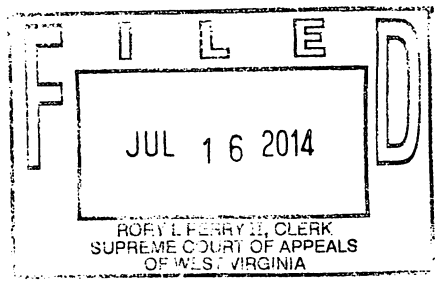
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0614



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

MITCHELL COLES,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT

PATRICK MORRISEY
WEST VIRGINIA ATTORNEY GENERAL

Misha Tseytlin (WV Bar No. 12386)
Deputy Attorney General
Office of the Attorney General
State Capitol Building 1, Room E-26
Charleston, WV 25305
Phone: (304) 558-2021
Email: Misha.Tseytlin@wvago.gov
Counsel for Respondent

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INTRODUCTION

Throughout July and August 1998, Mitchell Coles ("Defendant") engaged in a crime spree during which he stole thousands of dollars from local businesses by writing fraudulent checks. After he was apprehended, Defendant was indicted on four counts of defrauding (or attempting to defraud) specific businesses by false pretenses, as well as a single count of engaging in a fraudulent scheme, which did not specify any particular victim. Defendant then entered into a voluntary, counseled plea agreement with the State, in which he pleaded guilty to: (1) one count of defrauding One Valley Bank by false pretenses, and (2) one count of engaging in a fraudulent scheme, which did not mention any specific victim. Defendant also agreed to pay restitution to the multiple businesses that he had defrauded during his scheme, including businesses not specifically mentioned in the indictment. In exchange for this guilty plea, the State agreed to dismiss the remaining three false pretenses counts, substantially reducing Defendant's potential sentence. The Circuit Court then sentenced Defendant consistent with this voluntary guilty plea agreement.

More than a decade later, Defendant has filed a petition requesting to "correct" his sentence, thereby seeking to retain the benefits of his guilty plea while also obtaining a windfall through a reduced sentence. Specifically, Defendant argues that contrary to the admissions in his voluntary plea agreement, he did not actually commit multiple criminal violations in July and August 1998, and instead committed only a single crime, against only One Valley Bank. Accordingly, Defendant argues that the Circuit Court's decision to sentence him for both of the crimes he pleaded guilty to violates his constitutional right not be subjected to double jeopardy.

Defendant's collateral attack on his decade-old guilty plea should be rejected. Defendant does not—and could not possibly—claim that his guilty plea was involuntary, meaning that he is

limited to arguing that the charges in his indictment were so clearly duplicative that "the court had no power to enter the conviction or impose the sentence" under the Double Jeopardy Clause. *United States v. Broce*, 488 U.S. 563, 569 (1989). But the indictment and the existing record at the time of Defendant's plea reveal that Defendant committed multiple crimes against multiple victims in July and August 1998, providing ample legal authority for the Circuit Court to sentence him for committing (at least) two separate fraudulent acts during those months. Accordingly, Defendant's guilty plea and subsequent sentence should be permitted to stand.

STATEMENT OF THE CASE

I. DEFENDANT PLEADS GUILTY TO COMMITTING TWO SEPARATE CRIMINAL VIOLATIONS DURING JULY AND AUGUST 1998

In Case 99-F-28, the case at issue in this appeal, Defendant was indicted on five counts arising out of a scheme where Defendant presented fraudulent checks to various businesses, including banks, in Monongalia County, West Virginia in July and August 1998. A-1-2. The indictment contained the following counts, which appear on the face of the indictment:

> Count I: "on or about the 6th day of August, 1998, in Monongalia County, West Virginia, committed the offense of 'Attempted Obtaining Money By False Pretenses' by unlawfully, feloniously, knowingly, and with the intent to defraud, attempting to obtain money, by presenting check # 116, in the amount of Three Thousand Five Hundred Dollars ($3,500) to One Valley Bank . . . "
>
> Count II: "on or about the 20th day of July, 1998 in Monongalia County, West Virginia, committed the offense of 'Obtaining Money By False Pretenses' by unlawfully, feloniously, knowingly, and with the intent to defraud, obtaining money, by presenting check #117, in the amount of One Thousand Five Hundred Dollars ($1,500) to One Valley Bank . . . ."
>
> Count III: "on or about the 20th day of July, 1998, in Monongalia County, West Virginia, committed the offense of 'Attempted Obtaining Money By False Pretenses' by unlawfully, feloniously, knowingly, and with the intent to defraud, attempting to obtain money, by presenting check # 108, in the amount of One Thousand Five Hundred Dollars ($1,500) to One Valley Bank . . . ."

