

No.:24-757

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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WEST VIRGINIA DIVISION OF CORRECTIONS  
AND REHABILITATION,

Defendant Below, Petitioner

v.

Upon Appeal  
Circuit Court of Kanawha County  
(Case No.: 21-C-537)

CONNIE HARDY, Personal Representative  
of the Estate of Franklin Barnhouse,

Plaintiff Below, Respondent.

**PETITIONER WEST VIRGINIA DIVISION OF  
CORRECTIONS AND REHABILITATION'S BRIEF**

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## TABLE OF CONTENTS

|                                                                                                                                                         | <u>Page</u> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| TABLE OF AUTHORITIES .....                                                                                                                              | iii         |
| I. ASSIGNMENTS OF ERROR.....                                                                                                                            | 1           |
| II. STATEMENT OF THE CASE.....                                                                                                                          | 1           |
| A. Statement of Facts .....                                                                                                                             | 1           |
| B. Procedural History .....                                                                                                                             | 2           |
| III. SUMMARY OF ARGUMENT.....                                                                                                                           | 3           |
| IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....                                                                                                 | 3           |
| V. STANDARD OF REVIEW.....                                                                                                                              | 4           |
| VI. ARGUMENT.....                                                                                                                                       | 5           |
| A. The circuit court has exceeded its legitimate authority because it failed to recognize<br>that the Petitioner is entitled to qualified immunity..... | 5           |
| 1. Respondent has failed to show that Mr. Barnhouse’s cell placement was a<br>violation of his rights.....                                              | 9           |
| 2. Respondent has failed to show that Wines’ smuggling of contraband into the<br>facility was a result of a violation of Barnhouse’s rights.....        | 9           |
| 3. Respondent has failed to show that lack of cell checks violated Mr.<br>Barnhouse’s rights.....                                                       | 10          |
| VII. CONCLUSION.....                                                                                                                                    | 11          |

## TABLE OF AUTHORITIES

### Cases

|                                                                                                                        |       |
|------------------------------------------------------------------------------------------------------------------------|-------|
| <i>A.B.</i> , 766 S.E.2d at 776 (quoting <i>Anderson v. Creighton</i> , 483 U.S. 635, 640 (1987))                      | 7     |
| <i>Abney v. Coe</i> , 493 F.3d 412, 419 (4th Cir. 2007)                                                                | 10    |
| <i>Aetna Casualty &amp; Surety Co.</i> , 148 W. Va. 160, 133 S.E.2d 770 (1963)                                         | 4     |
| <i>Cf. Bell v. Wolfish</i> , 441 U.S. 520, 543 n.27 (1979)                                                             | 8     |
| <i>City of St. Albans v. Botkins</i> , 718 S.E.2d 863, 868 (W. Va. 2011))                                              | 7     |
| <i>Covey v. Assessor of Ohio County</i> , 777 F.3d 186, 196 (4th Cir. W. Va. 2015)                                     | 10    |
| <i>Estate of Seroy v. Leuck</i> , 2014 Wisc. App. LEXIS 858 (October 16, 2014)                                         | 9, 10 |
| <i>Findley v. State Farm Mutual Automobile Insurance Company</i> , 213 W. Va. 80, 576 S.E.2d 807 (2002)                | 4     |
| <i>Harper v. McCloud</i> , 2:12-cv-00656, 2014 U.S. Dist. LEXIS 37177 (March 21, 2014)                                 | 8     |
| <i>King v. Riley</i> , 76 F.4th 259, 267-268 (4th Cir. 2023)                                                           | 10    |
| <i>Lavender v. W. Va. Reg'l Jail &amp; Corr. Facility Auth.</i> , 2008 U.S. Dist. LEXIS 8162 (S.D.W. Va. Feb. 4, 2008) | 7     |
| <i>Parkulo v. W. Va. Bd. of Probation and Parole</i> , 199 W. Va. 161, 483 S.E.2d 507 (1996)                           | 6, 7  |
| <i>Robinson v. Pack</i> , 223 W. Va. 828, 679 S.E.2d 660 (2009)                                                        | 4     |
| <i>State v. Chase Securities, Inc.</i> , 188 W. Va. 356, 424 S.E.2d 591 (1992)                                         | 6     |
| <i>W. Va. Reg'l Jail &amp; Corr. Facility Auth. v. A. B.</i> , 234 W. Va. 492, 496, 766 S.E.2d 751, 755 (2014)         | 5     |
| <i>Wilson v. Layne</i> , 526 U.S. 603 (1999)                                                                           | 7     |

## **I. ASSIGNMENT OF ERROR**

The circuit court erred when it denied Petitioner's Motion for Summary Judgment because Petitioner was entitled to summary judgment on the basis of qualified immunity.

