
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-272

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STATE OF WEST VIRGINIA,

Respondent,

v.

HEATH ALLEN ROSE,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the February 16, 2023, Order
Circuit Court of Mingo County
Case No. 22-F-135

**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-Propser@wvago.gov**

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INTRODUCTION

Respondent State of West Virginia responds to Heath Rose's ("Petitioner") Brief filed in the above-styled appeal. Petitioner, who shot his romantic rival in the face, admitted to voluntarily giving a statement to police and the stipulation in that regard should not be disturbed. While one of the trial witnesses did test positive for marijuana and narcotics, a review of her testimony shows that she was a competent witness and, thus, her testimony was not stricken nor was there a necessity for a limiting instruction. Further, there was no confrontation clause violation regarding the statement of Violet Telfer's nontestimonial statement, and, even if there was, any error was harmless beyond a reasonable doubt. Finally, there was no evidence of a disqualifying conflict regarding an assistant prosecuting attorney's prior representation of Petitioner in a civil suit. As Petitioner has failed to demonstrate the existence of reversible error, the circuit court's sentencing order should be affirmed.

ASSIGNMENTS OF ERROR

Petitioner argues four assignments of error: 1.) error in the admission of Petitioner's statement to police upon counsel's stipulation, 2.) error in the court's failure to strike the testimony of Brittney Kennedy, who was allegedly under the influence at trial, 3.) error in the admission of Violet Telfer's recorded statement in violation of Petitioner's right to confront witnesses, and 4.) the failure of an assistant prosecuting attorney to remove himself from a case based on an alleged conflict. Pet'r's Br. 4-5.

STATEMENT OF THE CASE

On February 17, 2022, police responded to a call regarding a murder. App. 36. Police took statements from witnesses including Brittney Kennedy and Violet Telfer. App. 36. One of the responding officers also reviewed security footage of the shooting. App. 36. Petitioner was then

taken to the sheriff's office for processing, at which point he stated he did not wish to speak with officers without an attorney. App. 36.

The investigation revealed that Petitioner got into an altercation with Joda¹ Browning, then went to his vehicle, obtained a gun, and came back and shot Browning while he was in the passenger seat of Kennedy's vehicle attempting to leave. App. 36. After being shot in the face, Browning walked out of the vehicle to a small grassy area, where he laid down and died. App. 36. Violet Telfer then saw Petitioner walk over to Browning's body and say something akin to "I told you I would kill you, you son of a bitch." App. 36. Petitioner then left the scene. App. 36.

The criminal investigation report indicates that once Petitioner stated he did not wish to speak to police without an attorney present, the questioning ceased. App. 36. A short time later, officers "could see that the defendant appeared to be in distress through body language" and thus asked if he would like to discuss what happened and Petitioner indicated he wanted to get it off his chest. App. 36. The officers checked with the prosecuting attorney, advised Petitioner of his rights, and then interviewed him. App. 36.

In the initial interview, Petitioner is told he is under arrest and read his rights. App. 228-29. Petitioner indicated he wanted a lawyer, stating "I can talk to you, but I want a lawyer." App. 229. An officer then indicated that no more questions could be asked if Petitioner wanted a lawyer. App. 229. At two minutes, three seconds into the first video, Petitioner indicates he does wish to give a statement but wants a lawyer. *See* Video 1. The first interview video ends at 11:10 a.m. *See* Video 1.

At 11:28 a.m. the second video begins. *See* Video 2. At 1:29 in the video, an officer indicates that Petitioner seemed distressed and so the officer asked Petitioner if he wished to speak

¹ Browning is referred to as both Joda and Jody throughout the record. App. 206.

with them. At 1:32, Petitioner indicated he was willing to talk without an attorney and agreed that the police did not push Petitioner to speak with them or coerce him in any manner. At 1:45, Petitioner was read his rights again. At 2:13, Petitioner stated that he still wanted to talk to police and proceeded to tell his version of the events in question.

Petitioner indicated at about the 8:00 mark in the second video that when he arrived at Kennedy's apartment complex, he found Kennedy with Browning and demanded Browning get away from Kennedy's vehicle as Petitioner makes the payments. At the 8:28 mark Petitioner stated that Browning refused to leave and pulled a knife on Petitioner, threatening his life, so Petitioner ran to his vehicle and grabbed a gun. Both Browning and Kennedy jumped into Kennedy's car and pulled toward Petitioner. (8:30 mark, video 2). Petitioner stuck his arm through the window and accidentally pulled the trigger of the gun. (8:35 mark, video 2). Petitioner admitted that he was not in front of the car but at the side of the car when this occurred, and that he stuck his arm into the car with the gun in order to scare Browning. (8:55 mark, video 2). Petitioner threw his gun into a creek after he drove away from the scene. (10:50 mark, video 2). Petitioner noted that he "screwed up." (2:30 mark, video 4).

Petitioner admitted that he and Browning had threatened each other in the past. (11:33 mark, video 2). Petitioner also admitted that he had threatened Browning to stay away from Kennedy (2:20 mark, video 3) and that he had "bad blood" with Browning (0:32 mark, video 4). Petitioner admitted to knowing Kennedy's child was in the car. (3:20 mark, video 4).

Petitioner was indicted on one count of first degree murder and two counts of wanton endangerment. App. 45-46.

