

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

Supreme Court No.: 23-733
Case No. 22-F-5
Circuit Court of Ohio County

WILLIAM ROSS CARMAN,

Defendant below, Petitioner.

	PETITIONER'S BRIEF	

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ASSIGNMENTS OF ERROR

The State charged Petitioner for a home invasion robbery of an acquaintance that culminated in murder. Both Petitioner and his wife were present, and each claimed the other committed the crimes and disclaimed their own involvement.

- I. Are statements by the decedent automatically exempt from the Confrontation Clause due to forfeiture by wrongdoing, or must the State show that the defendant intended to prevent the decedent from testifying?
- II. Can a circuit court exclude evidence of a conviction, offered to impeach a felon's credibility under WVRE 609, because aside from credibility it is irrelevant to the facts of the current case?

STATEMENT OF THE CASE

There were two eyewitnesses to the murder in this trial: Petitioner and his then-wife, and each said the other was solely responsible for the crimes.¹ The jury believed Petitioner's wife and convicted him of all charges, but only after the court placed its thumb on the scale, twice.² First, in a fact pattern directly out of *State v. Michael C.*,³ the court ruled Petitioner could not impeach his wife with a prior conviction, because aside from credibility her federal drug crime was unrelated to this case.⁴ And second, the court allowed the State to bolster the wife's credibility with the unfronted pretrial statement of the decedent identifying Petitioner as her assailant, on the theory that the murder victim is always unavailable due to the defendant's actions.⁵

As a matter of clear law, this Court has already rejected both legal tests relied upon by the trial court below. Petitioner asks that the Court apply its precedents and order a new trial.

¹ See A.R. 521.

² A.R. 1607–09.

³ *State v. Michael C.*, 248 W. Va. 75, 887 S.E.2d 60 (2023).

⁴ A.R. 947; *but see Michael C.*, 248 W. Va. 75 at Syl. Pts. 3 and 4.

⁵ A.R. 1222; *but see* Syl. Pts. 4 and 5, *State v. Jako*, 245 W. Va. 625, 862 S.E.2d 474 (2021); *Giles v. California*, 554 U.S. 353, 377 (2008).

A. Petitioner and his wife both fled the scene of a home invasion robbery that ended in a murder.

Around 2:00 PM on September 17, 2021, a driver was returning home to the Mozart neighborhood of Wheeling.⁶ Along the way he encountered a woman and child who appeared in distress, and stopped his car to see if they needed help.⁷ Her response was incoherent, but she denied needing police assistance.⁸ Not believing her, the driver called 911.⁹

The woman was Amanda Carman, Petitioner's wife,¹⁰ and she was standing outside Anorah Schostag's home.¹¹ The 911 caller intended to wait in the area for police to arrive,¹² but Petitioner's wife did not.¹³ She fled in Anorah Schostag's car, and the caller returned to his vehicle to follow her.¹⁴ Petitioner's wife began driving out of the neighborhood but, with the 911 caller in pursuit, she instead made a U turn.¹⁵ She returned to the neighborhood, but not before making two brief stops where police would later recover discarded evidence.¹⁶

Police arrived about a minute before Petitioner's wife returned.¹⁷ The initial responding officer first interviewed the 911 caller, then turned her attention to Petitioner's wife.¹⁸ During the questioning, the officer received an order to detain the wife as two things happened.¹⁹ Police saw Petitioner fleeing on foot,²⁰ and other officers discovered Anorah Schostag stabbed to death inside her home.²¹

⁶ A.R. 575-76.

⁷ A.R. 581-82.

⁸ A.R. 582-83.

⁹ *Id.*

¹⁰ A.R. 583.

¹¹ *See* A.R. 587-88; A.R. 612. They later divorced. A.R. 951.

¹² A.R. 590-91.

¹³ A.R. 591-92.

¹⁴ A.R. 592.

¹⁵ A.R. 593.

¹⁶ *Id.*; A.R. 595; A.R. 1297-98.

¹⁷ A.R. 595.

¹⁸ A.R. 610-11.

¹⁹ A.R. 619.

²⁰ A.R. 620; A.R. 623-24; A.R. 649-51; A.R. 700.

²¹ A.R. 625; A.R. 645-46.

