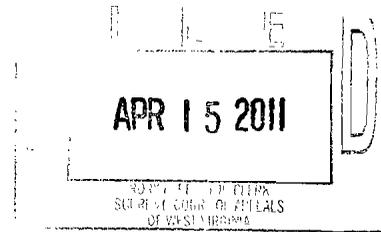


**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**



STATE OF WEST VIRGINIA, Plaintiff Below,

Respondent,

vs.) No. 11-0090 (Fayette County Circuit Court No. 10-F-1662)

SAMUEL D. SCARBRO, JR., Defendant Below,

Petitioner.

PETITIONER'S BRIEF

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**STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS**

**STATE OF WEST VIRGINIA,
Plaintiff Below,**

Respondent,

vs.

CASE NO.: 11-0090

**SAMUEL D. SCARBRO, JR.,
Defendant Below,**

Petitioner.

PETITIONER'S BRIEF

STATEMENT OF THE CASE

Petitioner (hereinafter sometimes referred to as Defendant) was indicted by the September 2010 term of the Fayette County Grand Jury for five individual counts of fraudulent use of an ATM access device, Indictment No. 10-F-166. Appendix 276. The Defendant stood trial on November 30, 2010. The jury returned a verdict of not guilty on Counts One, Two, Four and Five and guilty on Count Three of said indictment. Appendix 271. On January 14, 2011, the Defendant's application for probation was denied and Defendant was given a determinate sentence of two years in the West Virginia Penitentiary. Appendix 299.

STATEMENT OF FACTS

On or about January 5, 2010, one James Reid contacted Christine Lukach, Defendant's girlfriend, requesting transportation to go to the store. Appendix 164 and 181. This was not an unusual request of Mr. Reid. Appendix, *id.* Mr. Reid was previously the boyfriend of Christine Lukach and, in fact, had two children by Ms. Lukach. Appendix 162.

When Mr. Reid was transported around, it was not unusual for him to want to stop at multiple stores. Appendix 104, 164-165, 180-181. Mr. Reid did not have a driver's license.

Appendix 163.

On January 6, 2010, Mr. Reid contacted Ms. Lukach requesting transportation to the store. Mr. Scarbro and Ms. Lukach picked up Mr. Reid. Appendix 165. They drove to a nearby ATM machine so that Mr. Scarbro and Ms. Lukach could get a little cash to purchase some grocery items such as bread and milk. Appendix 166.

Apparently, just prior to their arrival at the ATM machine, one Earl Keith Withrow, Jr., had used his wife's ATM card to make a transaction. Appendix 81. Mr. Withrow, however, drove off without removing the ATM card. Appendix, *id.* Defendant, Ms. Lukach and Mr. Reid pulled up to the ATM machine. Mr. Scarbro, who was driving, noticed that the ATM machine revealed a message to the effect that, "Do you want to make another transaction?". Appendix 166 and 183. Defendant pressed the "No" button. Appendix, *id.* An ATM card then ejected. Appendix 166 and 183. Defendant threw that ATM card on the dash stating something to the effect that, "That's jail time. Don't mess with it." Appendix, *id.*

At this point, Defendant states that Mr. Reid grabbed the card stating that he would take care of it. Appendix 183. The parties then drove to approximately three stores where Mr. Reid purchased gas for Defendant's vehicle, cigarettes and beer. Appendix 167, 169, 184. The parties then ended up going to Wal-Mart where Ms. Lukach wanted to get some milk and bread. Appendix 170-171 and 187. Defendant and Ms. Lukach stayed together. He did not leave her side. Appendix 171. Ms. Lukach and Defendant parted from Mr. Reid and did not see Mr. Reid until they had gone back to the truck. Appendix, *id.* and 188. When they got back to the truck, Mr. Reid had three cartons of Marlboro cigarettes which cost about Fifty Dollars (\$50.00) each. Appendix 172 and 188.