At a hearing on November 29, 2022, Petitioner indicated that after a discussion with his attorney he admitted he had given his statement "voluntarily . . . without any type of coercion or

duress” and wished to stipulate to the same. App. 90. The court then questioned Petitioner, under oath, and Petitioner agreed that his statement was voluntary. App. 90-91. The voluntariness of the statement was then stipulated. App. 91.

Trial began on December 5, 2022. App. 96. Petitioner noted just prior to voir dire that Assistant Prosecuting Attorney (“APA”) Ferrell represented him in a civil case previously, but noted that “[i]t’s nothing to do with Mr. Ferrell.” App. 105. APA Ferrell stated that “[u]nder the Rules there’s no conflict and there’s nothing in that case that would possibly [be] relevant to this case. Nothing I learned then has any bearing on this case or would have nothing to do with his guilt or innocence.” App. 105. The date of representation was not discussed but APA Ferrell believed that it was “pre-covid.” App. 105. Petitioner’s counsel indicated he did not believe there was a conflict, and APA Ferrell noted that he was “sitting in second chair in this matter and [he] had no actual contact with this defendant.” App. 106.

Kennedy testified that she has known Petitioner for four years and dated him on and off. App. 159. At one point the two were engaged. App. 183. On the day of the shooting, Petitioner had to work at 5:30 a.m. so Kennedy drove him to his vehicle with her eight-year-old daughter in the back seat. App. 160, 163, 168. Kennedy had a flat tire that day just prior to dropping Petitioner off. App. 164-65. Thereafter, she stopped at Jody Browning’s house, picked him up, and drove back to her apartment complex. App. 165-67. Kennedy and Browning had also been in a relationship at the time. App. 179.

After Kennedy and Browning arrived at the complex, Petitioner drove up and started calling Kennedy names. App. 168. Petitioner then turned his attention to Browning and an altercation began; Kennedy told Browning to get into her car and they tried to leave. App. 168. When the two were pulling out, Petitioner ran to Kennedy’s car and shot Browning. App. 168.

Kennedy's child was in the back seat at the time. App. 169. Browning got out of the vehicle after being shot. App. 188. A surveillance video of the incident was shown to the jury. App. 170. Kennedy left the premises to take her child to a safer location. App. 176-77. She called 911. App. 177. Kennedy did not recall Browning having a weapon but admitted that in photographs a closed pocketknife was beside Browning's body when he died. App. 190, 199.

Kennedy testified that prior to this incident, Petitioner had gotten into an altercation with Kennedy's child's father. App. 172. The two got into a physical fight at Kennedy's apartment complex. App. 172. Browning had spoken to Petitioner previously after Petitioner had been threatening Browning and Kennedy. App. 187. Browning did not want any "bad blood." App. 187. Kennedy admitted, however, that she had also had problems with Browning and that he had cut her tires once. App. 197.

Immediately after Kennedy's testimony, the court called a sidebar with the attorneys and expressed his concern that Kennedy had slurred speech and requested drug testing. App. 200-01. The court noted that "she seemed to be all right until toward the end and then she just showed significant signs." App. 201. Drug testing showed that Kennedy had Percocet and marijuana in her system, but Kennedy informed the court that she had a prescription for Percocet after having just given birth days earlier.² App. 202. The court opined that it could not "make a finding that she was impaired." App. 202. The court determined that the jury would not be informed as the information was not relevant and the Percocet was for pain following a caesarean section. App. 202-03.

Corporal Roger Finch testified that when he arrived on scene Browning was on the ground dead. App. 205. Cpl. Finch testified to some of the crime scene photographs. App. 206-10, 221. In the photograph of Browning with the pocket knife by him, the knife is closed. App. 211-12. The

² Kennedy gave birth approximately ten days before she testified. App. 92-93.

surveillance video was also played for Cpl. Finch. App. 217. Cpl. Finch spoke with Kennedy and Violet Telfer on scene. App. 211.

Cpl. Finch testified that the photographs of Kennedy's vehicle and the blood therein were consistent with Browning being shot inside the vehicle. App. 223-24. No gun or other weapon was found inside Kennedy's vehicle. App. 225-26. The investigation also revealed that after Petitioner shot Browning he left the scene. App. 225. The gun used to shoot Browning was never found. App. 226.

Cpl. Finch also interviewed Petitioner and informed him there was a surveillance video of the incident. App. 218. There is also a recording of Petitioner's statement to police. App. 227. The statement was played for the jury and transcribed by the court reporter during trial. App. 228-30, 232. Petitioner indicated in the statement that he did not intend to shoot the gun at all. App. 233. Petitioner had no injuries and did not mention the possibility of a gun in the vehicle during the interview. App. 233.

Dr. Elizabeth Roush, who works as a medical examiner, testified that Browning suffered injury to his face, neck, and left shoulder. App. 243. Browning suffered a gunshot wound to his right cheek. App. 246. The gunshot exited on the left side of Browning's neck then re-entered on Browning's left shoulder. App. 248. The cause of death was a gunshot wound and the manner of death was a homicide. App. 255.

After the court determined that Violet Telfer's video recorded statement to police was admissible, App. 267-77, Cpl. Finch testified to it, App. 279. The video was played for the jury. App. 280. Telfer had been inside an apartment in the complex about ten feet from where Browning fell and died. App. 281. She was there caring for her great-grandson. App. 281.