## **II. STATEMENT OF THE CASE**

### **A. Statement of the Facts**

Respondent, and Plaintiff below, Connie Hardy ("Respondent") is the personal representative of Franklin Barnhouse ("Barnhouse") who is deceased. Respondent commenced this civil action, alleging that the West Virginia Department of Corrections and Rehabilitation ("WVDCR") was at fault for Barnhouse's death. Barnhouse was an inmate previously incarcerated at Eastern Regional Jail ("ERJ"), who allegedly died of a drug overdose as a result of voluntarily ingesting drugs while in custody.

On June 22, 2019, at approximately 10:35 p.m., Barnhouse was booked into ERJ for driving under the influence. (JA0006) On June 23, 2019, at approximately 1:06 a.m., Curtis Wines ("Wines") was booked into ERJ and was subsequently placed in the same holding cell as Barnhouse. (JA0077) Both Barnhouse and Wines were searched and processed through the body scanner looking for contraband at the time of their booking. *Id.* At approximately 1:14 a.m., Wines was searched by a correctional officer and was placed in the body scanner around 1:24 a.m. (JA0073) Wines' body scan image showed no identifiable contraband. (JA0082) Correctional officers performed checks on the cell around 7:00 a.m., and, at approximately 9:20 a.m., officers began pulling inmates from the cell for arraignments. (JA0073) The correctional officer was in and out of the cell multiple times and did not notice anything out of the ordinary. (JA0074) At approximately 11:15 a.m., Corporal Hoskins attempted to wake up Barnhouse for his arraignment, but he was blue in color and did not appear to be breathing. *Id.* Corporal Kendle called a medical

emergency and medical responded. *Id.* At approximately 12:30 p.m., Barnhouse was pronounced deceased by the medical examiner. (JA0077)

On June 26, 2019, Wines stated during a recorded phone call that the body scanner did not detect approximately three grams of drugs, believed to be heroin and fentanyl, that he had hidden in a black tube that he had placed inside of his anus. *Id.* Wines further stated that he shared those drugs with other inmates in his cell and that Barnhouse voluntarily took the drugs and then overdosed and died. *Id.* This is corroborated by inmate Carl McGinnis who stated on a recorded phone call that someone overdosed on heroin, and in a sworn statement by inmate Joshua Hoover who stated that he heard other inmates stating they did heroin.

Respondent's Complaint alleged the following claims against the WVDCR: Count I for negligence; Count II for violations of Article III,<sup>1</sup> Sections 1, 5, 10, and 14 of the West Virginia Constitution and for violations of the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Count III for intentional infliction of emotional distress; Count IV for extreme outrageous conduct and emotional distress; Count V for negligent hiring, retention, and supervision; and Count VI for duplicate claims under Article III, Sections 5 and 10 of the West Virginia Constitution.

## **B. Procedural History**

On or about July 12, 2021, Respondent filed her Complaint in the Circuit Court of Kanawha County, West Virginia.<sup>2</sup> (JA0001-JA0015) Petitioner filed Answer on August 11, 2021. (JA0016-JA0030) Petitioner filed their Motion for Summary Judgment and Memorandum of Law in Support on June 13, 2022 (JA0043-JA0065). Respondent filed Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment on July 25, 2022 (JA0110-JA0119) On November

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<sup>1</sup> The circuit court granted summary judgment in regards to Count II. Thus, it will not be addressed in this brief.

<sup>2</sup> Respondent subsequently filed an Amended Complaint naming Curtis Wines as a Defendant. (JA0031-JA0042) This did not substantively alter the allegations against Petitioner.

25, 2024, the circuit court entered its Order denying Petitioner's Motion for Summary Judgment based on qualified immunity. (JA0170-JA0174)

### **III. SUMMARY OF THE ARGUMENT**

The matter below, from which appeal is taken, derives from the Complaint filed by the Respondent. At the time of the incident giving rise to this matter, Barnhouse was an inmate at ERJ. Plaintiff's Complaint sought damages against the Defendant below, the West Virginia Division of Corrections and Rehabilitation, for injuries sustained while Barnhouse was incarcerated from June 22, 2019 to June 23, 2019.

