IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**Docket No. 23-86**

**STATE OF WEST VIRGINIA,**

***Respondent,***

**v.**

**GAVIN BLAINE SMITH,**

***Petitioner.***

# RESPONDENT'S BRIEF

Appeal from the January 24, 2023, Order
Circuit Court of Kanawha County
Case No. 22-F-130

**PATRICK MORRISEY**
**ATTORNEY GENERAL**

**ANDREA NEASE PROPER**
**SENIOR ASSISTANT**
**ATTORNEY GENERAL**
**1900 Kanawha Blvd., E.**
**State Capitol, Bldg. 6, Ste. 406**
**Charleston, WV 25305**
**Telephone: (304) 558-5830**
**Facsimile: (304) 558-5833**
**State Bar No. 9354**
**Email:** ***Andrea.R.Nease-Proper@wvago.gov***

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**



**Other Authorities**

## INTRODUCTION

Respondent State of West Virginia submits this brief in opposition to Gavin Smith's ("Petitioner") Brief filed in the above-styled appeal. Petitioner's appeal is based on little more than conjecture. Petitioner claims that advising the jury that he would be considered for parole after having served 15 years in prison if convicted of first degree murder caused them to be so tainted that he is entitled to a reversal of his conviction. Petitioner presents this argument, despite the record containing overwhelming evidence in support of his guilt, including the fact that he shot and killed his entire family execution-style while some slept, and while another family member hid under a bed. Petitioner cannot show error in the jury instruction under West Virginia law, and certainly cannot show prejudice, as Petitioner would undoubtedly have been convicted of first degree murder regardless of this instruction. As Petitioner has failed to demonstrate the existence of reversible error, the circuit court's order denying habeas relief should be affirmed.

## ASSIGNMENT OF ERROR

Petitioner argues a single assignment of error: whether the circuit court erred by instructing jurors that if they voted for the most serious degree of homicide, it would sentence Petitioner to parole eligibility after fifteen years. Pet'r's Br. 1.

## STATEMENT OF THE CASE

In December 2020, Petitioner was a 16-year-old who had been banned from seeing or speaking with his girlfriend. App. 375. Tired of being told what to do, Petitioner chose to shoot his mother Risa Saunders, and stepfather Daniel Long in the head while they slept, then turned the gun on his 12-year-old brother, Gage Ripley; Petitioner then found his 3-year-old brother Jameson Long hiding under a bed, lifted the mattress, and shot the toddler through the head as well. App.

418; 538-42; 544-45. Petitioner then left the residence and fled to the home where his teenage girlfriend was staying. App. 390.

In a March 2022 transfer hearing following Petitioner's arrest, the circuit court found probable cause to transfer Petitioner to adult criminal jurisdiction. App. 92. Petitioner was indicted in the May 2022 term of court on eight felony counts: four counts of murder and four counts of use and presentation of a firearm in the commission of a felony. App. 943-46.

Trial began on December 5, 2022. App. 193. Timothy Saunders, Petitioner's grandfather, testified that he talked to his daughter Risa daily, but had not heard from her from December 8, 2020 through December 13, 2020. App. 296-97. On December 13, he went to Risa's home and found Risa, Gage, and Dan dead. App. 300-02. He looked for Petitioner and Jameson but could not find them in the home. App. 302.

Prior to the murders, Saunders had been assisting the family with home remodeling and was around them frequently. App. 303. Petitioner and Gage would help. App. 304. Saunders testified that Dan treated all the children the same although only Jameson was his biological son. App. 307-08. Saunders described Risa as a good mother who put her children first. App. 310. Neither parent worked. App. 323. Saunders noted that there were locks on the freezer, pantry, and refrigerator, but that this was to try to control the amount of food Gage ate as he tended to overeat. App. 312-13, 331-32. Saunders never saw any of the boys physically disciplined by Risa or Dan. App. 314. Petitioner had no contact with his father. App. 322.

