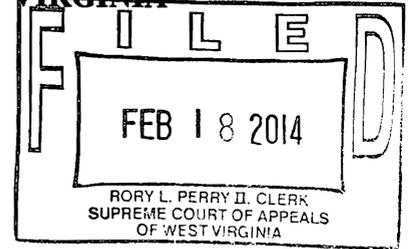


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0779



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

CINDY V. ALLMAN,

Defendant Below, Petitioner.

BRIEF ON BEHALF OF THE RESPONDENT

**PATRICK MORRISEY
ATTORNEY GENERAL**

**LAURA YOUNG
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
State Bar No. 4173
E-mail: Laura.Young@wvago.gov**

Counsel for Respondent

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Comes now the Respondent State of West Virginia, by counsel, Laura Young, Assistant Attorney General and files the within response brief.

I.

STATEMENT OF THE CASE

The petitioner was indicted (along with co-defendants) for the felony offenses of murder and conspiracy to commit burglary. The crime occurred on or about October 25, 2009. The victim of the murder was Terry Lewis, the house burglarized was the Lewis house. (App. at 6-7.) Alexander Bosley and Jeffrey Taylor were also charged with those same two offenses. (*Id.* at 5-6.) Jeannie Bosley was charged with being an accessory after the fact. (*Id.* at 7.)

The petitioner entered into a plea agreement which provided she would plead guilty to felony murder, and the conspiracy charge would be dismissed. The joint sentencing recommendation was the petitioner would be sentenced to the penitentiary for life, with parole eligibility after 15 years. (i.e., mercy). (*Id.* at 10-11.) This was not a binding plea pursuant to Rule 11 of the Rules of

Criminal Procedure. The agreement provided specifically that: “The acceptance or rejection of this Plea Agreement and the matter of sentencing is left in the sole discretion of the sentencing judge.”

(*Id.* at 11.) Further:

The defendant and his (*sic*) attorney are fully aware that this Plea Agreement falls within Rule 11(e)(1)(B) of the West Virginia Rules of Criminal Procedure, and the defendant is fully aware that the Court is not bound by any recommendations made by the State, and that if the Court does not accept the recommendation or request of the State, the defendant nevertheless has no right to withdraw her plea, and the defendant well knowing this, still agrees to enter a plea of guilty on the basis aforesaid.

(*Id.* at 12.)

At the time she pled guilty, the petitioner was a nineteen year old high school graduate who had a job. (*Id.* at 16-18.) Ms. Allman acknowledged receiving a copy of the indictment, understanding the charges against her, and knew the statutory penalties. (*Id.* at 19-20.) She understood that the penalty for murder was life, and that at trial, the jury had the option of recommending mercy, or not. (*Id.* at 21.) She acknowledged that the Court “may make a recommendation that you be eligible for parole after serving 15 years?” . . . but also understood “the Court’s not obligated to make that as a finding?” (*Id.* at 22.) She was satisfied with the services of her attorney. (*Id.* at 23.)

The terms of the plea agreement were spread upon the record. (*Id.* at 23-24.) Ms. Allman was satisfied with the plea agreement, and understood that no particular sentence was guaranteed in this case, and that she could received the maximum penalty. (*Id.* at 25.) She understood the sentencing recommendation was just that, a recommendation, and that the court was not bound by that recommendation. The judge specifically told her that he might not make the recommendation

that she receive parole eligibility, and that if he did not, she could not withdraw her plea. (*Id.* at 26-27.)

The judge then engaged in the plea colloquy to determine that the petitioner's plea was knowing, intelligent and voluntary. The petitioner could read and write, had a history of depression, was prescribed Paxil at the time of the plea, but represented she had a clear mind. (*Id.* at 27-29.)

Her lawyer believed that she was competent to plead. Ms. Allman understood the elements of felony murder. (*Id.* at 32.) The petitioner felt the State could prove its case against her beyond a reasonable doubt, and her attorney pointed out that she had confessed, her co-defendants implicated her, and there was forensic evidence. (*Id.* at 33, 34.)

