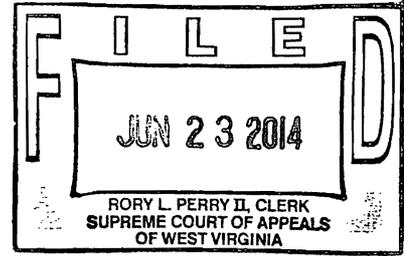


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



State of West Virginia, Plaintiff Below,

Respondent

Vs.) No. 14 – 0200

(Wood County Circuit Court #13-F-144)

Rick Brock, Defendant Below,

Petitioner

**PETITIONER'S BRIEF**

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## **ASSIGNMENTS OF ERROR**

- I. THE TRIAL COURT ERRED BY DENYING THE PETITIONER'S MOTION TO DISMISS AS BOTH COUNTS ONE AND TWO EACH ATTEMPT TO CHARGE THE DEFENDANT WITH TWO CRIMES IN VIOLATION OF RULE 8 THE OF WVRCrP AND PETITIONER'S CONVICTIONS THEREON SHOULD BE REVERSED.
  
- II. THE TRIAL COURT ERRED BY FAILING TO GIVE THE ENTIRETY OF PETITIONER'S PROPOSED INSTRUCTION NO. 1.
  
- III. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS WHERE THE INITIAL STOP OF THE VEHICLE WAS UNLAWFUL AND PRETEXTUAL AND THE POLICE LACKED PROBABLE CAUSE TO SEARCH THE VEHICLE IN THE POSSESSION AND CONTROL OF THE PETITIONER.
  
- IV. THE EVIDENCE ADDUCED AT TRIAL, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, WAS MANIFESTLY INADEQUATE TO CONVINCE IMPARTIAL MINDS OF THE GUILT OF THE PETITIONER BEYOND A REASONABLE DOUBT.
  
- V. THE TRIAL COURT ERRED BY ALLOWING AGENT STURM TO TESTIFY AS TO THE DANGERS AND EXPLOSIVENESS OF A METH LAB AS SAID TESTIMONY WAS IRRELEVANT AND ITS PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

## **STATEMENT OF THE CASE**

### **A. Procedural History.**

On July 18, 2013, the Petitioner was indicted by a Wood County Grand Jury. In Count One, the Petitioner was inexplicably charged with both the crime of Operating a Clandestine

Drug Lab and the crime of Attempting to Operate a Clandestine Drug Lab. In Count Two, the Petitioner was inexplicably charged with both the crime of Conspiracy to Operate a Clandestine Drug Lab and the crime of Conspiracy to Attempt to Operate a Clandestine Drug Lab. Prior to trial, the Petitioner moved the Court to dismiss the indictment for a violation of Rule 8 of the West Virginia Rules of Criminal Procedure which requires that each offense in an indictment be charged in a separate count. Petitioner also moved the Court to suppress the items seized from Petitioner's vehicle as the stop of said vehicle was unlawful and the officer lacked probable cause to search. Both of those Motions were denied. Trial began on December 11, 2013 and the Petitioner was convicted of the non-existent offenses of 1) Operating or Attempting to Operate a Clandestine Drug Laboratory and 2) Conspiracy to Operate or Attempt to Operate a Clandestine Drug Laboratory. The Petitioner was sentenced on February 13, 2014, to not less than two years, nor more than ten, in the DOC, with a credit of 76 days on Count One. On Count Two, the Petitioner was sentenced to 1 – 5 years, with a credit of 76 days. The sentences were run concurrent but were suspended and Petitioner was placed on three years' probation with conditions.

### **B. Statement of Facts.**

On the night of April 27, 2013, Deputy Rick Woodyard of the Wood County Sheriff's Department and Parkersburg Narcotics Task Force, was working undercover conducting surveillance on a home located at 1211 Pike Street, Parkersburg, West Virginia. (Supp. Hrg. Tr. pgs. 16-17). The residents of the home were suspected of illegal drug activity. (Supp Hrg. Tr. p. 17). At approximately 1:15 a.m., Deputy Woodyard observed a white Monte Carlo vehicle

pull up to the house. (Supp Hrg. Tr. p.17). Two people were in the vehicle but Deputy Woodyard could not identify who they were. (Supp. Hrg. Tr. p. 17). Deputy Woodyard watched as one of the individuals went into the house. (Supp. Hrg. Tr. p. 18). Deputy Woodyard could not tell which person got out of the vehicle. (Supp. Hrg. Tr. pgs. 17-18).

Approximately, 15 to 20 minutes later, an individual came out of the house and got in the vehicle. (Supp Hrg. Tr. p. 18). Deputy Woodyard did not know whether it was the same person who exited the vehicle earlier. (Supp. Hrg. Tr. p. 18). At that time, the vehicle left. (Supp. Hrg. Tr. p. 18).

Approximately 15 to 30 minutes later, Deputy Woodyard observed the vehicle return to 1211 Pike Street. (Supp. Hrg. Tr. p. 19). At that time, Deputy Woodyard claims to have identified the passenger in the vehicle as the co-Defendant, Terry Abbott. (Supp. Hrg. Tr. p. 19). Again, one of the individuals got out of the car and went into the house. (Supp. Hrg. Tr. p. 20). Again, Deputy Woodyard could not tell whether it was the driver or the passenger that got out. (Supp. Hrg. Tr. p. 20). The vehicle stayed for approximately 10 to 15 minutes and then left when an individual exited the home and got in the vehicle. (Supp. Hrg. Tr, p. 20). Deputy Woodyard did not know if the same person got out of the car on both occasions. (Supp. Hrg. Tr. p. 29).

Due to the lower court's pre-trial ruling, the jury was not made privy to any of the above information.

Deputy Woodyard began following the Monte Carlo at approximately 1300 Pike Street. (12/12/13 Tr. p. 7). Deputy Woodyard claims to have observed the Monte Carlo go left of center at the 1500 block of Pike Street. (12/12/13 Tr. p. 8). As the vehicle proceeded onto East Street, Deputy Woodyard claims it went left of center a couple of more times and once it crossed the fog line on the right. (12/12/13 Tr. pgs. 8-9). However, Deputy Woodyard did not stop the vehicle for any of these minor traffic violations. (12/12/13 Tr. p. 9).

Instead, he (Woodyard) radioed for a marked car and Trooper Jackson advised Deputy Woodyard that he (Jackson) was in the area. (12/12/12 Tr. p. 9). Deputy Woodyard continued to follow the vehicle to a Speedway service station on Seventh Street in Parkersburg.