Saunders testified that Petitioner had run away at least seven times in the past. App. 318-19. Petitioner ran away because he was not allowed to see Walker. App. 319. He would either go to Walker's home or to his great-grandfather's home. App. 319. Petitioner was often tasked with

caring for Jameson, who was a toddler. App. 324. The children were not allowed to go anywhere except to Saunders' home or their great-grandfather's home. App. 324.

Sergeant Paxton Lively was the first officer on scene and spoke with Saunders, then entered the home where he found Risa, Dan, and Gage all dead. App. 336-37. He then found Jameson's body under a bed in his room. App. 337-38. Petitioner could not be found. App. 339.

Detective Robert Alford testified that through his investigation he named Petitioner as a person of interest. App. 341. Det. Alford went to Walker's home where he was advised that Walker was at her grandmother's home. App. 341-42. Walker was questioned and indicated she did not know where Petitioner was; she appeared nervous during the conversation. App. 342-43. Det. Alford then searched the house and found Petitioner in a third floor bedroom behind a dresser. App. 343-45. Petitioner was detained. App. 346. Further investigation showed that Petitioner had ridden his bicycle from his home to Walker's home on December 9, 2020, as he appeared on surveillance footage. App. 351-56.

Rebecca Walker testified that she was in a relationship with Petitioner for about eight months before the shootings. App. 368. When Petitioner met Walker's family he told her father he wanted to have babies with Walker, then Petitioner refused to leave the home when asked by Walker's father. App. 373-74. After that interaction, Petitioner was no longer allowed in Walker's home. App. 374-75. Petitioner told Walker he was not allowed to see her anymore either. App. 375. Walker and Petitioner continued to communicate via phone but Walker got her phone taken away. App. 408. Walker then started using an Ipad her grandmother owned to communicate with Petitioner. App. 409. Petitioner was not supposed to use his phone to talk to Walker so he somehow obtained another phone that he secretly used. App. 409-10. The two met up against their parents'

wishes at Coonskin Park. App. 376. Walker was aware that Petitioner had run away from home several times by that point, once to her home. App. 381-82, 420-21.

The two discussed Petitioner wanting to kill his family so that he and Walker could be together. App. 382. Petitioner even showed Walker a gun and a knife that he intended to use during a video chat. App. 384. Walker encouraged him to "hurry up and do it." App. 393. Petitioner video called her after killing his family and was scared. App. 385. She heard a baby crying during the video chat. App. 386. Walker wanted Petitioner to kill his parents so that the two could be together. App. 417. Petitioner was "having a rough time at home" because he "didn't like being told what to do." App. 418.

Petitioner then switched to his stepfather's phone and the two continued talking over messages. App. 387. Petitioner messaged that he wanted to come to Walker's home but Walker discouraged that because it was daylight out. App. 387-88. A portion of Petitioner and Walker's 15,000 messages appear in the appendix record at 768-800, and were entered into evidence, App. 442-43. Petitioner came to the home that evening and Walker snuck him in through the basement. App. 390.

The next day, Walker's grandmother went on a trip and Petitioner and Walker were alone in the home. App. 393. On December 13, 2020, police came to the door. App. 394. Petitioner hid, and Walker told them he was not there. App. 395.

Walker was incarcerated at the time of trial upon her conviction for being an accessory after the fact. App. 397. Her sentence is ten years, but she would be up for parole approximately six months after the trial. App. 398. Her conviction arose from a plea agreement whereby her four first degree murder charges would be reduced in exchange for testifying. App. 399, 401-403.

Detective Jared Payne testified regarding the Facebook messages between Petitioner and Walker. App. 441-42. Following the shootings, Petitioner messaged Walker that he was "a murderer" repeatedly. App. 442-43.

Detective Michael Knapp was the crime scene photographer and photographed the scene. App. 452-53. The photographs, found at Appendix 801-941, were entered as evidence. App. 460, 486. Det. Knapp testified to the nature of the photographs. App. 460-78.

Sydney Jenkins of the State Police Laboratory testified that swabs from the sweatshirt and shoes Petitioner was wearing showed blood residue. App. 514-15. Brian Clemons of the crime lab testified that the blood on Petitioner's shoes matched Gage's blood. App. 564-67.

