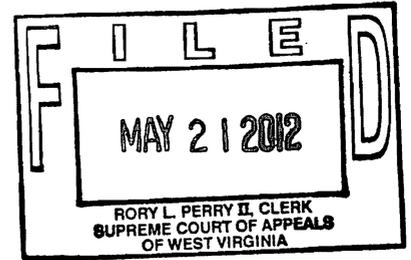


NO. 12-0189

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA



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CHARLESTON, WEST VIRGINIA

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STATE OF WEST VIRGINIA  
Plaintiff Below, Appellee

v.

Circuit Court of Mineral County  
The Honorable Judge Nelson  
Case No. 11-F-29

CHARLES EDWARD BRUFFEY  
Defendant Below, Appellant

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PETITIONER'S BRIEF

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**PETITION**

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF  
WEST VIRGINIA**

**I. ASSIGNMENTS OF ERROR**

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO COMMIT AND SOLICIT TESTIMONY ON THE PETITIONER'S PRE-TRIAL SILENCE AFTER HE WAS ADVISED OF HIS MIRANDA WARNINGS

B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE OF A SECOND UNCHARGED BANK ROBBERY PURSUANT TO RULE 404(b) AND BY FAILING TO CONDUCT A PROPER AND MEANINGFUL *MCGINNIS* HEARING

C. THE PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED WHEN SGT. DROPPLEMAN WAS PERMITTED TO TESTIFY ABOUT TESTIMONIAL STATEMENTS MADE TO HIM DURING THE COURSE OF HIS INVESTIGATION BY A WITNESS NOT CALLED TO TESTIFY AT TRIAL

D. IT WAS CLEARLY ERRONEOUS FOR THE TRIAL COURT TO FIND THE INFORMATION CONTAINED WITHIN THE FOUR CORNERS OF THE AFFIDAVIT AND COMPLAINT FOR SEARCH WARRANT WAS SUFFICIENT TO SUPPORT PROBABLE CAUSE TO ISSUE THE MARCH 5, 2010 SEARCH WARRANT

**II. KIND OF PROCEEDING AND THE NATURE OF THE RULINGS IN THE  
LOWER TRIBUNAL**

On October 13, 2010, the Petitioner was arrested by warrant for an unarmed bank robbery at M&T Bank in Fort Ashby, West Virginia. The Petitioner was arraigned by Magistrate Roby and incarcerated in lieu of \$100,000.00 cash bond. The Petitioner was eventually indicted by a Mineral County Grand Jury on January 11, 2011, for Robbery in violation of W.Va. Code § 61-2-12(c). The charged crimes allegedly occurred December 23, 2009 at approximately 9:30 a.m.

The Petitioner was originally represented by Attorney Chad Cissel. However, Mr. Cissel withdrew as Counsel after the Petitioner filed an ethics complaint with the disciplinary board due to his dissatisfaction with the representation he was receiving. During arraignment in Circuit Court on January 13, 2011, the Honorable Lynn Nelson *sua sponte* appointed Seth B. D'Atri to

take over the case as lead Counsel. Several months later, the Petitioner requested the appointment of additional counsel, at which time the Court by Order under date of July 7, 2011 appointed Gaynor Cosner as co-counsel.

Pursuant to the Arraignment Order, on February 09, 2011 an initial in-camera hearing was held regarding the validity of two search warrants, *to-wit*; one to collect a saliva sample from the Petitioner and the other to search the Petitioner's residence. Said search warrants were issued by Magistrate Harman on March 5, 2010. After considering the testimony of Sgt. John Droppleman, the Court ruled that the search warrants were valid and all evidence discovered was admissible. [Appendix, **March 5, 2010 Search Warrants**] The Court also heard testimony from Sgt. Droppleman regarding an inculpatory statement allegedly made by the Petitioner post-arrest. The Court also ruled that the statement was admissible against the Petitioner. [February 9, 2011, Transcript p. 30, paragraph 15] After the Court made its rulings, Counsel for Petitioner moved the Court to reduce the Petitioner's bond, which was denied. [February 9, 2011, Transcript p. 33, paragraph 4] The Court continued the matter to March 24, 2011 for a second pre-trial hearing.