(12/12/13 Tr. p. 10). Deputy Woodyard observed the two individuals exit the vehicle at the gas station. (12/12/13 Tr. p. 10). Upon leaving the station, the vehicle proceeded toward Staunton Avenue where, coincidentally, Trooper Jackson awaited. (12/12/13 Tr. p. 11). As the vehicle turned onto Staunton Avenue, Trooper Jackson pulled behind it and began to follow. (12/12/13 Tr. p. 11).

While Deputy Woodyard followed the vehicle, he ran the license plate and found that the vehicle was registered to Blossom Abbott at 1706 Staunton Avenue, Parkersburg, West Virginia. (12/12/13 Tr. p. 12). Deputy Woodyard issued no citations for the traffic violations he observed. (12/12/13 Tr. p. 13). However, Deputy Woodyard did admit it raised a concern in his mind as to whether the driver was impaired. (12/12/13 Tr. pgs. 8, 14-15). When Deputy Woodyard asked for a marked car for assistance, he informed Trooper Jackson of the alleged traffic violations and his concerns about an impaired driver. (12/12/13 Tr. pgs. 14-14).

After Trooper Jackson began following the vehicle, it took a left turn and proceeded to drive down that portion of Staunton Avenue. (12/12/12 Tr. p. 16). Trooper Jackson activated his lights after following the Monte Carlo for approximately and only a quarter of a mile. (12/12/13 Tr. p. 16). The vehicle was pulling into a driveway at 1706 Staunton Avenue or 1708 Staunton Avenue as Trooper Jackson activated his lights. (12/12/13 Tr. p. 57). Trooper Jackson observed no illegal driving.

Trooper Jackson approached the driver's side of the vehicle and made contact with the Petitioner, Rick Brock, at that time. (12/12/13 Tr. p. 17). Trooper Jackson was just a few feet away from him. (12/12/13 Tr. p. 58). Mr. Brock was the driver of the vehicle. Trooper Jackson asked Mr. Brock to produce the vehicle registration and his driver's license. (12/12/13 Tr. p. 17). Apparently, Mr. Brock produced the registration but, initially, he could not locate his identification. (12/12/13 Tr. p. 18).

During this time, Trooper Jackson observed nothing suspicious in the vehicle. (12/12/13 Tr. p. 57). He further became aware that Mr. Brock had borrowed the car with the permission of its owner, Blossom Abbott. (12/12/13 Tr. pg. 59). Blossom Abbott was Mr. Brock's

girlfriend. (12/12/13 Tr. p. 61). Trooper Jackson did not smell anything while standing at the driver's side of the vehicle talking to Mr. Brock. (12/12/13 Tr. p. 61).

Trooper Jackson was accompanied by a fellow State Trooper named DeMeyer. (12/12/13 Tr. p. 50). As Trooper Jackson talked to Mr. Brock, Trooper DeMeyer walked around the vehicle and attended to the passenger, Mr. Abbott. (12/12/13 Tr. p. 51). Trooper DeMeyer gave no indication that she noticed anything unusual in the vehicle or any suspicious smell. (12/12/13 Tr. p. 55).

Trooper Jackson then asked Mr. Brock to step out of the vehicle and he complied. (12/12/13 Tr. p. 18). Mr. Brock got into his wallet and produced his driver's license. (12/12/13 Tr. p. 18). Trooper Jackson testified that Mr. Brock was nervous and fidgety. (12/12/13 Tr. p. 19). However, he testified that it is normal for people to be nervous when pulled over by law enforcement. (12/12/13 Tr. p. 50).

Eventually, Mr. Abbott was also asked to step out of the vehicle. (12/12/13 Tr. p. 20). Trooper Jackson could not recall who advised Mr. Abbott to step out of the vehicle but acknowledged that Trooper DeMeyer was charged with speaking to him. (12/12/13 Tr. p. 20). Trooper DeMeyer did not testify.

Trooper Jackson did not ask Mr. Brock to perform any field sobriety tests. (12/12/13 Tr. pgs. 48 - 49). Nor did he testify to any signs of impairment. In addition, a pat down search of both Mr. Brock and Mr. Abbott was conducted but nothing suspicious or incriminating was found. (12/12/13 Tr. p. 50).

Nevertheless, after Mr. Brock declined to consent to a search of the vehicle, Trooper Jackson radioed for the assistance of the Parkersburg K-9 unit. (12/12/13 Tr. p. 20). Officer Nichols responded with a dog and it indicated on the passenger door of the two door vehicle. (12/12/13 Tr. p. 22). At that time, both Mr. Abbott and Mr. Brock were outside of the vehicle. (12/12/13 Tr. p. 22).

Once the dog indicated, Trooper Jackson opened the passenger door and continued to search. (12/12/13 Tr. p. 23). For the first time, Trooper Jackson noticed a number of things on the passenger side floorboards. (12/12/13 Tr. p. 26). Trooper Jackson found a blue insulated

cooler bag. Inside the cooler bag was a pop bottle with sediment at the bottom. (12/12/13 Tr. p. 25). Trooper Jackson could not recall whether or not the cooler bag was zippered shut so as to conceal the pop bottle inside. (12/12/13 Tr. p. 28). The cooler bag also had at least one other zippered compartment. (12/12/13 Tr. p. 32). Inside that compartment, Trooper Jackson found a syringe, a cold pack and a used coffee filter with white powder residue. (12/12/13 Tr. p. 33). No evidence was adduced as to whether this zippered compartment was opened or closed. Also found on the floorboard were coffee filters. (12/12/13 Tr. p. 23). Trooper Jackson never determined who owned the cooler or its contents. (12/12/13 Tr. p. 53). Mr. Brock denied knowledge of the cooler. (12/12/13 Tr. p. 54).

After the dog hit on the vehicle, Trooper Jackson opened the passenger door and saw coffee filters on the floorboard. (12/12/13 Tr. p. 27). He then testified that, "When I got closer, I then detected a chemical odor ... a very strong chemical indicative of a meth lab." (12/12/13 Tr. pgs. 27-28). Then, "When I was able to view closer, I observed a vapor or cloud emitting from that [bag]." (12/12/13 Tr. p. 28). He never clarified how close he had to be to detect those odors. Based upon those observations, he "verified and was pretty sure what I had on my hands." (12/12/13 Tr. p. 28). He then advised the other officers to put Mr. Brock and Mr. Abbott face down in handcuffs. (12/12/13 Tr. p. 28). On the videotape of the stop, however, Trooper Jackson is heard asking Mr. Brock and Mr. Abbott whether or not the lab was "active". Trooper Jackson wouldn't need to ask Mr. Brock that if he could smell the vapors.

