IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 22-771

STATE OF WEST VIRGINIA,
Respondent,

v.

BRADLEY ROHRBAUGH,
Petitioner.

(An appeal of the final order of the Circuit Court of Grant County, Case No.: 21-F-38)

PETITIONER'S BRIEF

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2. The Circuit Court clearly erred by finding that the Petitioner "wished to waive his right to a jury trial and that the parties wished to schedule this matter for a trial before the Court," and by conducting a bench trial, in the absence of a record demonstrating that the Petitioner's waiver of his right to a jury trial was knowing and voluntary.

STATEMENT OF THE CASE

The Petitioner was indicted for fleeing with reckless indifference, in violation of W. Va. Code §61-5-17(f), by the November, 2021 Grant County Grand Jury. (A.R., at 5). It was alleged in a criminal complaint that the Petitioner was observed driving a motor vehicle, and was followed by a State Trooper[1] traveling down the road that connects Smoke Hole Caverns to Seneca Rocks. It was further alleged that the Petitioner then drove at a high rate of speed, crossing the center line, and causing oncoming traffic to go off the road, after the Trooper turned his lights on. It was additionally alleged that he turned off the main road onto a side road and exited the vehicle with his passenger, until the two men were verbally ordered to stop by the Trooper, and subsequently detained. (A.R., at 9-10).

Following his arraignment, the Petitioner filed a number of pretrial motions, including a suppression motion, and a number of motions in limine regarding potential testimony concerning various collateral acts that were outside the scope of the indicted conduct. (A.R., at

1 The Petitioner and the State Trooper in question are both named "Rohrbaugh"; therefore, for the sake of clarity, Trooper Rohrbaugh will be described in this Brief as "the Trooper."

15-39). However, at a March 7, 2022 hearing, the Court was informed that rather than litigate those issues, the parties had agreed to a bench trial. (A.R., at 40). The entirety of that hearing is set forth as follows:

> (Monday, March 7, 2022, 10:08 a.m.)
>
> THE COURT: We're on the record in the Circuit Court of Grant County in the matter of State of West Virginia versus Bradley Steven Rohrbaugh. It's 21-F-38. I have him here with Mr. White. I have the State by its prosecutor, Mr. Ours. Where do we stand? We got some motions here it looks like.
>
> MR. OURS: Well, they're going to go away, Your Honor. What I'm about to tell you --
>
> THE COURT: Here, let me strip them out.
>
> MR. WHITE: Dismiss the charges, Judge; we'll get up and leave.
>
> THE COURT: There you go. Sounds fair, Max.
>
> MR. OURS: Not quite. Max and I talked Friday, and he told me about those, and I said, "That's not something what I -- I intended to do." He said, "We're thinking about a bench trial." I think we're here just to schedule a bench trial before you on a single charge.
>
> THE COURT: How long we going to take? Half a day?
>
> MR. OURS: One witness. Two?
>
> MR. WHITE: Two witnesses. Well, my -- we might have two. John is probably going to have at least two probably, rather than just one.
>
> THE COURT: Okay. I mean, I don't care. I'm just asking.
>
> MR. WHITE: Better do at least half a day, Judge.
>
> THE COURT: That's fine.
>
> MR. WHITE: Maybe make it in the afternoon in case we got to run into evening just a little bit, just to be on the safe side.

THE COURT: Ha, ha, ha.

MR. WHITE: Oh, never mind then. We'll do it in the morning, Judge.

THE COURT: Is Mr. Geary still the mental hygiene officer up here?

MR. WHITE: He is, Your Honor.

THE COURT: I want him to sign an order on Mr. White.

MR. WHITE: I appreciate that, Judge.

THE COURT: Okay. Let's pick a day.

MR. WHITE: Judge, let me ask you this. Can we do maybe June or so or...

THE COURT: Yeah, that's fine. Find us a clean day in June. We're going to do it in the morning.

MR. OURS: Yes, sir. I figured.

THE COURT: Six-thirty, thanks to Mr. White.

MR. WHITE: That's fine.

THE COURT: June 9th?

MR. WHITE: Just have to get there, Judge. That's fine with us, Your Honor.

THE COURT: John?