The March 24, 2011 hearing was continued to June 28, 2011. On said date the Court heard testimony in support of the State's "Notice of Intent To Use 404(b)" Evidence previously filed on June 23, 2011. [Appendix, **Notice of 404(b)**] Without calling a single witness, the Court admitted evidence pursuant to Rule 404(b) of a second uncharged bank robbery after listening solely to proffered evidence from the State. [Appendix, **Order Admitting 404(b) Evidence**] On June 30, 2011, the Petitioner filed "Motion And Consent To Continue." On July 5, 2011, the Court entered an order setting the matter for a jury trial to commence on September 26, 2011.

No additional pre-trial hearings were held prior to trial. A jury trial commenced on September 26, 2011, and on September 27, 2011 the Petitioner was convicted of Robbery in violation of W.Va. Code § 61-2-12(c). The State presented thirteen witnesses ranging from bank employees, investigating officers, and forensic experts from the FBI crime lab. No witnesses were called on behalf of the Petitioner. The Petitioner did not testify. After the guilty verdict was returned, the Petitioner was denied post-judgment bail, immediately remanded to the custody of the Sheriff and transported to the regional jail. On November 23, 2011, the Petitioner filed a motion for a new trial with the Court. [Appendix, **Motion For New Trial**] At the December 28, 2011 sentencing hearing, the Court denied the Petitioner's motion for a new trial. After considering the arguments of the parties and the pre-sentence investigation, the Court denied Petitioner's motion for probation and imposed the maximum statutory indeterminate sentence of not less than ten years nor more than twenty years in prison. [Appendix, **Sentencing Order**] The Petitioner filed a Rule 35 Motion for Reconsideration that has not yet been set for hearing.

### **III. STATEMENT OF THE CASE**

On December 23, 2010, a white male with blue eye entered M&T Bank in Fort Ashby, West Virginia and made an oral demand for money. On said date and time, Alisa Wagoner and Joyce Haines were the only employees working due to the fact that the other employees were on Christmas vacation. The suspect approached the window where Ms. Wagoner was working the teller line and said "[t]his is a robbery...give me all your loose bills...place them on the counter...no bait money or dye pack." September 26, 2011 Trial Transcript, p. 64, paragraph 13 Ms. Wagoner testified at trial that the suspect said "he was sorry," and "that he lost his job, and he had to." September 26, 2011 Trial Transcript, p. 64, paragraph 20 The suspect was handed

\$1,618.00. September 26, Trial Transcript, p. 66, paragraph 13 Ms. Wagoner locked the doors after the suspect exited the bank and observed him flee on foot to the left of the building towards Wayne's Meat Market. September 26, 2011 Trial Transcript, p. 65, Paragraph 4 Ms. Wagoner also testified that the suspect was wearing a Carhartt type jacket that had a silver piece of duck tape over what she believed to be a name. September 26, 2011 Trial Transcript, p. 67, Paragraph 8 Ms. Wagoner further testified that the suspect had a hood, a hat and a scarf on and that he had blondish hair that "stuck out." September 26, 2011 Trial Transcript, p. 67, Paragraph 13 The suspect was further described as between 5'6 to 5'8 inches tall. September 26, 2011 Trial Transcript, p. 68, Paragraph 16 In response to defense counsel's question as to whether the suspect threatened her, Ms. Wagoner testified on cross-examination that the suspect did not threaten her. More specifically, Ms. Wagoner stated the suspect said, "I don't want to hurt you...I just need the money because I'm out of work, and I need the money." September 26, 2011 Trial Transcript, p. 69, Paragraph 19 At no point during the course of the investigation was Ms. Wagoner asked to identify the suspect through a photographic array or by voice identification. September 26, 2011 Trial Transcript, p. 72, Paragraph 22

Joyce Saville was the only other employee working at M&T Bank on December 23, 2010. As the suspect entered the bank Ms. Saville just answered the a telephone call and observed a man walk in with his face covered. September 26, 2011 Trial Transcript, p. 74, Paragraph 12 Although Ms. Saville did not overhear the entire conversation between the suspect and Ms. Wagoner, she did hear the suspect say he was "sorry he had to do this because he had lost his job." September 26, 2011 Trial Transcript, p. 74, Paragraph 22 Ms. Saville described the suspects voice as "gruff," which caused her to believe he was older and a smoker. September 26, 2011 Trial Transcript, p. 74, Paragraph 24 Ms. Saville observed the suspect

gather the money from the counter and “calmly” walk out the door and eventually hit the silent alarm and called 911. September 26, 2011 Trial Transcript, p. 75, Paragraph 4 Unlike the Petitioner who is 6’0 tall and wears glasses, the suspect was not wearing glasses and was also described as around 5’6 to 5’8 inches tall. September 26, 2011 Trial Transcript, p. 77, Paragraph 15-19