Also, Agent Doug Sturm of the Parkersburg Narcotics Task Force testified that this particular chemical reaction "was stopped for one reason or another" (12/12/13 Tr. p. 98) and that he couldn't tell when it was started or stopped. (12/12/13 Tr. p. 100). This testimony is more consistent with Trooper Jackson's need to ask Mr. Brock and Mr. Abbott if the lab was "active". If the chemical reaction was ongoing at the time of the bottle's discovery, there would be no need to ask such a question.

Four of the items seized from the vehicle were submitted to the West Virginia State Police Lab. (12/12/13 Tr. p. 72). They were:

1. Item 1.1 were two plastic bags containing powder in chunks and coffee filters each containing white and off-white chunks weighing approximately 12 grams. At least some of these items tested positive for methamphetamine.
2. Item 2.1 was a liquid but not enough was submitted to allow testing.
3. Item 2.2 was a powder residue which contained methamphetamine.
4. Item 2.3 were chunks and powder residue that contained no methamphetamine. (12/12/13 Tr. pgs. 76-77).

### SUMMARY OF ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING THE PETITIONER'S MOTION TO DISMISS AS BOTH COUNTS ONE AND TWO EACH ATTEMPT TO CHARGE THE DEFENDANT WITH TWO CRIMES IN VIOLATION OF RULE 8 THE OF WVRCrP AND PETITIONER'S CONVICTIONS THEREON SHOULD BE REVERSED.

Despite being in the same statute, Operating a Clandestine Drug Laboratory is an offense separate and apart from the crime of Attempting to Operate a Clandestine Drug Laboratory. Therefore, a Conspiracy to commit one of those crimes is an offense separate and apart from a Conspiracy to commit the other. Nevertheless, both the crime of Operating a Lab and the crime of Attempting to Operate a Lab were charged in Count One. The crimes of Conspiracy to Operate a Lab and Conspiracy to Attempt to Operate a Lab were charged in Count Two.

Rule 8 of the WVRCrP requires that all offenses be charged in a separate count for each offense. The instant indictment violates that rule and the indictment should have been dismissed. Nevertheless, the State proceeded to trial on it, over Petitioner's objection, and the Petitioner was convicted of two non-existent crimes. Since jeopardy attached to the indictment, Petitioner's convictions should be reversed.

II. THE TRIAL COURT ERRED BY FAILING TO GIVE THE ENTIRETY OF PETITIONER'S PROPOSED INSTRUCTION NO. 1.

Petitioner's Instruction No. 1 was an accurate and complete statement of the law. It fully and fairly instructed the jury regarding their duty to return a verdict of not guilty if they had a

reasonable doubt as to whether the Petitioner had knowledge of the presence of drugs in the car or whether he exercised dominion and control over them. The portions of the instruction which the lower court failed to give were not adequately covered by other instructions. The instruction involved two very important elements of the crimes charged in Count One and the lower court's refusal to give it impaired Petitioner's ability to present an effective defense.

III. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS WHERE THE INITIAL STOP OF THE VEHICLE WAS UNLAWFUL AND PRETEXTUAL AND THE POLICE LACKED PROBABLE CAUSE TO SEARCH THE VEHICLE IN THE POSSESSION AND CONTROL OF THE PETITIONER.

The vehicle which Petitioner was driving was stopped on a pretext for offenses not committed in the trooper's presence. The lower court acknowledged that the officers did not have probable cause to search the vehicle until the canine indicated on the passenger side of the vehicle. However, the canine sniff constituted a search in and of itself. Therefore, the officers lacked probable cause to use the canine to search the vehicle and said search was illegal. Accordingly, all items seized as a result of the search should have been suppressed.

Moreover, the search exceeded the level of intrusion necessary to confirm or dispel the officers' concerns about the purpose of the stop. The only justification given for the stop was minor traffic violations and the possibility of an impaired driver. However, upon stopping, questioning and observing Petitioner, Trooper Jackson became aware quickly that Petitioner was not impaired.

IV. THE EVIDENCE ADDUCED AT TRIAL, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, WAS MANIFESTLY INADEQUATE TO CONVINCING IMPARTIAL MINDS OF THE GUILT OF THE PETITIONER BEYOND A REASONABLE DOUBT.

Petitioner was driving a borrowed car in which drugs were found during a search of it. The State offered no evidence to establish that Petitioner had knowledge of the presence of drugs in the car or that he exercised dominion and control over them.

Even the officers on the scene did not notice any chemical odors emanating from the car as they stood right beside it or when each occupant opened their separate doors to exit the vehicle. Neither occupant admitted to knowledge of any drugs in the car.

V. THE TRIAL COURT ERRED BY ALLOWING AGENT STURM TO TESTIFY AS TO THE DANGERS AND EXPLOSIVENESS OF A METH LAB AS SAID TESTIMONY WAS IRRELEVANT AND ITS PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

The testimony of Agent Sturm regarding the dangers and explosiveness of meth labs was irrelevant to any matter of consequence in the trial. Its only purpose could be to inflame the jurors and alert them to the danger posed by the Petitioner to the public-at-large, of which each juror is a member. The evidence had little, if any, probative value, but had great danger of prejudicial effect. To say the least, the State's case against the Petitioner was weak, which increased the risk that such inflammatory evidence could have underly influenced the jury against Petitioner.

STATEMENT REGARDING ORAL  
ARGUMENT AND DECISION

Petitioner believes that oral argument is necessary under Rule 20 as the case involves a question of first impression in Assignment of Error I and a constitutional question regarding the validity of a court ruling in Assignment of Error III.

## ARGUMENT

1. THE TRIAL COURT ERRED BY DENYING THE PETITIONER'S MOTION TO DISMISS AS BOTH COUNTS ONE AND TWO EACH ATTEMPT TO CHARGE THE DEFENDANT WITH TWO CRIMES IN VIOLATION OF RULE 8 OF THE WVRCrP. JEOPARDY HAS ATTACHED ON THE INDICTMENT AND PETITIONER'S CONVICTIONS THEREON SHOULD BE REVERSED.

The standard of review on a Motion to Dismiss an indictment is *de novo*.

Count One of the Indictment purports to charge the Petitioner with "the offense of Operating or Attempting to Operate a Clandestine Drug Laboratory" under W.Va. Code §60A-4-411. Count Two purports to charge the Petitioner with "the offense of Conspiracy to Commit Operating or Attempting to Operate a Clandestine Laboratory" under W.Va. Codes §§60A-4-411 and 61-10-31.

W.Va. Code §60A-4-411 provides, in relevant part:

"Any person who operates or attempts to operate a clandestine drug laboratory is guilty of a felony....."

Petitioner contends, therefore, that W.Va. Code §60A-4-411, by use of the disjunctive "or", creates two distinct offenses with the first being Operating a Clandestine Drug Laboratory and the second being Attempting to Operate a Clandestine Drug Laboratory. By implication, a conspiracy to commit each of these crimes would also constitute two distinct offenses. Petitioner's contention is supported by both case law precedent and basic rules of statutory construction.