At this point, Defendant testified that, "I told him -- I got suspicious and I asked him did he use that card. He said, 'No,' and I said, well, I didn't believe him, and so I took him home. I said, 'I'm done with you.', and that's the last dealings I've had with him." Appendix 188. Defendant then took Mr. Reid directly home. Appendix, *id.*

Defendant testified that he did not know that Mr. Reid was using the ATM card but got suspicious when he had three cartons of cigarettes after going into Wal-Mart. Appendix 187-189. A couple of days later, the State Police contacted Defendant's dad. The Defendant called the Trooper back and invited the Trooper to Defendant's house. Appendix 190. The Defendant cooperated with and spoke to the Trooper and has never changed his story. Appendix, *id.*

At trial, the State's primary witness was the said James Reid. Mr. Reid had already pled guilty to one count of fraudulent use of an ATM access device and one count of computer fraud. However, he had not yet been sentenced. Mr. Reid confirmed that when the three had pulled up to the ATM machine, another card came out of the machine which Defendant put on the dash of the vehicle. Appendix 108.

At this point, Mr. Reid began to testify substantially different from a prior statement he had given to the investigating officer, Trooper J. L. Milam. Mr. Reid's testimony went as follows:

Q Where did you go after you left the ATM machine?

A We went down to the Mountaineer Mart to get gas.

...

Q Well, what happened when you got to Mountaineer Mart?

A We pulled up there, and Mr. Scarbro put gas in the truck.
And he said, "Take that card and go ahead and get your cigarettes and your beer, Mr. Reid, and pay for the gas while you are in there."

Q Take what card?
A The card that was lying on the dash.
Q How did that card get to be on the dash?
A I reckon it's the one he threwed up on the dash.
Q What was the name on that card?
A Ms. Withrow.
...
Q And what happened with the beer and cigarettes you bought?
A I kept that.
...
Q And then where did you go?
A I believe we went up into Oak Hill, up there on Main Street somewhere, to one of them stores up there.
...
Q Alright. What did -- What was purchased there?
A Gas, I think, was the only thing purchased there.
...
Q And who went in and paid for that?
A I think Mr. Scarbro did.
Q Alright. And then after you left there, where did you go?
A We went to, I think Wal-Mart, over at Fayetteville.
...
Q What kind of conversations were being had?
A We were just talking, and they was saying they needed to go to Wal-Mart and go do some grocery shopping and all. Just the normal things.
Q And when you got to Wal-Mart, what happened?
A Me and Mr. Scarbro went in, and Christine came in behind us, and she went one way and he went behind her. And I'd asked on the way if I could get some cigarettes and, if she would do me the favor, I would get her a carton and pay her back when I go to working better. She said that would be fine. And I went to Aisle 15 and -- where you buy cigarettes, and got cigarettes. I got two cartons; I got her a carton and me a carton.
Q How did you pay for them?
A With the card.
Q Why did you use the card?
A Probably she didn't have enough cash on her or something. I don't know. Just they said that's -- Just use the card and pay me back like that.
Q Who told you that?
A Christine.

Q And who was present when she said that?

A Scarbro was there.

Appendix 109–113 (bolding added).

Without details, Mr. Reid, testified on direct examination that he gave a recorded statement to the police and that he pled guilty on two counts in front of the Honorable John W. Hatcher, Jr., Judge, but that there were no deals in regards to his testimony. He testified that he did sign Ms. Withrow's name, that he made a mistake and was ready to get this matter over with. Appendix 115–116.

On January 30, 2010, well before the Defendant's trial, James Reid gave a recorded statement to Trooper J. L. Milam. Appendix 285. During cross-examination, counsel for Defendant attempted to have a transcript of Mr. Reid's statement introduced into evidence. The eight-page document was marked as Defendant's Exhibit 2 for identification. Appendix, *id.*

In his statement, after being Mirandized, Mr. Reid maintained a theme of culpability that was very different than what he testified to during the Defendant's trial. During his prior statement to Trooper Milam, Mr. Reid insisted that he mistakenly thought he was using Christine Lukach's card for all of the purchases he had made that night. He never once stated that he knew it was Ms. Withrow's (the victim's) card nor did he ever inculcate the Defendant in the use of the victim's card. Mr. Reid told Trooper Milam that Christine Lukach had "threwed **her card** up with it on the dash ..." Appendix 287 (emphasis added). He admitted to using "the" credit card three times including One Stop, Mountaineer Mart and Wal-Mart. Appendix, *id.* Trooper Milam asked, "All this time you're under the impression that it was - - **From what you're telling me, you were under the impression it was your ex-girlfriends credit card, right?**" Mr. Reid responded, "Yes". Appendix 288 (emphasis added). Trooper Milam asked, "Did you ask her to

use that credit card?" Mr. Reid responded, "**I asked to use her credit card.**" Appendix, *id* (emphasis added). Trooper Milam persisted, "Now, when I talk to her, is she going to say that she gave you permission to use **her credit card** or?" Mr. Reid responded, "She should, I, I wouldn't see why she wouldn't." Appendix, *id* (emphasis added). Mr. Reid continued, "I mean, you know, like I told them, I said, you know, that's what I'm here for to get the facts straightened out, I don't want to carry it no further, don't want nothing else to happen. I feel bad about what happened. I, you know, I just soon get the restitution, and whatever we spent on this card, I'd just soon pay the lady." Appendix 288–89.