> Count IV: "on or about the 24th day of July, 1998, in Monongalia County, West Virginia, committed the offense of 'Attempted Obtaining Money By False Pretenses' by unlawfully, feloniously, knowingly, and with the intent to defraud, attempting to obtain money, by presenting check # 116, in the amount of Three Thousand One Hundred and Seventy-Five Dollars ($3,175) to One Valley Bank . . . ."
>
> Count V: "...during July and August, 1998 in Monongalia County, West Virginia, committed the offense of 'Fraudulent Scheme' by unlawfully, intentionally, willfully and feloniously depriving another person of any money, goods, property or services by means of fraudulent pretenses, representations or promises, of a total value in excess of One Thousand Dollars ($1,000), as part of a common scheme or plan..."

A-1-2.

Defendant was thus indicted for various larcenies occurring in July and August 1998, noting specific dates and identifying specific victims in Counts I, II, III, and IV. *Id.* Defendant was also indicted on Count V, which did not identify any specific victim and did not specify whether the four acts alleged in Counts I through IV represented the only fraudulent acts Defendant committed during July and August 1998, or whether there were other fraudulent crimes that Defendant committed during that period against other victims. *Id.*

On December 28, 1999, Defendant entered into a combined plea agreement with the State, containing three key elements:

First, Defendant pleaded guilty to two of the five counts in the indictment in Case 99-F-28, the case at issue here. A-5. Defendant pleaded guilty to Count II, which involved "Obtaining Money by False Pretenses" from One Valley Bank on July 20, 1998. *Id.* Defendant also pleaded guilty to Count V, which involved a "Fraudulent Scheme" occurring during July and August 1998, without specifying any specific victim. *Id.* As consideration for entering into this plea agreement, the State agreed to recommend the dismissal of Counts I, III, and IV. *Id.*

Second, Defendant also pleaded guilty to six counts in a different case (Case 99-F-175)—not at issue in this appeal—for a similar fraudulent scheme that Defendant engaged in between November 1998 and February 1999. A-3-4. In Case 99-F-175, the State had charged Defendant with three felony counts and three misdemeanor counts, naming as victims in the various counts One Valley Bank, U.S. Airways, Sears, Wal-Mart, Kroger in Sabraton, and Chuck's Furniture Mart. A-4. Pursuant to the combined plea agreement, Defendant pleaded guilty on all six counts, resulting in three felony and three misdemeanor convictions. A-5.

Third, Defendant agreed to pay restitution to the victims of his crimes in both Case 99-F-28 and Case 99-F-175. A-6. The victims listed in the restitution portion of the plea agreement included those specifically mentioned in Case 99-F-175 and/or Case 99-F-28: One Valley Bank, United National Bank, Chuck's Furniture Mart, Sears, Wal-Mart, U.S. Airways, and Kroger of Sabraton. *Id.* The victims listed also include three victims not mentioned in any of the counts in either case: Sound Investments, Huntington Bank, and Kroger of Morgantown. *Id.*

On March 6, 2000, the Honorable Robert B. Stone, Judge of the Circuit Court of Monongalia County, held a hearing pursuant to Rule 11 of the West Virginia Rules of Criminal Procedure. Defendant appeared at the hearing represented by counsel and voluntarily pleaded guilty pursuant to his plea agreement. A-7. On March 10, 2000, Judge Stone sentenced Defendant to one to ten years on each of Count II and Count V in Case 99-F-28, ordering the sentences run consecutively. A-8-9. With regard to Case 99-F-175, Judge Stone sentenced Defendant to one to ten years for each of the three felonies, and one year for each of the three misdemeanors, ordering the sentences to run concurrently to each other, but consecutively to the sentence imposed in Case 99-F-28. A-8. In sum, Judge Stone sentenced Defendant to three to thirty years in prison. *Id.*

Judge Stone also ordered Defendant to pay restitution to the victims of his scheme, consistent with the Victim Impact Statement. A-9. That Victim Impact Statement, in turn, lists most of the victims mentioned in the plea agreement. Supplemental Appendix ("SA")-1. Of particular note, Huntington Bank's Victim Impact Statement explains that in Case 99-F-28, the case at issue in this appeal, Defendant deprived Huntington of $2,838.92, sometime between July 21, 1998 and August 18, 1998. SA-1, SA-3-11 ("DATE OPENED: 072198; DATE CLOSED: 081898"). And Sound Investments' Victim Impact Statement explains that in Case 99-F-28, Defendant deprived it of $579.46, without specifying a date for this larceny. SA-1, SA-12.