She understood and agreed to waive her constitutional rights regarding a jury trial and the entry of a plea. (*Id.* at 34-35.) In terms of a factual basis, the petitioner stated that her co-defendant Bosley asked for her "help with something" and that Bosley told the co-defendant Taylor that "he wanted the guy to be killed no matter what." (*Id.* at 36.) They entered the front door. She was confronted by the victim, and co-defendant Taylor killed the victim. (*Id.* at 37-38.)

Petitioner's counsel stated that he did not believe that any claim of duress would be successful because Ms. Allman failed to mention any coercion when she confessed to the police. (*Id.* at 40.)

The State amplified the factual basis by noting that the petitioner's confession had nothing in it about duress. Taylor and Bosley agreed to the burglary, picked up Allman, and she was included in the burglary. She was given an outline of the house, where to enter, and where they believed the money was. Allman was given a smooth-edged knife. Two knives were used to kill the victim. One was serrated, one smooth. The wound that Allman inflicted with the smooth-edged knife was fatal. (*Id.* at 41-42.) Petitioner's counsel stated the only dispute he had with that

representation is that it was possible that the smooth edged injury occurred in the confrontation in the kitchen. (*Id.* at 43.)

Ms. Allman acknowledged that her plea was free and voluntary. (*Id.* at 44.) The petitioner then stated that she was under the influence at the time of the crime, and didn't know if she knew what she was doing or not. The court then rejected the plea. (*Id.* at 45.)

On a later date, the parties reconvened. The petitioner had reaffirmed she wished to plead guilty, and the court went over the plea procedures, including the plea agreement again. (*Id.* at 59-61.) Ms. Allman affirmed that parole eligibility was not guaranteed, even with the state's recommendation. (*Id.* at 61-62.) She indicated she understood the elements of felony-murder, and again evinced satisfaction with her attorney. (*Id.* at 62-64.) The plea agreement terms had not changed since the first plea hearing, and those were again spread on the record, with the notation that as to cooperation, two of the co-defendants, Bosley and Taylor, had already pled. (*Id.* at 65.) The State agreed to waive any prosecution as to the false statements the petitioner made at the first plea hearing. (*Id.* at 66.) Ms. Allman again understood that she could receive life imprisonment from the judge. (*Id.* at 67.) She understood the state's recommendation was not binding upon the court, and that no matter what the State said at disposition, nor what her attorney said at disposition, it was ultimately up to the court's discretion as to parole eligibility. (*Id.* at 68.) She further understood she could not withdraw her plea if she did not receive mercy. (*Id.* at 69.)

The court again engaged in determining whether the plea was knowing, voluntary, and intelligent. (*Id.* at 70-75.) The petitioner again proffered a factual basis. Bosley asked for help, she got into a car, and in the car Bosley and Taylor started talking about murder. She entered the home with Taylor, Bosley stayed in the car. This was actually the second plan. Ms. Allman rejected the

first plan, to rob another individual because it wasn't well thought out. Ms. Allman knew they were looking for money at the Lewis residence. (*Id.* at 75-79.)

Taylor gave her a knife, in case she needed it. The victim and his grandson were sleeping. She then saw the victim walk out of the bedroom, bleeding. The victim grabbed her, and she stabbed him: “. . . I believe that there's a good possibility I could have stabbed him a couple times.” (*Id.* at 80.)

The prosecutor amplified that the two knives used were very different, and that the wounds inflicted by Allman alone could have been fatal. (*Id.* at 82-83.)

The court then proceeded to inquire specifically of the petitioner her constitutional rights she was waiving by entering the plea. (*Id.* at 85-90.) She again acknowledged that she understood she could not withdraw her plea if a recommendation for mercy was not made. (*Id.* at 90.)

The court found that the plea was freely and voluntarily entered into, with the advice of a competent attorney, and that after being advised of her rights, she intelligently waived the same. Additionally, she knew the penalties that could be imposed and was competent to enter her plea. (*Id.* at 93.)

A pre-sentence report was conducted. As to the circumstances of the offense, the victim's wife was awakened by her husband yelling for help. She saw two people in her house, one definitely a man, one she believed to be a woman. Both fled. The victim's grandson witnessed part of the incident. (*Id.* at 112.) The police found Mr. Lewis dead at the top of the steps, with blood spatter and smear in the landing area, living room, stopping near the dining room door. (*Id.* at 113.)