B. Each testified the other was solely responsible for the crimes, leaving the jury to decide who was telling the truth.

The jury convicted Petitioner of two counts of child neglect, burglary, robbery, and murder (without mercy) after hearing two very different accounts of what happened inside the decedent's home.²²

Petitioner's wife's testimony: In her statement on the scene and first interview at the police station, Petitioner's wife told officers the assailant was a masked stranger²³ and the State charged her for the murder.²⁴ However, the State agreed to drop that and allow her to plead guilty to gross child neglect.²⁵ But only if she first incriminated Petitioner.²⁶

She testified that at the time of these crimes, she was friends with the decedent.²⁷ She was married to Petitioner but they were estranged, and he was homeless.²⁸ She recently lost her job as a recovery coach, for which she blamed Petitioner, but conceded that her own drug addiction and relapse may have been a factor.²⁹

Two days before the murder, Petitioner's wife sought him out at a homeless encampment to tell him she lost her job.³⁰ Petitioner threatened her and their child, and she helped him purchase a clip for a firearm he had stolen from a relative.³¹ He also told her that he intended to steal from the decedent.³² She tried to dissuade him and said there was always someone home and he could not break in without a confrontation.³³ Petitioner appeared undeterred, and said he could just shoot anyone present.³⁴ Petitioner's wife did not believe he seriously meant to rob or kill anyone, it was just talk.³⁵

²² A.R. 1607-09.

²³ A.R. 633-34; A.R. 1000-01.

²⁴ A.R. 1003.

²⁵ A.R. 1005.

²⁶ A.R. 1003-05.

²⁷ A.R. 951-52.

²⁸ A.R. 953.

²⁹ A.R. 952-55.

³⁰ A.R. 954-55.

³¹ A.R. 956-57.

³² A.R. 957-58.

³³ A.R. 958-59.

³⁴ A.R. 958-61.

³⁵ A.R. 958-60.

According to Petitioner's wife, she did not participate in any planning or discussion beyond trying to dissuade Petitioner.³⁶ She departed and spent the night at the decedent's home with her daughter.³⁷ If she returned to her own home, Petitioner might seek her out and bother her there.³⁸

That evening, Petitioner's wife stayed in a second-floor spare bedroom.³⁹ She warned the decedent about Petitioner, but the decedent did not take him seriously, either.⁴⁰ She and the decedent stayed up late doing drugs.⁴¹ Her daughter would have been in a "Pack 'n Play."⁴² She did not testify to where the decedent's child would have been while the adults partied.

Petitioner's wife stayed with the decedent a second night.⁴³ She awoke sometime that evening to find Petitioner in her room on the second floor.⁴⁴ He had the gun from earlier as well as two knives, one of which belonged to her.⁴⁵ He asked her to help rob the decedent, and she told him to leave.⁴⁶ The decedent's child came upstairs, so the wife escorted both children down to the first floor.⁴⁷ Petitioner then entered the decedent's bedroom.⁴⁸

Petitioner's wife tried to get into the bedroom, but the door was locked.⁴⁹ Both Petitioner and the decedent told her to take care of the children.⁵⁰ She did not see either of them again for at least an hour.⁵¹ At some point that morning, the decedent came

³⁶ A.R. 961–62.

³⁷ A.R. 963–64.

³⁸ A.R. 964.

³⁹ A.R. 964–65.

⁴⁰ A.R. 970–71.

⁴¹ A.R. 967.

⁴² A.R. 966–67.

⁴³ A.R. 968.

⁴⁴ A.R. 968–69.

⁴⁵ A.R. 969; A.R. 976; A.R. 1058.

⁴⁶ A.R. 969.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ A.R. 977–78.

⁵⁰ A.R. 978.

⁵¹ A.R. 977.

downstairs.⁵² Petitioner was upstairs asleep.⁵³ The decedent was upset and concerned that her ribs were broken.⁵⁴ She had the gun, and hid it in the kitchen.⁵⁵ She then phoned a friend and told him she had been tied up the night before, but now had freed herself.⁵⁶ Petitioner's wife did not call the police out of fear that Petitioner would kill people, and the decedent did not want to call the police because she had drugs in her home.⁵⁷

Instead of calling the police, the decedent and Petitioner's wife began packing their belongings to leave.⁵⁸ About thirty to forty-five minutes later they had not departed, and Petitioner came downstairs.⁵⁹ Petitioner's wife escorted the children out back to play while Petitioner and the decedent smoked on the front porch together.⁶⁰ While the children played, a neighbor approached to notify her that his security cameras had spotted a stranger—presumably Petitioner—in the neighborhood the night before.⁶¹ She did not seek the neighbor's help during this interaction.⁶²

Petitioner's wife returned to the kitchen, and the decedent was again on the phone with her friend from before.⁶³ At one point, Petitioner also spoke on the phone.⁶⁴ He then passed the phone back, and the decedent spoke for another minute before hanging up.⁶⁵ She testified that after the phone call, Petitioner was concerned the friend on the other end wanted to kill him.⁶⁶

⁵² A.R. 979.

⁵³ A.R. 984.

⁵⁴ A.R. 979.

⁵⁵ A.R. 980.

⁵⁶ A.R. 980–82.

⁵⁷ A.R. 982.

⁵⁸ A.R. 983–84.

⁵⁹ A.R. 983.

⁶⁰ A.R. 985.

⁶¹ *Id.*

⁶² A.R. 986–87.

⁶³ A.R. 987.

