IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 23-478

VICTOR LEE THOMPSON, Petitioner,

v.

STATE OF WEST VIRGINIA, Respondent.

(Appeal from sentencing order of the Circuit Court of Wood County, West Virginia, 22-F-80)

PETITIONER'S REPLY BRIEF

Counsel for Petitioner,

William R. Morris, Esq.
WV State Bar No. 14278
P.O. Box 5518 Vienna, WV 26105
(304) 488-4601 (call | text)
william@jmorganleach.law
jmorganleach.law

J. Morgan Leach, Esq.
WV State Bar No. 13124
P.O. Box 5518 Vienna, WV 26105
(855) 444-5529 (call | text | fax)
morgan@jmorganleach.law
jmorganleach.law

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ASSIGNMENTS OF ERROR

I. THE CIRCUIT COURT ERRED BY ADMITTING THE BOOKING PHOTOGRAPHS AND THE 911 CALL INTO EVIDENCE

II. THE CIRCUIT COURT ERRED BY PERMITTING HEARSAY TESTIMONY OF TIFFANY MCCUNE

III. THE CIRCUIT COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR POST-VERDICT JUDGMENT OF ACQUITTAL

IV. THE CIRCUIT COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL

STATEMENT OF THE CASE

This case stems from a tragic incident wherein the Defendant, Victor Thompson (hereinafter "Mr. Thompson"), was forced to use deadly force in self-defense when the alleged victim, Mr. Salaam drew a gun on him. Mr. Thompson was an invited guest at the McCune household and was a longtime and trusted friend of the McCune's. On the date of the incident, Mr. Thompson was having an argument with Mrs. McCune stemming from a drug transaction the night before. Mrs. McCune, while heavily intoxicated on recreational drugs, escalated the argument by reaching for a gun. At some point during the argument, Mr. Thompson was able to remove the firearm from Mrs. McCune. Upon hearing the scuffle, Mr. Salaam came from a back bedroom and drew his gun on Mr. Thompson. Mr. Thompson then used the gun taken from Mrs. McCune in self-defense against Mr. Salaam. Mr. Thompson was subsequently indicted on one count of first degree murder, one count of felony murder, and one count of burglary.

Mr. Thompson now prays that the Supreme Court of Appeals review the underlying conviction entered on the 22nd day of December, 2022. Mr. Thompson contends that the denial of his *Motion for Post-Verdict Judgment of Acquittal* and *Motion for a New Trial*, were erroneous.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to Rule 19(a) for the following reasons: (1) the case involves assignments of error in the application of settled law; (2) the case involves an unsustainable exercise of discretion where the law governing that discretion is settled; and (3) the case involves a narrow issue of law.

STANDARD OF REVIEW

The following standards of review apply to Mr. Thompson's four assignments of error:

> The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

State v. LaRock, 196 W. Va. 294, 310-311, 470 S.E.2d 613 (W. Va. 1996) (overruled on other grounds).

> A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.

Syl. Pt. 4, *State v. Rodossakis*, 204 W. Va. 58, 511 S.E.2d 469 (W. Va. 1998).

> It is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction.

Syl. Pt. 3, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (W Va. 1996) (overruled on other grounds).

> The trial court's disposition of a motion for judgment of acquittal is subject to our *de novo* review; therefore, this Court, like the trial court, must scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict's favor, and then reach a judgment about whether a rational jury could find guilt beyond a

> reasonable doubt.

State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613 (W. Va. 1996) (overruled on other grounds).

> In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged differential 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.

State v. Vance, 207 W. Va. 640, 535 S.E.2d 484 (W. Va. 2000).

