authority unless this Court abandons the strict elements test for evaluating lesser included offenses.

The *Guthrie* Court found that the legislature's departure from the common law to separate homicide into degrees indicated its intent that each be a lesser included of the one before it.[115] As established in *State v. Louk*, West Virginia follows a strict elements test for determining lesser included offenses, such that if the putative lesser contains an element the greater does not, it cannot be a lesser included offense.[116] This Court concluded then, that under general separation of powers doctrines, it had a responsibility to provide definitions that maintained the legislature's statutory scheme.[117] It could not give definitions for homicide offenses that either caused the offenses to collapse or to no longer be lesser included.[118]

In looking at the common law view, as relied upon by the Response Brief, the *Guthrie* Court found the state of the law lacking.[119] Under the pre-*Guthrie* view, the law allowed for instantaneous premeditation, eliminating the difference between first and second degree murder.[120] Furthermore, voluntary manslaughter required intent to kill while,

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[115] *See Guthrie*, 674–75.
[116] Syl. Pt. 1, *State v. Louk*, 169 W. Va. 24, 285 S.E.2d 432 (1981) (overruled on other grounds by Syl. Pt. 6, *State v. Jenkins*, 191 W. Va. 87, 443 S.E.2d 244 (1994).
[117] *See Guthrie*, 674–75.
[118] *Id.*
[119] *Id.*
[120] *See State v. Haddox*, 166 W. Va. 630, 632, 276 S.E.2d 788, 790 (1981) (per curiam) (citing *Starkey*, *see supra.*) *State v. Starkey*, 161 W. Va. 517, 523, 244 S.E.2d 219, 223 (1978) (equating premeditation with specific intent to kill); *State v. Taylor*, 57 W. Va. 228, 50 S.E. 247, 252 (1905) ("If there was a fixed, deliberate, and sedate purpose to kill, usually termed "specific intent to take life," willful, deliberate, and premeditated, ... the offense was murder of the first degree."); *State*

under the Response's theory, second degree did not.[121] Consequently, voluntary manslaughter could be a lesser included offense of first degree murder but not second.[122] Out of respect for separation of powers, this Court deferred to the legislature and adopted the orthodox view to fix this problem.[123] Under *Guthrie*, each offense is a lesser one of those following it. Involuntary manslaughter is an unlawful killing, and voluntary requires intent to kill as well as unlawfulness. Second degree murder requires unlawfulness, intent to kill, and malice. And premeditated first degree murder requires all preceding elements plus premeditation.

The Response does not appear to contest that Petitioner's position—the orthodox view—solves this problem just as the *Guthrie* Court intended.[124] And it admits that its own proposal to revert to the pre-*Guthrie* theory creates this problem all anew.[125] All it offers to ameliorate this condition is an invitation to engage in judicial fiat rather than follow the established rule of law.[126] The Response suggests this Court abandon the strict elements test, look only to the trial evidence, and simply declare that voluntary manslaughter is a lesser included offense.[127] It claims support for this one-off approach through a misunderstanding of felony murder and by misreading *State v. Henning*,[128] to reach its desired conclusion.

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v. Dodds, 54 W. Va. 289, 46 S.E. 228, 229 (1903) (internally incoherent, but at one point approving of an instruction stating that specific intent to kill distinguishes first and second degree murder.); Syl. Pt. 6, *State v. Beatty*, 51 W. Va. 232, 41 S.E. 434 (1902) ("Whether murder is of the first degree or second degree depends upon whether the act which produced death was accompanied by specific intent on the part of the slayer to take life."); *State v. Morrison*, 49 W. Va. 210, 38 S.E. 481, 484 (1901) (positing sufficient premeditation for first degree murder if, in the instant between grabbing a stick and striking a victim, the intent to kill arose.).

[121] *Compare Guthrie*, 194 W Va. at 673 (discussing common law malice aforethought) *with* Syl. Pt. 3, *State v. McGuire*, 200 W. Va. 823, 490 S.E.2d 912 (1997) (Voluntary manslaughter is an intentional killing without malice.).

[122] *See Louk*, 169 W. Va. at Syl. Pt. 1.