⁶⁴ *Id.*

⁶⁵ A.R. 989.

⁶⁶ *Id.*

Petitioner's wife testified that at this point in time, Petitioner and the decedent were pacing back and forth between the kitchen and living room on the ground floor.⁶⁷ The decedent told the wife that Petitioner was leaving, and asked her to put the children down for a nap.⁶⁸ Petitioner's wife took her daughter upstairs, then saw to the other child.⁶⁹ She then saw Petitioner in the second floor office with the decedent.⁷⁰ Petitioner stabbed the decedent, and Petitioner's wife fled with the decedent's child.⁷¹

Petitioner's testimony: The preceding was all according to Petitioner's wife, the only other plausible suspect. Petitioner himself testified very differently. He said that he and his wife had originally planned to steal from the decedent.⁷² The first night she stayed in the guest bedroom, she was supposed to let Petitioner in through the window to cart off money, drugs, and other valuables.⁷³ However, that did not happen.⁷⁴ Petitioner loitered around the neighborhood that night but his wife did not answer her phone or let him inside, so he left.⁷⁵

The next day, Petitioner's wife visited him at the homeless encampment and they called off the intended theft.⁷⁶ Instead, Petitioner's wife would introduce him to the decedent so he could sell her the gun.⁷⁷ The decedent was a smalltime drug dealer, and Petitioner and his wife figured a gun would be valuable to her.⁷⁸ Early the next morning, Petitioner returned to the home and his wife let him in through the backdoor.⁷⁹ Petitioner met the decedent when she awoke for the day.⁸⁰

⁶⁷ A.R. 990.

⁶⁸ A.R. 990-91.

⁶⁹ A.R. 991.

⁷⁰ *Id.*

⁷¹ A.R. 994.

⁷² A.R. 1454.

⁷³ *Id.*

⁷⁴ A.R. 1455.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ A.R. 1455-56.

⁷⁸ *Id.*

⁷⁹ A.R. 1456-57.

⁸⁰ *Id.*

The three then got high on the decedent's supply.⁸¹ Petitioner and the decedent discussed the gun, and she was interested.⁸² The decedent suggested Petitioner look through her brother's room in the basement for items to barter.⁸³ While there, he crashed after days of methamphetamine-induced wakefulness, and slept.⁸⁴

When he awoke, Petitioner went upstairs and found the children alone watching TV.⁸⁵ He went to the second floor and found his wife and the decedent in the office, on the phone.⁸⁶ The decedent handed the phone to him to speak with the person on the other line, but Petitioner did not recall what they talked about.⁸⁷ Ten to fifteen seconds after returning the phone, the decedent said she was leaving.⁸⁸ Petitioner's wife then took a knife from her pants pocket and stabbed the decedent.⁸⁹

Petitioner tried to intervene, and his wife stabbed his hand.⁹⁰ He later required surgery for the gash,⁹¹ and per his wife's testimony, she could not account for how he received the injury.⁹² Petitioner ran to the kitchen for towels to apply pressure to his wound.⁹³ He returned to the office and saw his wife standing over the decedent, who was not moving.⁹⁴ He and his wife then fled in separate directions.⁹⁵ Petitioner first tried running through woods in the neighborhood, but the foliage was too thick.⁹⁶ He turned back towards the house.⁹⁷ He ran down the street, which is when the police saw him.⁹⁸

⁸¹ A.R. 1458.

⁸² A.R. 1458-59.

⁸³ A.R. 1458-59.

⁸⁴ A.R. 1459.

⁸⁵ A.R. 1460.

⁸⁶ *Id.*

⁸⁷ A.R. 1461.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ A.R. 1464.

⁹² A.R. 1010.

⁹³ A.R. 1461-62.

⁹⁴ A.R. 1462.

⁹⁵ A.R. 1463.

⁹⁶ A.R. 1464.

⁹⁷ *Id.*

⁹⁸ *Id.*

C. The court disallowed Petitioner from impeaching his wife with a felony conviction because it was factually unrelated to the instant case.

Jurors had to decide which version of events to believe, so Petitioner sought to introduce evidence that his wife had a prior federal drug conviction.⁹⁹ However, the State objected, and the court disallowed it, because it was more prejudicial than it was probative concerning the facts of the case.¹⁰⁰ As a result, Petitioner was unable to impeach his chief accuser as a convicted felon.