MR. OURS: What time?

THE COURT: All right. Set this for June 9th.

MR. WHITE: Nine a.m.?

THE COURT: Yeah.

MR. WHITE: Or do you want to start earlier?

THE COURT: Nine a.m. We'll be ready if you get here. We're

usually here by 8:30.

MR. WHITE: Gotcha, Your Honor. Hey, Judge, there is one thing I just want to put on the record. There's a couple things I got to check with John about from the trooper about the video, but that's neither here nor there. There is an issue in regards to the stop of the vehicle itself. I filed a motion to suppress the stop of the vehicle itself. Just want to reserve the right -- it really comes before Your Honor, because --

THE COURT: Right. We'll decide it then.

MR. WHITE: That's an issue that we need to take care of, Judge. I am just reserving that right.

THE COURT: Okay. Right. You have the right to bring that up at trial.

MR. WHITE: Yes, Your Honor. Other than that, we're ready to go.

THE COURT: Might as well kill one bird with two stones as sixteen. Right. Stones, I mean. All right. This hearing is closed.

(The hearing ended at 10:10 a.m.)

(A.R., at 72-75).

The bench trial took place on June 9, 2022. The State put on the testimony of the Trooper, and the defense put on the testimony of the Petitioner, following which the State recalled the Trooper in rebuttal. The Trooper testified that he observed the Petitioner driving across Smoke Hole bridge opposite of the direction that the Trooper was driving. He testified that he recognized the Petitioner, and knew that the Petitioner had previously been convicted of driving suspended for DUI, among other criminal entanglements. (A.R., at 80-81). The Trooper testified that he did not feel he had probable cause to pull over the Petitioner at that point, so he turned around and followed the Petitioner, and observed that the Petitioner was traveling at a high rate of speed. (A.R., at 82).

The Trooper testified that he paced the Petitioner at approximately 73 miles per hour in

a 55 zone. He stated at that time that he turned on his emergency lights to initiate a traffic stop, and that he then observed the Petitioner traveling at approximately 100 miles per hour, and going left of center. He observed the Petitioner turning off onto Long Hollow Road, and skidding in the turn as a result of his high speed. He then saw the vehicle stopped, and both doors open with the Petitioner and his passenger heading toward a residence. The Trooper testified that he held the two men at gunpoint to await the arrival of backup. Upon inquiry by the prosecutor, the Trooper testified that he saw at least one vehicle traveling from the opposite direction as the Petitioner crossed a ridge before turning off of the highway. (A.R., at 83-84).

On cross-examination, the Trooper testified that he did not initially throw on his lights or siren when he first identified the Petitioner as the driver of the vehicle. He testified that by the time he turned around and got back on the highway following the Petitioner, he was a couple of hundred yards behind him, and still did not turn on the lights at that time. (A.R., at 84-89). The Trooper testified that it is a couple of miles between the bridge and Long Hollow Road. He stated that he had to close the gap in order to pace the Petitioner's vehicle to determine whether he was exceeding the speed limit. The Trooper could not testify exactly how far he traveled in order to pace the Petitioner's vehicle, but thought that he turned on the lights somewhere around the bottom of Crow's Ridge near the intersection with Jordan Run Road. (A.R., at 89-93). The Trooper testified as to the following concerning his observation of another vehicle that may have gone off of the road as a result of the Petitioner's driving:

> Q. Okay. You had indicated that Mr. Rohrbaugh had crossed the center line. Did he ever run anybody off the road, anything of that nature?
>
> A. There -- like I testified to earlier, I do remember one car around either the top or the backside going off where, at that point in time, we were running in around a hundred mile per hour going across the -- up over.

(A.R., at 94).

The Trooper testified that his body camera video was turned on automatically as a result of his lights going on. (A.R., at 95). The Trooper acknowledged that the body cam did not show the Petitioner's vehicle, nor any other vehicles, and only showed the Trooper driving one-handed down the road. (A.R., at 95-96). The Trooper testified that at the time he turned on his lights, he was only a few car lengths behind the Petitioner, and that he did not turn on the siren. (A.R., at 97). The State rested its case.