In State v. Coulter, 288 S.E. 2d 819 (W.Va. 1982), this Court had the opportunity to review the provisions of former W.Va. Code 61-2-12, making robbery and attempted robbery separate crimes of equal degree and carrying the same penalty.

At that time, W.Va. Code 61-2-12, provided:

"If any person commit, or attempt to commit robbery....he shall be guilty of a felony....."

In Coulter, the Defendant was convicted of attempted robbery. He appealed on the ground that he had not successfully completed the robbery by actually taking anything from the victim. This Court upheld his conviction, stating:

“In this case the appellant attempted to steal Mrs. Greathouse’s pocketbook by grabbing and pulling on it and when he was unsuccessful in his attempt, knocked her to the ground. Unquestionably, the appellant used force in his attempt to take the pocketbook. The fact that he was unsuccessful is irrelevant because the attempt to commit robbery is embraced in the statute and is a crime in itself.”

Therefore, the Court acknowledged that former W.Va. Code §61-2-12, by use of the disjunctive “or”, established two separate crimes, those of robbery and attempted robbery.

The current version of W. Va. Code §61-2-12, without the use of commas, provides:

(a) “Any person who commits or attempts to commit robbery...” and then proceeds to define the various degrees of robbery.

This Court has likewise had the chance to discuss the language of the current §61-2-12. In State v. Panell, 225 W.Va. 743, 696 S.E. 2d 45 (2010), the Defendant again appealed on the ground he did not complete the robbery. This Court again upheld his conviction, stating:

“Fact that no money was taken from victim did not require reversal of defendants’ convictions for first degree robbery...robbery statute under which defendants were convicted included both robbery and attempt to commit robbery.”

While the current version of W.Va. Code §61-2-12, only defines the varying degrees of robbery, this Court recognized that the use of the word "or" means that robbery can be committed either by actually robbing someone or by attempting to rob them.

This Court's rulings in both Coulter and Panell are wholly consistent with basic rules of statutory construction which should now be used to hold that W.Va. Code §60A-4-411 established the separate crimes of Operating a Clandestine Drug Laboratory and Attempting to Operate a Clandestine Drug Laboratory.

"A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Evans v. Evans, 639 S.E. 2d 828 (W.Va. 2006)

Petitioner contends that W.Va. Code §60A-4-411 clearly and unambiguously contemplates two separate offenses, particularly given the use of the disjunctive "or" between "operates or attempts to operate..." Therefore, the legislative intent to create two separate offenses should be given full force and effect by this Court.

Importantly, the same result is reached even if this Court finds ambiguity in the statute as "it is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning." Evans, Id.

To hold that W.Va. Code §60A-4-411 defines only one offense and, therefore, that each count of the indictment herein charges only one offense, would render both the word "or" and the clause "or attempts to operate" meaningless, synonymous, redundant and surplusage. Such a holding would equate them with "operates" and vice-versa, thereby violating the above rules of statutory construction.

The inclusion of the clause "or attempts to operate" also evinces a clear Legislative intent to elevate the crime of "Attempting to Operate" to be on a par with Operating and removes it from the provisions of the general attempt statute set forth in W.Va. Code §61-11-8.

Finally, W.Va. Code §60A-4-411 is a penal statute which "must be strictly construed against the State and in favor of the defendant." State v. Stone, 229 W.Va. 271, 728 S.E. 2d 155 (W.Va. 2012).

Allowing this indictment to stand permits the State to advance to trial on alternative crimes set forth in a single count and further allows them to pick which one the evidence best suits at the instruction stage, thereby forcing the Defendant to guess throughout the trial at which charge will be submitted to the jury. While the State is generally permitted to advance alternative theories, Rule 8 of the WVRcP requires that they do so by separate counts.

Rule 8 provides, in relevant part, that:

"All such offenses upon which the attorney for the state elects to proceed shall be prosecuted by separate counts in a single prosecution....."

"It is well established that the word "shall" in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Evans v. Evans, supra.

Petitioner assumes the same rule applies when interpreting the Court Rules.

The evidence in this case illustrates the prejudice to the Petitioner of allowing this Indictment to stand. It is pretty clear from the facts that 1) the State had no evidence that the Petitioner actually participated in the manufacturing of any methamphetamine and 2) the process of manufacturing was stopped before meth was produced. Had the indictment been drafted correctly, there would have been separate counts for Operating a Lab and Attempting to Operate a Lab (plus separate conspiracy counts). At the close of the State's evidence, the Petitioner could theoretically have obtained a judgment of

acquittal on individual counts. He was precluded from doing so by the joinder of offenses in Counts One and Two as the evidence might fit one of the offenses per count but not the other.

The same infirmity applies to Count Two, W.Va. Code §61-10-31, the conspiracy statute, provides:

It shall be unlawful for two or more persons to conspire (1) to commit any offense against the State....

Any person who violates the provisions of this section by conspiracy to commit an offense against the State which is a felony.... shall be guilty of a felony....

Again, the conspiracy statute provides that a conspiracy to commit any offense is a crime in and of itself. Therefore, a Conspiracy to Operate a Clandestine Lab is a separate offense from that of Conspiracy to Attempt to Operate a Clandestine Lab and they should have been charged in separate counts.

Petitioner has not located a single case in this State dealing with an Indictment which charges multiple offenses in the same count with no remedy appearing in Rule 8. However, numerous other cases have required dismissal of the charging instrument for a violation of Rule 8 where jeopardy has attached, therefore, it seems a remedy is implied. In this particular case, Petitioner sought dismissal prior to trial but was denied relief. Such a dismissal would undoubtedly have been without prejudice. Petitioner contends that such a remedy is the minimum appropriate remedy to be applied here.

However, with full knowledge of the Petitioner's position on this matter prior to trial, the State chose not to obtain a superseding Indictment and proceeded to trial, thereby allowing jeopardy to attach to this Indictment.

"One is in jeopardy when he has been placed on trial on a valid indictment before a court of competent jurisdiction, has been arraigned, has pleaded and a jury has been impaneled and sworn." Syl. Pt. 1, Adkins v. Leverette, 164 W.Va. 377, 264 S.E. 2d 154 (1980).

This Court has previously held that:

“Trial court’s dismissal of indictment for violation of compulsory joinder rules had nothing to do with indictment being bad or its sufficiency, and state could not appeal dismissal, where there was no contention that indictment failed to contain all elements of offense charged, that it did not sufficiently apprise defendant of what he was prepared to meet, or that it failed to contain sufficient accurate information to permit plea of former acquittal or conviction. State ex rel Forbes v. Canady, 197 W.Va. 37, 475 S.E. 2d 37 (1996).