Cpl. Finch also testified that the surveillance video showed Petitioner and Browning in what appeared to be a verbal altercation. App. 287. It appeared that Browning may have pushed Petitioner, then Petitioner walked away “really quickly.” App. 287. Petitioner informed Cpl. Finch in his statement that Browning had pulled a knife on him during the altercation. App. 288. Petitioner told Cpl. Finch he then went to his vehicle for protection and got his gun, then went to the vehicle and shot Browning. App. 292. Petitioner claimed in his statement that the gun went off by accident. App. 294.

After the State rested, Petitioner moved for judgment of acquittal for failure to prove premeditation. App. 296. Further, Petitioner argued that there was no intent sufficient to sustain the wanton endangerment charges. App. 297. The court denied the motion. App. 299. Petitioner rested without calling any witnesses. App. 302.

Petitioner was found guilty of second degree murder and two counts of wanton endangerment. App. 353-54. Petitioner’s conviction order was entered on February 16, 2023. App. 32.

Petitioner moved for a new trial, arguing that the statement of Violet Telfer was a violation of the Confrontation Clause and reversible error. App. 358-59. Petitioner also argued that Kennedy’s impairment on the stand was grounds for a new trial. App. 360. In response, the State argued that Kennedy’s credibility was up to the jury to determine, and that she had given birth and was on pain medication. App. 360-63. With regard to the statement of Telfer, the State argued that she was unavailable and relied on the court’s prior ruling. App. 365-67. The motion was denied for the reasons given at trial. App. 369.

In Petitioner’s presentence investigation report (“PSI”) he maintained that he only pointed the gun through the vehicle window to scare Browning and it went off. App. 39. Petitioner’s only

criminal history was a wanton endangerment charge from 2009 that was dismissed. App. 40. Several victim impact letters were received. App. 55-62.

Petitioner was sentenced to forty years of incarceration for second degree murder, ten days in jail on one wanton endangerment count and five years of incarceration on the other wanton endangerment count. App. 70, 378. The two wanton endangerment counts were ordered to run concurrently with one another but consecutively with the second degree murder sentence. App. 70. Petitioner appeals from that decision.

SUMMARY OF THE ARGUMENT

All of Petitioner's claims fail. Petitioner voluntarily recanted his request for counsel, and then doubled down on his recantation by agreeing to stipulate to the voluntariness of his statement at the suppression hearing. Thus, the court did not err in admitting Petitioner's statement to police.

The court did not err in failing to strike or limit the testimony of Brittney Kennedy. Despite testing positive for narcotics and marijuana, Kennedy was a competent witness. Petitioner cannot point to any part of her testimony that was affected by the narcotics, and drug use alone does not render a witness incompetent.

Violet Telfer's testimony was properly admitted as a nontestimonial statement. Nontestimonial statements, when a witness is properly deemed unavailable, do not violate the Confrontation Clause. Even if this Court finds a violation of the Confrontation Clause, any error is harmless beyond a reasonable doubt.

Finally, there is no disqualifying conflict between APA Ferrell and Petitioner. APA Ferrell represented Petitioner several years prior in a civil suit. This cannot be deemed the same or substantially similar representation. Moreover, Petitioner has not shown anything that APA Ferrell could have learned in his prior representation that would have affected this trial. Thus, this Court should affirm Petitioner's sentence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the West Virginia Rule 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. Standards of Review

Petitioner's assignments of error have varying standards of review.

In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error 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. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

This Court reviews the Petitioner's Confrontation Clause claim under a multi-faceted standard of review: "Three separate levels of scrutiny apply to Confrontation Clause claims: The circuit court's order is reviewed for abuse of discretion; its factual findings are reviewed for clear error; and its legal rulings are reviewed de novo." *State v. Martin*, No. 13-0112, 2013 WL 5676628, at *2 (W. Va. Supreme Court, Oct. 18, 2013) (memorandum decision).

"Recognizing the trial court's need for latitude, several courts have applied an abuse of discretion standard when reviewing decisions on disqualification motions. We agree that this is the appropriate standard of review." *State v. A.B.*, 247 W. Va. 495, 502, 881 S.E.2d 406, 413 (2022), *cert. denied sub nom. A. B. v. W. Virginia*, 143 S. Ct. 2499, 216 L. Ed. 2d 457 (2023) (citation omitted).

B. The court properly accepted Petitioner’s stipulation to the voluntariness of his statement to police, and a review of the record shows that the statement was indeed voluntary, as he recanted his request for counsel.

Petitioner first argues that the lower court and trial counsel both erred in allowing Petitioner’s statement into trial. Pet’r’s Br. 12. Petitioner stipulated to the voluntariness of his statement and no objection was made to the statement. App. 90. This Court has declined to address errors when a litigant did not object on the same ground below. *State v. Edward C.*, No. 19-0831, 2020 WL 6051314, at *4 (W. Va. Supreme Court, Oct. 13, 2020) (memorandum decision). This Court notes that “[t]o preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect.” *Id.* (citing *State v. Sites*, 241 W. Va. 430, 438, 825 S.E.2d 758, 766 (2019) (additional citation omitted)). “One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result’ in the imposition of a procedural bar to an appeal of that issue.” *State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995). Because Petitioner failed to object on this ground at trial, this Court should decline to address this argument on appeal.

In this case, rather than simply not objecting, Petitioner actually invited error. This Court has held, “[a] judgment will not be reversed for any error in the record introduced by or invited by the party asking for the reversal.” Syl. Pt. 21, *State v. Riley*, 151 W. Va. 364, 367, 151 S.E.2d 308, 312 (1966), *overruled on other grounds by Proudfoot v. Dan’s Marine Serv., Inc.*, 210 W. Va. 498, 558 S.E.2d 298 (2001).