In the State's *Brief of Respondent*, the State attempts to utilize the cases of *Shafer v. Kings Tire Serv., Inc.*, 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004) and *State ex rel. First State Bank v. Hustead*, 237 W. Va. 219, 225, 786 S.E.2d 479, 485 (2015) to argue that this Court does "not substitute [its] judgment for the circuit court's" and will only do so for truly "unsupportable" decisions. Rsp.'s Br. 10-11. However, both of these cases are civil cases and not binding upon a criminal proceeding. Furthermore, neither of these cases have any involvement with criminal law, either express or implied. The State has made no attempt to explain why these civil matters should have relevance to the pending criminal appeal.

The State further attempts to utilize the cases of *Benjamin v. Sparks*, 986 F.3d 332, 345 (4th Cir. 2021) and *McDougal v. McCammon*, 193 W. Va. 229, 235, 455 S.E.2d 788, 794 (1995) to argue that this Court does not "reverse merely because it would have come to a different result in the first instance" and that this Court is deferential to the circuit court's rulings because they must be made "quickly, without unnecessary fear of reversal, and must be individualized to respond to" each case's specific facts. Rsp's Br. 10-11. Again, however, these cases are procedurally improper for this case as they are in the context of civil matters with no underlying relevance to a criminal matter. The State makes no attempt to account for the differing burdens of proof between civil matters and criminal matters and what effect, if any, the shift of the burden

would have on the rules set forth in said cases.

ARGUMENT

I. THE CIRCUIT COURT DID NOT PROPERLY ADMIT THE PHOTOGRAPHS OF PETITIONER'S PREJUDICIAL TATTOOS UNDER WEST VIRGINIA RULES OF EVIDENCE 401, 402, 403, AND 404.

The circuit court did not properly admit the photographs of Petitioner's swastika and Aryan tattoos as evidence of his motive in the killing of Darren Salaam.

A. Petitioner's tattoos were not relevant.

Simply put, the pictures of Petitioner's prejudicial tattoos were not admissible under Rules 401 and 402, despite any argument that the Respondent makes now. The State is correct that under those rules, relevant evidence is characterized as anything that tends "to make a fact more or less probable than it would be without the evidence" and such evidence is generally admissible. However, evidence of the Petitioner's tattoos does not make the fact that he killed Mr. Salaam more or less probable than it would be without the evidence since the Petitioner's motive to enter the residence was not to commit a racially-motivated murder. The sole use of outside jurisdictions by both parties to analyze the issues regarding the Petitioner's tattoos further illustrates the proposition that this is a case of first impression in the State of West Virginia and this Court should analyze the issues as such. Such a lack of precedent in this State likely supports the Petitioner's argument as to the admissibility of such racist tattoos in this context.

In its brief, the State makes the generalized argument that any racial motives were relevant in this case simply because the Petitioner has racist tattoos. However, within the same argument, the State admits that the motive for the killing of Mr. Salaam could also have been the fact that Mr. Salaam was connected to the drug sale. Rsp's Br. 23. The State simply cannot have

it both ways. In fact, the Petitioner's motive was solely connected to the drug sale from the night before. Thus, when viewing the evidence of the tattoos, Petitioner's personal views have no relevance to a killing resulting from a drug deal gone bad.

B. Petitioner's tattoos did violate Rule 403.

Because the Petitioner's tattoos were not relevant to the death resulting from a drug deal as described above, the minimal probative value of such evidence is substantially outweighed by the risk of unfair prejudice. Additionally, as argued above, the State also admits that the motive for the killing could have simply been due to the fact that Mr. Salaam was connected to the drug sale. Rsp's Br. 23. The prejudicial effect of evidence indicating racist ideals is obvious when observing how such ideals are condemned in society. It is simply not possible to argue that evidence of such ideas would not create an unfair prejudice against a defendant in a criminal trial. Any possible remedies rendered by a court would not erase such prejudice from the minds of a jury.

The State argues that pursuant to *McCallum v. State*, 311 S.E.3d 9, 11 (Tex. App. 2010), the Petitioner's tattoos pass the 403 test due to showing a racist gang affiliation that explains motive. Rsp's Br. 25. However, the case of *McCallum v. State* is non-binding and irrelevant since evidence of racist affiliation was used "to explain to the jury why [the defendant] would engage in an unprovoked attack." Rsp's Br. 25. Moreover, the events in *McCallum* stemmed from a disagreement about the two mens tattoos. *There*, the Defendant attacked the victim specifically because of the tattoo. *Id.* at *11.