The same is true here. The Indictment is not under attack for any of those reasons. It is only under the compulsory joinder rule.

“The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution [and Article III, Section 5 of the West Virginia Constitution] consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” State v. Minigh, 224 W.Va. 112, 680 S.E. 2d 127 (2009).

The Petitioner was essentially convicted of four felonies and sentenced on two. He was granted probation but has already begun serving his period of probation and is thus subject to a deprivation of his full liberty interests. A subsequent prosecution would subject him to further convictions and punishments for the same offenses.

“Rules of Criminal Procedure compels prosecuting attorney to charge in the same charging document all offenses based on same act or transaction...whether felonies, misdemeanors or both, provided that offenses

occurred in same jurisdiction, and prosecuting attorney knew or should have known of all the offenses, or had an opportunity to present all offenses prior to time that jeopardy attaches in any one of these offenses.” State ex rel State v. Hill, 201 W.Va. 95, 591 S.E. 2d 765 (1997).

The same rule requires that all offenses be charged in separate counts. Clearly all of the other requirements of the rule are met here and the prosecutor certainly had knowledge of Petitioner’s arguments relating to the indictment. Nevertheless, he permitted the case to go to trial.

“In the event the state fails to comply with the mandatory joinder provisions of [Rule 8], and all of the elements requiring mandatory joinder are extant, the charging document addressing any subsequent offenses must be dismissed.” State v. Jenkins, 204 W.Va. 347, 512 S.E. 2d 860 (1998).

This case is different in that there is no subsequent charging document. However, there would be if this Indictment is dismissed after jeopardy attached on this Indictment. Moreover, the prosecutor had every opportunity to avoid this situation. With full knowledge of the law and facts, the State chose to proceed to trial. By failing to obtain a superseding indictment, they knowingly put off to another day the decision whether they would have such a new indictment after trial and appeal.

However,

“...the procedural joinder rule is intended to prevent harassment by the prosecution; it is not intended to afford defendant with a procedural expedient to avoid prosecution.” State v. Johnson, 197 W.Va. 575, 476 S.E. 2d 522 (1996).

The Petitioner here did not seek to avoid prosecution. He raised this matter pre-trial when the State could have fixed the problem and before jeopardy attached. This Court made it very clear to all involved in State ex rel Blaney v. Reed, 215 W.Va. 220,

599 S.E. 2d 643 (2004), that if jeopardy has not attached, the State can proceed to further prosecution on a new indictment. The State chose to run the risk of proceeding to trial and they should be prevented from harassing the Petitioner with a subsequent indictment after appeal.

II. THE TRIAL COURT ERRED BY FAILING TO GIVE THE ENTIRETY OF DEFENDANT'S PROPOSED INSTRUCTION NO. 1.

Defendant's Proposed Jury Instruction No. 1, stated:

"In West Virginia, mere physical presence on premises in which controlled substance is found does not give rise to a presumption of possession of a controlled substance, but is evidence to be considered along with other evidence demonstrating conscious dominion over the controlled substance. In order to sustain a conviction for assembling any chemicals or equipment for the purpose of manufacturing methamphetamine as charged in Count One of the Indictment, the State must prove beyond a reasonable doubt that the Defendant, Rick Brock, had actual or constructive possession over the chemicals and/or equipment.

In order to establish constructive possession where the Defendant, Rick Brock, was present in a vehicle wherein such materials were found, the State must prove beyond a reasonable doubt that the Defendant, Rick Brock, had knowledge of the presence of the chemicals and/or equipment to be used for the purposes of manufacturing methamphetamine and that such items were subject to the Defendant's dominion and control.

Therefore, if the jury, and each member of the jury, has a reasonable doubt as to whether the Defendant, Rick Brock, had knowledge of the presence of the chemicals and/or equipment to be used for the purpose of manufacturing

methamphetamine, you should find the Defendant, Rick Brock, not guilty of Operating or Attempting to Operate a Clandestine Drug Laboratory.

In addition, if the jury, and each member of the jury, has a reasonable doubt as to whether the Defendant, Rick Brock, exercised dominion and control over the chemicals and/or equipment, then you should find the Defendant, Rick Brock, not guilty. State v. Cummings, 647 S.E. 2d 869 (W.Va. 2007).

The Court read paragraphs 1 and 2 of Instruction No. 1. Petitioner contends it was error not to read it in its entirety.

“As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is de novo.” Syl. Pt. 1, State v. Hindale, 200 W.Va. 280, 489 S.E. 2d 257 (1996).

“As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” State v. McGuire, 490 S.E. 2d 912 (W.Va. 1997).

With respect to an erroneous decision by a trial court to refuse to give a particular instruction, we have established specific guidelines to be used in determining whether such a ruling constitutes reversible error. A trial court’s refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant’s ability to effectively present a given defense.” Kessel v.

Leavitt, 204 W.Va. 95, 511 S.E. 2d 720 (1998);  
State v. Wade 200 W.Va. 637, 646, 490 S.E. 2d  
724, 733 (1994).

First, the instruction is a correct statement of the law. In State v. Cummings, 647 S.E. 2d 869 (2007) this Court clearly held:

“In order to establish constructive possession where the defendant is present in a vehicle wherein such materials are found, the State must prove beyond a reasonable doubt that the defendant had knowledge of the presence of the chemicals and/or equipment to be used for the purposes of manufacturing methamphetamine and that such items were subject to the defendant’ dominion and control.”

Cummings essentially makes knowledge of the presence of the chemicals/equipment plus dominion and control over the drug elements of the crime, under circumstances such as those present here, mandatory.

The evidence established merely that the Petitioner was in a vehicle in which chemicals/equipment were found. Therefore, the State assumed the burden of proving knowledge and dominion. The proposed instruction merely informs the jury of this burden and, more importantly, what to do if the State fails to meet its burden of proof on the particular issues of knowledge and dominion. If they fail to meet that burden on either one of those elements, a defendant is entitled to an acquittal. The jury should be told that. One cannot logically assume the jury knows what they are supposed to do without telling them. Otherwise, instructions would not be necessary.

Second, paragraphs 3 and 4 are not substantially covered by other instructions. As a whole, the instructions adequately define the statutory elements of the crimes charged (except that it includes two crimes for each count) on appendix pages 25-27. However, those elements do not include knowledge and dominion. Petitioner notes that each of those instructions specifically tell the jury under what circumstances they should find the defendant guilty and that they should find the defendant not guilty if they feel

the State has not met its burden on any of the elements enumerated in those instructions.