Trooper Milam continued on his line of questioning. "Did you think it was odd that, that **she was letting you use this card** all over the neighborhood?" Mr. Reid stated, "Well, not really, because **I had borrowed money from her before** and I had paid her back ..." Appendix 290 (emphasis added). Mr. Reid went on to state that he had been known to use **her card** by himself. Appendix, *id* (emphasis added). Trooper Milam persisted, "Now, I know you only recall three times, but, but there's a total of six transactions made on the, the credit card. Do you think it's kind of odd that she would let you use it six different places?" Mr. Reid responded, "No, no not really, I mean honestly no." Appendix, *id*.

The story changed during Defendant's trial. There Mr. Reid insisted that Mr. Scarbro and Christine Lukach told him to use the Withrow card to make his purchases. Appendix 109. During his testimony he did not mention anything about being given permission to use Christine Lukach's card. When asked during direct-examination what he told the police, Mr. Reid stated, "Told them basically what we've spoke about here today. I told them about the credit card. And I come forth because Mr. Scarbro identified me in a picture, and I come forth to just try to

straighten the matter up.” Appendix 115.

During cross-examination, Mr. Withrow was handed a copy of the transcript of his statement that he gave to Trooper Milam, and Mr. Reid identified it as his statement. Appendix 122–123 (Defendant’s Exhibit 2 marked for identification). Mr. Reid then changed his story again during cross-examination and stated that, “When the [victim’s] card was throwed on the dash, I thought it was her [Christine Lukach’s] card that I was using.” Appendix 129. Up until that time Mr. Reid had not testified during the trial that he thought he was using Christine Lukach’s card. Further, Mr. Reid was asked, “Now, that wasn’t the truth, was it?” Mr. Reid responded, “Yes, sir.” Appendix, *id.*

Counsel next sought to lay a foundation regarding Mr. Reid’s plea transcript where counsel was referring to other versions of the facts given during Mr. Reid’s prior plea hearing. However, the Court shut down the attempt to get into the witness’ plea transcript for purposes of laying a foundation. Therefore, it was not offered. Appendix 130–134.

Lastly, counsel for Defendant attempted to introduce Defendant’s Exhibit 3, being the Information and Amended Information upon which Mr. Reid pled guilty. The Court ultimately denied Defendant’s Exhibits 1, 2 and 3 marked for identification being Mr. Reid’s Arrest Warrant, Mr. Reid’s prior statement to Trooper Milam and Mr. Reid’s Information upon which he pled guilty. Appendix 278, 285 and 294. The State’s objection to Defendant’s Exhibits 2 and 3 was relevance. Appendix 137.

As to Defendant’s Exhibit 1 marked for identification, the Court not only denied counsel the opportunity to lay a foundation but forced counsel to move for its admission without having laid a proper foundation. Appendix 121. It was denied without any cited reason. Appendix, *id.*

The State then interjected an objection of hearsay to Defendant's Exhibit 2 even though the declarant of the statement, Mr. Reid, was sitting on the witness stand. Appendix 138. Ultimately, in denying Defendant's Exhibits Nos. 2 and 3 (his prior Statement and Information), the Court stated, "**The Court feels that the relevant information about those statements has been elicited from this witness. It would unduly complicate the record and clutter the record up in this matter to have those admitted into evidence.**" Appendix 139–140 (bolding added). Mr. Reid's prior inconsistent statement consisted of eight (8) pages. Appendix 285. Mr. Reid's Information and Amended Information consisted of four (4) pages. Appendix 294.

Accordingly, the Court denied the request for admission of all three of Defendant's exhibits marked for identification.

The jury found Defendant not guilty on Counts One, Two, Four and Five of the charges of fraudulent use of an ATM access device. Appendix 271. The jury found the Defendant guilty of Count Three, involving the Wal-Mart incident, of fraudulent use of an ATM access device. Appendix *id.* The Wal-Mart purchase consisted of three cartons of cigarettes totaling \$136.37. Appendix 279.

