

SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**State of West Virginia,
Plaintiff Below, Respondent**

vs.

No. 23-272

**Heath Allen Rose,
Defendant Below, Petitioner**

**Appeal from the Order of the Circuit
Court of Mingo County
(Court Case No. 22-F-135)**

PETITIONER'S BRIEF

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PETITIONER’S BRIEF

NOW COMES Heath Rose (hereinafter “Rose”), by and through his undersigned counsel,¹ and hereby submits the *Petitioner’s Brief* pursuant to this Honorable Court’s *Amended Scheduling Order* entered on August 10, 2023.

I. ASSIGNMENTS OF ERROR

The trial court committed plain error on the following grounds:

- A. The trial attorney, Jeff Simpkins (hereinafter “Simpkins”), proffered to the trial court that Rose would stipulate to his statement to police as being voluntary. No suppression hearing was held and the statement was admitted. The statement should not have been allowed in because at the beginning of the questioning by the police, Rose requested an attorney and then later withdrew this request after being prompted by the police , which is not allowed under the law.
- B. A witness to the crime who was in the vehicle with the victim, Brittney Kennedy, testified at trial. The trial judge believed that she was under the influence due to her behavior during trial testimony. She was then, on the same day, drug tested by the Court. Her drug results came back positive for Marijuana, Oxycodone, Noroxycodone, Oxymorphone, and Benzodiazepines. Her testimony should have been struck and/or a special jury instruction should have been given by the trial court.

¹ Undersigned counsel was not counsel of record in the underlying criminal matter before the Circuit court. Trial counsel was Jeffrey Simpkins.

- C. A trial witness, Violet Telfer, could allegedly not be located to testify at trial. The trial court allowed her video recorded statement to be played to the jury without Rose's counsel having the ability to cross examine her in direct violation of Rose's 6th Amendment Right to confront witnesses.
- D. Mingo County Assistant Prosecuting Attorney, Josh Farrell, did not conflict himself off the case. Farrell had been retained as Rose's civil attorney only one year prior to this criminal trial.

II. STATEMENT OF THE CASE

In the September term of 2022, the Grand Jury returned Indictment No. 22-F-135 charging the Plaintiff with the following: one count First Degree Murder and two counts of Wanton Endangerment. The Plaintiff was arraigned by the Honorable Miki Thompson of Mingo County Circuit Court on September 27th, 2022 and a jury trial set on December 5th, 2022. The Plaintiff's bond was denied on the First Degree Murder charge and bond was set at \$25,000 cash for each Wanton Endangerment charge.

On December 5th, 2022, came the State of West Virginia, by Mingo County Prosecuting Attorney, Jonathan "Duke" Jewell, and the Plaintiff in person and by counsel, Jeffrey Simpkins, for a jury trial. On December 6th, 2022, the jury came back with guilty verdicts on Second Degree Murder as set forth in Count I, Wanton Endangerment on Counts II and III of Indictment 22-F-135. On January 12, 2023 the Plaintiff was sentenced to a definite term of forty years for the charge of Second Degree Murder as charged in Count I, a definite term of ten days for the charge of Wanton Endangerment, as charged in Count II, and a definite term of five years and a \$2,500 fine

for the charge of Wanton Endangerment, as charged in Count III. The sentences of Wanton Endangerment are to run concurrently to the sentence of Second Degree Murder.

III. STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

"In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." Syl. Pt. 2, *State v. Hinchman*, 214 W.Va. 624, 591 S.E.2d 182 (2003). *State v. McDonald*, No. 16-0053, 2016 W. Va. LEXIS 944, at *5 (Nov. 21, 2016)

"This Court has generally held that "the Rules of Evidence do not apply to sentencing hearings." *State v. Trail*, 236 W.Va. 167, 180 n.17, 778 S.E.2d 616, 629 n.17 (2015) (citing W.Va. R. Evid. 1101(b)); see also *State v. LaRock*, 196 W.Va. 294, 306 n.15, 470 S.E.2d 613, 625 n.15 (1996) (noting that "the West Virginia Rules of Evidence do not apply to sentencing matters and proceedings[.]"). *State v. McDonald*, No. 16-0053, 2016 W. Va. LEXIS 944, at *10 (Nov. 21, 2016).