“Invited error” is a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous [ruling] and then later seeking to profit from that error. The idea of invited error is . . . to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at

a later stage of the trial use the error to set aside its immediate and adverse consequences.

State v. Crabtree, 198 W.Va. 620, 627, 482 S.E.2d 605, 612 (1996). Petitioner abandoned his motion to suppress and agreed to stipulate to the voluntariness of the statement. App. 90. By now claiming error, Petitioner has fallen squarely into the realm of invited error.

Even if this Court does not find invited error, Petitioner waived any objection to the entry of his statement into evidence. This Court has found that “[w]aiver . . . is the ‘intentional relinquishment or abandonment of a known right.’” *State v. Myers*, 204 W. Va. 449, 460, 513 S.E.2d 676, 687 (1998) (quotations and citations omitted). “[W]hen there has been such a knowing waiver, there is no error and the inquiry as to the effect of the deviation from a rule of law [or violation of a right] need not be determined.” *Id.* (quotations and citations omitted). Importantly, “[w]hen a right is waived, it is not reviewable even for plain error.” *Id.* Petitioner, after filing a motion to suppress and after consulting his counsel, affirmatively waived any objection to the statement by stipulating that the statement was in fact voluntary.

Even if this Court were to decide that Petitioner did not invite error and did not commit waiver below, it must review the assignment of error under the plain error doctrine. “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.” Syl. Pt. 7, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. Plain error warrants reversal “solely in those circumstances in which a miscarriage of justice would otherwise result.” *Id.* at 18, 459 S.E.2d at 129 (citing *United States v. Frady*, 456 U.S. 152, 163 n. 14 (1982)). As Petitioner cannot show a miscarriage of justice, his conviction should be affirmed.

Petitioner “bears the burden of persuasion on each of the four prongs of the plain error standard.” *Lowery v. United States*, 3 A.3d 1169, 1173 (D.C. 2010). And “[s]atisfying all four

prongs of the plain-error test is difficult[.]” *United States v. Williamson*, 706 F.3d 405, 413 (4th Cir. 2013). In short, while appellate courts may review forfeited objections for plain error “such error is rarely found.” 9 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 46.02[2] (3d ed. 2002). The *Miller* Court noted that “[h]istorically, the ‘plain error’ doctrine ‘authorizes [an appellate court] to correct only ‘particularly egregious errors’ . . . that ‘seriously affect the fairness, integrity or public reputation of judicial proceedings [.]’ ” *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129 (citing *United States v. Young*, 470 U.S. 1, 15 (1985)). Moreover, “[p]lain error warrants reversal “solely in those circumstances in which a miscarriage of justice would otherwise result.” *United States v. Frady*, 456 U.S. 152, 163 n. 14, (1982).” *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129. Justice Cleckley expanded on this proposition, stating as follows:

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. Pt. 9, *Miller*, 194 W. Va. 3, 459 S.E.2d 114.

Petitioner certainly cannot sustain his burden in proving plain error. Petitioner cannot meet the first two factors, as there was no error. Petitioner, with the assistance of counsel, voluntarily stipulated to the voluntariness of the statement. App. 90. Petitioner had filed a motion to suppress, but, when the hearing occurred decided strategically to stipulate to the statement. App. 90-91. The court questioned Petitioner to determine if he indeed wished to admit to the voluntariness of his statement to police, and he indicated that he did. App. 90-91. The court was under no further duty to question Petitioner’s repeated assertions, both on the video during the statement and at the hearing, finding the statement was given voluntarily. Petitioner’s assertions now that the court should have further questioned him are without legal support.

The court brought the issue up again sua sponte prior to the recording being played. The court stopped the trial and called a sidebar to ensure there was no objection to playing the recording. App. 230. Counsel confirmed that he wanted the statement played as long as Petitioner was not called as a witness. App. 231. This was a sound strategic decision, as noted above. As Petitioner was claiming self-defense, it was important for the jury to hear his side of the story and that Petitioner felt threatened by Browning. The safest way to do this was to allow the video statement to be admitted, as this protected Petitioner from undergoing what would have undoubtedly been a rigorous cross-examination.

Moreover, the evidence shows that Petitioner knowingly and intelligently recanted his request for counsel. The general rule is that if a criminal defendant requests an attorney, one should be secured “within a reasonable time,” and, “no interrogation shall be conducted” in the interim. Syl. Pt. 2, *State v. Easter*, 172 W. Va. 338, 339, 305 S.E.2d 294, 295 (1983). On the other hand, a criminal defendant has the right to recant his request. “There can be no interrogation of a person accused of committing a crime after he requests counsel, until counsel is provided except that if the suspect recants his request before counsel can be provided with reasonable dispatch, interrogation may be conducted.” Syl. Pt. 4, *Easter*, 172 W. Va. 338, 305 S.E.2d 294 (quotation omitted). “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).

In this case, Petitioner was in distress following the invocation of his right to counsel. (*see* video 2). When police mentioned his distress, Petitioner agreed to speak with them without counsel. At the 1:32 mark of the second video, Petitioner indicated he was willing to talk without an attorney and agreed that the police did not push Petitioner to speak with them or coerce him in

any manner. At 1:45, Petitioner was read his rights again. At 2:13, Petitioner repeated that he still wanted to talk to police and proceeded to tell his version of the events in question. It is clear that Petitioner met the above factors. He initiated a conversation about what occurred after police asked if he wanted to speak with them. He was then informed of his rights for the second time in less than thirty minutes and chose to waive his right to counsel. Petitioner later affirmed this waiver at the hearing on this matter. App. 90-91.