The State has exactly the same burden of proof on the elements of 1) knowledge, and 2) dominion and control. Nevertheless, the lower court treated those elements differently by failing to similarly instruct the jury that the defendant should be acquitted if the State failed to meet its burden on those elements. This disparate treatment of equally necessary elements of proof is arbitrary and an abuse of discretion. A defendant would be seriously impaired in presenting a defense if the jury was not told that a failure by the State to prove the statutory elements of a crime should result in an acquittal. That is why the instruction is given. A defendant is equally impaired by the failure of the court to fully instruct the jury as to the consequences of the State's failure to prove knowledge and dominion.

III. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS WHERE THE POLICE LACKED PROBABLE CAUSE TO SEARCH THE VEHICLE IN THE POSSESSION AND CONTROL OF THE DEFENDANT.

During the pre-trial hearing on the Motion to Suppress, the lower court ruled:

"At that point the officer did not have the right to search the vehicle, but they were entitled to a reasonable delay to obtain the narcotic sniffing dog. The dog arrived fairly promptly after the stop and once a hit was made on the vehicle by the drug dog, then probable cause at that point was established for the search of the vehicle. Therefore, it is a legal search and the motion to suppress would be denied."

Petitioner contends that the lower court erred in two respects. First, the lower court did not correctly characterize the use of the dog as an aid to establish probable cause for a search. The actions of the dog constituted a search in and of themselves for which the lower court admitted there was no probable cause. Second, the police are not

automatically entitled to a delay in the traffic stop for the purpose of bringing a dog to search the vehicle.

In Florida v. Jardines, 133 S.Ct. 1409, 185 L. Ed 2d 495, 81 USLW 4209 (U.S. 2013), the United States Supreme Court expressly held:

“The government’s use of trained police dogs to investigate the home and its immediate surroundings is a search within the meaning of the Fourth Amendment...”

Further, the Court stated:

“Since the officer’s investigation took place in a constitutionally protected area, we turn to the question of whether it was accomplished through an unlicensed physical intrusion”

In other words, the question of where the search took place was separate and apart from the question of whether a dog-sniff itself constitutes a search.

Regardless, the search here also took place in a constitutionally protected area. This Court has held that an automobile is likewise considered a constitutionally protected area.

“Searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution – subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that courts imperative.

The burden rests on the State to show by a preponderance of the evidence that the warrantless search falls within an authorized exception.

In order to come within the automobile exception which authorizes a warrantless search, the police must initially have probable cause to believe that the automobile contains contraband or evidence of a crime. Second there must be exigent circumstances which prevent the obtaining of a search warrant" State v. Meadows, 170 W.Va. 191, 292 S.E. 2d 50 (1982).

As agreed to by the lower court, the officers here lacked probable cause to search the vehicle. The information known to them at the time can be summarized as follows:

1. The vehicle was twice seen at a home on which drug surveillance was being done and one of the occupants went into the house.
2. That occupant came out of the house and got back in the car.
3. Detective Woodyard observed minor traffic violations while following the vehicle.
4. Trooper Jackson did not observe any traffic violations.
5. The Petitioner stopped immediately when signaled to do so.
6. The Petitioner could not immediately provide identification but did so in approximately six (6) minutes.
7. The Petitioner was nervous.

However, we also know that:

1. Trooper Jackson observed no illegal activity.
2. While at the driver's side door, Trooper Jackson did not notice anything unusual in the vehicle.
3. While at the driver's side door, Trooper Jackson detected no chemical odors.
4. The other Trooper did not detect any chemical odor even when Mr. Abbott exited the passenger side of the vehicle.
5. Trooper Jackson admits his probable cause was based solely on the information received by Captain Woodyard, traffic violations and Petitioner's nervousness.

6. Trooper Jackson observed no signs of impairment from Petitioner and conducted no field sobriety tests.
7. Petitioner and Mr. Abbott were detained and not free to leave before the canine unit arrived.
8. There was no consent to search the vehicle.

This case is fairly similar to State v. Moore, 165 W.Va. 837, 272 S.E. 2d 804 (1980). In Moore, the officer pulled a vehicle over for the tail lights not operating. As he was following him he noticed the driver made a "furtive" gesture. The officer approached the driver's side of the vehicle and shined his flashlight inside, noting two occupants and a brown paper bag partially protruding from under the front seat on the passenger side. At the request of the officer, the driver produced his license and the officer remembers the name "Moore" from a drug-related arrest two and a half years earlier. The officer then walked around to the passenger side of the vehicle and asked the passenger to step outside, which he did. The trooper reached into the vehicle and seized the paper bag and opened it. Inside he found marijuana. This Court ruled that the officer lacked probable cause to search the vehicle, stating:

"Analyzing the instant case under this subcategory of the Carroll doctrine, we recognize the initial stop of the vehicle for a missing tail light was lawful. Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1931, 59 L.Ed.2d 660 (1979). Next, we must consider whether the conduct and activities observed by the officer before and after the stop constituted probable cause to justify the seizure of the paper bag. The officer stated that after he followed the vehicle a short distance he turned on his emergency light and noticed that the passenger apparently leaned forward. Since the officer was still in his vehicle, he was not able to observe what, if anything, the passenger was accomplishing by this motion.

A further circumstance was when the driver showed his driver's license with the surname

“Moore,” this triggered a recollection by the officer that a person with a similar last name had been arrested on a drug-related charge two and one-half years earlier. Finally, the officer shined his light into the vehicle and observed a portion of a brown paper bag protruding from beneath the front seat on the passenger side. For reasons discussed below, we do not believe that these events constituted probable cause to justify the police officer’s seizure and search of the paper bag.”

In this case, we likewise have a misdemeanor traffic violation. However, it was not observed by the arresting officer or committed in his presence, making any arrest by him for that offense unlawful. We do not have even so much as a furtive gesture. Although the Petitioner acted nervous, Trooper Jackson testified that people usually act nervous when they are stopped by law enforcement.

Moreover, neither Trooper Jackson nor his partner observed anything suspect when they approached the car. No paper bag, no odor of chemicals, nothing of any note which contributed at all towards probable cause.

Petitioner’s temporary inability to produce identification did not play into Trooper Jackson’s probable cause determination but it is as innocuous as the officer’s recollection of the name “Moore” in State v. Moore, Id.

The State will undoubtedly rely on the fact that the Petitioner was momentarily present at a house being watched by Captain Woodyard. However, there was no testimony that Petitioner was identified as a person who went into the house or that law enforcement had anything more than a vague suspicion that drugs might have been purchased there.

In Moore, this Court also stated:

“The United States Supreme Court concluded in Sibron v. New York, 3392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), that the fact defendant had been observed by a police officer over an eight-hour period talking to known

narcotic addicts did not furnish probable cause for the search of his person.”