II. DEFENDANT REPEATEDLY ATTEMPTS TO SEEK REDUCTION OF THE SENTENCE THAT HE VOLUNTARILY AGREED TO

Just months after he was sentenced pursuant to his voluntary plea agreement, Defendant initiated a series of challenges to his sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure. The Circuit Court denied these petitions on September 28, 2000, April 2, 2001, and January 24, 2007. A-45-47. Defendant was then granted parole in 2007, at which point he returned to his criminal pursuits. A-46 n.2. After he pleaded guilty to committing yet another felony, this time in Virginia, the authorities returned Defendant to the West Virginia Division of Corrections to serve the remainder of his sentence. *Id.* Defendant then filed yet another Rule 35(b) motion, which the Circuit Court denied on June 21, 2011. A-47.

Most relevant here, on November 1, 2011, Defendant sought to correct his sentence under Rule 35(a) of the West Virginia Rules of Criminal Procedure, alleging that the sentence violated his "constitutional rights against double jeopardy." A-11.

On May 2, 2013, the Honorable Susan B. Tucker, Chief Judge of the Monongalia Circuit Court, denied defendant's Rule 35(a) motion. A-44.[1] Chief Judge Tucker noted that Defendant had been sentenced consistent with his voluntary plea agreement. A-47. The sentence involved no double jeopardy, Chief Judge Tucker explained, because "Defendant's crimes for which he pled in Case No. 99-F-28 were against numerous victims, as outlined in the Plea Agreement, and Sentencing Order." A-47-48. Chief Judge Tucker also articulated that this Court's decision in *State v. Rogers*, 209 W. Va. 348, 547 S.E.2d 910 (2001), was inapplicable because the charge in Count II was "committed against One Valley Bank," whereas Count V involved acts "against other victims (including crimes against Huntington National Bank, Sound Investments, Kroger's of Morgantown, and United National Bank)." A-48.

On September 6, 2013, Defendant appealed, and the State filed a summary response. Then, on April 2, 2014, this Court scheduled this matter for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure and set a calendar for re-briefing the issues.

SUMMARY OF ARGUMENT

More than a decade ago, Defendant pleaded guilty to committing two separate crimes in July and August 1998. As the United States Supreme Court explained in *United States v. Broce*, 488 U.S. 563 (1989), "[b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of substantive crime." *Id.* at 570. Accordingly, Defendant's collateral attack on his sentence is "ordinarily confined to whether the underlying plea was both counseled and voluntary." *Id.* at 569. Defendant does not dispute that his guilty plea was wholly voluntary. To permit him now to seek relief from that

[1] On March 29, 2013, Defendant petitioned this Court for a writ of mandamus, asking for an order directing Chief Judge Tucker to rule on his Rule 35(a) motion. A-32-41. Chief Judge Tucker's May 2, 2013 decision rendered that petition moot.

plea on double jeopardy grounds would give Defendant an unjustified windfall, permitting him to avoid the sentence he agreed to while also retaining the benefits he received from his plea.

Given that Defendant's plea was unquestionably voluntary, the only possible basis for his attempt to escape his sentence on double jeopardy grounds is to satisfy the exception that a trial court may not sentence a defendant twice for the same exact crime. *Id.* That exception, in turn, is exceptionally narrow and requires a defendant to show that the face of his indictment unequivocally charged him twice for committing the same crime, such that if his case had gone to trial, he could not possibly have been sentenced on both counts. In the present case, Defendant pleaded guilty to committing two crimes: taking money by false pretenses from One Valley Bank on July 20, 1998 (Count II), and engaging in a fraudulent scheme whereby he took more than $1,000 from unnamed victims during July and August 1998 (Count V). Count V does not limit itself to Defendant's defrauding of One Valley Bank on July 20, thus precluding application of the narrow "face of the indictment" exception. Indeed, the record evidence here shows that Defendant defrauded multiple victims during July and August 1998, meaning that—depending upon the State's presentation of the case at trial and the jury's ultimate verdict—the Circuit Court could well have lawfully punished Defendant on both counts.