The Supreme Court of the United States has stated that “waivers of counsel must not only be voluntary, but must also 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.’” *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). That is precisely what occurred here. The videos show that Petitioner was not under distress or coercion while giving his statement, and such has not been alleged on appeal. The videos also show Petitioner freely explaining his version of the events and speaking intelligently throughout. A review of the facts and circumstances of this case show that Petitioner not only intelligently waived his right to counsel at the time of the interview, but also later during the pretrial hearing. Thus, Petitioner cannot meet his burden under the plain error standard as he cannot show error.

With regard to any implication that Petitioner’s trial counsel was ineffective in allowing Petitioner to stipulate to the voluntariness of the statement, this contention is not proper on direct appeal. “In past cases, this Court has cautioned that ‘[i]neffective assistance claims raised on direct appeal are presumptively subject to dismissal.’” *State v. Woodson*, 222 W. Va. 607, 621, 671 S.E.2d 438, 452 (2008) (quoting *State v. Miller*, 197 W.Va. 588, 611, 476 S.E.2d 535, 558 (1996));

State ex rel. Daniel v. Legursky, 195 W. Va. 314, 318 n.1, 465 S.E.2d 416, 420 n.1 (1995) (“Traditionally, ineffective assistance of counsel claims are not cognizable on direct appeal.”); *State v. Brichner*, No. 14-0659, 2015 WL 1236005, at *2 (W. Va. Supreme Court, Mar. 16, 2015) (memorandum decision) (“As an initial matter, we observe that petitioner’s ineffective assistance of counsel claims are not properly before this Court on a direct appeal.”). Indeed, this Court has held that

[i]t is the extremely rare case when this Court will find ineffective assistance of counsel . . . on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.

Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992). Moreover, the Court has explained that

[t]he very nature of an ineffective assistance of counsel claim demonstrates the inappropriateness of review on direct appeal. To the extent that a defendant relies on strategic and judgment calls of his or her trial counsel to prove an ineffective assistance claim, the defendant is at a decided disadvantage. Lacking an adequate record, an appellate court simply is unable to determine the egregiousness of many of the claimed deficiencies.

State v. Miller, 194 W.Va. 3, 15, 459 S.E.2d 114, 126 (1995). Here, Petitioner’s allegations of ineffective assistance of counsel claims all implicate trial counsel’s strategic decision in stipulating to the voluntariness of Petitioner’s statement because counsel wanted the statement entered into evidence. App. 231. Petitioner was claiming self-defense, and allowing his statement to be played for the jury was a way for Petitioner to have his story told without the risk of cross-examination. Accordingly, this Court should refuse to address the Petitioner’s ineffective assistance of counsel claim to allow the Petitioner to develop the claim in a habeas corpus proceeding.

C. Brittney Kennedy's testimony was not stricken or limited because any alleged intoxication did not affect her ability to recall the events or make her an incompetent witness.

Petitioner contends that Brittney Kennedy's testimony should have been stricken, or there should have been a special limiting instruction regarding Kennedy's alleged intoxication. Pet'r's Br. 14. A review of the record, however, shows that Kennedy was not incompetent as a witness despite any consumption of narcotics and marijuana. Thus, there was no need to strike or limit her testimony.

Rule 601 of the West Virginia Rules of Evidence provides that "[e]very person is competent to be a witness except as otherwise provided for by these rules." "[G]enerally, a proposed witness who is so intoxicated when it is sought to put him on the witness stand that he would not know what he was testifying to will be excluded from testifying." *State v. Porter*, 182 W. Va. 776, 783, 392 S.E.2d 216, 223 (1990) (citing 81 Am.Jur.2d Witnesses § 544, at 545 (1976)). But, "[b]oth state and federal case precedent establish that the fact of consumption or intoxication does not in and of itself make an otherwise competent witness incompetent." *Burgess v. Ballard*, No. 14-0750, 2015 WL 7628844, at *41 (W. Va. Supreme Court, Nov. 23, 2015) (memorandum decision); *see also United States v. Van Meerbeke*, 548 F.2d 415, 418 (2d Cir. 1976) (finding that a witness who ingested opium on the stand was still a competent witness and leaving credibility determinations to the jury).

This Court looks to the testimony in the case to determine if the witness was competent. As this Court noted in *Porter*, "[t]here is no evidence that [the allegedly intoxicated witness] did not know what he was testifying to at the time he previously testified or that he was necessarily intoxicated at that time." 182 W. Va. at 784, 392 S.E.2d at 224. Further, the "[c]ompetency of a witness to testify, as distinguished from the issue of credibility, is a limited threshold decision by

the trial judge as to whether a proffered witness is capable of testifying in any meaningful fashion whatsoever.” *United States v. Banks*, 520 F.2d 627, 630 (7th Cir. 1975). In *Banks*, two witnesses were “taking drugs and actively participating in a methadone maintenance treatment program,” but the court chose to keep this information from the jury, “concluding that the jury had had ample opportunity to observe the witnesses’ demeanor and ability to testify.” 520 F.2d at 630. On appeal, the court found that the witnesses “testified extensively, providing ample opportunity for the trial judge to consider their capacity” and held that “[w]e have reviewed the trial transcript carefully and find nothing therein to contradict the court’s express conclusion that the witnesses were competent to testify.” *Id.*

The court in this case had ample time to evaluate Kennedy’s testimony and demeanor, as did the jury. The court heard the entirety of Kennedy’s testimony and determined that “she seemed to be all right until toward the end and then she just showed significant signs.” App. 201. Further, after watching and listening to Kennedy, the court could not make a finding that she was impaired. App. 202. Kennedy admitted to ingesting marijuana and was on painkillers for the caesarean section she had less than two weeks prior to trial. App. 202-03. But, even given that information the court, after watching Kennedy testify and be cross-examined, specifically opined that it could not determine that she was impaired. This Court should respect the lower court’s discretion.