Sergeant Droppleman with the West Virginia State Police was the lead investigator in the case. Thomas Flosnik, a special agent with the FBI, assisted Sgt. Droppleman in the investigation. Agent Flosnik’s involvement was limited to just discussing and consulting with the Mineral County Sheriff’s Office and the Sgt. Droppleman. September 26, 2011 Trial Transcript, p. 152, Paragraph 19 After being advised of the bank robbery, Sgt. Droppleman was on scene within ten minutes. September 26, 2011 Trial Transcript, p. 174, Paragraph 17 Sgt. Droppleman was in charge of coordinating other officers and sealed off the crime scene. Sgt. Droppleman started the investigation by obtaining a general description of the suspect and which direction the suspect traveled after exiting the bank. September 26, 2011 Trial Transcript, p. 176, Paragraph 19 Sgt. Droppleman learned that the suspected was “pretty much covered up except for a small portion of his face.” September 26, 2011 Trial Transcript, p. 176, Paragraph 124 Sgt. Droppleman also learned that the suspect took an immediate left as he exited the bank and that is the last time that Ms. Wagoner saw him. September 26, 2011 Trial Transcript, p. 178, Paragraph 4

At this point in the investigation, Sgt. Droppleman requested Deputy Smith to report to the scene with his K-9. Deputy Smith and K-9 Kira were called to the scene in attempt to track the suspect from the bank. September 26, 2011 Trial Transcript, p. 93, Paragraph 20 According to Deputy Smith, K-9 Kira picked up a track inside the lobby of the bank and led him to an area

in a parking lot next to a red car. September 26, 2011 Trial Transcript, p. 97, Paragraph 17 Deputy Smith testified on cross-examination that the parking lot where K-9 Kira stopped was approximately 300 yards away from the bank. September 26, 2011 Trial Transcript, p. 106, Paragraph 10 Deputy Smith observed a cigarette butt on the ground where K-9 Kira stopped her track. September 26, 2011 Trial Transcript, p. 99, Paragraph 22 Sgt. Droppleman had no direct involvement with the tracking after Deputy Smith arrived with the K-9. September 26, 2011 Trial Transcript, p. 179, Paragraph 4

While reviewing videotape, Sgt. Droppleman was notified by Deputy Smith that a witness may have been identified and a potential piece of evidence was discovered in a parking lot. The witness was identified as Brit Crowder and the piece of evidence was the cigarette butt. September 26, 2011 Trial Transcript, p. 179, Paragraph 14 On cross-examination, Sgt. Droppleman estimated that the distance from the front door at M&T bank to where he located the cigarette butt was two hundred to three hundred feet. September 26, 2011 Trial Transcript, p. 220, Paragraph 1 According to Sgt. Droppleman, the Petitioner would have had to walk out of the bank, take a left and travel fifty to seventy five feet down an alley towards Wayne's Meat Market, take another left, and walk an additional two hundred feet to get to the parking lot behind the Taste of the Town Restaurant. September 26, 2011 Trial Transcript, p. 10, Paragraph 8

Sgt. Droppleman photographed the cigarette butt and collected it for evidence with tweezers and rubber gloves. September 26, 2011 Trial Transcript, p. 180, Paragraph 7 Sgt. Droppleman testified that the cigarette butt was found between forty-five to fifty-five minutes after he arrived on scene at the bank. September 26, 2011 Trial Transcript, p. 230, Paragraph 10 Sgt. Droppleman did find some footprints in the snow that were leading to and from the bank,

but he could not identify who made them. September 26, 2011 Trial Transcript, p. 231, Paragraph 10 Sgt. Droppleman also dusted the front counter where Ms. Wagnor was working the teller line, but no identifiable fingerprints were lifted. September 26, 2011 Trial Transcript, p. 232, Paragraph 11 No other evidence was located in the parking lot. September 26, 2011 Trial Transcript, p. 180, Paragraph 11