The defense originally filed the motion pretrial as a request to use WVRE 404(b) evidence.¹⁰¹ The State's theory was that Petitioner was after money and drugs.¹⁰² Petitioner believed that the conviction, which showed his wife's involvement in the drug trade, provided her a motive for the crime.¹⁰³ The court described the connection between the facts of the prior conviction and current prosecution to be "a stretch."¹⁰⁴ It denied the 404(b) motion, reasoning that the prejudice of jurors learning that the State's witness was a convicted felon outweighed the evidence's probative value.¹⁰⁵

At trial, the defense renewed its attempt to use the conviction.¹⁰⁶ Armed with *State v. Michael C.*, Petitioner said he intended to impeach her credibility with the conviction under WVRE 609.¹⁰⁷ Petitioner quoted the rule.¹⁰⁸ Petitioner then quoted from *Michael C.*: "the language of this rule is mandatory evidencing a presumption that a witness's conviction of any crime punishable by imprisonment in excess of one year is fair game for impeachment and thus relevant to credibility."¹⁰⁹

⁹⁹ A.R. 24; A.R. 934.

¹⁰⁰ A.R. 939.

¹⁰¹ A.R. 24.

¹⁰² *See, e.g.*, A.R. 1535.

¹⁰³ A.R. 24–25.

¹⁰⁴ A.R. 25.

¹⁰⁵ A.R. 1898; A.R. 947.

¹⁰⁶ A.R. 934.

¹⁰⁷ A.R. 934–35.

¹⁰⁸ A.R. 935. *See also* WVRE 609 ("For the purpose of attacking the credibility of a witness other than the accused ... evidence that the witness has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted[.]").

¹⁰⁹ A.R. 935.

The court and prosecutor were unfamiliar with the recent case and recessed to review copies provided by the defense.¹¹⁰ Back on the record, the court considered the nature of the offense—a felony conviction for methamphetamine trafficking—and inquired about its probative value.¹¹¹ Petitioner proffered his original 404(b) grounds, then added “Additionally, it goes to credibility matters related to this case.”¹¹²

The State objected on 403 grounds.¹¹³ It argued that in this case, there was no evidence of drug trafficking.¹¹⁴ Per the State, “This conviction, number 1, I think it’s far outside of what really -- what the matters are here.”¹¹⁵

The court agreed. When the defense began explaining that, aside from substantive evidence that the conviction went to credibility, the court interjected: “Well that’s different. That’s -- that’s impeachment. ... The question is, can you bring it in, aside from impeachment? I’m trying to figure out what -- what fact does [the conviction] make more or less likely[?]”¹¹⁶ The defense responded that in addition to Petitioner’s perceived substantive value, the conviction went to credibility.¹¹⁷

The circuit court sought to distinguish *Michael C.* In its view, this Court permitted the impeachment in *Michael C.* because the conviction was factually related to the charges.¹¹⁸ It saw no nexus here.¹¹⁹ The court therefore excluded the conviction as irrelevant.¹²⁰ It made no findings of fact concerning the prejudicial impact, but noted that whatever substantive value the evidence had was “outweighed by danger it would create unfair prejudice, confuse the issues, and mislead the jury under a 403 analysis.”¹²¹

¹¹⁰ A.R. 935–37.

¹¹¹ A.R. 937–38.

¹¹² A.R. 938

¹¹³ A.R. 939.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ A.R. 940–41.

¹¹⁷ A.R. 941.

¹¹⁸ A.R. 945.

¹¹⁹ *Id.*

¹²⁰ A.R. 947.

¹²¹ *Id.*

D. The court permitted a witness to testify that the decedent had identified Petitioner as her assailant on the theory that Petitioner forfeited the right to confront the witness he was accused of murdering.

In addition to disallowing Petitioner from impeaching his wife, the court also let the State corroborate her testimony with uncontroverted hearsay from the friend the decedent phoned.¹²² In addition to nontestimonial statements by the decedent, the friend also testified that she identified Petitioner as her assailant.¹²³

Petitioner originally moved to exclude the friend's testimony on hearsay grounds.¹²⁴ The court ruled the phone calls and texts could come in as present sense impressions and excited utterances.¹²⁵ However, at trial Petitioner renewed the objection, based upon confrontation grounds.¹²⁶

The State argued that WVRE 807 "trumps" the state and federal constitutions.¹²⁷ The court asked about forfeiture by wrongdoing.¹²⁸ The defense pointed out the absurdity of presuming Petitioner's guilt in a case where only the jury could determine that, and also pointed out that forfeiture by wrongdoing requires that the accused's intent was to render them unavailable for trial.¹²⁹

The court ruled it would admit the testimony upon the strength of its pretrial hearsay ruling.¹³⁰ As to confrontation, it found that the State had made a prima facie case that Petitioner had rendered the decedent unavailable.¹³¹ It made no findings concerning Petitioner's intent.

Later at trial, the friend testified about their phone calls. The decedent called him the first night Petitioner's wife stayed over, and they discussed her day.¹³² She told him

¹²² A.R. 1222.

¹²³ A.R. 1395.

¹²⁴ A.R. 17; A.R. 1858–59.

¹²⁵ A.R. 132–33; A.R. 135.

¹²⁶ A.R. 1218–19.

¹²⁷ A.R. 1220–22.

¹²⁸ A.R. 1220.