This Court has approved of a test for disqualifying a witness, but Kennedy’s testimony does not meet the criteria. “The 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.” *State v. Merritt*, 183 W. Va. 601, 608, 396 S.E.2d 871, 878 (1990) (quoting F. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 2.2(B) (2d ed.1986) (additional citation omitted)). Kennedy’s

testimony does not meet any of these grounds. Kennedy clearly had knowledge of the matters to which she testified, and her testimony was supported by video evidence. Further, there was no evidence that Kennedy had any inability to recall the facts surrounding the shooting. While Kennedy may not have had perfect recollection, there is no proof that this was a result of anything but the trauma of seeing someone she cared about shot in the face by someone she had been in a relationship with for years, all in front of Kennedy's young child. Finally, there is no proof that Kennedy did not understand the duty to testify truthfully, nor is there even an allegation that she did not testify truthfully. This Court should affirm the lower court's decision not to strike or limit Kennedy's testimony.

D. The statement of Violet Telfer was nontestimonial and did not violate the Confrontation Clause. Even if this Court disagrees, any error was harmless beyond a reasonable doubt.³

Petitioner next argues that the recorded statement of Violet Telfer, who could not be located to testify at trial, was erroneously played for the jury. Pet'r's Br. 16. A review of the surrounding facts of this claim is necessary. The State indicated that Violet Telfer was unavailable prior to eliciting testimony regarding her statement. App. 234-35. The State wanted Cpl. Finch to testify to Telfer's statement she gave at the scene. App. 236. The court recognized that the statement, which recounted statements made by Petitioner just after the shooting, was double hearsay. App. 237. Petitioner objected as he could not cross-examine Telfer. App. 238.

The court chose to hold a hearing on the issue. App. 238, 267. The State proffered that it had tried "for weeks" to contact Telfer and was unable to reach her or leave a message. App. 267. The State learned that Telfer was in the area that day taking care of her great-grandson and found

³ The majority of the argument below centered on the hearsay rules allowing the admission of Telfer's testimony. As Petitioner has abandoned all argument to that end, the State will not address the same and will only respond to the Confrontation Clause claim set forth in Petitioner's brief.

she may have moved to Ohio; the State then attempted to call and find her there and could not. App. 267-68.

The home Telfer was at that day was just feet from where Browning fell to the ground. App. 268. Telfer gave her statement to the police within an hour of the shooting. App. 269.

The court first inquired regarding Telfer's unavailability. App. 269-70. Petitioner argued that Telfer was not unavailable as she was not suffering from illness and had not died. App. 270. Petitioner also objected on Confrontation Clause grounds and based on prejudice. App. 271-72. The State argued that the statement represented a statement against interest and a statement offered against a party deponent. App. 272. The State also argued excited utterance and present sense impression. App. 273.

The court found that the State met its burden in showing that Telfer was unavailable. App. 275. The court also found the statement admissible pursuant to either Rule 803 or 804(b)(3)(A) and (B) of the Rules of Evidence. App. 277. Petitioner failed to make Telfer's statement part of the appendix on appeal.

1. There was no Confrontation Clause violation here.

The Sixth Amendment to the United States Constitution provides, in pertinent part, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” The confrontation right includes the right of cross-examination. “The Sixth Amendment to the United States Constitution guarantees an accused the right to confront the witnesses against him. The Sixth Amendment right of confrontation includes the right of cross-examination.” Syl. Pt. 1, *State v. Mullens*, 179 W. Va. 567, 371 S.E.2d 64 (1988). “An essential purpose of the Confrontation Clause is to ensure an opportunity for cross-examination. In exercising this right, an accused may cross-examine a witness to reveal possible biases, prejudices

or motives.” Syl. Pt. 2, in part, *State v. Phillips*, 194 W.Va. 569 461 S.E.2d 75 (1995) (quoting Syl. Pt. 1, in part, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995), *overruled on other grounds by State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006)). “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, [93 S.Ct. 1038 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 106 S.Ct. 2142, 2146 (1986) (quoting *California v. Trombetta*, 104 S.Ct. 2528, 2532 (1984)).

“Pursuant to *Crawford v. Washington*, 541 U.S. 36 [(2004), the Confrontation Clause . . . 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.” Syl. Pt. 1, *State v. Jako*, 245 W. Va. 625, 862 S.E.2d 474, 476 (2021), *cert. denied sub nom. Jako v. W. Virginia*, 142 S. Ct. 1680, 212 L. Ed. 2d 585 (2022).