Sgt. Droppleman did take a written statement from Mr. Crowder. September 26, 2011 Trial Transcript, p. 189, Paragraph 10 After learning from Mr. Crowder that the suspect was observed sitting inside a purple vehicle, Sgt. Droppleman began looking for purple vehicles in the immediate area. Sgt. Droppleman testified that he thought there “would only be one or two, but [he] actually found probably six or seven.” September 26, 2011 Trial Transcript, p. 191, Paragraph 18 Sgt. Droppleman ruled out the six or seven purple vehicles as having any involvement in the bank robbery, and was unable to identify a matching vehicle on surveillance video. September 26, 2011 Trial Transcript, p. 194, Paragraph 8

Sgt. Droppleman testified that a witness by the name of John Brown observed a purple vehicle parked in the parking lot behind the Taste of the Town restaurant two days before the second robbery at the same M&T Bank in Fort Ashby on February 26, 2010, and that the vehicle “belonged to a fellow that lived on Route 46, just down from Ray’s Texaco.” September 26, 2011 Trial Transcript, p. 198, Paragraph 8 Sgt. Droppleman testified that this information is what led him to start looking at the Petitioner was a potential suspect in the bank robbery. September 26, 2011 Trial Transcript, p. 198, Paragraph 23 On March 4, 2010, Sgt. Droppleman passed the Petitioner on Route 46 and turned around in the roadway and followed him to his residence so he could speak with him. September 26, 2011 Trial Transcript, p. 204, Paragraph 21 Sgt. Droppleman testified that he spoke with the Petitioner and that he was initially fine.

September 26, 2011 Trial Transcript, p. 206, Paragraph 7 Sgt. Droppleman stated that the Petitioner was cooperative. September 26, 2011 Trial Transcript, p. 206, Paragraph 21 After speaking with the Petitioner, Sgt. Droppleman prepared an affidavit for a search warrant to collect DNA and to search the Petitioner's residence. September 26, 2011 Trial Transcript, p. 207, Paragraph 5 On March 5, 2010, Sgt. Droppleman with assistance of several other officers executed the search warrants. September 26, 2011 Trial Transcript, p. 208, Paragraph 24 A dark navy work style jacket, gray hooded sweatshirt and red cloth scarf were recovered, but never shown to any of the witnesses for identification. September 26, 2011 Trial Transcript, p. 227, Paragraph 8-19 The black ball cap that was observed by a witness was not found at the Petitioner's residence. September 26, 2011 Trial Transcript, p. 228, Paragraph 8 At the time the search warrant was executed, the Petitioner was read his *Miranda* warnings. September 26, 2011 Trial Transcript, p. 209, Paragraph 8 Sgt. Droppleman testified at trial that the Petitioner was asked questions, but refused to provide a statement. September 26, 2011 Trial Transcript, p. 210, Paragraph 7 On October 13, 2010, Sgt. Droppleman located the Petitioner at Ray's Texaco and took him into custody for the M&T Bank robbery that occurred on December 23, 2009. Sgt. Droppleman testified at trial that he again read the Petitioner the *Miranda* warning and that the Petitioner "didn't want to waive his rights and provide a written statement to me at that time." September 26, 2011 Trial Transcript, p. 217, Paragraph 24

Bret Crowder, owner of the red car where the cigarette butt was found, was living in an apartment overlooking the parking lot where his vehicle was located. According to Mr. Crowder, he noticed a vehicle that "didn't look familiar in the parking lot near where I park my car." September 26, 2011 Trial Transcript, p. 114, Paragraph 21 Mr. Crowder described the vehicle as purple with a discolored purple fender. September 26, 2011 Trial Transcript, p. 115,

Paragraph 7 Mr. Crowder testified that he observed an occupant in the vehicle with the window down smoking a cigarette. September 26, 2011 Trial Transcript, p. 118, Paragraph 1 However, Mr. Crowder was unable to identify anything particular about the person. September 26, 2011 Trial Transcript, p. 118, Paragraph 5 Eventually, Mr. Crowder went outside and observed a police officer in the parking lot and asked what was going on. At that point, Mr. Crowder informed Sgt. Dropplemen of his observations from his apartment. September 26, 2011 Trial Transcript, p. 119, Paragraph 24

Throughout the trial, several expert witnesses were called by the State, including Chris Francis. Mr. Francis, an employee of the West Virginia State Police DNA Laboratory, was qualified as an expert in DNA analysis. September 26, 2011 Trial Transcript, p. 138, Paragraph 21 Mr. Francis testified that the DNA profile found on the Pall Mall cigarette butt found in the parking lot 300 yards away from the bank was consistent with the profile of the Petitioner. September 26, 2011 Trial Transcript, p. 147, Paragraph 16