"An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request [*471] may be the person who most needs counsel." *Miranda v. Arizona*, 384 U.S. 436, 470-71, 86 S. Ct. 1602, 1626 (1966).

"Once the accused is in custody, has been read his Miranda rights, and has requested a lawyer, statements made thereafter without the accused's lawyer present are inadmissible, unless

the accused initiated the discussion. If it is determined that the accused did initiate the discussion, it must still be shown that the accused knowingly waived his right to have a lawyer present during the discussion. For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel.” *State v. Marcum*, 182 W. Va. 104, 104, 386 S.E.2d 117, 117 (1989).

“Rule 601 of the West Virginia Rules of Evidence and the Federal Rules of Evidence both provide that “[e]very person is competent to be a witness” unless otherwise excluded by the rules. Drawing on Fourth Circuit [*108] Court of Appeals precedence, the Supreme Court of Appeals in *State v. Merritt*, 183 W. Va. 601, 608, 396 S.E.2d 871, 878 (1990) noted that [t]he only grounds for disqualifying a party as a witness are that the witness does not have knowledge of the matters about which he is to testify, that he does not have the capacity to recall, or that he does not understand the duty to testify truthfully.” *Burgess v. Ballard*, No. 14-0750, 2015 W. Va. LEXIS 1210, at *107-08 (Nov. 23, 2015).

“[E]valuating the credibility of witnesses is not the role of the judge; such evaluations are the province of the jury.” “The Petitioner has simply not provided this Court with any credible evidence to show that 1) the subject witnesses were in fact intoxicated or under the influence of alcohol or drugs; 2) if the subject witnesses were in fact intoxicated, that the prosecutor was aware of their condition; or 3) if the subject witnesses were in fact intoxicated, they were so intoxicated that their ability to accurately recall events surrounding the fire was so impaired as to legitimately call their competency to testify into question.” *Id. At III*, No. 14-0750, 2015 W. Va. LEXIS 1210, at *111 (Nov. 23, 2015).

“We have explained that "the Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured [*15] for defendants in state as well as federal criminal proceedings under *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923[] (1965)." *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Indeed, "[t]he fundamental right to confront one's accusers . . . contemplates the opportunity of meaningful cross-examination . . . guaranteed by Article III, Section 14 of the West Virginia Constitution." *State v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975). Pursuant to a defendant's right to confront witnesses, "[a] defendant on trial has the right to be accorded a full and fair opportunity to fully examine and cross-examine the witnesses." Syl. Pt. 1, *State v. Crockett*, 164 W. Va. 435, 265 S.E.2d 268 (1979). This Court has provided general guidelines for cross-examination of a witness:" *Johnson v. Mutter*, No. 19-0788, 2020 W. Va. LEXIS 786, at *14-15 (Nov. 4, 2020).

“The Confrontation Clause contained within the Sixth Amendment to the United States Constitution and W. Va. Const. art. III, § 14, bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.” *State v. Kennedy*, 229 W. Va. 756, 759, 735 S.E.2d 905, 909 (2012).

“The core class of testimonial materials endorsed in *Crawford* consists of ex parte in-court testimony or its functional equivalent - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;

statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id at 756*.

“The trial court should be afforded considerable latitude in making its determination to disqualify a criminal defense attorney due to a conflict of interest. Recognizing the trial court's need for latitude, several courts have applied an abuse of discretion standard when reviewing decisions on disqualification motions. This is the appropriate standard of review.” *State v. A.B.*, 881 S.E.2d 406, 409 (W. Va. 2022).

“Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry to determine if a conflict of interest exists. Furthermore, prejudice will not be presumed, and the automatic reversal rule will not apply. Rather, in order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.” *Id. At 406*.

“The only prerequisites for the establishment of an ethical violation of W. Va. R. Prof. Conduct 1.7(a) are those clearly set forth in the rule itself; namely, representation of one client that is "directly adverse" to another client without the consent of each client. The "directly adverse" language does not imply that a bad result must occur before representation is impermissible. It is the interests of the clients with which the rule is concerned, not the result obtained.” *State ex rel. Clifford v. W. Va. Office of Disciplinary Counsel*, 231 W. Va. 334, 336, 745 S.E.2d 225, 227 (2013).