Petitioner alleges error in the finding that Telfer was unavailable. Pet’r’s Br. 17. “The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness’s out-of-court statement.” Syl. Pt. 3, *State v. Mechling*, 219 W. Va. 366, 368, 633 S.E.2d 311, 313 (2006), *holding modified by State v. Jako*, 245 W. Va. 625, 862 S.E.2d 474 (2021). “In order to satisfy its burden of showing that the witness is unavailable, the State must prove that it has made a good-faith effort to obtain the witness’s attendance at trial. This showing necessarily requires substantial diligence.” Syl. Pt. 3, *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990), *overruled on other*

grounds by *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), holding modified by *State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999). If there is no evidence showing “the State's good-faith efforts to secure the witness for trial, the prosecution has failed to carry its burden of proving unavailability.” *Id.* at Syl. Pt. 4.

The record in this case shows that the State was substantially diligent in attempting to secure Violet Telfer for trial. The State repeatedly called and went to the address she gave police on the date of the shooting. App. 235, 267-68. The State noted that Telfer had possibly moved to Ohio and tried to reach her there, but could not. App. 267-68. The State sustained its burden in showing that Telfer was unavailable, and the court did not err in ruling that Telfer was unavailable.

But, Telfer’s unavailability is not at issue here, as the statement she made was non-testimonial and, thus, outside the parameters of the Confrontation Clause. “[A] testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Syl. Pt. 6, *State v. Bowie*, 235 W. Va. 709, 776 S.E.2d 606 (2015). “A witness’s statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency.” Syl. Pt. 9, *State v. Kaufman*, 227 W. Va. 537, 711 S.E.2d 607 (2011). This is precisely the case here.

Cpl. Finch testified regarding the circumstances of Telfer’s statement as follows:

- Q. And explain to the jury like once you’re on the scene and you have a deceased body what is it that you, as an officer, what you do thru the investigation?
- A. The first thing that we try to do is understand why this person is, in fact, deceased. Part of the investigative process is talking to the people in the area and try to investigate.

Q. Did you talk to witnesses?

A. Yes.

Q. Do you recall who you spoke with?

A. I spoke with Brittany Kennedy and a lady named Violet Telfer.

App. 211. The statement, which was not made part of the appellate record, was clearly taken as part of the initial investigation while there was still an ongoing emergency. This is further evidenced by Cpl. Finch's testimony agreeing that his "investigation was based, in part, on Violet Telfer's statement" given at that time. App. 294.

Petitioner had shot Browning in the face then ran off. App. 36, 225, 10:50 mark, video 2. At the time police arrived and spoke with Telfer there was an ongoing emergency. Petitioner had shot Browning and left, still armed and presumably dangerous. This makes Telfer's statement nontestimonial as it occurred during the ongoing emergency of finding Petitioner. "[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). In this case, the right to cross-examination was ameliorated by the emergent circumstance and the unavailability of Telfer.

Moreover, the Supreme Court of the United States held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822 (2006). In that case, the statement was made in a 911 call after the speaker was assaulted and the assailant had fled. This is in line with other jurisdictions who have found that "when police arrive upon a scene shortly after and in response to an emergency telephone call, statements made to police officers by witnesses with the

purpose of securing the scene or apprehending fleeing suspects are non-testimonial.” *State v. Riley*, 2007-Ohio-879, ¶ 21 (2007). Likewise, a statement made while an officer was on scene after suspects had fled was found to be nontestimonial. *State v. Reardon*, 860 N.E.2d 141, 144 (Ohio 2006). Further, “initial inquiries at the scene of a crime might yield nontestimonial statements when officers need to determine with whom they are dealing in order to assess the situation and the threat to the safety of the victim and themselves.” *State v. Koslowski*, 209 P.3d 479, 488 (Wash. 2009).

Although the lower court admitted the statement exclusively on evidentiary grounds which are not at issue in this appeal, this Court may affirm because the statement was nontestimonial. “This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.” Syl. Pt. 4, *White v. Haines*, 215 W. Va. 698, 601 S.E.2d 18 (2004) (quotation omitted). Therefore, the court should affirm the admission of Telfer’s statement.

2. Any error was harmless beyond a reasonable doubt.

Even if the admission of Telfer’s statement is error pursuant to the Confrontation Clause, this Court should find that the error was harmless beyond a reasonable doubt. “Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.” Syl. Pt. 3, *Jako*, 245 W. Va. 625, 862 S.E.2d 474. “Courts assessing the harm arising from the introduction of evidence violating the Confrontation Clause have focused upon whether the information gleaned by the jury through such evidence contributed to the verdict or addressed a critical issue involving conflicting and pivotal evidence at trial.” *State v. Blevins*, 231 W. Va. 135, 156, 744 S.E.2d 245, 266 (2013). This Court has noted that “[i]n a criminal case,

the burden is upon the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Id.* at 156, 744 S.E.2d at 266 (quotation omitted).

The statement of Telfer did not contribute to the verdict. A review of the evidence shows abundant proof of what occurred. Kennedy testified that as she tried to leave with Browning in an effort to de-escalate the situation, Petitioner ran up to her vehicle with a gun, put the gun inside the vehicle, and shot Browning in the face. App. 36, 168. Video surveillance confirmed Kennedy’s story that both she and Browning were in the vehicle trying to leave. App. 168, 170. Moreover, Petitioner’s own statement was that he was beside the vehicle with both Kennedy and Browning in the vehicle when he reached his gun inside the car to scare them. App. 39.

Petitioner’s claim that he had been threatened by Browning was clearly discounted by the jury, and rightfully so. The only weapon found at the scene was a closed pocket knife. App. 190, 199, 225-26. Even if the knife had been open at one point and used to threaten Petitioner, the jury believed that the threat had dissipated when Browning and Kennedy got into the vehicle to leave. Petitioner could have also left but instead chose to go get a gun and chose to stand alongside the vehicle and stick the gun through the window.