¹²⁹ A.R. 1220–21.

¹³⁰ A.R. 1222.

¹³¹ *Id.*

¹³² A.R. 1389–90.

Petitioner's wife was staying with her, and that their children got along well.¹³³ She told her friend that Petitioner's wife would be spending the night again the next day.¹³⁴

The friend next heard from the decedent on the day of her death.¹³⁵ She called him at 11:00 AM, upset.¹³⁶ She said that the night before, she had been tied up and beaten, and threatened with a gun.¹³⁷ She said she was now free, and her assailant was asleep.¹³⁸ The friend asked her to identify her assailant.¹³⁹ The decedent answered, "her husband[,]" which the friend took to mean the house guest's—Petitioner's wife's—husband.¹⁴⁰

The friend urged the decedent to call 911, but she was reluctant and, after calming down, did not believe it was necessary.¹⁴¹ They hung up, with the understanding that she would leave with her child, then call 911 as the friend urged.¹⁴²

The friend sent a series of texts and only received one response.¹⁴³ He called her again just after 1:00 PM, and she sounded flat.¹⁴⁴ The decedent confirmed that her assailant was in the room with her.¹⁴⁵ The friend then asked to speak to him.¹⁴⁶ The friend variously threatened, cajoled, and tried to intimidate the assailant to leave.¹⁴⁷ The decedent then returned to the line before ending the call.¹⁴⁸ She sounded hopeful and more like herself.¹⁴⁹ The two continued to text until 1:24 PM.¹⁵⁰

¹³³ A.R. 1390.

¹³⁴ *Id.*

¹³⁵ A.R. 1392.

¹³⁶ A.R. 1393–94.

¹³⁷ A.R. 1394–95.

¹³⁸ A.R. 1395–96.

¹³⁹ A.R. 1395.

¹⁴⁰ *Id.*

¹⁴¹ A.R. 1396.

¹⁴² A.R. 1397–98.

¹⁴³ A.R. 1398–01.

¹⁴⁴ A.R. 1402.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ A.R. 1403–04.

¹⁴⁸ A.R. 1404–05.

¹⁴⁹ *Id.*

¹⁵⁰ A.R. 1405–08.

SUMMARY OF ARGUMENT

The only difference between this case and *State v. Michael C.* is that this one came later, and the judge had a copy of *Michael C.* at hand while making the exact same error.

Likewise, the court's reading of the forfeiture by wrongdoing exception to confrontation is, in all material respects, identical to the one rejected by the Supreme Court in *Giles v. California*. The only question is whether these black-and-white errors were harmful.

They were. For all the State's physical evidence, it showed only what no one contested—both Petitioner and his wife were present for a heinous killing and fled. Jurors had to decide which of them to believe, but the court placed its thumb on the scale. First by preventing Petitioner from impeaching his wife, and then by allowing the State to corroborate her testimony in violation of the Confrontation Clause.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court has already answered both questions posed by this case in Petitioner's favor. The only question is whether these errors affected the proceedings' fairness. Petitioner therefore requests a Rule 19 argument and signed opinion reversing his conviction.

ARGUMENT

I. The court below erred because forfeiture by wrongdoing requires intent to prevent the witness from testifying.

The Sixth Amendment to the United States Constitution provides that “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”¹⁵¹ This applies more broadly than in-court testimony.¹⁵² Out-of-court statements, offered for the truth of the matter asserted, also may implicate the Confrontation Clause.¹⁵³ Statements whose primary purpose is to “establish or prove past events potentially relevant to later criminal prosecution” are testimonial, and thus subject to the

¹⁵¹ U.S. Const. Amend. VI; *accord.* W. Va. Const. Art. III § 14. *See also Pointer v. Texas*, 380 U.S. 400 (1965) (incorporating the Sixth Amendment Confrontation Clause as applying to the states).

¹⁵² *See Crawford v. Washington*, 541 U.S. 36, 50–51 (2004).

¹⁵³ *See Crawford*, 541 U.S. at 51.

Confrontation Clause.¹⁵⁴ If the declarant does not appear at trial, then their testimonial statements may not be admitted unless 1) the witness is unavailable and the defendant had a prior opportunity to cross-examine them,¹⁵⁵ or 2) a founding-era confrontation exception applies.¹⁵⁶

Here the court permitted the State to introduce the decedent’s out-of-court testimonial statements based on the second exception: that Petitioner forfeited his confrontation rights because the State had made a *prima facie* showing that Petitioner was responsible for the decedent’s unavailability.¹⁵⁷ Whether its interpretation of the forfeiture by wrongdoing exception accurately stated the founding-era common law is a legal question this Court reviews *de novo*.¹⁵⁸ It is also a legal question that both this Court¹⁵⁹ and the United States Supreme Court¹⁶⁰ have already answered in Petitioner’s favor.