Moreover, the initial stop of the vehicle was a mere pretext and was purportedly based solely on Captain Woodyard’s observation of very minor traffic violations. However, Captain Woodyard did not stop the vehicle at the time of those violations. He passed them on to Trooper Jackson who admits that he did not observe any traffic violations or suspect driving during the time he followed the vehicle.

In State v. Meadows, 170 W.Va. 191, 292 S.E. 2d 50 (1982), the Defendant was observed by officers crossing the center line. After a vehicle-to-vehicle conversation between the officers and the Defendant at a stop light where no incriminatory remarks were made, the officers pulled the vehicle over.

This Court stated:

“Our facts do not demonstrate any probable cause for the police to stop Higginbotham’s car. The car may have crossed the center line, but was not stopped then. The officers testified that they would not have stopped the car, but for the conversation at the traffic intersection. There were no words spoken nor actions described, that amount to probable cause for any official reaction except, perhaps, dispensation of directions and advice. Having found the initial stop and search illegal, the search warrant based upon the illegal seizure was also illegal. See State v. Stone, W.Va. 268 S.E. 2d 50 (1980).”

Petitioner acknowledges that probable cause is no longer the standard for stopping a vehicle. However, if a violation which the police ignored should not be considered in a probable cause determination, it likewise should not be considered in reasonably articulable suspicion evaluation.

Finally,

“The Supreme Court in Florida v. Royer, 460 U.S. 491 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983) noted that although the intrusion

permitted varies with the facts and circumstances of each case, "[t]his much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. [Citations omitted.]" Terry also required the governmental interest justifying the particular intrusion to be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. [Footnote omitted.]" 392 U.S. at 21, 88 S.Ct. at 1880." Hill v. Cline, 193 W.Va. 436, 457 S.E. 2d 113 (1995).

The only legal justification offered for the stop of Petitioner's vehicle was the traffic violations and the possibility of impaired driving. However, Trooper Jackson wrote no citation for any traffic offense and observed no signs of impairment from the Petitioner. Therefore, his suspicions of impaired driving were dispelled almost immediately. That was the purpose of the stop. While Petitioner concedes that he could proceed to obtain identification, neither that or any other act of Petitioner or the passenger led to probable cause to search the vehicle.

Needless to say, detaining the Petitioner while obtaining a canine unit to search the vehicle was not "the least intrusive means reasonably available to verify or dispel the officers suspicion in a short period of time".

In summary, nothing arose during the traffic stop to suggest that it was "probable" that a search of the car would turn up evidence of a crime.

IV. THE EVIDENCE ADDUCED AT TRIAL, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, WAS MANIFESTLY INADEQUATE TO CONVINCe IMPARTIAL MINDS OF THE GUILT OF THE PETITIONER BEYOND A REASONABLE DOUBT.

“In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilty on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done. State v. Cummings, 647 S.E. 2d 869 (2007).

This case is also very similar to Cummings. In Cummings, the Defendant was driving a borrowed vehicle. He was pulled over for speeding. A woman named Rachel Pritt was in the passenger seat and the Defendant’s wife, Amy Cummings, was seated in the back center of the vehicle. Eventually, the trooper ordered all occupants to exit the vehicle. He searched the Defendant and found methamphetamine. Trooper Cox ultimately searched the vehicle and found pseudoephedrine, six boxes of matches and syringes. Interestingly, the Defendant, Michael Cummings, was charged with Attempting to Operate a Clandestine Drug Lab and Conspiracy to Attempt to Operate. He was not charged with Operating a Lab. The Defendant, MC was convicted of both counts and he appealed, claiming insufficient evidence. This Court reversed, stating:

“The Fifth Circuit has recognized, however, that while [k]nowledge of the presence of contraband may ordinarily be inferred from the exercise of control over the vehicle in which it is concealed, [courts] also look for additional factors and circumstances evidencing a

consciousness of guilt on the part of the defendant.” *Garcia*, 917 F.2d at 1376-7, *citing United States v. Richardson*, 848 F.2d 509, 513 (5<sup>th</sup> Cir.1988).

This requirement of additional circumstances to justify such an inference was explained by the Tenth Circuit Court of Appeals in a case involving a conviction for possession of a methamphetamine making ingredient. In *United States v. Valadez-Gallegos*, 162 F.3d 1256 (10<sup>th</sup> Cir.1998), the Court explained the government’s burden to demonstrate constructive possession of the alleged contraband stating:

We may not uphold a conviction obtained by piling inference upon inference. An inference is reasonable only if the conclusion flows from logical and probabilistic reasoning. The evidence supporting the conviction must be substantial and do more than raise a suspicion of guilt...To prove constructive possession when there is joint occupancy of a vehicle, the government must present direct or circumstantial evidence to show some connection or nexus individually linking the defendant to the contraband. The government must present some evidence supporting at least a plausible inference that the defendant had knowledge of and access to the ...contraband. *Valadez-Gallegos*, 162 F.3d at 1262 (internal quotations and citations omitted).

We agree with the Tenth Circuit that a conviction arising from the possession of illegal contraband, here ingredients for the manufacturer of methamphetamine, requires the State to do more than pile inference upon inference. There must be some evidence indicating that the defendant actually or constructively possessed and assembled the methamphetamine ingredients. Accordingly, we now hold that in order to sustain a conviction for

violation of W.Va. Code §60A-4-411 (2003), by assembling any chemicals or equipment for the purpose of manufacturing methamphetamine, the State must prove beyond a reasonable doubt that the defendant had actual or constructive possession over the chemicals and/or equipment. In order to establish constructive possession where the defendant is present in a vehicle wherein such materials are found, the State must prove beyond a reasonable doubt that the defendant had knowledge of the presence of the chemicals and/or equipment to be used for the purposes of manufacturing methamphetamine and that such items were subject to the defendant's dominion and control.

Upon review of the evidence presented at Appellant's trial, we conclude that the State did not meet this burden in the instant matter. All of the State's case was presented through the testimony of one witness, Trooper Cox. There were no other witnesses. There was no forensic evidence (such as fingerprints on the cold medicine or matches). The State offered no evidence, other than that the cold medicine and matches which were discovered in the back seat of a vehicle driven by, but not owned or rented by, Appellant. The Appellant was not the only person in the vehicle. There were two other passengers either of whom may have owned some or all of the items. Neither was called by the State. There was no evidence presented

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that the defendant had purchased the items, either by introducing a receipt for the same containing his name or through the testimony of a person who may have sold the items to him. There was no evidence that the Appellant was even aware the items were in the vehicle prior to their discovery by Trooper Cox. There is simply

no evidence to support an inference of actual or constructive possession. Absent a finding of actual or constructive possession, a finding that the Appellant was assembling the materials for the purpose of manufacturing methamphetamine is therefore not plausible. Likewise, the State failed to prove actual or constructive possession of the materials by Appellant's alleged coconspirator, Amy Cummings. Absent evidence sufficient to meet the necessary elements of the crimes for which Appellant was charged, Appellant's convictions must be reversed.