“Under W. Va. R. Prof. Conduct 1.9(a), determining whether an attorney's current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances, and legal issues of the two representations. The same holds

true with regard to W. Va. R. Prof. Conduct 1.11(a) given that a prerequisite for prohibiting representation under Rule 1.11(a) is also prior participation in a substantially related matter.” *Id.* At 334.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure as this is a matter of first impression. In the alternative, as the issue involves the interpretation of an existing statute, Petitioner would request oral argument under Rule 19 of the Rules of Appellate Procedure.

V. ARGUMENT

- A. The trial attorney, Jeff Simpkins (hereinafter “Simpkins”), proffered to the trial court that Rose would stipulate to his statement to police as being voluntary. No suppression hearing was held and the statement was admitted. The statement should not have been allowed in because at the beginning of the questioning by the police, Rose requested an attorney and then later withdrew this request after being prompted by the police, which is not allowed under the law.**

“Once the accused is in custody, has been read his Miranda rights, and has requested a lawyer, statements made thereafter without the accused's lawyer present are inadmissible, unless the accused initiated the discussion. If it is determined that the accused did initiate the discussion, it must still be shown that the accused knowingly waived his right to have a lawyer present during the discussion. For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the

circumstances, waive his right to counsel.” *State v. Marcum*, 182 W. Va. 104, 104, 386 S.E.2d 117, 117 (1989).

"For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel." *Syl. Pt. 1, State v. Crouch*, 178 W. Va. 221, 358 S.E.2d 782 (1987).

Rose clearly requests an attorney in his statement to the Mingo County Sheriff's Department on February 17, 2022 (Statement of Heath Rose Disc 1 of 4). The interview begins at 11:06 a.m. (Id.). At 1:38 into the interview he first requests an attorney (Id.). At 1:48 into the interview he again requests an attorney for a second time (Id.) Both Sheriffs at this time continue to speak with Rose, in violation of his constitutional rights, about his request for an attorney (Id.) One Sheriff says, "You do want to give a statement correct, you just want a lawyer at the 2:02 mark in the video (Id.). Rose says yes, he wants a lawyer, "I don't understand the law and a lawyer will" (Id.). Again, the Sheriffs continue to speak to Rose and ask him questions in violation of the constitution (Id.). At the 3:00 mark, one Sheriff even asks Rose for the passcode to his phone, which he provides, without an attorney being present and after Rose has now requested an attorney at least three times (Id.). All statements on disc 1 of 4, after Rose requested an attorney, were obtained illegally and could not be shown to the jury.

Disc 2 of 4 in the interview of Rose begins at 11:28 a.m. on the same date (Statement of Heath Rose Disc 2 of 4). The same two members of the Sheriff's department again began to interview Rose. The Sheriff says, "I could tell it was eating at you, so I asked you if you wanted to talk to us and at that point you indicated you wanted to talk to us without an attorney" (Id.). This is a clear violation of *Marcum* and *Crouch*. Rose requested an attorney approximately seven times in the first interview (Statement of Heath Rose Disc 1 of 4). This conversation to reinitiate the

interview and the voluntary statement with police was NOT initiated by Rose as stated by the Sheriff (Statement of Heath Rose Disc 2 of 4). At this point, the Sheriff reads Rose his rights again (Statement of Heath Rose Disc 2 of 4). Because the first part of the test in *Crouch* has clearly not been met, the entire statement is NOT admissible and cannot be shown to the jury.

Trial Counsel Simpkins stated to the trial judge at the suppression hearing on November 29, 2022, that the statement was voluntary and there needed to be no suppression hearing (HR_090). Specifically, Simpkins stated:

“Your Honor, I had a brief discussion with my client off the record and he has told me that the statement was voluntarily given without any type of coercion or duress. He voluntarily gave it, and that he would like to go ahead and just stipulate to those matters.”

(HR_090). The trial court and trial counsel both clearly erred in allowing the statement into the trial because the issues regarding the client requesting an attorney are not even addressed. First, it doesn't matter if Rose believed his statement was voluntary, he is not an attorney and it is Simpkin's duty to request a suppression hearing on this issue. Second, the trial court does not even address the issue of Rose requesting an attorney when questioning Rose. The trial court stated;

The Court: “Your attorney has stated that with regard to the statement you made to the police that you're saying now that it was made to the police that you're saying now that it was made voluntarily, and you are not going to have an attorney attempt to suppress the statement. Is that Correct?