It is for that same reason that this Court's decision in *State v. Rogers*, 209 W. Va. 348, 547 S.E.2d 910 (2001), does not support Defendant's position. As Chief Judge Tucker noted below, in *Rogers* the jury convicted the defendant twice for the same act of larceny against the same victim, meaning that the Circuit Court's punishment of that defendant twice for that crime violated the defendant's double jeopardy rights. Here, in contrast, Defendant committed multiple crimes, against multiple victims, making this Court's holding in *Rogers* inapplicable.

ARGUMENT

I. BY ENTERING INTO A VOLUNTARY GUILTY PLEA ADMITTING THAT HE COMMITTED TWO SEPARATE CRIMES, DEFENDANT FORFEITED HIS BELATED ARGUMENT THAT HE ONLY COMMITTED A SINGLE CRIME, AGAINST A SINGLE VICTIM

This case implicates the relationship between two principles. First, the Double Jeopardy Clauses of the United States Constitution and West Virginia Constitution protect a defendant against being subjected to "multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Second, "[w]hen a defendant enters into a valid plea agreement with the State that is accepted by the trial court, an enforceable right inures to both the State and the defendant not to have the terms of the plea agreement breached by either party." Syl. Pt. 2, *State v. Surber*, 228 W.Va. 621, 723 S.E.2d 851 (2012) (per curiam) (quotation omitted). Confronting the interaction between these two principles in a case where a defendant pleaded guilty to committing two crimes but later asserted that those two crimes were one and the same, the United States Supreme Court in *Broce* held that "[b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of substantive crime." 488 U.S. at 570. "Just as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes." *Id.* In such a case, the Court explained, the defendant's challenge is "ordinarily confined to whether the underlying plea was both counseled and voluntary." *Id.* at 569.

Defendant does not dispute that his plea agreement was voluntary. Indeed, he entered his guilty plea after a Rule 11 hearing, where he was represented by counsel. Ap-7-9. In that plea, he admitted *both* to obtaining money by false pretenses from One Valley Bank on July 20, 1998

(Count II) *and* to engaging in a fraudulent scheme in July and August 1998 without specifying any particular victim (Count V). In exchange for that plea, Defendant received a substantial benefit because the State agreed to the dismissal of Counts I, III, and IV. A-5.

Defendant now argues that he committed only one offense—defrauding One Valley Bank on July 20, 1998—and that he is being impermissibly punished twice for that single crime under both Counts II and V. Pet. Br. 12. Defendant's assertion, made for the first time more than a decade after his crime spree, that he did not engage in any misconduct in July and August 1998 covered by Count V other than the July 20 larceny covered by Count II was waived by his guilty plea. Indeed, if Defendant's argument is accepted, he would receive an unjustified and substantial windfall: he would avoid punishment *both* for the three counts that the State agreed to dismiss in exchange for Defendant entering into the plea agreement *and* for most of the fraudulent acts he committed in July and August 1998 that are covered by Count V. That would violate the State's right "not to have the terms of the plea agreement breached by" Defendant. Syl. Pt. 2, *Surber*, 228 W.Va. 621, 723 S.E.2d 851.

II. DEFENDANT CANNOT SATISFY THE NARROW "FACE OF THE INDICTMENT" EXCEPTION

The Supreme Court in *Broce* recognized only one arguably relevant exception to the rule that a defendant who voluntarily pleads guilty to committing multiple crimes may not later argue that he committed only a single crime for double jeopardy purposes: where "on the face of the record the court had no power to enter the conviction or impose the sentence." *Broce*, 488 U.S. at 569. This exception applies where the face of the indictment and the preexisting record make unambiguously clear that the defendant had pleaded guilty to two counts that punish one crime. *Id.* As Justice Cleckley explained, "*Broce* carved out a 'face of the indictment' exception" to the

rule that a defendant's guilty plea waives his right to subsequently raise a double jeopardy claim. *State v. Greene*, 196 W. Va. 500, 506, 473 S.E.2d 921, 927 (1996) (Cleckley, J., concurring). "[I]f deciding a double jeopardy claim requires going beyond the existing record and holding a separate evidentiary hearing, a defendant's guilty plea bars any antecedent constitutional violations—including a double jeopardy claim. The justification for the *Broce* rule is that such a double jeopardy claim cannot be proven without contradicting the existing record 'and that opportunity is foreclosed by the admissions inherent in the guilty plea.'" *Id.* (quoting *Broce*, 488 U.S. at 576 (alterations omitted)); *accord State v. McGilton*, 229 W. Va. 554, 559, 729 S.E.2d 876, 881 (2012). The *Broce* exception thus applies only where a defendant's indictment is so clearly duplicative that a reviewing court must be forced to conclude—based only upon the face of that indictment and the existing record at the time of the plea—that if the case had gone to trial, the trial court could not possibly have sentenced defendant on both charges.