Allen Mock, medical examiner, testified that Dan Long had a gunshot wound to his head and that he was shot from within an inch of his forehead. App. 538-40. Risa Saunders was also shot in the head from around an inch away. App. 541. Likewise, Gage Ripley was shot in the head from around an inch away. App. 542. Jameson Long was shot a bit further away, around a foot, but also in the head. App. 544-45. Dr. Mock indicated that the two adults both had significant health conditions prior to their death. App. 550-53.

Petitioner moved for judgment of acquittal on three of the firearm counts noting that none of them specify a victim. App. 570-71. The State did not oppose dismissal of counts six, seven, and eight. App. 572. As to the remaining counts, Petitioner argued that the State did not prove intent sufficient to sustain a first degree murder conviction. App. 573-74. The court denied the motion. App. 575.

The defense called Deputy Cooper who testified that in September 2020 he had reported to Petitioner's home because Petitioner had run away. App. 578-79. Petitioner had fled to his great-grandfather's home. App. 579-80. Dep. Cooper made a CPS referral at that time based on

Petitioner's history of running away. App. 580-82. Dep. Cooper was also concerned about Petitioner's responsibility caring for his toddler brother and locks on some cabinets and the refrigerator. App. 582. When Dep. Cooper returned Petitioner to his parents, Petitioner did not seem fearful and did not mention any kind of physical abuse. App. 585.

Petitioner was convicted on all five counts that went to the jury, but count three was reduced to second degree murder, a lesser included offense. App. 727-28. At the sentencing hearing, Petitioner requested he be placed in the Anthony Center. App. 737, 746-47. Petitioner apologized for his actions. App. 747-48. Long's family gave victim impact statements. App. 749-54. The State argued that placement at the Anthony Center was not appropriate, and that Petitioner's sentences should run consecutively. App. 755-56.

The court noted that this was a "heinous crime" and that Petitioner "murdered [his] entire family in cold blood . . . for the selfish reason of spending more time with [his] girlfriend." App. 761. The court further found that Petitioner "executed [his] mother and stepfather by shooting them in the head while they were asleep" and then "executed [his] two brothers by shooting them in the head." App. 761. The court also noted that Petitioner had no remorse and felt justified in his actions. App. 761.

Petitioner was sentenced to life with mercy on each first degree murder count and forty years on the second degree murder count, with all four murder counts running consecutively. App. 762, 947-48. Petitioner was sentenced to ten years of incarceration on the use or presentment of a firearm during the commission of a felony conviction, to run consecutively to the four murder sentences. App. 762, 948. Petitioner now appeals.

## SUMMARY OF THE ARGUMENT

The lower court did not abuse its discretion in giving the requested jury instruction. The instruction properly informed the jury of the penalty for first degree murder and is in accordance with West Virginia law stating that the jury should be informed of the penalty in a first degree murder case. Further, the instruction served only to clarify a previously given and agreed-upon instruction. Finally, Petitioner's claim that this instruction led to his first degree murder conviction is unavailing when considering the damning evidence against him. Petitioner's convictions should be affirmed.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

## ARGUMENT

### A. Standard of review

A trial court has "broad discretion" in the formulation of jury instructions, and the relevant determination is "whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law." Syl. Pt. 4, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). "Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion." *Id.*

**B. The jury instruction in this case was proper as a matter of law, served as a clarification on a previously issued and agreed-upon instruction, and did not prejudice Petitioner.**

Petitioner argues that the State may not inform jurors of the penalties that may result from a guilty verdict. Pet'r's Br. 8. Petitioner, however, does not address the fact that first degree murder is a clear exception to this rule, and that the instruction complained of was merely a repetition of an agreed-upon instruction given earlier in the trial. Further, Petitioner's arguments presuppose that the jury ignored the vast amount of evidence supporting a first degree murder conviction in this case and, instead, focused on Petitioner's parole eligibility in finding him guilty of three counts of first degree murder.