The Defendant: Yes.

The Court: And when you gave that statement it was voluntary?

The Defendant: Yes.

The Court: That was yes. Right?

Mr. Simpkins: You've got to speak up.

The Defendant: Yes.

The Court: And you were in custody?

The Defendant: Yes.

The Court: The Court will find that Mr. Rose has knowingly, intelligently, and voluntarily admitted that he gave the statement to the police voluntarily while he was in custody and has further stipulated to its admission at trial.

The Defendant: Yes.

Mr. Simpkins: Your Honor, let the record reflect my client has responded yes. We did have that discussion and he does not want to contest the statement that was given. He actually

stated that he wanted to get something off his chest and that's exactly what he did. I want it to be clear that I'm willing to move forward with his hearing but he wishes to voluntarily stipulate.

(HR_090-091). From the record it is clear that neither Simpkins or the Court even discussed the fact that Rose requested an attorney multiple times and did not reinitiate the interview without being prompted first by the Sheriff. The Court and Simpkins cannot rely on Rose to examine the statement and determine he said it voluntarily. Furthermore, Simpkins goes on to incriminate his client by saying that "he wanted to get something off his chest and that's exactly what he did" (HR_091).

"The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense are voluntary before such may be admitted into the evidence of a criminal case." *State v. Marcum*, 234 W. Va. 415, 416, 765 S.E.2d 304, 305 (2014).

Waivers of counsel must not only be voluntary but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *State v. Persinger*, 169 W. Va. 121, 123, 286 S.E.2d 261, 264 (1982).

The trial court addressed this issue further during the trial (HR_141-145). Simpkins again says the statement was voluntary and NEVER addresses the fact that Rose requested an attorney and did not reinitiate the statement with police without being prompted by the two Sheriffs present (HR_143-144).

In the present case, Simpkins stated that he had a "brief conversation" with Rose about waiving his suppression hearing (HR-090). This clearly does not meet the standards in *Marcum* or

Persinger and therefore, the statement of the defendant must be deemed involuntary as he did not initiate the conversation to his request for counsel and the statement MUST NOT be delivered to the jury. The trial must be thrown out and Rose must be given a new trial.

B. A witness to the crime who was in the vehicle with the victim, Brittney Kennedy, testified at trial. The trial judge believed that she was under the influence due to her behavior during trial testimony. She was then, on the same day, drug tested by the Court. Her drug results came back positive for Marijuana, Oxycodone, Noroxycodone, Oxymorphone, and Benzodiazepines. Her testimony should have been struck and/or a special jury instruction should have been given by the trial court.

“Rule 601 of the West Virginia Rules of Evidence and the Federal Rules of Evidence both provide that “[e]very person is competent to be a witness” unless otherwise excluded by the rules. Drawing on Fourth Circuit [*108] Court of Appeals precedence, the Supreme Court of Appeals in *State v. Merritt*, 183 W. Va. 601, 608, 396 S.E.2d 871, 878 (1990) noted that [t]he only grounds for disqualifying a party as a witness are that the witness does not have knowledge of the matters about which he is to testify, that he does not have the capacity to recall, or that he does not understand the duty to testify truthfully.” *Burgess v. Ballard*, No. 14-0750, 2015 W. Va. LEXIS 1210, at *107-08 (Nov. 23, 2015).

Brittany Kennedy (hereinafter “Kennedy”) testified in the criminal trial of Rose as a State’s Witness (HR_158-200). During her testimony, the Court was concerned about the witness due to her being impaired and slurred speech (HR_200-201). In fact, the Court stated:

The Court: You know, I’ve been wrong before, but I’m concerned about this witness. I think she behaved inappropriately. When she answered questions, her voice was slurred. She closed her eyes for long periods of time. Maybe she’s under stress and it has that effect

on her, but I don't know. I think she needs to be drug tested, and that way we'll know if she's okay. If it's okay, it's all good.