The Petitioner testified in his own defense that the Trooper did not turn on his lights until the intersection of Long Hollow Road, at which point he had already parked by his destination. (A.R., at 107-108). He testified he and his passenger were aware of the Trooper being behind them, and were watching to see whether the lights would come on. (A.R., at 108). He denied that he crossed the center line, and denied that he ran anyone off the road. (A.R., at 110-111). He denied that his four-cylinder car was capable of reaching 100 miles per hour without a great deal of acceleration time. (A.R., at 111).

Following the Petitioner's testimony, the State put the Trooper back on the stand. The Trooper testified again that he turned on his lights around Jordan Run Road. The Trooper also confirmed that the Petitioner had given a *Miranda*-ized statement stating that "he was traveling approximately 70 mile an hour in a posted 55 mile an hour zone before he advised he knew the trooper was after him." (A.R., at 117-118). On cross-examination, the Trooper reiterated that the body camera turned on as a result of him throwing on his lights. (A.R., at 118-120).

At the conclusion of the Trooper's rebuttal testimony, the Circuit Court stated:

THE COURT: All right. Based upon the testimony that I heard

> here today, I have no doubt Mr. Rohrbaugh may have not have seen -- this Mr. Rohrbaugh, the Defendant, may not have seen him right when it happened. But I do believe Trooper Rohrbaugh's testimony. Based upon the facts that have been presented, I'm finding the Defendant guilty.

(A.R., at 121).

The Circuit Court noted the Petitioner's objection to the verdict. (A.R., at 122). At sentencing, the Court denied a motion for alternative sentence, and sentenced the Petitioner to 1-5 years of incarceration. It is from the judgment of sentence that the Petitioner now appeals.

SUMMARY OF ARGUMENT

The verdict in this case is unlawful, because there is no record to support the notion that the Petitioner made a knowing and intelligent waiver of his constitutional right to a trial by jury. There is no written waiver to that effect. There was not even the most cursory of colloquies to that effect. All the record supports is that the Petitioner's trial counsel decided to request a bench trial. The law permits the waiver of a constitutional right, but the waiver must be knowing and voluntary. Nothing in the record supports such a finding, and such a finding is not to be presumed from a silent record.

Additionally, the evidentiary record developed at the bench trial, in light of the Circuit Court's stated factual findings, demonstrate that it was erroneous to find the Petitioner guilty beyond a reasonable doubt. The Circuit Court explicitly stated that it had “no doubt” that the Petitioner may not have seen the Trooper's lights when they came on, but nevertheless found the Petitioner guilty. These findings are internally inconsistent, and cannot stand. The evidence, as viewed through the lens of the Circuit Court's findings, does not support a verdict of guilt beyond a reasonable doubt on the element of the intentional nature of the Petitioner's conduct. Therefore, the Petitioner is entitled to the reversal of his conviction and the dismissal

of the indictment with prejudice.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is appropriate for oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure because the issues presented involved the application of settled law, and an allegation of insufficient evidence. This case should be disposed of by signed opinion.

ARGUMENT

1. The Circuit Court erred by determining at the conclusion of the bench trial that the State had put on evidence beyond a reasonable doubt of the Petitioner's guilt, based upon the oral recitation of the Circuit Court's factual findings.

The standard of review regarding a criminal bench trial has been recently set forth by this Court as follows:

> This Court previously has held that
>
> > [i]n reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.
>
> Syl. pt. 1, *Pub. Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996).

City of Martinsburg v. Dunbar, 868 S.E.2d 437, 441 (W. Va. 2022). The Petitioner raised an objection to the verdict at the conclusion of the bench trial, which was acknowledged by the Circuit Court. (A.R., at 122).

Courts are required to make factual findings at the conclusion of a bench trial: "In a case tried without a jury, the court shall make a general finding and shall, in addition, on

request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein." W.Va.R.Crim.P. 23(c). The Circuit Court complied with this requirement, making the following factual findings in support of its guilty verdict at the conclusion of the trial:

> THE COURT: All right. Based upon the testimony that I heard here today, I have no doubt Mr. Rohrbaugh may have not have seen -- this Mr. Rohrbaugh, the Defendant, may not have seen him right when it happened. But I do believe Trooper Rohrbaugh's testimony. Based upon the facts that have been presented, I'm finding the Defendant guilty.