All of this evidence was presented to the jury. The jury also heard how Petitioner had a history of threatening the men in Kennedy’s life, App. 172, 187, and had a history of threatening Browning specifically, App. 187, 11:33 mark, video 2. Moreover, the jury heard that Petitioner was angered to find Browning with Kennedy, telling him to leave immediately. 8:00 mark, video 2.

Further, the statement of Telfer would have shown premeditation, but the jury in this matter convicted Petitioner of second degree murder. App. 353-54. This Court has stated that “the intent

to kill or malice is a required element of both first and second degree murder but the distinguishing feature for first degree murder is the existence of premeditation and deliberation.” *State v. Drakes*, 243 W. Va. 339, 345, 844 S.E.2d 110, 116 (2020). Telfer’s statement that Petitioner told Browning as he lay dying that he told Browning he would kill him would go to premeditation and deliberation. There was no question in this case as to who shot Browning. The only question was whether it was in self defense, and, if not, whether the shooting was first degree murder or some lesser included offense. As the jury returned a verdict of second degree murder, the jury did not find premeditation.

Should Petitioner contend that the statement helped prove malice, this, too, fails, as there was abundant proof of malice absent this passing statement by Telfer. Petitioner admitted he had “bad blood” with Browning. (0:32 mark, video 4). Although Petitioner safely retreated to his vehicle, he did not leave the scene, but, instead, chose to pull his gun on Browning, which also shows malice. App. 36. In fact, malice can be inferred from the use of a deadly weapon. Syl. Pt. 5, *State v. Jenkins*, 191 W. Va. 87, 443 S.E.2d 244 (1994). Thus, the statement Telfer overheard had no bearing on the verdict in this matter and this is evidence of harmless error beyond a reasonable doubt. Indeed, the statement was so inconsequential to the verdict that Petitioner failed to include it in the record on appeal.

E. There was no conflict of interest between Petitioner and the Assistant Prosecuting Attorney.

Petitioner’s final assignment of error is that APA Ferrell had a conflict of interest because he previously represented Petitioner in a civil action. Pet’r’s Br. 18. Petitioner opines that there was “[n]o mention of this conflict” to the court, but the record reflects that this is untrue. Pet’r’s Br. 18. Just before voir dire, Petitioner realized that APA Ferrell had represented him in a civil case. App. 105. APA Ferrell admitted as much but noted that “there’s nothing in that case that would

possibly [be] relevant to this case. Nothing I learned then has any bearing on this case or would have nothing to do with his guilt or innocence.” App. 105. Moreover, APA Ferrell believed that the representation was “pre-covid” which would place the representation at least three years before this trial and at least two years before the shooting. App. 105. Nothing in APA Ferrell’s prior representation of Petitioner in a civil matter would impact this case, and, thus, Petitioner’s argument must fail.

Petitioner cites to Rule 1.9(a) of the West Virginia Rules of Professional Conduct in support of his argument, but this rule is inapplicable. Rule 1.9(a) states that “[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person *in the same or substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” Both parties indicated that APA Ferrell’s prior representation of Petitioner was civil relating to an automobile crash. App. 105. This is clearly not the same or substantially similar to a murder case.

Rule 1.9(c)(1) and (2) states that an attorney who has previously represented a client cannot “use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known” nor can he “reveal information relating to the representation except as these Rules would permit or require with respect to a client.” “Under Rule 1.9(a) of the Rules of Professional Conduct, 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.” Syl. Pt. 5, *State ex rel. Clifford v. W. Va. Off. of Disciplinary Couns.*, 231 W. Va. 334, 745 S.E.2d 225 (2013) (quotation omitted).

Petitioner offers no argument that either of these provisions were violated. In fact, Petitioner makes no argument whatsoever as to what information could possibly have been gleaned from APA Ferrell's civil representation years prior that was used against Petitioner in this criminal action. It is certainly not for this Court to guess what that might have been. "[T]his Court has made clear that '[a] skeletal "argument," really nothing more than an assertion, does not preserve a claim ... Judges are not like pigs, hunting for truffles buried in briefs.'" *State v. Gilbert*, No. 20-0174, 2021 WL 653224, at *3 (W. Va. Supreme Court, Feb. 19, 2021) (memorandum decision) (quoting *State, Dep't of Health v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995) (quoting, in turn, *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

Further, the lower court's duty to analyze the facts surrounding this representation was satisfied. Both parties agreed that the representation here was not a problem in this matter. App. 105. Petitioner offered no objection to APA Ferrell's continued participation in the criminal matter. The record shows that the undisputed circumstances of the prior representation do not violate Rule 1.9, as the cases were not the same or substantially similar. Thus, Petitioner's argument to this end is baseless.

CONCLUSION

Petitioner can show no error in the lower court's rulings. Accordingly, Petitioner's conviction should be affirmed.

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. 23-272

STATE OF WEST VIRGINIA,

Respondent,

v.

HEATH ALLEN ROSE,

Petitioner.

CERTIFICATE OF SERVICE

I, Andrea Nease Proper, do hereby certify that on the 16th day of October, 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:

Joseph H. Spano, Jr. Esquire
Pritt & Spano, PLLC
714 ½ Lee Street, E. Suite 204
Charleston, WV 25301



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