The Respondent then argues that the West Virginia case of *State v. Hypes*, 230 W. Va. 390, 395, 738 S.E.2d 554, 559 (2013) supports the State's theory that evidence of the Petitioner's tattoos was properly admitted to show motive to kill based on racial animus. However, the case

of *State v. Hypes* is concerned with a defendant's statement that he knew how to cook meth and enjoyed it. Rsp.'s Br. 25. There is no doubt that such a statement indicates motive and opportunity, but there is simply no relevance between cooking meth and killing a human being. Following such logic, the Petitioner should have said something to the effect that "I know how to kill people and I enjoy it." Such a comparison is absurd and the State makes no effort to connect this case showing motive to cook meth to the admission of tattoos to show motive to kill.

The Respondent attempts to argue that the cases of *State v. Atkinson*, __ Ohio St.3d __, 2010-Ohio-2825, __ N.E.2d __ and *State v. Stein*, 193 Wash. App. 1003 (2016) are inapplicable due to the fact that the racial evidence at issue dealt with a different party. Rsp's Br. 26-27. However, the issue in this case is not with the party, but with the content of the evidence. As argued in *Petitioner's Brief*, the cases cited help to explain how the racial messages fail to show motive for how the attacks started. As such, the circuit court abused its discretion in admitting the tattoos as evidence as the probative value of such evidence is substantially outweighed by a risk of unfair prejudice.

C. Petitioner's tattoos did violate Rule 404.

Rule 404(b)(1) states that evidence of a "crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." W. Va. R. Evid. 404(b)(1). While tattoos are not crimes or evidence of a wrong, they can certainly be classified as an "other act" that could be improperly used to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

It is argued throughout the *Respondent's Brief* that evidence of the Petitioner's racist tattoos were relevant to show motive for the killing and that the perceived racist motive was

important to the State’s case. However, pursuant to Rule 404(b)(2), “Any party seeking the admission of evidence pursuant to this subsection must: (A) provide reasonable notice of the general nature and the specific and precise purpose for which the evidence is being offered by the party at trial; and (B) do so before trial–or during trial if the court, for good cause, excuses lack of pretrial notice.” Notice was not given as to the specific and precise purpose for which evidence of the tattoos was going to be offered at trial. Such a notification did not occur before trial, nor did an explanation occur at trial for the lack of pre-trial notice. As such, the court did not make a determination that good cause was shown to excuse lack of pre-trial notice. Therefore, such evidence violated Rule 404 of the West Virginia Rules of Evidence and the circuit court abused its discretion in admitting such evidence.

II. THE CIRCUIT COURT IMPROPERLY ADMITTED DARREN JR.’S 911 CALL UNDER RULES 401, 402, 403, 801, 802, AND 803.

A. The Petitioner should be permitted to supplement his Appendix pursuant to Rule 7(g) of the W. Va. R. of App. P.

There is no doubt that an argument within a Petitioner's brief shall be strictly held to those rules of procedures, and specifically Rule 10(c)(7). *See also* Resp. Br. 18-19. It is indisputable that the Petitioner—by error and with good cause shown—has failed to include any recording or transcript form of the 911 call itself, subject to this assignment of error. *Id*. It should be pointed out though that, while perhaps it does not have the same effect on his argument, the Petitioner did support his argument by describing the call in great detail within his brief using specific citation to the appendix involving testimony discussing the call.

However, Rule 7(g) of the W. Va. R. of App. P permits a petitioner to supplement their appendix, upon being granted leave by the Court, when good cause is shown as to why the materials were omitted. *See also Longanacre v. Farmers Mut. Ins*. Co., No. 12-0993 *2 (W. Va.