At the conclusion of discovery, the Petitioner moved for summary judgment, in relevant part, on the basis of qualified immunity. The Petitioner's motion asserted that the Respondent had failed to develop evidence that shows the discretionary decisions made by the WVDCR personnel at ERJ violated any clearly established law, or that a reasonable officer would believe such a clearly established law was violated by the conduct alleged therein, principally because there was no evidence that Mr. Barnhouse was in any articulated danger during his incarceration. In denying qualified immunity, the circuit court determined that there was evidence of policy violations. *Id.*

The circuit court has exceeded its legitimate authority in failing to recognize the applicability of qualified immunity in this matter. Petitioner moves this Court to remand the matter back the Circuit Court of Kanawha County, West Virginia, directing it to reverse its Order and grant Petitioner's *Motion for Summary Judgment*.

### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner requests oral argument pursuant to Rule 19 of the *West Virginia Rules of Appellate Procedure*. This case is appropriate for a Rule 19 argument because the Judge's Order deviates clearly and significantly from the clear language of the *West Virginia Rules of Civil*

*Procedure* and clearly established precedent. This case would be appropriate for a Memorandum Decision.

## V. STANDARD OF REVIEW

An order denying a motion for summary judgment is interlocutory and is generally not appealable except in special instances. Syl. Pt. 8, *Aetna Casualty & Surety Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963). This Court has specifically recognized that “[a] circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine.” Syl. Pt. 2, *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009). The Court observed in *Robinson* that allowing interlocutory appeal of a qualified immunity ruling is the only way to preserve the intended goal of an immunity ruling: to afford public officers more than a defense to liability by providing them with “the right not to be subject to the burden of trial.” *Id.* at 833, 679 S.E.2d at 665 (citation omitted).

The standard of review applied in these special instances is stated in syllabus point one of *Findley v. State Farm Mutual Automobile Insurance Company*, 213 W. Va. 80, 576 S.E.2d 807 (2002): “This Court reviews de novo the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.” Likewise, the review undertaken follows the general principle applicable to any summary judgment ruling: “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Casualty & Surety Co.*, 148 W. Va. at 160, 133 S.E.2d at 771.

## VI. ARGUMENT

### **A. The circuit court has exceeded its legitimate authority because it failed to recognize that the Petitioner is entitled to qualified immunity.**

The circuit court erred in its determination that the Petitioner was not entitled to qualified immunity.

The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

*W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 496, 766 S.E.2d 751, 755 (2014).

In its Order denying Petitioner's Motion for Summary Judgment, the circuit court found that:

10. As relates to the issue of qualified immunity which has been asserted by Defendant, the standard to pierce qualified immunity requires more than mere negligence. It requires a violation of a statutory or constitutional duty which must be seen as reasonably foreseeable to an official or be something of which the official would be aware.

11. That in this instance, Plaintiff has provided an affidavit of an agent indicating that several separate written policies regarding Mr. Barnhouse's placement which carries at least a question of fact sufficient to overcome Defendant's Motion for Summary Judgment.

(JA0173, ¶¶ 10-11).

This Honorable Court has set forth the qualified immunity standard to be applied by a trial court in *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 766 S.E.2d 751, 763 (W. Va. 2014). First, a court must determine if the alleged conduct can be defined as a "discretionary act."

To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making

acts or omissions, both the State and the official involved are absolutely immune pursuant to Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996).

*Id.* at Syl. Pt. 10. Second, a court must determine if material evidence of the violation of a “clearly established law” has been developed.

Respondent has failed to develop and present any evidence that shows the discretionary decisions made by Petitioner or its officers at ERJ violated a clearly established law. Respondent’s Complaint asserts that the WVDCR is liable because its employees were negligent in handling their discretionary duties, and, as a result, Wines was able to bring drugs into the jail hidden inside his body, which Barnhouse subsequently voluntarily ingested.

Qualified immunity bars a claim of negligence against a State agency or an officer of that department who is acting with the scope of employment “with respect to the discretionary judgments, decisions, and actions of the officer.” *Id.* This discretionary decision immunity applies here because Petitioner’s employees were all acting within the scope of their employment and were exercising their judgment and discretion. Respondent cannot hold Petitioner liable for simple negligence or errors in decision making.

Second, the Court must determine if Respondent has developed material evidence that the conduct of the Petitioner violated a “clearly established law.”

To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the Respondent has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992).

*Id.* at Syl. Pt. 11. See also, *Lavender v. W. Va. Reg’l Jail & Corr. Facility Auth.*, 2008 U.S. Dist. LEXIS 8162 (S.D.W. Va. Feb. 4, 2008). “In other words, the State, its agencies, officials, and employees are immune for acts or omissions arising out of the exercise of discretion in carrying

out their duties, so long as they do not violate any known law or act with malice or bad faith.” Syl. Pt. 8, *Parkulo v. W.Va. Bd. Of Probation*, 483 S.E.2d 507 (W. Va. 1996). “In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.” Syl. Pt. 11, *A. B.*, 766 S.E.2d 751.