The narrow operation of the *Broce* exception is demonstrated by *Broce* itself. In that case, the defendants had pleaded guilty to two conspiracies to rig bids on construction projects. 488 U.S. at 565-66. The defendants later challenged the plea agreement, arguing they were engaged in only one conspiracy because their conspiracy had the same object and applied the same methods. *Id.* at 567-68. The Supreme Court held that the double jeopardy claim had been waived because a guilty plea represents an admission that the defendant committed two separate crimes, and "the face of the record" did not unambiguously dictate otherwise. *Id.* at 569. "Just as a defendant who pleads guilty to a single count admits guilt to the specified offense," the Supreme Court explained, "so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate offenses." *Id.* at 570. Federal Courts of Appeals have dutifully applied *Broce*'s "face of the indictment" exception

narrowly, requiring merely a "rational basis for a finding that the [two] counts . . . were predicated on different conduct" (*United States v. Stefanidakis*, 678 F.3d 96, 100 (1st Cir. 2012)), and rejecting application of the exception where "[t]he State had not specified before [the defendant] pled guilty which theory of [its second count] it intended to prove at trial" and where at least one possible version of the State's theory would not create double jeopardy problems (*Taylor v. Whitley*, 933 F.2d 325, 328 (5th Cir. 1991)).

In the present case, Defendant cannot satisfy the "face of the indictment" exception because there exists at least a "rational basis" for concluding that the State's theory of Count V would not have duplicated its theory under Count II at trial. This Court in *State v. Rogers* held that "every element necessary for a larceny conviction under West Virginia Code § 61-3-24 (false pretenses) is also an element for larceny conviction under West Virginia Code § 61-3-24d (fraudulent scheme)," meaning that a defendant only commits a single larceny when he fraudulently takes money from a single victim and that, under the Double Jeopardy Clause, he cannot be punished for both false pretense and fraudulent scheme for that single act. 209 W. Va. at 359, 547 S.E. 2d at 921. As applied here, *Rogers* means that ***if*** the indictment had charged Defendant with false pretenses only toward One Valley Bank on July 20, 1998 under West Virginia Code § 61-3-24, and then also charged Defendant with a fraudulent scheme only with regard to One Valley Bank on July 20, 1998 under West Virginia Code § 61-3-24d, the Circuit Court could not have punished Defendant on both counts. ***But that is not what the indictment charged.*** Rather, Count II charged Defendant with false pretenses toward One Valley Bank on July 20, 1998, while Count V charged Defendant with a fraudulent scheme occurring in July and August 1998 without specifying any victim, meaning that it was at least "rational" to conclude that Count V encompassed different larcenies, against different victims. This defeats

Defendant's appeal because, just as in *Broce*, the "face of the indictment" does not show that the State charged Defendant twice for the same crime.

Put another way, Defendant's appeal boils down to a single demonstrably false assertion: "the only victim is, in fact, One Valley Bank and all the allegations in Count Two (obtaining money by false pretenses) are based on the same conduct against the same victim as Count Five (fraudulent scheme)." Pet. Br. 12. As Chief Judge Tucker explained, Defendant's crimes involved multiple victims, including Huntington National Bank and Sound Investments. A-48. And while Defendant points out that "[n]owhere in either charging instrument was [Defendant] charged with offenses against Huntington National Bank or Sound Investments" (Pet. Br. at 7), the ambiguity Defendant identifies dooms his appeal because Count V identifies no specific victims at all. Rather, Count V only includes a date range—July to August 1998—and a dollar amount—"over $1,000." A-2. ***From the "face of the indictment," therefore, Count V may well cover Defendant's crimes against Huntington National Bank, Sound Investments and/or any of the other victims identified by the plea agreement or the Victim Impact Statement; or victims not identified in the record at all.***[2] Indeed, Huntington National Bank's Victim Impact Statement claimed that Defendant deprived it of $2,838.92, which offense appears to have occurred sometime between July 21, 1998 and August 18, 1998, the very time range covered by Count V. SA-11. This larceny alone, if proven at trial, would have been sufficient to convict

[2] Contrary to Defendant's assertions (Pet. Br. 6-7), none of the victims Chief Judge Tucker identified were the victims named in the counts in Case 99-F-175, the other case in the combined guilty plea. All of the victims Chief Judge Tucker identified (A-48) were either victims in the dismissed counts in the present case—Case No. 99-F-28—(e.g., United National Bank) or were listed in the restitution portion of the combined plea agreement without being identified in either charging document (e.g., Huntington National Bank, Sound Investments, Kroger's of Morgantown). And with regard to Huntington Bank and Sound Investments, their Victim Impact Statements identify their losses as part of the present case, Case No. 99-F-28. SA-3, SA-12.