Nov. 8, 2013). It is well established that "reaching a decision on the merits of a case is always a preferred alternative. *Id*. at *3; *See also In re B.L.*, No. 14-0660 at *3 (W. Va. June 10, 2015) (noting that when an appendix lacks documents from the record that are essential for the court's review, it should be supplemented to ensure the necessary parts are included.) An honest mistake of oversight by a party can constitute good cause, which is required to be more than just "just a ruse." *State ex Rel. Charleston Med. v. Kaufman*, 197 W. Va. 282, 287 (W. Va. 1996). Additionally, good cause and excusable neglect requires "a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules." *Bailey v. SWCC*, 170 W. Va. 771, 777 n. 8, 296 S.E.2d 901, 907 n. 8 (1982), superseded by statute on other grounds as stated in *Fucillo v. Workers' Compensation Com'r,* 180 W. Va. 595, 378 S.E.2d 637 (1988).

Applied here, it was the Petitioners mistaken belief that the 911 call, which was entered as an exhibit in this case, was included within the trial transcript that was included in the appendix for this appeal. It was only upon viewing the *Respondent's Brief* that he became aware of his error, specifically that no rendition of the call had in fact been included within the appendix. The inclusion of this recording now is essential in determining this assignment of error, and reaching a decision on the merits.

Subsequent to the filing of his *Reply Brief*, the Petitioner has also submitted a *Motion to Supplement Appendix and Leave to File Appendix Outside of Time*. Should he be granted such leave by the Court, he will promptly file the audio recording to the Clerk of this Court in order to supplement the appendix, in accordance with Rule 38A(m) of the W. Va. R. of App. P. At such a time, this argument would be moot. However, should the Court not grant him leave, the Petitioner stands by the detailed description of the call, with citations to the appendix, in support

of his argument. This Court has noted that a complete disregard of an entire assignment of error is a "drastic step" and its preference is to consider the arguments taken as a whole from the record provided. *In re D.P.*, No. 22-585 at *2 (W. Va. Apr. 25, 2023) Accordingly, the Court would have the ability to reverse the judgment so long as the error affirmatively appears within the record. *Dolin v. Nunn*, No. 12-0298 at *2 (W. Va. Mar. 29, 2013) (citing Syl. Pt. 2, *WV Dept. of Health & Human Resources Employees Federal Credit Union v. Tennant*, 215 W.Va. 387, 599 S.E.2d 810 (2004)).

B. The circuit court incorrectly applied the relevant rules of evidence.

i. The 911 call was not relevant.

The 911 call was not relevant under Rules 401 and 402. When listening to the call and the contents therein, none of the important facts described by the Respondent were mentioned by Darren Jr. The only piece of information that Darren Jr. relayed over the phone was that his father had been shot and was bleeding. No other relevant facts were provided by Darren Jr. This is evidenced by Darren Jr.'s failure to understand minor details such as what address he was located at and what street he was on. Upon disclosure of the recorded call, it will become clear that no relevant information was provided by Darren Jr. and that the only discernible facts that can be extrapolated from that 911 call is that a young boy was devastated due to watching his father dying in front of him.

ii. The 911 call was not proper under Rule 403.

Petitioner did object to the 911 call on Rule 403 grounds in his *Motion for Post-Verdict Judgment of Acquittal* and *Motion for New Trial* (See appx. at 566, 573). The circuit court did err by permitting the call to come into evidence. The call could not have been construed to be an important piece of the State's narrative and thus *Res Gestae* cannot apply here since no relevant

information was expressed through the contents of the call. As argued above, the call only contained the audio depiction of a child watching his father dying before him. This must be a clear example of a piece of evidence containing minimally probative value that is substantially outweighed by the danger of unfair prejudice.