Here, there is no evidence of such conduct on the part of Petitioner and/or its employees. Indeed, Respondent has not individually named any officer, solely filing suit against the WVDCR. Further, Respondent has failed to identify what acts were perpetrated by what persons.

Even if an officer’s actions could be found sufficiently unreasonable to violate a clearly established law, as alleged by Respondent, a court should nonetheless rule in Petitioner’s favor on qualified immunity grounds if it would not be clear to a reasonable officer that his conduct would violate clearly established law. *City of St. Albans v. Botkins*, 718 S.E.2d 863, 868 (W. Va. 2011); *Wilson v. Layne*, 526 U.S. 603 (1999). To demonstrate a clearly established right was infringed upon, a Respondent “must do more than allege that an abstract right has been violated. Instead, the Respondent must make a ‘particularized showing’ that a ‘reasonable official would understand that what he is doing violated that right’ or that ‘in the light of preexisting law the unlawfulness’ of the action was ‘apparent.’” *A.B.*, 766 S.E.2d at 776 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Respondent has failed to do so in this case.

In West Virginia, “broad categories of duties such as training, supervision, and retention easily fall within the category of discretionary governmental functions that ordinarily entitle a Petitioner to qualified immunity.” *Id.* Barring a showing by Respondent that the WVDCR violated a “clearly established right or law” with respect to hiring, training, or supervision of its officers, Petitioner WVDCR is entitled to qualified immunity on claims involving these discretionary acts.

The Respondent simply cannot demonstrate any legal right to maintain a cause of action based solely upon an alleged “violation of policy.” In response to Defendant’s Motion for

Summary Judgment, Plaintiff alleged the following violations of clearly established law: CSR 95.1.11-Emergency Response; CSR 95.1.12-Observation every 30 minutes; CSR 95.1.13-Inmate Count; CSR 95.1.18.3-Screening of incoming inmates; and CSR 95.1.18.5-Housing of Intoxicated Inmates.

Prior to Barnhouse's incarceration, 95CSR1 was repealed in February of 2019. *See* W. Va. S. 240, Reg. Sess. (Feb. 11, 2019). A repealed regulation has no force of law and, thus, cannot form the basis of overcoming qualified immunity. The circuit court erred by giving effect to a regulation that had been repealed and was not in effect. As Senate Bill 240 repealed 95CSR1 in February of 2019, Petitioner was under no obligation to train on these and therefore cannot be found negligent due to any alleged failure to train on it, much less adhere to it.

Additionally, the United States District Court for the Southern District of West Virginia has previously held that WVDCR Policy Directives are merely guidelines. *See Harper v. McCloud*, 2:12-cv-00656, 2014 U.S. Dist. LEXIS 37177 (March 21, 2014). While Petitioner does not concede that any "policy" was violated, even if a "policy" had been violated it would not, in and of itself, create a cause of action for the Respondent. Specifically, in *Harper*, addressing WVDOC Policy Directive 312.02, held that:

Even assuming that Defendants varied from the rules set forth in Directive 312.02, any such variance does not per se establish a violation of Respondent's constitutional rights. To be sure, compliance with the Policy Directives may in certain circumstances be instructive on whether Petitioners acted in good faith and whether they are entitled to qualified immunity. They do not, however, establish constitutional minima. *Cf. Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979) (noting that correctional standards recommendations by various organizations and associations "may be instructive in certain cases" but that "they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question."). *Id.*

**1. Respondent has failed to show that Mr. Barnhouse's cell placement was a violation of his rights.**

In its Order, the circuit court stated that "Plaintiff has provided an affidavit of an agent indicating that several separate written policies regarding Mr. Barnhouse's placement which carries at least a question of fact sufficient to overcome Petitioner's Motion for Summary Judgment." (JA0173, ¶ 11). While Respondent's expert has alleged generally that Barnhouse should have been placed in a cell that allowed more intensive monitoring due to his alcohol intoxication, his opinion is did not articulate a violation of any enumerated law or statute. "Based on my experience as a jail administrator, there is good reason for separating and closely monitoring intoxicated commitments. Their judgment is impaired, and they are at increased risk of harm." (JA0124, ¶ 24). This is conjecture, not a violation of a clearly established right.