This issue actually arose twice during the trial. The first time was during Walker's testimony when she was asked if she knew "that the sentence for murder is life" with regard to her own prior charges. App. 425. The State expressed concern that the jury would be led to believe "that [Petitioner] will receive a life sentence if he is convicted of first degree murder" when, under West Virginia law, Petitioner would be eligible for parole because he was a juvenile at the time of the crime. App. 426. The State requested a clarifying instruction to the jury, to which Petitioner's counsel agreed. App. 426-27. The jury was then instructed as follows: "[t]he Court will instruct the jury with regards to first degree murder with regards to juveniles, juveniles are not subject to being in prison for the rest of their life, they are actually eligible for parole after 15 years." App. 427.

During discussions on jury instructions, the State expressed concern that the instruction during trial that Petitioner was not facing a life sentence and would be eligible for parole after 15 years had confused the jury. App. 630-31. Thus, the State prepared "an instruction explaining about parole eligibility and the factors of the [sic] parole board would consider before granting

parole." App. 631. The instruction was offered to clarify that the sentence would be life imprisonment, not 15 years of imprisonment. App. 631. Petitioner objected, stating that the prior limiting instruction was sufficient. App. 632. Petitioner argued that there was no reason to repeat the instruction and requested there be no mention of sentencing during closing argument. App. 632-33. The State rebutted that argument, stating that the jury was left with the impression that the greatest sentence possible was 15 years. App. 633. The instruction given read as follows:

> [I]f you find the Defendant, Gavin Smith, guilty of First Degree Murder, the Defendant will be confined to the penitentiary of this state for life . . . and as a juvenile when these subject acts occurred, he will be eligible to be considered for parole after serving a minimum of 15 years of his sentence. The fact that the Defendant is eligible to be considered for parole does not guarantee his release after serving 15 years.

App. 678. This instruction was amongst almost 40 transcript pages of jury instructions. App. 643-82. The issue was not brought before the jury again.

Although the general rule is that matters of parole or probation should not be before the jury, *State v. Parks*, 161 W. Va. 511, 516, 243 S.E.2d 848, 852 (1978), the analysis in a first degree murder case is different. This Court recognized as much in *Guthrie* when it found:

> our cases are not entirely consistent in reference to the relevance of penalty evidence and penalty comment during closing arguments. We believe our prior rulings can be placed into two broad categories. The first category concerns cases involving a recommendation of mercy. We have said, for example, in first degree murder cases, it is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to such verdict and to explain to the jury the legal implications of such a recommendation.

194 W. Va. at 677–78, 461 S.E.2d at 183–84. The *Guthrie* opinion post-dates the decision Petitioner relies upon in *State v. Lindsey*, 160 W. Va. 284, 233 S.E.2d 734 (1977), by almost two decades. Even then, *Lindsay* dictates that "[t]he jury should be told the consequence of a recommendation of mercy in a case." *Id.* at 293, 233 S.E.2d at 739. The *Lindsay* reasoning applies in this case, though, as this Court was concerned about the jury misunderstanding the law and

reversed on that very ground. *Id.* at 292, 233 S.E.2d at 739. *Lindsay* specifically noted that jury concerns over when a defendant would be paroled are legitimate, and, thus, in first degree murder cases, the jury should be properly informed of such matters. *Id.* As this Court noted, "[t]he jury is the trier of the facts and 'there is no presumption that they are familiar with the law.'" *Id.* at 291, 233 S.E.2d at 739 (quoting *State v. Loveless*, 139 W.Va. 454, 80 S.E.2d 442 (1954)). This is precisely why the second instruction was given in this matter.

The State, and the court, expressed concerned that the jury was confused and/or misled by the initial instruction and, accordingly, properly crafted an explanatory instruction. App. 630-31. This Court has stated that "[a] verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties." Syl. Pt. 6, *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995). Moreover, "[w]hether facts are sufficient to justify the delivery of a particular instruction is reviewed by this Court under an abuse of discretion standard. In criminal cases where a conviction results, the evidence and any reasonable inferences are considered in the light most favorable to the prosecution." Syl. Pt. 12, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

Even though Petitioner was transferred to adult jurisdiction, he was a juvenile when he shot his family. As this Court has noted, "the law treats juveniles differently than others." *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W. Va. 648, 654, 453 S.E.2d 631, 637 (1994). The jury was informed properly that the law in this case would treat Petitioner differently. This likely alleviated any jury question that someone who had not yet reached the age of 20 would not be forced to spend his entire life in prison with no hope of parole.