In *State v. Jako*, this Court considered the proper standard for the forfeiture by wrongdoing exception.¹⁶¹ Based upon the plain text of WVRE 804(b)(6), West Virginia’s codification of the common law rule, the Court held that before admitting unconflicted testimonial statements, the circuit court must “find by a preponderance of the evidence that the defendant (1) acted wrongfully, or acquiesced to the wrongful actions of another; (2) did so with the intent to cause a witness to be unavailable; and (3) actually rendered the witness unavailable.”¹⁶²

The circuit court’s rule fell short of this standard in two major respects. First, likely recognizing the absurdity of finding that Petitioner killed the decedent when that task

¹⁵⁴ *Ohio v. Clark*, 576 U.S. 237, 244 (2015) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

¹⁵⁵ See *Crawford*, 541 U.S. at 53–54.

¹⁵⁶ See *Giles v. California*, 554 U.S. 353, 358 (2008).

¹⁵⁷ A.R. 1222.

¹⁵⁸ See *State v. Jako*, 245 W. Va. 625, 633 (2021).

¹⁵⁹ See *Jako*, 245 W. Va. 625 at Syl. Pt. 4.

¹⁶⁰ *Giles*, 554 U.S. at 361.

¹⁶¹ See *Jako*, 245 W. Va. at 632.

¹⁶² *Id.* at Syl. Pt. 4.

belonged solely to the jury,¹⁶³ the court did not find that fact by a preponderance of the evidence, or any other standard of proof.¹⁶⁴ Rather, the court found that the State had made a prima facie case, from which a fact-finder *could* infer Petitioner had rendered the decedent unavailable.¹⁶⁵ This falls short of *Jako*'s requirement that the court itself find, by a preponderance of the evidence, that the defendant procured the witness's absence.

And second, the court ruled only that the State had made a prima facie showing that Petitioner rendered the decedent unavailable¹⁶⁶—it made no findings as to whether he did so “with the intent to cause a witness to be unavailable[.]”¹⁶⁷ This omission is fatal to the court's ruling, not only under the West Virginia Rules of Evidence,¹⁶⁸ but also under the Confrontation Clause of the United States Constitution.¹⁶⁹

In *Giles v. California*, the Supreme Court confronted a state evidence rule similar to the one the circuit court applied.¹⁷⁰ There, California charged the defendant for shooting his ex-girlfriend.¹⁷¹ To rebut his self-defense claim, prosecutors sought to introduce earlier statements from the victim describing Petitioner's violence towards her.¹⁷² The trial court permitted this testimony per a state rule that allowed such testimony if the defendant caused the witness's unavailability regardless of intent.¹⁷³

On certiorari, the Supreme Court ruled that this state standard was broader than the founding era forfeiture doctrine, and thus California had violated the defendant's

¹⁶³ See *Giles*, 554 U.S. at 365 (“The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior judicial assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to ‘dispensing with jury trial because a defendant is obviously guilty.’”) (quoting *Crawford*, 541 U.S. at 62).

¹⁶⁴ See A.R. 1222.

¹⁶⁵ A.R. 1222.

¹⁶⁶ *Id.*

¹⁶⁷ *Jako*, 245 W. Va. 625 at Syl. Pt. 4.

¹⁶⁸ See *id.*

¹⁶⁹ *Giles*, 554 U.S. at 361.

¹⁷⁰ See *Giles*, 554 U.S. at 357.

¹⁷¹ See *id.* at 356.

¹⁷² See *id.* at 356–57.

¹⁷³ See *id.*

confrontation rights.¹⁷⁴ Historically, only deliberate witness tampering forfeited the accused’s confrontation rights.¹⁷⁵ The court therefore reversed. “The state courts in this case did not consider the intent of the defendant because they found that irrelevant to application of the forfeiture doctrine. This view of the law was error[.]”¹⁷⁶

The circuit court below predicated its ruling on the same, intent-less standard the Supreme Court rejected in *Giles*, and which this Court foreclosed in *State v. Jako*. Petitioner therefore asks that the Court reverse his conviction.

II. The court below erred by excluding Petitioner’s impeachment of his wife, believing that to be admissible, a felony conviction must factually relate to the charged offense.

West Virginia Rule of Evidence 609 states, “For the purpose of attacking the credibility of a witness other than the accused ... evidence that the witness has been convicted of a [felony] crime shall be admitted.”¹⁷⁷ “The language of the rule is mandatory, evidencing a presumption that a witness’s conviction of any [felony] is fair game for impeachment and thus relevant to the witness’s credibility.”¹⁷⁸ “The question of whether or not the evidence of a witness’s prior conviction is relevant is not a factor in determining its admissibility under West Virginia Rule of Evidence 609; by definition, the evidence is relevant to impeach the witness’s credibility.”¹⁷⁹

This Court reviews evidentiary decisions for abuse of discretion,¹⁸⁰ but a circuit court’s interpretation of the rules is a legal question reviewed de novo.¹⁸¹ Here, the circuit court erred by interpreting Rule 609 in a manner this Court has already rejected.