(A.R., at 121).

The Petitioner does not contest the Circuit Court's factual findings. However, it is a legal error for the Circuit Court to have come to a verdict of guilt based upon those factual findings. An element of the offense is that the defendant's conduct must be *intentional*. The test of the statute sets forth the elements of the offense:

> A person who intentionally flees or attempts to flee in a vehicle from a law-enforcement officer, probation officer, or parole officer acting in his or her official capacity after the officer has given a clear visual or audible signal directing the person to stop, and who operates the vehicle in a manner showing a reckless indifference to the safety of others, is guilty of a felony and, upon conviction thereof, shall be fined not less than $1,000 nor more than $2,000 and shall be imprisoned in a state correctional facility not less than one nor more than five years.

W. Va. Code §61-5-17(f).

Under this statutory language, it is not enough that the Trooper merely turned on his lights and that the Petitioner engaged in reckless conduct after the lights came on. The Petitioner cannot have "intentionally fle[d] … after the officer has given a clear visual or audible signal directing the person to stop" if the Petitioner did not see the lights in the first

place. The Circuit Court has "*no doubt*" that the Petitioner "may not have seen him right when it happened." The Circuit Court moreover credited the Trooper's testimony in its findings. (A.R., at 121). If the Circuit Court had "no doubt" that the Petitioner "may not have seen" the Trooper's lights, how could the Circuit Court find beyond a reasonable doubt that the Petitioner violated each of the elements of this statute? There must, based on the Circuit Court's findings, have been reasonable "doubt" as to the Petitioner's mental state.

The Trooper described the section of roadway in which his lights were on – the section between Jordan Run Road prior to the final turnoff at Long Hollow Road (i.e., "Crow's Ridge") as being hilly and curvy. (A.R., at 84, 93-94, 97). The Trooper admitted that the Petitioner's car was not visible on the footage of the body camera taken after the lights came on. (A.R., at 95). If the Petitioner did not see the lights "right when it happened," there are no facts to establish that the Petitioner could have possessed the necessary mental state to violate this statute prior to turning onto Long Hollow Road (at which point he contends he saw the lights), where the car was promptly parked and its occupants exited and surrendered. The trial record may implicate the Petitioner in a variety of uncharged traffic offenses, but the trial record, in light of the Circuit Court's factual findings, does not support his guilt as to this particular felony. Accordingly, the Petitioner requests that this matter be reversed and remanded for entry of a judgment of acquittal.

2. The Circuit Court clearly erred by finding that the Petitioner "wished to waive his right to a jury trial and that the parties wished to schedule this matter for a trial before the Court" and by conducting a bench trial, in the absence of a record demonstrating that the Petitioner's waiver of his right to a jury trial was knowing and voluntary.

This Court has previously set forth the legal standard and procedures governing the waiver of a right to a jury trial, including the applicable *de novo* standard of review for legal

conclusions, and the "clearly erroneous" standard applicable to factual findings:

> 1. A trial court's ultimate determination of the knowing, intelligent voluntariness of a criminal defendant's waiver of the constitutional right to a jury trial is upon review a legal question requiring independent appellate determination. In such a case, although appellate review of the trial court's ultimate determination is plenary and de novo, this Court will review specific findings of fact by the trial court which underlie its determination under the deferential "clearly erroneous" standard.
>
> 2. "Certain constitutional rights are so inherently personal and so tied to fundamental concepts of justice that their surrender by anyone other than the accused acting voluntarily, knowingly, and intelligently would call into question the fairness of a criminal trial." Syllabus Point 5, *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77 (1988).
>
> 3. The right to a jury trial is so fundamental that procedural safeguards must be employed, including making an appropriate record of any waiver of this right, to ensure that a defendant's waiver of the right was made personally, knowingly, intelligently and voluntarily. *State v. Neuman*, 179 W.Va. 580, 584, 371 S.E.2d 77, 81 (1988).
>
> 4. When a criminal defendant in a circuit court proceeding seeks to waive the right to a jury trial, the preferred procedure is for the trial court: (1) to interrogate the defendant on the record concerning whether he understands the nature of the right he is waiving; (2) if the defendant is represented by counsel, to ascertain whether the defendant has consulted with counsel about the decision to waive a jury trial; (3) to spread upon the record sufficient information to demonstrate that the defendant's jury trial waiver is made personally, knowingly, intelligently and voluntarily; and (4) to obtain the defendant's signature on a written waiver of the right to a jury trial.
>
> 5. Whether a criminal defendant's waiver of the right to a jury trial is personal, knowing, intelligent and voluntary is a matter to be determined by looking at the totality of the circumstances. In making such a determination, the fact that the defendant has personally executed a written document reflecting the waiver of the right to a jury trial, and the fact that the defendant had the advice of counsel at the time of waiver, are probative that the waiver was personal, knowing, intelligent and voluntary--but they are not necessarily determinative.