Keeping the relevant legal standard in mind, the lower court did not err in giving the second, clarifying instruction. The court had to ensure that the jury was properly instructed as a

matter of law, and knew the correct punishment in this case, as punishment in a first degree murder case is relevant. Whether a trial court's instructions improperly coerced a verdict "necessarily depends upon the facts and circumstances of the particular case and cannot be determined by any general or definite rule." *State v. Blessing*, 175 W. Va. 132, 134, 331 S.E.2d 863, 865 (1985). The facts and circumstances of this case dictated an additional instruction, clarifying the first instruction. This Court has specifically found error when a trial court failed to clarify a jury's misunderstanding of an issue, and, thus, failure to issue the second instruction in this case would have surely been reversible error. See, i.e., *State v. Davis*, 220 W. Va. 590, 596, 648 S.E.2d 354, 360 (2007) (finding that "the court committed error by failing to clarify the jury's misunderstanding of the law"); *Moran v. Atha Trucking, Inc.*, 208 W. Va. 379, 388, 540 S.E.2d 903, 912 (1997) ("a properly worded instruction serves to clarify issues for the jury's benefit" (citation omitted)).

More importantly, the jury had already been instructed on the very same issue, with the approval of Petitioner's counsel. Following Walker's testimony, the jury was instructed that "with regards to first degree murder with regards to juveniles, juveniles are not subject to being in prison for the rest of their life, they are actually eligible for parole after 15 years." App. 427. This instruction was given after Rebecca W.'s testimony but did not specify the correct sentence. As the State opined, "the jury may think that he can only get 15 years for first degree murder, and we're concerned that the jury would be confused about that." App. 631. Thus, a clarifying instruction was necessary to correct the earlier instruction that could easily lead to the jury being confused.

Additionally, this information was before the jury for the majority of the trial and was only repeated amidst pages and pages of jury instructions given to the jury at the close of the case.

Petitioner's counsel even agreed to the initial instruction. App. 427. "Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy." Syl. Pt. 4, in part, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. The instructions as a whole show that the jury was properly instructed in this matter. The complained-of instruction was but a small portion of the instructions, and was a correct statement of law. When reviewing the instructions, and the case, as a whole, this instruction was not sufficient to reverse Petitioner's conviction.

Petitioner argues prejudice, claiming that the jurors in this case were "divert[ed]" "from their structural role." Pet'r's Br. 11. Petitioner's arguments presume that the jury ignored the evidence in this case and only convicted him of three counts of first degree murder because they chose to "punt" to the parole board. There is no support to this argument. Rather, the record belies this argument, as the jury not only had vast amounts of evidence to support the first degree murder conviction, but also found Petitioner guilty of a lesser included charge regarding the murder of Gage, showing that they carefully reviewed the evidence as to each count and did not simply reach a verdict based on one jury instruction.

The evidence supported all elements of first degree murder in this case. This Court has repeatedly held that "the elements that separate first degree murder and second degree murder are deliberation and premeditation in addition to the formation of the specific intent to kill." *Guthrie*, 194 W. Va. at 673–74, 461 S.E.2d at 179–80 (citation omitted). *Guthrie* explains that "[d]eliberation and premeditation mean to reflect upon the intent to kill and make a deliberate choice to carry it out." *Id.* at 674, 461 S.E.2d at 180. While there is "no particular amount of time" required for premeditation or deliberation, "there must be at least a sufficient period to permit the

accused to actually consider in his or her mind the plan to kill. In this sense, murder in the first degree is a calculated killing as opposed to a spontaneous event." *Id.*

As Petitioner aptly notes, there was no question as to who committed these crimes. Pet'r's Br. 11. Petitioner also aptly notes that if jurors believed the State, "they could legitimately convict Petitioner as charged"; if, instead, they believed Petitioner, then the jury would find him guilty of a lesser included offense. Pet'r's Br. 11. This is precisely what occurred here.