Defendant on Count V, without reference to the July 20 misconduct toward One Valley Bank in Count II. This provides well more than a "rational basis" for rejecting Defendant's double jeopardy argument. *Stefanidakis*, 678 F.3d at 100.

For much the same reasons, *State v. Rogers* does not support Defendant's case. Pet. Br. 12-14. In *Rogers*, the defendant committed a single act of larceny against a single victim, but the jury convicted him on two counts: fraudulent scheme and false pretenses. 209 W. Va. at 354, 547 S.E.2d at 916. Because the offenses of false pretenses and fraudulent scheme contain the same elements, under the Double Jeopardy Clause, this Court held that the defendant could only be punished once for the offense. *Id.* at 359, 547 S.E.2d at 921. This Court explained that "[t]he offenses in the instant case represent alternative theories for proving larceny, involving the same criminal conduct as to each victim. The situation here is . . . akin to an indictment charging premeditated murder and, alternatively, felony murder. In these latter circumstances, this Court has held that the case may be put to the jury under either theory, that the jury may convict under either theory," but may not convict on both theories. *Id.* at 362, 547 S.E.2d at 924.[3]

The present case is wholly distinguishable from *Rogers*, and these differences reinforce why Defendant's appeal must fail. Whereas in *Rogers* the jury convicted the defendant both on fraudulent scheme and false pretenses counts for committing a single larceny against a single victim, here Defendant pleaded guilty to false pretenses as to one victim and a fraudulent scheme as to unnamed victims, who could well be numerous. A-1-2. The State could have obtained a conviction of Defendant on Count V's charge of a fraudulent scheme by focusing entirely upon

[3] This Court in *Rogers* reached a parallel decision involving a second victim whom the defendant had also defrauded. With regard to that victim, the State had charged the defendant with fraudulent scheme and larceny by embezzlement counts, and this Court held that the two charges were duplicative under the facts of the case. *Rogers*, 209 W. Va. at 361, 547 S.E.2d at 923.

those other victims, such as Huntington National Bank, without any reference to One Valley Bank, the victim in Count II. *See supra* at pp.12-13. That did not occur in *Rogers*, where only one relevant victim was involved in the two charges based upon the evidence actually presented at trial. And unlike in *Rogers*, there was no jury trial here because of Defendant's guilty plea. Given that plea, it will never be known whether the State would have tried Defendant on Count V based only upon the July 20 incident at issue in Count II—which trial must have had to proceed on an "alternative theory" under *Rogers*—or whether, as would have been more likely, the State would have presented evidence regarding Defendant's other fraudulent crimes against over victims in July and August 2008, in which case Defendant could have lawfully been sentenced on both Counts II and V. Given that "the face of the indictment" cannot settle the ambiguity as to what would have occurred at trial, the conviction must be permitted to stand because "[t]he State had not specified before [the defendant] pled guilty which theory . . . it intended to prove at trial." *Taylor*, 933 F.2d at 328.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court should affirm the order denying Defendant's motion to correct his sentence.

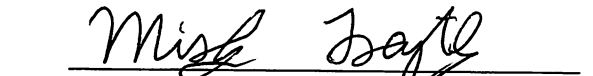
Respectfully submitted,

STATE OF WEST VIRGINIA,

Plaintiff below, Respondent

By Counsel,

PATRICK MORRISEY
WEST VIRGINIA ATTORNEY GENERAL



Misha Tseytlin (WV Bar No. 12386)
Deputy Attorney General
Office of the Attorney General
State Capitol Building 1, Room E-26
Charleston, WV 25305
Phone: (304) 558-2021
Email: Misha.Tseytlin@wvago.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I, MISHA TSEYTLIN, Deputy Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *BRIEF OF RESPONDENT* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 16th day of July, 2014, addressed as follows:

W. Jesse Forbes, Esquire
Forbes Law offices PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301

MISHA TSEYTLIN