The State makes a lengthy analysis of the 911 call through the lens of *Res Gestae* and attempts to argue that the call would be important for the jury to hear to gather the full picture of the events that occurred that day. However, the State's analysis is misguided since the State has not yet had an opportunity to review the contents of said recording. The 911 call contained no useful information in ascertaining what happened or who all was involved. The call failed to even have sufficient information to assist first responders in how to get to the scene. The only purpose of introducing this call into evidence was to inflame passion in the jury and to cause unfair prejudice to the Petitioner. Therefore, the circuit court committed plain error in admitting the phone call.

III. TIFFANY MCCUNE'S ADMITTED STATEMENTS DO VIOLATE THE CONFRONTATION CLAUSE AND THE HEARSAY RULES.

A. Admitting Tiffany's statement did violate the Confrontation Clause.

The Confrontation Clauses in the federal and West Virginia Constitutions "bar[] 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." Tiffany's statement was testimonial since she was not addressing any emergency. The Petitioner was not on scene and EMS was on their way to take care of the victim. At that point, no emergency remains. The State attempts to argue that the Petitioner being missing is an emergency that Tiffany was attempting to aid in. However, if the State is arguing that the

Petitioner killed the victim in a racially targeted manner, it is not logically consistent to argue that he is now a danger to anyone else he may come into contact with.

Additionally, Tiffany McCune had approximately a half hour between the incident and the arrival of the first responders. This is plenty of time for her to visualize what statements she may or may not make to law enforcement to aid in their investigation. Keeping in mind that Tiffany herself was a criminal, she knew better than to speak to law enforcement because anything said to law enforcement can be used against you. As such, Tiffany knew the consequences of her statements and had reason to believe that whatever she said at the scene would later be used as evidence against the Petitioner. Thus, the statements made by Tiffany were testimonial in nature and violated the Confrontation Clause.

B. Tiffany's statement does not satisfy the hearsay rules.

As argued in *Petitioner's Brief*, there are plenty of instances that indicate a lack of reliability as to Tiffany's credibility. The circuit court improperly admitted her statement as an excited utterance, but this is simply wrong by the State's own test for excited utterances.

The Court uses a three-part test for excited utterances: "(1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition." Syl. pt. 1, *State v. Ferguson*, 216 W. Va. 420, 607 S.E.2d 526 (2004). Rsp's Br. 46. There is no dispute that Tiffany encountered a startling event or condition. However, since Tiffany had approximately a half hour between the startling event and the time she made her statement, the statement was not made without reflection and fabrication. Tiffany had about a half hour to think about what she was going to tell law enforcement, regardless of whether or not it was the truth.

When combining the amount of time that Tiffany had to reflect on the statement she was going to give to law enforcement and the evidence outlining Tiffany's tendency to be an untruthful person, there is clearly no way to say that her statement had "adequate indicia of reliability." Furthermore, her statement did not satisfy the excited utterance hearsay exception since she had plenty of time to fabricate a story that may or may not have been beneficial to her own self-interests. As such, the circuit court erred by admitting Tiffany's statement over Petitioner's hearsay objections.

IV. THE RESPONDENTS ARGUMENTS AS TO CONSENT ARE MISGUIDED AND INACCURATE.

The Respondent here misconstrues the Petitioner's third and fourth assignments of error and as such, their augment falls short. In their brief, the Respondent contorts the arguments made by the Petitioner to center around the issue of consent; a position that is not only misguided but ill conceived. Rsp's Br. 38. Rather, the Petitioner has argued that his consent to be there, by virtue of his relationship with the homeowners, evidences his lack of intent to commit a crime upon entering the house. Pet'r's Br. 31.

There is no doubt that a burglary in the State of West Virginia is defined as a "breaking and entering a house, or entering without breaking, with the intent to commit a crime." Rsp's Br. 38; *See e.g.* W. Va. Code § 61-3-11; App. 497; Pet'r's Br. 29. It is not the position of the Petitioner that, because he was an invited guest, he could not have committed a burglary nor that he did not exceed any scope of such consent. Rsp's Br. 38-39. It is agreed that a person could enter a house with the intent to commit a crime while being an invited guest of the occupant. However, that is not the argument the Petitioner makes in his brief. Rather, the Petitioner contends that his entrance was done so lacking any intent to commit a crime; he entered as a mutually welcomed guest with the intent of visiting with friends.