Petitioner showed the gun to Walker over video chat and discussed his plan with her. App. 384. There is no greater evidence of premeditation than discussing the murders he intended to commit with a third party. Then, Petitioner methodically shot his mother and stepfather while both were sleeping in their bed, with his stepfather still connected to a CPAP machine. App. 466. The medical evidence showed that the shootings were "execution style" being less than an inch from each adult's head. App. 538-42, 547. Petitioner next shot his younger brother, which the jury found no evidence of deliberation or premeditation for that shooting and, thus, convicted him of second degree murder. App. 727. Finally, Petitioner found his three-year-old brother hiding under a bed, pulled the mattress up, and shot the child in the head. App. 337-38, 476-77. These facts lend to no other conclusion than a first degree murder conviction.

Petitioner presented absolutely no evidence to mitigate the intent portion of first degree murder. While Petitioner made passing references to alleged abuse in the home, no proof was presented of said abuse and no proof of provocation or anything that would lessen the degree of murder as to Risa, Dan, or Jameson. No testimony of any witnesses referenced abuse. On the other hand, there was evidence that Petitioner murdered his parents to be with his teenage girlfriend. His girlfriend testified that the two discussed Petitioner wanting to kill his family so that they could be together. App. 382. Walker specifically testified that she wanted Petitioner to kill his parents so

that the two could be together. App. 417. Walker did not testify to any knowledge of Petitioner being abused, but only noted that Petitioner was "having a rough time at home" because he "didn't like being told what to do." App. 418.

Likewise, Petitioner presents no evidence that the jury was somehow distracted or swayed by the instruction into sentencing him to first degree murder. The record belies this contention, because the jury clearly thoughtfully deliberated on each count and did not issue a blanket first degree murder conviction. In fact, the jury found Petitioner guilty of the lesser-included offense of second degree murder with relation to his shooting of Gage. App. 727.

Petitioner's arguments of prejudice based on the jury instruction are but a red herring to distract from the massive amount of evidence lending only to support the jury's convictions on three first degree murder counts. Accordingly, Petitioner's convictions and sentence should be upheld.

## CONCLUSION

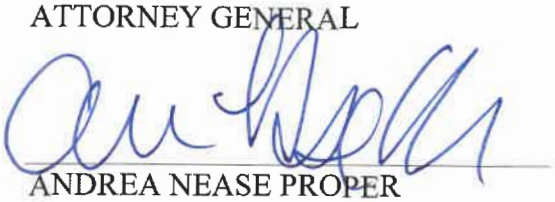
For the foregoing reasons, Respondent respectfully asks this Court to affirm the circuit court's order sentencing Petitioner on four counts of murder and one count of presentation of a firearm in the commission of a felony.

Respectfully Submitted,

**STATE OF WEST VIRGINIA,**
*Respondent,*

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



ANDREA NEASE PROPER
SENIOR ASSISTANT
ATTORNEY GENERAL
W. Va. State Bar #9354
1900 Kanawha Blvd. East
State Capitol
Building 6, Suite 406
Charleston, WV 25305
(304) 558-5830
Fax: (304) 558-5833
Andrea.R.Nease-Proper@wvago.gov
*Counsel for Respondent*

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 23-86**

**STATE OF WEST VIRGINIA,**

***Respondent,***

**v.**

**GAVIN BLAINE SMITH,**

***Petitioner.***

## CERTIFICATE OF SERVICE

I, Andrea Nease Proper, do hereby certify that on the 31st day of July, 2023, I served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure,:

Matthew Brummond, Esquire
Public Defender Services
One Players Club Dr., Suite 301
Charleston, WV 25311

Andrea Nease Proper (State Bar No. 9354)
Senior Assistant Attorney General