The Court admitted evidence of an uncharged second bank robbery against the Petitioner that occurred at the same M&T Bank in Fort Ashby on February 26, 2010. In that regard, the State called Ginny Mason, Deputy McKone, Brea Fisher, and Marguerite McHenry as witnesses. Ms. Mason testified that she was working at M&T Bank on February 26, 2010, when a white male came in the door at 9:45 a.m. wearing a black jacket with a light gray sweatshirt with the hood up and burgundy scarf across his face. September 27, 2011 Trial Transcript, p. 11, Paragraph 8 The suspect demanded money by presenting Ms. Ginny a handwritten note. September 27, 2011 Trial Transcript, p. 11, Paragraph 20 Ms. Ginny testified that when she did not instantly hand the money over, the suspect aggressively said, "large money...hurry up." September 27, 2011 Trial Transcript, p. 11, Paragraph 8 Ms. Ginny then immediately gave the

suspect money and he left the bank, but did not take the note. September 27, 2011 Trial Transcript, p. 11, Paragraph 8 On cross-examination, Ms. Ginny stated that that she was not present during the December 23, 2009 robbery and would not be able to tell whether or not it was the same suspect. September 27, 2011 Trial Transcript, p. 15, Paragraph 8 Ms. Ginny also stated that the suspect did not have any tape on his jacket and that she was never asked by the police to identify the clothing found at the suspect's residence. September 27, 2011 Trial Transcript, p. 15, Paragraph 17; September 27, 2011 Trial Transcript, p. 17, Paragraph 5

Deputy McKone testified at trial that he investigated both robberies, but he was the first officer on scene for the second robbery. September 27, 2011 Trial Transcript, p. 21, Paragraph 7 Deputy McKone received the handwritten note from the second robbery from Sgt. Droppleman and turned it over to Agent Flosnik. September 27, 2011 Trial Transcript, p. 23, Paragraph 11 Brea Fisher, a forensic document examiner with the FBI laboratory, qualified as an expert and testified that she analyzed the note used during the second bank robbery, compared it to known samples from the Petitioner and concluded that a definite determination could not be reached. September 27, 2011 Trial Transcript, p. 46, Paragraph 7 However, Marguerite McHenry, another forensic examiner with the FBI, also qualified as an expert, testified that she received additional known samples from the Petitioner and concluded that the Petitioner prepared the demand note. September 27, 2011 Trial Transcript, p. 60, Paragraph 3

The Petitioner did not testify at trial or call a single witness on his behalf.

#### **IV. STANDARD OF REVIEW**

**A.** The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, this Court must review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second,

this Court must review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, this Court must review for an abuse of discretion the trial court's conclusion that the “other acts” evidence is more probative than prejudicial under Rule 403. *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996)

**B.** By employing a two-tier standard, we first review a circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. Second, we review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action. *State v. Fraley*, 192 W.Va. 247, 452 S.E.2d 50 (1994)

## **V. SUMMARY OF ARGUMENT**

The one count indictment returned against the Petitioner stems from an unarmed bank robbery that occurred at M&T Bank in Mineral County, West Virginia on December 23, 2009. Upon a close review of the record in this case, it is clear that the trial court committed reversible error multiple times. First, the court erred by allowing the State to comment and solicit evidence regarding the Petitioner’s pre-trial silence after he was advised of his *Miranda* warnings. The Court also impermissibly admitted evidence of a second uncharged bank robbery pursuant to Rule 404(b) that occurred on February 26, 2010 by failing to conduct a proper and meaningful *McGinnis* Hearing. The Court committed further error by denying the Petitioner his Sixth Amendment right to confrontation. Sgt. Droppleman was permitted to testify to testimonial statements made to him during the course of his investigation by a witness not called to testify at trial. The Court also committed error by finding the search warrants were valid. In sum, the Petitioner was denied the right to a fair trial on multiple levels.

## VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner states that the assignments of error raised in error A-C of the Petition are proper for consideration by oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure as the issues involve constitutional questions regarding the lower court's pre-trial rulings.

The Petitioner states that the assignment of error raised in error D has been authoritatively decided and oral argument is not necessary unless the Court determines that other issues raised upon the record should be addressed.