[123] *See Guthrie*, 194 W. Va. at 674–76.

[124] Resp.'s Br. 20.

[125] Resp's Br. 21

[126] Resp.'s Br. 23.

[127] Resp.'s Br. 22.

[128] *State v. Henning*, 238 W. Va. 193, 793 S.E.2d 843 (2016).

The Response Brief suggests that this Court can discard the strict element test because it already does so in the case of felony murder.[129] If the State pursues premeditated murder, the other degrees of homicide may be lesser included, but if it argues for felony murder, there are no lesser included offenses; the Response presumes this is because the trial evidence differs.[130] The Response Brief's presumption is incorrect. The reason felony murder has no lesser included offenses is *because* it has no elements in common with any other degree of homicide (besides death).[131] This is not a departure from *Louk*; it's a straightforward application of the strict elements test.[132]

The Response also misunderstands *State v. Henning*. There, the Court affirmed a conviction for misdemeanor assault as a lesser included offense of malicious assault.[133] On its face, malicious assault does not require a perceived risk of harm in precisely the same language used to define assault.[134] However, the Court noted that the legislature intended for it to be a lesser included offense,[135] and therefore the Court had a duty to interpret the statute so that it fell within the *Louk* analysis.[136] It did so by construing the perceived risk of harm required for assault as an inchoate degree of the actual harm required for malicious assault.[137] By so construing the statute, this Court made misdemeanor and malicious assault comport with *Louk*. It did not carve out an exception to the strict elements test as

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[129] Resp.'s Br. 21.
[130] *Id.*
[131] *State v. Wade*, 200 W. Va. 637, 646–47, 490 S.E.2d 724, 733–34 (1997) ("We find that both second-degree murder and voluntary manslaughter are not lesser included offenses of felony-murder because they each require an element that is not necessary for a conviction of felony-murder[.]").
[132] *Wade*, 200 W. Va. 637 at Syl. Pt. 3 (quoting *Louk*, 169 W. Va. 24.).
[133] *Henning*, 238 W. Va. at 200.
[134] *Id.* at 198.
[135] *Id.*
[136] *Id.* at 198–99.
[137] *E.g. id.* at 199 ("[W]e are confronted with essentially one offense that is assigned differing degrees of punishment depending on the extent of its completion.").

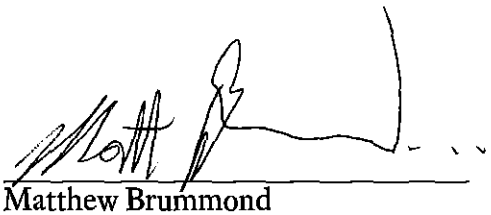
the Response Brief claims.[138] The Court said precisely the opposite: "we find it unnecessary to adopt an expanded definition of a lesser included offense[.]"[139]

This is the same analysis this Court used in *Guthrie* to establish the orthodox of homicide,[140] and which analysis the Response calls "inverted."[141] On the contrary, it is an elegant solution that effectuates the legislature's intent in *Henning* and *Guthrie* alike.

CONCLUSION

Petitioner punched a man for harassing a pregnant woman. It is undisputed he had no intention to kill the stranger.[142] Petitioner should not be labeled a murderer and should not serve a forty-year prison sentence. But for the circuit court's erroneous instructions, he wouldn't be. Therefore, Petitioner asks this Court to reverse his conviction and remand for a new trial with proper jury instructions.

Respectfully submitted,
Hayden Drakes,
By Counsel



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[138] *See* Resp's Br. 22 ("[T]his Court has recognized exceptions to the *Louk* test where the legislature has made it clear that an offense is intended to be a lesser included offense of another."); *but see Henning*, 238 W. Va. at 200 ("[W]e find it unnecessary to adopt an expanded definition of a lesser included offense[.]").

[139] *Henning*, 238 W. Va. at 200; *See also State v. Bland*, 239 W. Va. 463, 468–69, 801 S.E.2d 478, 483–84 (2017).

[140] *See Guthrie*, 194 W. Va. 674–75.

[141] Resp.'s Br. 20.

[142] *See* Resp.'s Br. 1–4.