Bosley gave a statement inculcating Taylor and petitioner in the burglary and murder. (*Id.* at 116.) Ms. Allman gave a statement about her participation in the burglary, that she pushed a

button on the telephone, and that Taylor gave her a knife. She admitted stabbing Mr. Lewis. (*Id.* at 118.)

Taylor, after waiving extradition and returning to West Virginia, inculcated the three in the burglary, and admitted taking knives from a drawer and giving one to Allman. Taylor stated Allman stabbed the victim first, and that he struck out at the victim with his knife later. (*Id.* at 120.) The sharp edged knife (Allman's) was responsible for an upper cut in the victim's neck and the stab wound to his chest. There was only one cut with the jagged edge knife (Taylor's) to the neck. (*Id.* at 122.)

Ms. Allman had no criminal record. (*Id.* at 125.) Along with the pre-sentence investigation, Ms. Allman had a diagnostic evaluation done at Lakin. (*Id.* at 130.) The petitioner minimized her participation in the crime in the diagnostic evaluation. (*Id.* at 144.) Further the evaluator noted that, at the very least, her versions of the events to the police and to the evaluator were contradictory. (*Id.* at 145.) She additionally stated that she killed the victim in self-defense. (*Id.* at 147.) She had several disciplinary events while jailed, pending trial and disposition. (*Id.* at 148.)

The petitioner had no past legal history, but did have a history of behavioral difficulties, drug usage, gang-related activities and poor judgment. She had poor insight, and blamed others for her problems. (*Id.* at 153.) She was determined to be at a high risk to re-offend because of that lack of judgement and lack of motivation to change. (*Id.* at 155.)

Ms. Allman, Mr. Taylor and Mr. Bosley were sentenced at the same time. Ms. Allman's attorney had received the presentence and diagnostic reports, had reviewed them, and had no corrections. (*Id.* at 159.)

The plea agreements for Bosley and Taylor were the same as for Allman, each receiving a recommendation of mercy from the State. Each was young, each had a limited criminal history. (*Id.* at 159-62.) Taylor’s attorney expressed his client’s sorrow. (*Id.* at 162.) Allman’s attorney noted her young age, her remorse, her past history, and her cooperation. (*Id.* at 163.)

On behalf of the State, the assistant prosecutor asked for parole eligibility for each of the three defendants, including Ms. Allman. (*Id.* at 168.) That recommendation was based solely on the age of each of the three. She stated that her view of the reports is that Taylor was the most honest. (*Id.* at 169.)

The court noted that Mr. Lewis may have been selected as a victim because Bosley had a motivation to kill Lewis, whom his mother had dated. (*Id.* at 170.) Ms. Allman expressed her remorse. (*Id.* at 200.)

The court noted that the sentence prescribed was life, and that the determination the court had to make was not whether the petitioner and her co-defendants received “mercy” but rather would the sentence imposed render them parole eligible. (*Id.* at 202.) The judge noted specifically that he was always mindful of plea agreements, and that the plea agreements in this matter contained a recommendation from the State that the petitioner (and the others) be eligible for parole. (*Id.*) It was not a question as to whether “they’re entitled to mercy.” The judge found that the facts of this case,

a home invasion in the middle of the night to steal someone’s property to satisfy one’s own needs and desires, and during the course thereof the home owner is killed in front of his wife and young grand–grandchild. Those facts would cry out for a jury in hearing this case not to grant any mercy to the defendants.

(*Id.*) The judge noted the family would have to relive the crime every day for the rest of their lives.

The judge noted that he considered the young age of the defendants, the lack of each having any

criminal record, and their cooperation and acceptance of responsibility. Each had been exposed to some degree of abuse and had no parental supervision. (*Id.* at 202-204.)