## VII. ARGUMENT

### A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO COMMIT AND SOLICIT TESTIMONY ON THE PETITIONER'S PRE-TRIAL SILENCE AFTER HE WAS ADVISED OF HIS MIRANDA WARNINGS

During opening statements the State made reference to the Petitioner's pre-trial silence after he was advised of his *Miranda* warnings and invoked his right to remain silent. More specifically, the State argued "[o]n another occasion, after another *Miranda* warning was given, Sergeant Droppleman also was told by Mr. Bruffey, '...I think I should wait to talk to you about this,' and said nothing further.' Following up with these opening remarks during the State's case-in-chief, Sgt. Droppleman was asked the following during direct examination by the prosecuting attorney, *to-wit*; "[d]id Mr. Bruffey make any statement to you on that occasion after being advised of his rights?" September 26, 2011 Trial Transcript, p. 217, Paragraph 12 In direct response thereto, Sgt. Droppleman stated,

[y]es. On October 13<sup>th</sup> 2010, I located Mr. Bruffey at Ray's Texaco, at which Point in time I took him into custody based on the bank robbery that I had charged Him with, the one we are here for today. I read his Miranda rights at the counter and then took him out. We drove to the office. And then after I got him to the office before processing, I filled out another Miranda form, a written form, he

did initial portions of that form, but decided not to sign it. **He didn't want to sign a waiver. He didn't want to waive his rights and provide a written statement to me at that time.** September 26, 2011 Trial Transcript, p. 217, Paragraph 23; [Appendix, **October 13 2010 & March 5, 2010 Interview & Miranda Rights Form**]

Prior to these comments, the State also solicited the following response from Sgt.

Droppleman at trial, ..."[a]nd, no, we didn't take a written statement. **He didn't want to provide one, which is his right.** September 26, 2011 Trial Transcript, p. 210, Paragraph 7

On September 26, 2011, the Court specifically advised the Petitioner of his trial rights and duties and required the Petitioner to sign and file with the Court "Notice To Defendant Of Criminal Trial Rights And Duties." [Appendix, **Notice To Defendant of Criminal Trial Rights and Duties**] The fifth paragraph specifically states,

5. You have the right not be called as a witness and not to be compelled to incriminate yourself. **The State may not comment on your silence nor use the fact that you remained silent against you** and the jury may be instructed that you have the right to remain silent.

Regardless, the State commented on the Petitioner's silence, thus constituting reversible error. In *State v. Boyd*, this Court clearly held that under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, **it is reversible error** for the prosecutor to cross-examine a defendant in regard to his pre-trial silence **or to comment on the same to the jury** [emphasis]. *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977) In *Boyd*, the defendant shot and killed James Baldwin. After the shooting, the defendant drove to the jail and turned himself in and admitted to the shooting. At trial, the defendant asserted that he was acting in self-defense since he believed Baldwin was coming after him. The prosecuting attorney, on cross-examination, sought to impeach the defendant by asking him why he did not

disclose his self-defense story to the police at jail and commented on the defendant's election to remain silent at jail. *Id.* at 236

On appeal, this Court outlined the law on the issue of pre-trial silence by recognizing that Article III, Section 5 of the West Virginia Constitution provides the constitutional right to remain silent. *State v. Fortner*, 150 W.Va. 571, 148 S.E.2d 669 (1966) The *Boyd* Court also recognized similar language is found in the 5<sup>th</sup> Amendment to the United States Constitution. The Court also restated the holding in *Miranda v. Arizona, to-wit*; after *Miranda* warnings have been given, unless and until such warnings and waiver are demonstrated by the prosecution at trial, "no evidence obtained as a result of the interrogation can be used against him." *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966)

The *Boyd* Court relied heavily on the United States Supreme Court case *Doyle v. Ohio* as precedent. In *Doyle*, the United States Supreme Court held that because it is constitutionally mandated that a person be advised immediately upon being taken into custody that he (or she) has the right to remain silent, the warning itself can create the act of silent. *Doyle v. Ohio*, 426 U.S. 610 (1976) Consequently, it would be unfair to permit the State to obtain an advantage by being able to utilize the silence to impeach the defendant. *Boyd* at 239 The *Doyle* Court further elaborated by holding that one of the main purposes of a *Miranda* warning is to assure the defendant that if he [or she] asserts his [or her] privilege to remain silent no harmful consequences will flow from such assertion. Therefore, it would be wrong to permit the State to attack the defendant over his [or her] pre-trial silence. *Boyd* at 240 The *Boyd* Court supported its holding by citing to W.Va. Code § 57-3-6, which states, *inter alia*, "his [the defendant] failure to testify at trial shall create no presumption against him, nor be the subject of any comment before the court or jury by anyone."