HR_200-201. The Court then ordered the drug screen of Kennedy, which came back positive for Marijuana, Oxycodone, Noroxycodone, Oxymorphone, and Benzodiazepines (HR_084-085). Furthermore, Kennedy admitted to smoking marijuana (HR_202). The Court states, for unknown reasons, that Kennedy tested positive for Percocet and Marijuana which is not true (HR_202). The Court and counsel then discuss the results and the Court says "we're not going any farther and I don't want this mentioned before the jury" (HR_202). Simpkins states, "But Percocet is a narcotic?" (HR_202). The Court says, "And it's also prescribed by doctors after c-sections²" (HR_202-203). The Court finally decides to hide these drug results from the jury, not admit the drug screen into evidence and to only place it in the Court file (HR_203). There is no more discussion regarding the drug screen.

"[E]valuating the credibility of witnesses is not the role of the judge; such evaluations are the province of the jury." "The Petitioner has simply not provided this Court with any credible evidence to show that 1) the subject witnesses were in fact intoxicated or under the influence of alcohol or drugs; 2) if the subject witnesses were in fact intoxicated, that the prosecutor was aware of their condition; or 3) if the subject witnesses were in fact intoxicated, they were so intoxicated that their ability to accurately recall events surrounding the fire was so impaired as to legitimately call their competency to testify into question." *Burgess v. Ballard, No. 14-0750, 2015 W. Va. LEXIS 1210, at *107-08 (Nov. 23, 2015)*.

In the present case, when evaluating the test in *Burgess*, first it is clear Kennedy was under the influence. The Court ordered the drug test because she was overly concerned with her behavior and testimony. Second, Kennedy failed for three different drugs being marijuana, narcotics and

² Kennedy had recently given birth just days before her testimony.

benzodiazepines (HR_084-085) This cocktail of drugs is sure to cause sleepiness, disorientation and confusion.

In the present case, one of two things must have happened after the results of the drug screen came back and the admissions to smoking marijuana of Kennedy. First the testimony should have been struck as unreliable due to the impairment of Kennedy. If the Court did not think this was necessary,³ then a limiting instruction should have been given to the jury regarding the testimony of Kennedy under the influence by her drug screen and self-admission. Neither happened. The Court should have either excluded the testimony, ordered a mistrial or instructed the Jury on the self-admission and findings of the drug test regarding Kennedy's testimony. None of this happened even though the Court and counsel were aware that Kennedy was "high" when she testified in Court, the jury was not.

C. A trial witness, Violet Telfer, could allegedly not be located to testify at trial.

The trial court allowed her video recorded statement to be played to the jury without Rose's counsel having the ability to cross examine her in direct violation of Rose's 6th Amendment Right to confront witnesses.

"We have explained that "the Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured [*15] for defendants in state as well as federal criminal proceedings under *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923[] (1965)." *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Indeed, "[t]he fundamental right to confront one's accusers . . . contemplates the opportunity of meaningful cross-examination . . . guaranteed by Article III, Section 14 of the West Virginia Constitution." *State v. Blair*, 158 W. Va. 647, 214

³ Even though the Court was so concerned after the testimony she ordered a drug screen right then and there.

S.E.2d 330 (1975). Pursuant to a defendant's right to confront witnesses, "[a] defendant on trial has the right to be accorded a full and fair opportunity to fully examine and cross-examine the witnesses." Syl. Pt. 1, *State v. Crockett*, 164 W. Va. 435, 265 S.E.2d 268 (1979). This Court has provided general guidelines for cross-examination of a witness:" *Johnson v. Mutter*, No. 19-0788, 2020 W. Va. LEXIS 786, at *14-15 (Nov. 4, 2020).

“The Confrontation Clause contained within the Sixth Amendment to the United States Constitution and W. Va. Const. art. III, § 14, bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.” *State v. Kennedy*, 229 W. Va. 756, 759, 735 S.E.2d 905, 909 (2012).