¹⁷⁴ See *id.* at 377.

¹⁷⁵ See *id.* at 366.

¹⁷⁶ *Id.* at 377.

¹⁷⁷ WVRE 609.

¹⁷⁸ *State v. Michael C.*, 248 W. Va. 75, 80, 887 S.E.2d 60, 65 (2023).

¹⁷⁹ *Michael C.*, 248 W. Va. 75 at Syl. Pt. 4.

¹⁸⁰ *Id.* at 79.

¹⁸¹ See Syl. Pt. 1, *Gentry v. Magnum*, 195 W. Va. 512, 466 S.E.2d 171 (1995).

The Court reversed in *State v. Michael C.* based upon strikingly similar facts.¹⁸² In both cases, the defendant and the State’s witness were the only plausible suspects.¹⁸³ Also in both, the defendants first sought to admit evidence of the witness’s conviction under 404(b), believing it supported their theory of the case.¹⁸⁴ In both, the court excluded the evidence as irrelevant to the facts of the case—in *Michael C.*, because the conviction for neglect was fundamentally different from the charged child abuse, and below because the conviction was for drug trafficking, yet the allegations here only concerned drug use.¹⁸⁵

Both defendants also sought to use the evidence for impeachment under Rule 609, but the trial court stuck to its original ruling.¹⁸⁶ The only difference Petitioner can perceive is that here, the court had the benefit of this Court’s ruling in *Michael C.* yet made the exact same error.¹⁸⁷

Given the compressed nature of its review,¹⁸⁸ the court’s misreading is understandable. Nonetheless, its ruling turned upon a misconception of the rule and was fundamentally flawed. Per WVRE 609, evidence of a prior felony conviction is relevant to witness credibility and need not relate to the issues beyond that.¹⁸⁹ Yet the court entirely discounted its impeachment value and insisted Petitioner explain its substantive relevance.¹⁹⁰ Per the court: “The question is, can you bring it in, aside from impeachment?”¹⁹¹ But per this Court, that is not the question at all. “The question of whether or not the evidence of a witness’s prior conviction is relevant is not a factor in determining its admissibility under West Virginia Rule of Evidence 609[.]”¹⁹²

¹⁸² See *Michael C.*, 248 W. Va. at 81.

¹⁸³ See *id.* at 79; A.R. 1520–46 (State’s closing); A.R. 1546–84 (defense closing).

¹⁸⁴ See *id.* at 77; A.R. 24.

¹⁸⁵ See *Michael C.*, 248 W. Va. at 77; A.R. 1898; A.R. 947.

¹⁸⁶ See *Michael C.*, 248 W. Va. at 77; A.R. 947.

¹⁸⁷ A.R. 935–37; A.R. 947.

¹⁸⁸ A.R. 935–37.

¹⁸⁹ *Michael C.*, 248 W. Va. 75 at Syl. Pt. 4.

¹⁹⁰ A.R. 940–41.

¹⁹¹ *Id.*

¹⁹² *Michael C.*, 248 W. Va. 75 at Syl. Pt. 4.

Trial courts still must weigh 609 evidence under WVRE 403, but because of the court's misread, the judge weighed the wrong factors. Because it found that the evidence must be independently relevant, the court assigned impeachment no probative value¹⁹³ Yet whether jurors believed Petitioner or his wife was the singular, central issue in this case.¹⁹⁴ Indeed, though the court did not place its reasoning for prejudice on the record,¹⁹⁵ it may even have considered its impeachment value a source of *prejudice*. The court believed this Court decided *Michael C.* because the crimes were similar.¹⁹⁶ It may have found that the proposed impeachment with a dissimilar crime would unfairly prejudice the State's witness in the eyes of the jury. Yet discrediting her was the whole point.

Nor can any real prejudice be gleaned from the record. Jurors learned about Petitioner's entire, lengthy, criminal history.¹⁹⁷ If this did not confuse the issues or cause undo prejudice, it is difficult to see the harm in asking a key State witness whether she has a federal conviction for drug trafficking.

III. These errors harmed Petitioner and undermined the trial's fundamental fairness because the central issue in the case was whether Petitioner or his wife was telling the truth.

Finally, both errors prejudiced Petitioner and he requests a new trial. Whether a constitutional error may be deemed harmless is a federal question.¹⁹⁸ In *Chapman v. California*, the Supreme Court rejected an "overwhelming evidence" test that asked whether the jury could have still convicted on the remaining evidence.¹⁹⁹ Instead, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it

¹⁹³ See A.R. 940–41.

¹⁹⁴ E.g. A.R. 1524–27; A.R. 1528–31; A.R. 1532; A.R. 1537; A.R. 1539–40.