Subsequently, the Court denied Defendant's application for probation and sentenced him to two (2) determinate years in the West Virginia Penitentiary. Appendix 279. Defendant was ordered to pay restitution to the victim in the amount of One Hundred Thirty-Six and 37/100 Dollars (\$136.37). Appendix, *id.*

ASSIGNMENTS OF ERROR

1. **The Court abused its discretion and committed reversible error when it refused to admit an eight-page, typed prior statement of the State's key witness that substantially contradicted his trial testimony on the grounds that the witness had already testified to the relevant**

information in the statement and that such statement would unduly complicate and clutter the record.

2. **The Court erred by failing to give a cautionary instruction to the jury, pursuant to *State v. Caudill*, 170 W.Va. 74; 289 S.E. 2d 748 (1982), regarding the testimony of James Reid, the State's primary witness, who previously entered into a plea agreement with the State, including a charge of fraudulent use of an ATM access device.**
3. **The Court committed error by sentencing Defendant to a determinate sentence of two years in the West Virginia Penitentiary over a \$136.37 ATM card purchase that was not premeditated nor preplanned as such sentence violates Article 3, Section 5 of the West Virginia Constitution, is disproportionate and is cruel and unusual punishment.**

ISSUES PRESENTED AND ARGUMENT

ISSUE NO. 1

Whether the Court abused its discretion in refusing to admit a prior typed statement of the State's key witness that diametrically contradicted his trial testimony upon the grounds that the witness had already testified about the statement thereby making the introduction of such statement unnecessary and to admit it would unduly complicate and clutter the record.

In *State v. Blake*, 197 W.Va. 700; 478 S.E. 2d 550 (1996), this Court held: "A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are reviewed for an abuse of discretion." (Citation omitted.)

The credibility of the State's key witness, James Reid, was paramount in the trial against Defendant. In *State v. Graham*, 208 W.Va. 463; 541 S.E. 2d 341 (2000), this Court held:

Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is co-extensive with, and limited by, the material evidence given on direct examination. **The second is that a witness may also be cross-examined about**

matters affecting his credibility. The term “credibility” includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness’ character. The third rule is that the trial judge has discretion as to the extent of cross-examination.

Graham, supra quoting Syl. Pt. 4, *State v. Ritchey*, 171 W.Va. 342; 298 S.E. 2d 879 (1982) (emphasis added).

Regarding prior inconsistent statements and hence, the credibility of witnesses, the case of *State v. Blake, supra*, is controlling. In Syl. Pt. 1 of *Blake*, the Court held:

Three requirements must be satisfied before admission at trial of a prior inconsistent statement allegedly made by a witness: (1) The statement actually must be inconsistent, but there is no requirement that the statement be diametrically opposed; (2) If the statement comes in the form of extrinsic evidence as opposed to oral cross-examination of the witness to be impeached, the area of impeachment must pertain to a matter of sufficient relevancy and the explicit requirements of Rule 613(b) of the West Virginia Rules of Evidence – notice and an opportunity to explain or deny – must be met; and, finally, (3) The jury must be instructed that the evidence is admissible only to impeach the witness and not as evidence of a material fact.

Syl. Pt. 1, *Blake, supra*.

Applying the *Blake* factors to the prior inconsistent statement of James Reid which Defendant sought to introduce, there is no question that the prior statement was inconsistent. In his prior statement, Appendix 285, Mr. Reid testified continuously upon the theme that he thought he was using Christine Lukach’s card during every transaction (although failing to explain how he signed Cassie Withrow’s name to every transaction) and that he had mistakenly grabbed Ms. Lukach’s card that she somehow threw on the dashboard beside the Cassie Withrow card that he actually did pick up. On the other hand, during his trial testimony, Mr. Reid did not state one time during direct examination that he thought he was using Christine Lukach’s card. To the contrary, Mr. Reid testified that he knew he was using Cassie Withrow’s card and that

Defendant outright told him to use the card to go purchase gasoline and cigarettes. Appendix 109 and 115. He even testified that his statement to the police was “basically” the same as his testimony at the Defendant’s trial. Appendix 115. There is certainly no question that the two statements are diametrically opposed.

In addition, the other prior statement of James Reid given under oath during his plea hearing contradicted both his prior statement to Trooper Milam and his then current trial testimony. However, the Court shut down defense counsel’s opportunity to lay a foundation to even try to introduce the transcript of Mr. Reid’s plea bargain testimony. Appendix 133–134.