In the present case, the recorded statement of Violet Telfer (hereinafter “Telfer”) was admitted without her testifying at trial as Exhibit 24 (HR_279-280). Simpkins did object on multiple occasions to this statement being admitted (HR_279-280 and HR_267-278). Simpkins further objects to the statement coming under the Confrontation Clause (HR_271). The Court ultimately decides that Telfer is deemed unavailable only because the State made multiple tries to locate her to no avail through phone calls (HR267-268). This is clear error. The Court ultimately allows the statement over Telfer under both W.Va. Rules of Evidence 803 and 804 (HR_277). This is a clear violation of the Confrontation Clause and the case law listed above. Simpkins makes very good arguments as to why this does not fit under the hearsay exceptions and the rules against confrontation in his argument with the Court (HR_267-278). The prior recorded statement of Telfer should have been presented to the jury and was clearly damning to Rose as she says she saw him standing over the body of the victim with a gun and making statements about the shooting (HR_268). None of the exceptions are met under Rule 804(a) for the witness being declared

unavailable and Simpkins had no ability to cross examine her which is a clear constitutional right of Rose.

D. Mingo County Assistant Prosecuting Attorney, Josh Farrell, did not conflict himself off the case. Farrell had been retained as Rose’s civil attorney only one year prior to this criminal trial.

“Under W. Va. R. Prof. Conduct 1.9(a), determining whether an attorney's current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances, and legal issues of the two representations. The same holds true with regard to W. Va. R. Prof. Conduct 1.11(a) given that a prerequisite for prohibiting representation under Rule 1.11(a) is also prior participation in a substantially related matter.” State v. A.B., 881 S.E.2d 406, 409 (W. Va. 2022).

In the present case, Josh Farrell (hereinafter “Ferrell”) represented Rose in a civil automobile accident case less than one year before this criminal trial. Farrell did not even bring this potential conflict up to the judge during the pretrial or trial. No mention of this conflict was ever brought to the attention of the trial judge. By not bringing this up, the trial judge was no able to analyze the facts, circumstances and legal issues of the two representations to determine if Farrell had learned things about Rose in his civil representation of Rose. Farrell could have possibly used what he had learned in directly representing Rose against him in the trial.

VI. CONCLUSION

The trial court committed plain error and abuse of discretion at the sentencing hearing by:

- The trial attorney, Jeff Simpkins (hereinafter “Simpkins”), proffered to the trial court that Rose would stipulate to his statement to police as being voluntary. No suppression hearing was

held and the statement was admitted. The statement should not have been allowed in because at the beginning of the questions by the police, Rose requested an attorney and then later withdrew this request after a break, which is not allowed under the law.

- A witness to the crime who was in the vehicle with the victim, Brittney Kennedy, testified at trial. The trial judge believed that she was under the influence due to her behavior during trial testimony. She was then, on the same day, drug tested by the Court. Her drug results came back positive for opiates and cannabinoids. Her testimony should have been struck and/or a special jury instruction should have been given by the trial court.

- A trial witness, Violet Telfer, could allegedly not be located to testify at trial. The trial court allowed her video recorded statement to be played to the jury without Rose's counsel having the ability to cross examine her in direct violation of Rose's 6th Amendment Right to confront witnesses.

- Mingo County Assistant Prosecuting Attorney, Josh Farrell, did not conflict himself off the case. Farrell had been retained as Rose's civil attorney only one year prior to this criminal trial.

Petitioner further prays that this Court will reverse the circuit court's sentencing order and remand this matter back to the Circuit Court of Mingo County for a new trial.

Respectfully Submitted,
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By Counsel

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SUPREME COURT OF APPEALS OF WEST VIRGINIA

**State of West Virginia,
Plaintiff Below, Respondent**

vs.

No. 23-272

**Heath Allen Rose,
Defendant Below, Petitioner
Appeal from the Order of the Circuit
Court of Mingo County
(Court Case No. 22-F-135)**

CERTIFICATE OF SERVICE

I, Joseph H. Spano, Jr., counsel for Petitioner, Heath Rose, do hereby certify that service of the foregoing *Petitioner's Brief* in the above-styled case has been made upon the following:

Andrea Nease Proper, Esq.
Assistant Attorney General
Office of the WV Attorney General
Appellate Division
1900 Kanawha Blvd. E.
State Capitol Complex, Bldg. 6, Ste. 406
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this the 31st day of August 2023, via United States mail, in a sealed envelope, postage prepaid.

/s/ Joseph H. Spano, Jr.
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