However, the court questioned whether each had accepted his responsibility for the crime. (*Id.* at 204.) He noted that this was felony murder, and that there was no need for the State to prove an intent to kill. (*Id.* at 205.) He noted that Taylor and Allman physically killed the victim, but Bosley selected the victim. (*Id.* at 205-206.) However, the judge believed each to be as responsible as another. He sentenced Ms. Allman to live in prison without the possibility of parole. (*Id.* at 206.) Her co-defendants received the same sentence. He noted that he had considered their youth, the facts of the case, their histories, and their inability at any time to be productive members of society. (*Id.*)

The written sentencing order indicated that among the factors considered in imposing sentence upon the petitioner included “the defendant’s age, lack of parental supervision or help, and history of substance abuse, physical abuse and sexual abuse” and further noted the Court’s skepticism as to her sincere acceptance of responsibility, and the nighttime burglary which resulted in the death of the homeowner in front of his grandchild. (*Id.* at 212.) A hearing was held at which time the sentence was reimposed. Sentencing recommendations were reargued. The sentence of life in prison, without parole eligibility was reimposed with the judge noting that he considered the same factors as when he originally imposed his sentence, noting that after disposition the petitioner had filed letters with the court setting forth a greater involvement in the crime. (*Id.* 216-19.)

The notice of appeal and filing of the petitioner’s brief and the appendix ensued.

II.

SUMMARY OF THE ARGUMENT

The petitioner contends that because there was a joint sentencing recommendation, the court had an obligation to give such weight to the recommendation that it would only depart from the recommendation if the proposed sentence was contrary to the interest of justice. Despite the affirmative statement of the judge that, in fact, he was mindful of the plea agreement and its terms, the petitioner contends that the judge did not indicate that any weight was given to the recommendation and did not find that the recommendation was contrary to the interest of justice. The petitioner cites no law, because there is no law that supports that proposition. The petitioner argues that this failure somehow demonstrates that the judge was not fair nor impartial.

Essentially, the petitioner's brief is a policy argument that has no support in the rules, case law, or the Rules of Criminal Procedure. The petitioner was scrupulously and repeatedly informed that the sentencing recommendation was merely that. She knew the plea was not binding, She knew she could receive the sentence she did. The judge gave more than adequate reason for the sentence imposed. That sentence was not an abuse of discretion and the petitioner should not receive a new sentencing hearing.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The respondent agrees with the statement in petitioner's brief that oral argument is unnecessary in this matter as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This matter is appropriate for a memorandum decision. Should this Honorable Court determine that oral

argument is necessary, for any reason, this case would appear to qualify for Rule 19 argument as opposed to Rule 20.

IV.

ARGUMENT

The petitioner is attempting to craft onto Rule 11, and pleas and dispositions in general, a rule for which there is no legal justification. In short, the petitioner wants a trial court to accept the state's recommendation as to sentence in a plea agreement, unless the court affirmatively determines that the ends of justice require a deviation from that recommendation

The word "recommendation" is defined in the Oxford Concise Dictionary, Eleventh Edition, Revised, 2009, as a "suggestion or proposal as to the best course of action" or the "action of recommending." Recommend is defined in that same Edition as "put forward with approval as being suitable for a purpose or role, advise as a course of action, advise to do something."

A recommendation is a suggestion or proposal, even an approved suggestion or proposal. Such suggestion or proposal is not in and of itself defined as being consonant with the ends of justice.

Rule 11 of the West Virginia Rules of Criminal Procedures addresses different kinds of pleas. In general, the parties may engage in discussions towards reaching an agreement that upon entry of the plea, the State will do any of these actions: move for the dismissal of other charges, make a recommendation for a particular sentence *with the understanding that such recommendation shall not be binding on the court*, agree a specific sentence is the appropriate disposition, or agree not to seek additional charges for other known offenses. (Emphasis added.)

The plea type referenced in Rule 11 (e)(1)(C) is commonly referred to as a binding plea. In that sort of plea, a circuit court has only three options: to accept the agreement, reject the agreement or defer decision. Should the court determine that the bargained for sentence is not appropriate, the petitioner shall be permitted to withdraw his plea, if he chooses. The plea type referenced in Rule 11(e)(1)(B), the type of plea here, involves an agreement for the prosecutor to make a recommendation, which the sentencing court is free to reject. (On the distinction between these types of pleas, please see among many other decisions, *State ex rel. Forbes v. Kaufman*, 185 W. Va. 72, 404 S.E.2d 763 (1991).)