Secondly, the second prong of admission of a prior inconsistent statement under *Blake, supra*, is not applicable here given that the evidence was being brought in under oral cross-examination of the witness to be impeached. It was not being brought forth in the form of extrinsic evidence but rather during oral cross-examination. Nevertheless, Mr. Reid was given an opportunity to explain his prior statement and counsel for the State had previously, although briefly, examined him about his two prior statements during direct examination.

Finally, upon admission of the prior inconsistent statement, the jury should have been instructed that the evidence was being admitted only to impeach the witness and not as to evidence of a material fact.

The State objected to the admission of witness Reid’s prior inconsistent statements upon the grounds of relevancy and hearsay. Appendix 137–138. It is hard to imagine how the prior inconsistent statements of the State’s lead witness which seriously contradicted his direct examination testimony regarding the use of the victim’s lost ATM access card would not be relevant in this matter during Defendant’s trial. Further, even though this prior inconsistent

statement to Trooper Milam was not given under oath, it was being offered for impeachment purposes and was admissible under Rule 613 of the Rules of Evidence.

The Court, in denying the proffered evidence stated, **“The Court feels that the relevant information about those statements has been elicited from this witness. It would unduly complicate the record and clutter the record up in this matter to have those admitted into evidence.”** Appendix 139–140 (emphasis added).

The same rationale was given by the lower Court in *State v. Barnett*, 701 S.E 2d 460; 2010 W.Va. LEXIS 89 (2010). In *Barnett*, the Defendant sought to introduce a video taped interview containing a prior inconsistent statement of the State’s lead witness. Although the lower Court’s denial of the prior inconsistent statement did not appear to question the relevancy of it, the Court denied the statement upon the belief that once the witness had acknowledged his inconsistent statements, and once the Court ruled that the witness had, in fact, lied, it was not necessary to place the actual statements before the jury. This Court, however, reversed the lower Court in *Barnett* holding the prior inconsistent statement admissible.

This case is also not unlike the case of *State v. King*, 183 W.Va. 440; 396 S.E. 2d 402. In *King*, this Court held, “Clearly, this case presents an instance where a witness’ prior inconsistent statements do possess a unique advantage over her testimony during the trial and that it allowed the jury to decide the issues of the witness’ credibility on two occasions, both of which the jury was able to observe.” *Id*, 183 W.Va. at 446; 396 S.E. 2d at 409.

Further, the Court in *King* recognized that there was a split of authority on whether to admit a prior inconsistent statement if the witness unequivocally admitted the inconsistencies in a prior statement before extrinsic evidence of the statement had been offered. See *King, supra*,

183 W.Va. 444, 45; 396 S.E. 2d 406, 07.

The case *sub judis*, however, does not even fall within the “refusal to admit” category mentioned in *King* because Mr. Reid did not unequivocally admit inconsistencies in his prior statement during direct or cross-examination testimony. When speaking to Trooper Milam, Mr. Reid went on and on about how he thought he was using Christine Lukach’s card. Appendix 287–289. During his direct examination testimony at trial, he never mentioned anything about believing he was using Christine Lukach’s card. Appendix 102–116. Rather, he testified that he knew he was using the victim’s card but was told by Defendant and Christine Lukach to use the card to make purchases. Appendix 109 and 113. Clearly, the jury should have been given the opportunity to review Mr. Reid’s prior inconsistent statement to Trooper Milam and his prior inconsistent testimony of his guilty plea hearing.

ISSUE NO. 2

Whether the Court committed reversible error by failing to give a cautionary instruction to the jury regarding the testimony of James Reid who testified against Defendant following the Court’s acceptance of his guilty plea to fraudulent use of an ATM access device yet before he was sentenced.

In Syl. Pt. 3 of *State v. Caudill*, 170 W.Va. 74; 289 S.E. 2d 748, this Court held:

In a criminal trial an accomplice may testify as a witness on behalf of the state to having entered a plea of guilty to the crime charged against a defendant where such testimony is not for the purpose of proving the guilt of the defendant and is relevant to the issue of the witness–accomplice’s credibility. The failure by a trial judge to give a jury instruction so limiting such testimony is, however, reversible error.