¹⁹⁵ See A.R. 947 (Only paraphrasing the text of WVRE 403).

¹⁹⁶ A.R. 945.

¹⁹⁷ E.g. A.R. 1438–39 (“[Defense counsel:] And if I don’t ask you, I’m confident [the prosecutor] would, but you got a conviction on that occasion for grand larceny, for conspiracy, and for fleeing; is that correct?”). *But see* WVRE 609(a)(1) (“For the purpose of attacking the credibility of a witness accused in a criminal case, evidence that the accused has been convicted of a crime shall be admitted but only if the crime involved perjury or false swearing.”).

¹⁹⁸ See *Chapman v. California*, 386 U.S. 18 at 21 (1967).

¹⁹⁹ *Id.* at 23.

was harmless beyond a reasonable doubt.”²⁰⁰ For nonconstitutional errors, the defendant must show whether “the error had any prejudicial effect on the jury”²⁰¹ such that the error “was prejudicial to the final outcome of the trial.”²⁰²

The State cannot meet its burden as to the Confrontation Clause, and Petitioner can meet his burden as to WVRE 609. As shown by the closing arguments, Petitioner’s versus his wife’s credibility was the most crucial issue in the case.²⁰³ The prosecutor said she offered Petitioner’s wife the one to five plea deal because she needed her testimony to “get to the truth[.]”²⁰⁴ Because although the State had considerable physical evidence, it could only carry the case so far.

The physical evidence proved what no one disputed—that Petitioner and his wife were both present for a heinous murder. Rational jurors could believe the decedent’s blood was on him²⁰⁵ because he was in the room and tried to intervene.²⁰⁶ They could also believe Petitioner’s blood was in the house²⁰⁷ because his wife stabbed him as well.²⁰⁸ And the recorded phone call in which Petitioner expressed pleasure that his wife lied to police is unsurprising.²⁰⁹ At that time they were still closely aligned, and Petitioner’s concern may have been for his wife rather than himself.²¹⁰ None of the physical or documentary evidence uniquely pointed to Petitioner’s guilt unless jurors credited his wife, which is why the State consistently returned to their credibility throughout its closing.²¹¹

²⁰⁰ *Id.* at 24.

²⁰¹ Syl. Pt. 2, in part, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979) (discussing improper admission of evidence).

²⁰² *Mays v. Chang*, 213 W. Va. 220, 225, 579 S.E.2d 561, 566 (2003) (discussing harm analysis for improper exclusion of evidence).

²⁰³ See A.R. 1520–46 (State’s closing); A.R. 1546–84 (defense closing); A.R. 1584–93 (rebuttal).

²⁰⁴ A.R. 1590.

²⁰⁵ A.R. 1538.

²⁰⁶ A.R. 1461.

²⁰⁷ See A.R. 1538.

²⁰⁸ A.R. 1461.

²⁰⁹ A.R. 1484–86.

²¹⁰ *Id.*

²¹¹ *E.g.* A.R. 1524–27; A.R. 1528–31; A.R. 1532; A.R. 1537; A.R. 1539–40.

And these errors went directly to the credibility of the two most important fact witnesses. Jurors heard all of Petitioner’s criminal history,²¹² but Petitioner could not ask one question about his wife’s conviction.²¹³ And in closing, the State could argue Petitioner’s wife had no motive,²¹⁴ in part because the court’s ruling prevented jurors from learning that she was a convicted drug trafficker.²¹⁵

The uncontroverted statements the decedent allegedly made to her friend are also harmful. First, the Prosecutor relied on the friend’s testimony as independent corroboration for the wife in closing argument.²¹⁶ And second, if believed, his testimony (really *her* testimony) is incredibly compelling. If believed, the decedent herself identified Petitioner as her assailant shortly before the murder.²¹⁷ The State cannot prove—certainly not beyond a reasonable doubt—that such a damning statement would not have played a role in jury deliberations.

CONCLUSION

At an unrelated pretrial hearing, the prosecutor argued she should win a motion because even if the court erred, this Court would find no prejudicial error.²¹⁸ The judge tried to laugh it off as a joke, but the prosecutor persisted.²¹⁹ She was serious.²²⁰ Why shouldn’t the court err in her favor, so long as it would be deemed harmless on appeal?

If the harmless error rule is inadvertently telegraphing to prosecutors that no harm means no error at all, then the rule is dis-serving the justice system. Because the errors here went to the heart of what jurors had to decide, Petitioner asks the Court to reverse for a new trial.

²¹² *See Supra.* at n. 197.

²¹³ A.R. 497.

²¹⁴ A.R. 1541.

²¹⁵ A.R. 938.

²¹⁶ A.R. 1531; A.R. 1534.

²¹⁷ A.R. 1395.

²¹⁸ A.R. 31.

²¹⁹ *Id.*

²²⁰ A.R. 32.

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