As in Cummings, there was no evidence introduced in this case to prove that the Petitioner had knowledge of the presence of the chemicals to be used for the production of the meth or that he exercised control over it. There was no forensic evidence (such as fingerprints on the bottle or anything else) or even the attempt to obtain forensic evidence. The State again merely offered evidence that the Petitioner was in the vehicle with another person who may have owned and been wholly responsible for the presence of the items seized. There was no evidence the Petitioner purchased any of the items used. There was no evidence he was even aware of the presence of the items.

There was, however, evidence that Trooper Jackson was unable to detect any odor emitting from the car while he was standing at the driver's side door. If he could not smell it from that close proximity to Petitioner, it does not follow from "logical and probabilistic reasoning" that Petitioner could. Trooper Jackson's partner had the passenger exit the front passenger door but detected no chemical or other odor emanating from the car when he did. The cooler bag and its contents were found immediately in front of the front passenger seat and outside the area of immediate control by Petitioner.

Finally, there is a notable conflict in the evidence offered by the State. Trooper Jackson testified that when he opened the passenger side door, he could smell vapors from the car. As noted, however, he could not smell them from the driver's side nor did either trooper smell them when the passenger opened his door to get out. More

importantly, however, is Officer Sturm's testimony that this alleged cook had already been stopped and the reaction process terminated before it was seized. Under those circumstances, no vapors would be escaping at the time of its discovery. Officer Sturm could not state an opinion as to when the process was stopped so the evidence is just as susceptible to the interpretation that somebody else started the process before the Petitioner was in the car.

As in Cummings, "there is simply no evidence to support an inference of actual or constructive possession...Absent evidence sufficient to meet the necessary elements of the crimes for which Appellant was charged, Appellant's conviction must be reversed."

There is further no evidence of any agreement or discussion between the parties upon which to base a conspiracy conviction. Even in the light most favorable to the State, the best they have is that two men were riding in a car together where coffee filters, meth and a dormant lab were found. Even though an agreement may be inferred from the totality of the circumstances in any given case, there is no evidence in this particular case upon which to draw that inference.

This is a classic example of piling inference upon inference. The Petitioner was out late at night and, therefore, must have been up to no good. He went to a home under surveillance and, therefore, must have bought drugs. He didn't stay perfectly between the lines and, therefore, must be impaired. He was nervous when pulled over by the police and, therefore, must be engaged in criminal activity. He was in the same car as a small dormant meth lab and, therefore, must have known about it. He was driving the car and, therefore, must be in control of the contents of the car. He was with another person and, therefore, must have conspired with him. The problem with those inferences is that there was no proof of them. Therefore, Petitioner's convictions should be reversed.

V. THE TRIAL COURT ERRED BY ALLOWING AGENT STURM TO TESTIFY AS TO THE DANGERS OF A METH LAB AS SAID TESTIMONY WAS IRRELEVANT AND ITS PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

Douglas Sturm, a police officer with the City of Parkersburg, assigned to the Parkersburg Violent Crime and Narcotics Task Force, was permitted to testify as an expert witness in the area of awareness and detection of methamphetamine processing labs. Agent Sturm was not disclosed as a witness prior to trial and, over the objection of Petitioner, was permitted to testify as follows:

“The dangers are about – you had your own set of dangers with the red phosphorous method. You still have numerous dangers with the one-bottle method. The ammonia gas is extremely harmful. You have a substantially greater risk of fire or explosion with the one-bottle method. Lithium is extremely water reactive. Basically when you are taking the lithium from the battery, it will actually react with the moisture in the atmosphere. If it comes into contact with water, it will cause a fire or explosion.

The bottles themselves, if the bottle is degraded, because you are going to be building up pressure, the bottles can actually bust and explode. And a lot of the fumes of the ammonia gas is harmful to your lungs. That is the biggest, the risk of fire when the reaction is actually going on.” (Trial Tr. p. 88-89).

“So if you don’t burp it, it is called burping, or vent some of the pressure off, it is going to stop the reaction completely because it is going to drown itself out. It can’t do – it produced so much, it is going to stop itself because it doesn’t have any more room to go, or it could rupture the bottle, cause the explosion. That is basically where we are going.” (Trial Tr. p. 92).

Rule 401 WVRE, provides:

“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

Rule 402 WVRE, provides, in part:

“All relevant evidence is admissible evidence . . . Evidence which is not relevant is not admissible.”

Rule 403 WVRE, provides, in part:

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...”

Evidence as to the danger and explosiveness of methamphetamine labs did not tend to make the existence of any fact of consequence to the determination of the action more or less probable than it would have been without such evidence. Therefore, it was irrelevant and should not have been admitted. It was very prejudicial to the Petitioner’s case.

It is highly probable that evidence before the jury that the public-at-large, of which each jury is a member, is put at risk of explosion by meth labs was prejudicial to the Petitioner’s case. It injects into the trial the notion that the Petitioner presents a general risk of harm or danger to the public when that is not one of the issues to decide.

On the whole, the evidence presented created a relatively weak case for Petitioner’s guilt. Despite the paucity of evidence, the jury convicted him anyway. It is impossible to say exactly what “facts” the jury relied on, but it is reasonable to say that inflammatory testimony like that quoted above could tip the scales in favor of the State and against Petitioner.

CONCLUSION

For the reasons set forth above, the Petitioner moves the Court to reverse his convictions outright or reverse his convictions and grant him a new trial.

A handwritten signature in black ink, appearing to read "Eric K. Powell", written over a horizontal line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff/Respondent,

Wood County Circuit Court  
Case No.: 13-F-144

RICK BROCK,

Supreme Court Case No: 14-0200

Defendant/Petitioner

**CERTIFICATE OF SERVICE**

I, Eric K. Powell, hereby certify that on the 23rd day of June, 2014, I have caused to be served upon the parties hereto listed below, a true and accurate copy of the attached ***Petitioner's Brief*** and ***Appendix*** by sending the same by U.S. Postal Service on same date to all the parties listed below:

Mr. Rory Perry II, Clerk  
West Virginia Supreme Court of Appeals  
Room E-317, State Capitol  
1900 Kanawha Blvd., East  
Charleston, West Virginia 25305

State of West Virginia  
Office of the Attorney General  
**Attention Ms. Laura Young, Assistant Attorney General**  
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