The petitioner is not claiming that her plea was involuntary, and is not claiming that her sentence was unlawful or excessive. The petitioner is propounding a policy argument which would apparently bind the judge to accept a recommendation even though the plea was not a binding plea, unless he determined that the sentence was not in the interest of justice.

Isn't that, in fact, what the judge did here? The court was mindful of the parameters of the plea agreement, weighed any and all positive factors mitigating in favor of parole eligibility against those factors, including the circumstances of the offense, and determined that this petitioner should not ever become parole eligible.

The petitioner posits "If the judge is supposed to be neutral, and the parties agree on what the outcome should be, how can our system justify departure from that outcome?" (Pet'r's Br. at 4.)

The short answer is because that's what judges do. The parties in a criminal case have distinctly different functions, and it is the duty of the court to determine what sentence should be imposed upon a criminal defendant, and not the prerogative of the parties to determine what should happen.

Plea agreements, and sentencing recommendations are offered and accepted for all sorts of reasons, many of them good, some of them not. Anecdotally, counsel for the respondent listened to and read the briefs in a petition for writ of prohibition against a circuit judge in which the newly elected prosecutor disagreed vehemently with the course of action taken by his predecessor. The brief filed by the respondent in that matter (and the respondent in this matter is not stating that the brief is factually accurate) states that said predecessor was criminally negligent in her handling of cases, virtually giving cases away because of laziness or incompetence. (Resp't Br., *State ex rel. Brian Thompson v. Honorable Joseph Pomponio, Judge and Eugene Simmons, Prosecuting Attorney*, 13-1036.) In point of fact, the reasons for forging a plea range from a plea being in the interest of justice, to being expedient, to moving cases along in a crowded judicial system, to, yes, a prosecutor's laziness, malfeasance and negligence.

The prosecutor and the defendant, most generally with the advice of counsel, negotiate a plea. If the necessity of a specific sentence is of critical importance to the defendant, it is incumbent upon him to negotiate a binding plea. That did not happen in this case.

The petitioner got exactly what she bargained for, dismissal of the other felony and a recommendation of specific sentence in her matter. The judge, as he was free to do, and as the petitioner knew he was free to do, rejected that recommendation for reasons fully expounded in the dispositional hearing. The judge was mindful of the recommendation—he stated so at the hearing, and included it in the order. However, he was not bound to that sentence, and did not impose it.

The petitioner is not claiming, nor could she, an illegal sentence, an excessive sentence, a disparate sentence, or a cruel and unusual sentence. She is not claiming that her plea was unintelligent or involuntary. She is simply asking this Court to impose a regulation upon the

sentencing court which would seriously hamper the discretion of any judge in accepting any plea agreement.

The very recent case of *State v. Robey*, 2014 WL 350911, No. 12-1418, Filed January 28, 2014, is remarkably similar to this case in that the facts involved a felony murder, although Robey did not receive a recommendation of parole eligibility while his co-defendants did. In *Robey*, this Honorable Court reiterated in Syllabus Point 1 that “‘The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard unless the order violates statutory or constitutional commands.’ Syl. Pt. 1, in part *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997).” Syl. Pt. 1, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011) and in Syllabus Point 2, “‘Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.’ Syllabus Point 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982).” Syl. Pt. 6, *State v. Slater*, 222 W. Va. 499, 665 S.E.2d 674 (2008).

Robey and his co-defendants entered a home, robbed a victim, and Robey beat the victim to death. A plea agreement was reached in which the State joined with the petitioner in requesting a recommendation of mercy. The Supreme Court upheld the sentence imposed—that is a sentence of life without mercy, determining that the petitioner’s role in the murder clearly justified the sentence. This Court also specifically rejected the argument that the circuit court failed to make appropriate findings to support the sentence imposed.

Further, this Honorable Court has noted that,

Typically a grant of discretion to a lower court commands this Court to extend substantial deference to such discretionary decisions. Although this Court may not necessarily have obtained the same result had we been presiding over a case

determined by a lower court, our mere disagreement with such a ruling does not automatically lead to the conclusion that the lower court abused its discretion

State v. Allen, 208 W. Va. 144, 155, 539 S.E.2d 87, 98 (1999).