**2. Respondent has failed to show that Wines' smuggling of contraband into the facility was a result of a violation of Barnhouse's rights.**

Respondent further asserts that the examination of Wines was deficient. The evidence clearly establishes that WVDCCR employees undertook all necessary and mandated steps in examining Wines for contraband and seeking to prevent its introduction into the facility. First, Petitioner's employees performed a pat down search of Wines' person. Next, Wines was placed through the body scanner, in accordance with policy. Thus, Petitioner's employees performed the appropriate search on Wines and neither the pat down search nor the body scanner revealed any contraband. (JA00235) Respondent cannot present any evidence to show that any policies were violated during Wines' booking process.

Of note, other jurisdictions have failed to uphold the reasoning that contraband in a jail presents an obvious danger and extinguishes qualified immunity protection. *Estate of Seroy v. Leuck*, 2014 Wisc. App. LEXIS 858 (October 16, 2014) . "Only when drugs have actually been

discovered would their existence be known and the need to confiscate them become compelling and nondiscretionary.” *Id.*, \*17.

Respondent has failed to even identify a policy or procedure that was violated or an employee who committed any alleged wrongful acts. Respondent’s Complaint has only made broad accusations that Petitioner’s employees failed to properly screen Wines at booking. The fact remains that Wines was able to smuggle in drugs, which Respondent willingly and voluntarily ingested. To the degree Respondent asserts that, but for Barnhouse’s intoxication he would not have ingested them, Petitioner would remind this Honorable Court that Barnhouse’s initial intoxication was also voluntary. The Petitioner cannot be held accountable for Barnhouse’s poor choices.

**3. Respondent has failed to show that lack of cell checks violated Mr. Barnhouse’s rights.**

Respondent has failed to support the inference that the alleged lack of cell checks is tantamount to a constitutional violation. “It is, in fact, settled law that a violation of departmental policy does not equate with constitutional unreasonableness.” *Abney v. Coe*, 493 F.3d 412, 419 (4th Cir. 2007). “[Q]ualified immunity cares about violations of clearly established constitutional law, not clearly established prison policy.” *King v. Riley*, 76 F.4th 259, 267-268 (4th Cir. 2023).

In *King*, an inmate was murdered by fellow inmates. *Id.* at 263. The deceased inmate’s family sued the South Carolina Department of Corrections officer Sergeant McKan, alleging that he was deliberately indifferent to the inmate’s safety. *Id.* at 259. McKan had been tasked with 30 minute cell checks, much like in the case at bar. *Id.* at 263. However, the McKan failed to actually look into the cells.

In order to defeat qualified immunity, the Court determined that “even if the risk of inmate violence was substantial and Sergeant McKan knew that King needs precedent establishing that Sergeant McKan’s efforts to mitigate that risk (i.e., security checks without looking in cells) were

constitutionally deficient.” *Id.* at 266. In other words, an officers’ actions must violate a clearly known right.

In the current matter, Respondent offers the musing of its expert who stated that “[h]ad the ERJ staff been diligently performing their safety checks, they may well have interrupted the criminal use of the smuggled drugs, or the involved staff member may have recognized that Barnhouse was in medical distress. Either finding would have likely saved Barnhouse’s life.” (JA0127, ¶ 46). Respondent is equating a violation of policy with a constitutional violation, but the law is well-settled that this is not permissible.

Again, Respondent has failed to articulate how insufficient cell checks amount to a clearly established constitutional violation. Those arguments are irrelevant to the determination as to whether Petitioner violated Respondent’s constitutional rights. Respondent simply has not or cannot point to any action, or inaction, taken by Petitioner that overcomes qualified immunity.

## **VII. CONCLUSION**

For the reasons set forth above, Petitioner is entitled to summary judgment on Respondent’s claims on the basis of qualified immunity. The circuit court failed to set forth any conduct of Petitioner which violated any statutory or constitutional right of Respondent. The circuit court’s Order relied solely on violations of internal policies and procedures, which does not give rise to constitutional violations. As a result, summary judgment should have been granted in favor of Petitioner and the circuit court’s denial was in error.

Petitioner respectfully moves this Honorable Court to reverse the circuit court’s order denying summary judgment and that the matter be remanded with instructions that Petitioner is entitled to qualified immunity.

Respectfully submitted,

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CONNIE HARDY, Personal Representative  
of the Estate of Franklin Barnhouse,

Plaintiff Below, Respondent.

**CERTIFICATE OF SERVICE**

I, the undersigned, counsel for Petitioner West Virginia Division of Corrections and Rehabilitation do hereby certify that on the 25th day of March 2025, I electronically filed the foregoing *“Petitioner West Virginia Division of Corrections and Rehabilitation’s Brief”* with the Clerk of the Court using the electronic filing system which will send notification of such filing to the following participants:

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