> 6. Especially in a serious case, a circuit court is well advised to ascertain on the record that a defendant who wishes to waive his right to a jury trial knows that a jury is composed of the appropriate number of members of the community, that the defendant may participate in the selection of the jurors, that the verdict of the jury must be unanimous or as otherwise prescribed by law, and that a judge alone will decide guilt or innocence should the defendant waive the right to a jury trial. Additionally, a circuit court is well advised to ascertain on the record whether improper pressure or inducements, or a confused mental state, have affected the defendant's decision to waive the right to a jury trial. These suggested inquiries are neither mandatory nor limiting.
>
> 7. In a circuit court proceeding, when a criminal defendant's jury trial waiver is personal, knowing, intelligent, and voluntary as reflected in an on-the-record statement in open court, the failure to obtain a written waiver signed by the defendant does not in itself make the jury trial waiver invalid, despite the technical "writing" requirement of Rule 23(a) of the West Virginia Rules of Criminal Procedure. However, **when the record contains no written waiver of the right to a jury trial personally signed by the defendant, as required by West Virginia Rules of Criminal Procedure 23(a), and a defendant contends that he or she did not personally, knowingly, intelligently, and voluntarily waive the right to a jury trial, the jury trial waiver is valid only when the record firmly establishes the defendant's personal, knowing, intelligent and voluntary waiver of the right to a jury trial.**

Syl. Pts 1-7, *State v. Redden*, 487 S.E.2d 318, 199 W.Va. 660 (1997) (emphasis added).

The Petitioner contends that the Circuit Court's claim that the Petitioner "wished to waive his right to a jury trial and that the parties wished to schedule this matter for a trial before the Court" is clearly erroneous, and wholly unsupported by the record in this proceeding. (A.R., at 55). The Circuit Court did not obtain the written waiver required by Rule 23(a) W.Va.R.Crim.P.: "Trial by jury. — Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state." The Circuit Court's finding that the Petitioner "wished" to waive his jury

trial has no support in the record, given that the right to a jury trial is a *personal* right that must be surrendered by the Petitioner himself, and not merely by his counsel acting on his behalf. Syl. Pt. 2, *Redden*.

The record supports a finding that Petitioner's *trial counsel* desired to have a bench trial. There is no support in the record whatsoever for the finding of a personal waiver, let alone support of the nature that "firmly establishes the defendant's personal, knowing, intelligent and voluntary waiver of the right to a jury trial" in the absence of a written waiver. A jury trial waiver should only be upheld in the instant circumstances if the record independently supports a finding of knowing, intelligent, and voluntary waiver by the Petitioner in his own capacity. In *Redden*, the trial court had actually made an explicit finding based upon an actual colloquy.

> In the instant case, the trial judge stated (just before the bench trial began) that he had found that Mr. Redden had made a knowing and intelligent waiver of his right to a jury trial. However, because the trial court did not make specific factual findings going to the knowing, intelligent and voluntary nature of the appellant's jury trial waiver, we will uphold the trial court's determination "only if a reasonable review of the evidence clearly supports [the trial court's determination.]" *Farley*, 192 W.Va. at 254, 452 S.E.2d at 56-57.

Redden, 487 S.E.2d at 324, 199 W.Va. at 666.