In the instant case, the petitioner minimized her participation in the offense. She only reluctantly admitted that she stabbed the victim, and in her first plea hearing insisted that she committed the crime under duress and was so intoxicated on drugs that she either didn't know or couldn't remember what she was doing. (App. at 45.) She stated that Taylor actually killed the victim. (*Id.* at 37-38.) After the judge refused to go forward with that plea, the parties reconvened, but she then stated that she only stabbed the victim after Taylor had already stabbed him, and the victim grabbed her. Even then, she did not wholeheartedly accept responsibility but stated she believed there was a possibility that she stabbed him. (*Id.* at 80.)

In her statement to the police, which was included in both the diagnostic evaluation and pre-sentence report, the petitioner admitted stabbing the victim. The diagnostic report was clear that the petitioner minimized her involvement in the crime and gave contradictory responses. (*Id.* at 145.) She also essayed that she killed the victim in self-defense. (*Id.* at 148.)

Although she had no criminal history, she had a history of behavioral difficulties, drug abuse, gang-related activities and poor judgement. She blamed others for her problems, and was determined to be at a high risk to reoffend because of that lack of judgment and lack of motivation to change. (*Id.* at 153, 155.)

The judge was mindful of the plea agreement and its recommendation of parole eligibility, but found that the facts of the case would against mitigate any finding of mercy. The judge noted that the crime was a nighttime home invasion to steal property to satisfy one's own needs, and the

victim was stabbed to death in front of his wife and grandchild. (*Id.* at 202.) He did note that the petitioner (and her co-defendants) was young, lacked a significant criminal history, and had evinced that she would cooperate. Each lacked parental supervision. (*Id.* at 202-204.)

The judge was however skeptical about any true acceptance of responsibility for the crime. (*Id.* at 204.) Ms. Allman actually, physically killed the victim. (*Id.* at 205-206.) He believed that Ms. Allman could never be a productive member of society. (*Id.* at 206.) Upon resentencing, the judge considered those same factors, and denied parole eligibility. (*Id.* at 216-19.)

The decision to withhold mercy, the decision to deny parole eligibility was not an abuse of discretion. The petitioner got what she bargained for. The reasons for the court's decision are adequately supported in the Appendix. The petitioner, a young woman—but an adult woman—voluntarily agreed to participate in a nighttime burglary of a specific household. In fact, according to her statement, the only reason the Lewis household was picked was after she, Allman, objected to robbing Holly Welch. (*Id.* at 124.) The petitioner stated she

flat out refused to do that because I didn't like the way they were saying it was going to go down. It seemed a little too shaky, I guess you could say. . . . So many things in their plan could have gone wrong. It was a very quickly thrown together plan without much thought.

(*Id.* at 78-79.)

Therefore, in her own words, the petitioner rejected a plan where she thought she could get caught, voluntarily participated in a burglary and stabbed the victim in his chest causing or at least contributing to his death. The judge did not buy her expressions of remorse. The judge believed that the interest of justice required that this petitioner spend the rest of her life in prison. Based upon the

facts in this case, that determination was not an abuse of discretion. The sentencing recommendation of parole eligibility was appropriately rejected.

V.

CONCLUSION

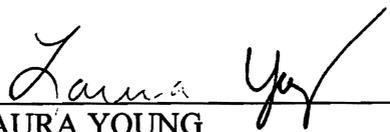
Based upon the foregoing recitations of fact and arguments of law, the respondent respectfully requests that the sentencing order of the Circuit Court of Harrison County, imposing a term of life in prison, without the possibility of parole, upon the petitioner's plea of guilty to felony-murder be affirmed, and that the petitioner not be afforded a new sentencing hearing.

Respectfully submitted,

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL



LAURA YOUNG
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
State Bar No. 4173
E-mail: Laura.Young@wvago.gov

Counsel for Respondent

CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *BRIEF ON BEHALF OF THE RESPONDENT* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 18th day of February, 2014, addressed as follows:

To: Jonathan Fittro, Esquire
P.O. Box 1636
Clarksburg, WV 26302-1636



LAURA YOUNG