In their argument, the Respondent likens the case at bar to *Salmons*, where there, an invited guest did in fact commit a burglary. *See generally State v. Salmons*, No. 21-0424 (W. Va. Nov. 3, 2023) Unfortunately, that case varies a great deal from this matter. There, this Court found plenty of evidence necessary to infer intent prior to entry. Specifically, the Court noted:

> In this case, Jerry invited the Petitioner and Mr. Laney into the Goins' house to drink and play pool-not to steal. The jury could have found, based on the evidence, that the Petitioner had an intent to steal before entering the Goins' house given that: (1) the Petitioner knew before going with Jerry to the Goins' house that Jerry's parents were not at home, (2) Jerry had consumed quite a bit of alcohol before inviting the Petitioner and Mr. Laney to the Goins' house (from which the jury could have conclude that the Petitioner knew Jerry was less observant and responsive than he would otherwise be), (3) Ms. Goins had banished the Petitioner from the Goins' residence; and, (4) Ms. Goins believed that the Petitioner had been in the Goins' house more than once taking Ms. Goins' belongings. We find this evidence sufficient to satisfy the Jackson/Guthrie standard and, therefore, we affirm the jury's verdict finding the Petitioner guilty of Burglary.

Salmons supra at *5. Conversely here, at no time has it ever been established, nor is there any evidence that the Petitioner ever entered with the intent to cause harm to anyone. It was only during his visit that an alleged crime was committed, whether the crime be the sale of drugs, drug use, or murder. Even if such drug use had occurred, it would have been done so mutually, which remains within the scope of any entry.

Furthermore, such facts further distinguish this case from *Plumley*, where the defendant gained permission to enter the premises under fraudulent pretexts and then maintained the requisite intent to commit grand larceny and aggravated robbery. *See generally State v. Plumley*, 181 W. Va. 685 (W. Va. 1989) Even if this Court feels the Petitioner exceeded his scope of consent, it has never been established that he had any intent to commit murder. Such a lack of intent can be established merely by the fact that he was not convicted of murder in the first or

second degree.

Thus, a charge of burglary falls short as a result of his lack of intent to commit any crime upon entering the dwelling. Accordingly, it is axiomatic that the Petitioner cannot be guilty of felony murder if he cannot be guilty of the underlying crime of burglary.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Court reverse the circuit court's ruling and remand the case back to the circuit court for a ruling consistent with this Court's findings.

Respectfully submitted:

/s/ William R. Morris
William R. Morris, Esq.
W. Va. State Bar Id. 14278
P.O. Box 5518, Vienna, WV 26105
(304) 488 - 4601 (call | text)
william@jmorganleach.law
jmorganleach.law
Counsel for Petitioner

/s/ J. Morgan Leach
J. Morgan Leach, Esq.
W. Va. State Bar Id. 13124
P.O. Box 5518, Vienna, WV 26105
(855) 444 - 5529 (call | text | fax)
morgan@jmorganleach.law
jmorganleach.law
Counsel for Petitioner

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

VICTOR LEE THOMPSON,
Petitioner,

Appeal No. 23-478

v.

STATE OF WEST VIRGINIA,
Respondent.

CERTIFICATE OF SERVICE

I, William R. Morris, hereby certify that I have served a true and correct copy of the foregoing **Petitioner's Reply Brief** upon the following parties of record via the WV File & ServeXpress system this 15th day of February, 2024.

Frankie Dame (WV Bar # 14401)
Assistant Solicitor General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305-0220
Email: Frankie.A.Dame@wvago.gov
Telephone: (304) 558-2021
Facsimile: (304) 558-0140

/s/ William R. Morris
WILLIAM R. MORRIS, ESQ.