In the case *sub judice*, the only finding, whether oral or written, concerning the Petitioner's waiver is found in the order memorializing the same, which states that the Petitioner "wished" to waive his jury trial (A.R., at 55), as the Circuit Court did not discuss the matter either during the hearing at which the bench trial was scheduled, nor when the bench trial itself took place. This is an insufficient record upon which to uphold the result in this case. The clear standard set forth in *Redden* is nowhere near met. The appropriate course of

action for this Court is therefore to vacate the conviction and grant the Petitioner a new trial.

The Petitioner anticipates that the Respondent may raise the issue of whether the Petitioner suitably preserved this issue for review. The Petitioner admits that nowhere did trial counsel raise this issue in the case below (trial counsel, of course, was involved in the defective waiver process). However, it is clear from *Redden* that this claim is of the sort that is reviewable without explicit preservation in the record below:

> A threshold inquiry is, should this Court review these assignments of error? The appellant did not make his jury trial waiver an issue at trial or in a post-trial motion; the issue is raised for the first time on this appeal. The transcript excerpt quoted above indicates that the appellant's decision to waive a jury trial was a strategic decision, which the appellant stated that he concurred in. The appellant's counsel even explained the reasoning behind the jury waiver decision to the court. The appellant makes no contention on appeal that trial counsel was ineffective.
>
> Consequently, we are asked in this appeal to decide that a trial judge erred in doing what the appellant with the advice of counsel directly and repeatedly asked the judge to do to, in furtherance of a reasoned defense strategy. Even if the trial court committed error, the error was clearly "invited as a part of a trial strategy or tactic." *State v. Dozier*, 163 W.Va. 192, 197, 255 S.E.2d 552, 555 (1979).
>
> The appellant contends nonetheless that the trial court's alleged errors, even if unobjected to and invited, constituted plain error, and involved a fundamental right secured by the West Virginia and United States Constitution s. It has been said that even if error is invited, "under Rule 23(a) the primary responsibility for protecting the right to trial by jury rests on trial judges and prosecutors." *United States v. Garrett*, 727 F.2d 1003, 1013 (1984). The state does not contend that we should not review the appellant's assignments of error. We proceed to address them, in part because the Rule 23(a) writing issue is apparently one of first impression in our State.

Redden, 487 S.E.2d at 323, 199 W.Va. at 665.

The primary difference between *Redden* and the instant case in this regard is that

although this Court dealt with the "Rule 23(a) writing issue" in *Redden* itself, the Circuit Court here abjectly failed to abide by *Redden*'s now-long-established admonitions concerning the consequences of failing to obtain a written waiver. Notably, despite the aforementioned holding of *Garrett*, the prosecutor also did nothing to see to it that the Petitioner's rights were protected.

The *Redden* court did not consign these issues to the arduous plain error standard, even in a case where there was an oral colloquy. This Court should apply the *de novo*/clearly erroneous standard described in Syllabus Point 1 of *Redden* to this case rather than the plain error standard. However, the Petitioner argues in the alternative that under the plain error standard, he is still entitled to relief.

> 7. To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.
>
> 8. Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right--the failure to make timely assertion of the right--does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious."
>
> 9. Assuming that an error is "plain," the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. Pts. 7, 8, and 9, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

That there was obvious error in light of the *Redden* standards has already been discussed in this argument section. That a substantial right was affected is clear, given this Court's clarity in *Redden* concerning the fundamental, personal nature of the Constitutional right to a jury trial, and the obvious fact that the Petitioner was, in point of fact, deprived of one. There can be little question given the lack of any discussion of the Petitioner's rights whatsoever that there was not a "waiver" of a right to a jury trial as opposed to a "forfeiture." Given the stark facts of this case, the Petitioner is clearly entitled to relief.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that this Court grant the following relief:

1. That this Court vacate and reverse the guilty verdict, and remand for entry of a judgment of acquittal;

2. That this Court vacate the conviction and remand the matter for a jury trial; or

3. Grant any other relief the Court deems just and proper.

Respectfully submitted,

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By Counsel,

/s/ Jeremy B. Cooper
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CERTIFICATE OF SERVICE

On this 23rd day of January, 2023, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Brief to counsel for the Respondent, Gail Lipscomb, via e-service through FileAndServeXpress.

/s/ Jeremy B. Cooper

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