In this case, James Reid entered a plea of guilty to one count of fraudulent use of an ATM access device which was the same ATM access device of which Defendant was charged with

using. Mr. Reid also pled guilty to one count of computer fraud. He was called as a witness for the state against the Defendant. He had not yet been sentenced. There was no limiting instruction given as to the weight and credibility the jury was to give such testimony. As stated in Syl. Pt. 3 of *State v. Caudill, supra*, this is reversible error.

ISSUE NO. 3

Whether Defendant's determinant sentence of two (2) years in the West Virginia Penitentiary for a \$136.37 purchase of cigarettes from an unplanned and unpremeditated use of an ATM card violates Article 3, Section 5 of the West Virginia Constitution as being cruel and unusual punishment and disproportionate to the crime purportedly committed.

“The principle of proportionality can be traced to the Magna Carte where it is stated, ‘[a] Free man shall not be [fined] for a trivial offense, except in accordance with the degree of the offense; and for a serious offense he shall be [fined] according to its gravity.’ (Citations omitted).” Footnote 4 of *Wanstreet v. Bordenkricher*, 166 W.Va. 523; 276 S.E. 2d 205 (1981).

“Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: ‘Penalties shall be proportioned to the character and degree of the offense.’” Syl. Pt. 5, *State v. Phillips*, 199 W.Va. 507; 485 S.E. 2d 676 (1997).

“There are two tests to determine whether a sentence is so disproportionate to a crime that it violates our Constitution. (Citation omitted) The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the Court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a

disproportionality challenge is guided by the objective test we spelled out in Syl. Pt. 5 of *Wanstreet v. Bordenkriher*, 166 W.Va. 523; 276 S.E. 2d 205 (1981).” *State v. Cooper*, 172 W.Va. 266; 304 S.E. 2d 851, 857 (1983).

Here, the defendant was taking another person to the store, went to an ATM machine for a completely legitimate transaction and without premeditation or consideration, another person’s ATM card comes out of the machine. Defendant maintains that he did not use the ATM card nor did he know that Mr. Reid was using it. Regardless, the jury found the Defendant guilty of a \$136.37 purchase of cigarettes at a Wal-Mart store.

Defendant has three prior misdemeanor charges, two of which involve domestic issues. If the crime had been premeditated, planned or based upon some well-thought-out conspiracy¹, perhaps the Court’s two-year determinative sentence would be appropriate. However, with no premeditation, no planning and based upon a mere \$136.37 purchase of cigarettes, it should shock the conscience of the Court that this Defendant was sentenced to the West Virginia Penitentiary for two solid years.

CONCLUSION

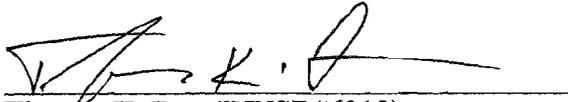
Accordingly, your defendant, Samuel D. Scarbro, Jr., petitions this Court to accept his appeal and find that the lower Court committed reversible error by failing to give the jury an opportunity to review the State’s lead witness’ prior inconsistent statements which contained overwhelming contradictions to what he had just testified to under oath before the jury. The prior statements significantly question the witness’ credibility.

¹The Defendant was initially charged with conspiracy to commit a felony, but the Grand Jury did not indict him on that charge.

Mr. Scarbro further petitions this Court to find that the lower Court committed reversible error by failing to provide a limiting instruction to the jury when the State called as its main witness one whom the Defendant purportedly aided and abetted and elicited testimony from the witness of his guilty plea of the same crime as charged against Defendant.

Lastly, Mr. Scarbro petitions this Court to find that his determinant sentence of two years over a \$136.37 purchase of cigarettes violates the proportionality principles found in the West Virginia and United States Constitutions. The relief sought is that this matter be reversed and remanded for a new trial on Count Three of the Indictment or otherwise remanded for resentencing.

Respectfully submitted,
SAMUEL D. SCARBRO, JR.
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**STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS**

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CASE NO.: 11-0090

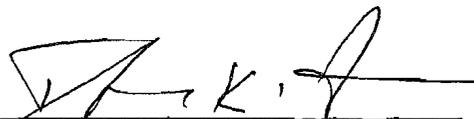
**SAMUEL D. SCARBRO, JR.,
Defendant Below,**

Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of the foregoing *PETITIONER'S BRIEF* and *APPENDIX* upon the following by depositing the same in the regular course of the United States Mail, First Class, postage prepaid, at the address indicated, on this the 15th day of **April**, 2011.

Michelle Bishop
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