In similar decided almost seventy years before *Boyd*, this Court held, “[s]o the law, having brought the prisoner into court against his will, did not permit his silence to be treated or used as evidence against him.” *State v. Taylor*, 57 W.Va. 228, 50 S.E. 247 (1905)

The basis for the rule prohibiting the use of the defendant’s silence against him is that it runs counter to the presumption of innocence that follows the defendant throughout the trial. It is this presumption of innocence which blocks any attempt by the State to infer from the silence of the defendant that such silence is motivated by guilt rather than the innocence which the law presumes. Under our law, the presumption of innocence is an integral part of the criminal due process and that such presumption is itself a constitutional guarantee embodied in Article III, Section 10 of the West Virginia Constitution.

**B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE OF A SECOND UNCHARGED BANK ROBBERY PURSUANT TO RULE 404(b) AND BY FAILING TO CONDUCT A PROPER AND MEANINGFUL MCGINNIS HEARING**

On June 23, 2011, the State filed its “Notice Of Intent To Use 404(b) Evidence.” [Appendix, **Notice Of Intent To Use 404(b) Evidence**] Five days later, the matter was heard by the Court on June 28, 2011. In paragraph two of the Notice, the State requests to use “[a]ll evidence related to a second bank robbery of the M&T Bank in Fort Ashby that occurred on February 26, 2010, and most particularly evidence of a handwriting expert from the FBI laboratory who will identify the handwriting on the note presented to the bank teller as that of the Defendant.” The State submitted that said evidence of the second uncharged robbery falls under Rule 404(b), as it established a common scheme and plan on the part of the Petitioner, identity of the Petitioner and plan and intent of the Petitioner.

Counsel for Petitioner argued that evidence of the second bank robbery is highly prejudicial, that the Petitioner had not been charged with the second bank robbery and that “it

takes of leap of logic to take a subsequent incident and kind of try to incorporate it into the first incident and say that it's a pattern of establishing a common scheme." June 28, 2011 Motion Hearing, p. 5, paragraph 5-16

After a very brief hearing in which mere proffers were submitted by the State, the Court admitted the 404(b) evidence. [June 28, 2011 Motion Hearing Transcript, p. 7, paragraph 11; Appendix, **Order Admitting Rule 404(b) Evidence**] At trial, several witnesses testified in great detail about the second uncharged bank robbery, *to-wit*; Ginny Mason, Deputy McKone, Brea Fisher, Marguerite McHenry and Sgt. Droppleman.

The Petitioner asserts that it was reversible error for the Court to admit evidence of the second uncharged bank robbery. In *State v. McDaniel*, this Court held that "[t]ypically, evidence of other **uncharged crimes** is not admissible against a defendant in a criminal case. *State v. McDaniel*, 211 W.Va. 9, 560 S.E.2d 484 (2001) The *McDaniel* Court reasoned that this general exclusion is to "prevent the conviction of an accused for one crime by the use of evidence that he has committed other crimes, and to preclude the inference that because he had committed other crimes previously, he was more liable to commit the crime for which he is presently indicted and being tried." *Id.* at 12

This Court has recognized the potential for unfair prejudice that is inherent in prior bad acts evidence and the following standard must be followed by trial courts when deciding whether to admit 404(b) evidence. *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994); *Huddleston v. United States*, 485 U.S. 681 (1988) First, when an offer of evidence is made under Rule 404(b), the trial court, pursuant to Rule 104(a), is to determine its admissibility. *Id.* at 13 Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986) After hearing the evidence and arguments of

counsel, **the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts** [emphasis]. The Petitioner first submits that the evidence of the second bank robbery should have been excluded pursuant to *State v. McDaniel* as it involved evidence of “other uncharged crimes.” Second, the State failed to produce any evidence that the Petitioner committed the second bank robbery. The State simply made a mere proffer to the Court. June 28, 2011 404(b) Motion Hearing, p. 3, paragraph 16 Consequently, the Court could not have been satisfied by a preponderance of the evidence that the Petitioner committed the second bank robbery and the evidence should have been excluded.

The State and Court skipped the first prong and jumped immediately to the second, *to-wit*; if a sufficient showing has been made by a preponderance of the evidence that the act occurred and the defendant committed the act, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 and conduct the balancing required under Rule 403. The State simply argued that the two robberies were similar and that the second robbery should be admitted under Rule 404(b). The Court’s analysis ended there and admitted the evidence. June 28, 2011 404(b) Motion Hearing, p. 6, paragraph 19 The Court reasoned by stating,

[o]kay. Well, it’s the Court’s understanding that there was a robbery that occurred on December 23<sup>rd</sup> for which he’s been charged. At that time he came in or allegedly came in - - someone came in, whether it was Mr. Bruffey or not - - someone came in and said to them I don’t - - or: Give me some money. I don’t want any die packs, no bait money. Which the Court’s been prosecuting robberies for twenty some years as the prosecutor prior to taking the bench, and I find that that’s a very distinctive type phrase that you don’t hear with the dye packs and the bait money. I understand Mr. D’Atri’s arguments, but I am going to let it come in for the purpose of establishing a common scheme and identity. June 28, 2011 404(b) Motion Hearing, p. 7, paragraph 7

The State and trial court merely cited to a litany of possible uses listed in Rule 404(b).

The trial court judge did not carefully scrutinize the proffered 404(b) evidence as required pursuant to *McDaniel*. In *Dolan*, this Court held that other-crime evidence may be admitted if

the evidence of other crimes is so distinctive that it can be seen as a 'signature' identifying a unique defendant, such as the infamous Jack the Ripper .... [E]vidence of the commission of the same type of crime is not sufficient on this theory unless the particular method of committing the offense, the *modus operandi* (or m.o.), is sufficiently distinctive to constitute a signature. Other-crimes evidence is not permissible to identify a defendant as the perpetrator of the charge act simply because he or she has at other times committed the same garden variety criminal act. *State v. Dolan*, 176 W.Va. 688, 347 S.E.2d 208 (1986)

Despite the argument made by the State and ruling by the Court, it is clear the two robberies were not similar. On February 26, 2010, a second robbery occurred at the M&T Bank in Fort Ashby, West Virginia. It should be noted that there have been a string of bank robberies in the tri-state area, including another bank robbery in Fort Ashby at BB&T Bank on March 16, 2012. Unlike the first robbery on December 23, 2009 in which the suspect made an oral demand, the suspect in the second case used a handwritten note. Furthermore, the suspect in the first robbery was wearing a jacket with a piece of tape over a name on what appeared to be a work style jacket. Ms. Ginny, an employee of M&T Bank that was working on February 26, 2010, testified that the suspect in the second robbery did not have tape on his jacket. September 27, 2011 Trial Transcript, p. 15, Paragraph 17 Another difference in the two cases is that the first robbery suspect was not aggressive. During the first robbery Ms. Wagoner testified that the suspect said, "I don't want to hurt you...I just need the money because I'm out of work, and I need the money." September 26, 2011 Trial Transcript, p. 69, Paragraph 19 On the other hand, the second suspect was more aggressive. Ms. Ginny testified that during the second robbery after the suspect handed her a demand note he aggressively said, "large money...hurry up."

September 27, 2011 Trial Transcript, p. 11, Paragraph 8 Although the two bank robberies are similar in that the suspects demanded money, all bank robberies involve the demand of money, which is not sufficiently distinctive to constitute a “signature.” The State failed to make a sufficient showing of substantial similarity and uniqueness to establish the proffered evidence’s probative value.

In sum, the Petitioner submits that a meaningful *in-camera* hearing should have been held to consider the admissibility of the second uncharged bank robbery pursuant to the prongs set forth in *State v. McGinnis* and its progeny. Pursuant to the facts in the case *sub judice* and the charges as stated in the indictment it is evident that the second bank robbery evidence should not have been admitted by the lower Court. In balancing the *McGinnis* factors, the facts militate in favor of the Petitioner. The trial court abused its discretion by admitting the second uncharged bank robbery evidence without properly satisfying each prong set forth in *McGinnis*. Additionally, the Court failed to consider that Rule 404(b) evidence must not cause unfair prejudice. The likelihood that the jury convicted the Petitioner because of the wrongfully admitted February 26, 2010 uncharged bank robbery and not because of the actual evidence surrounding the December 23, 2009 bank robbery is great. In exercising its discretion, the trial court failed to protect the Petitioner’s right to a fair trial. As stated in *McDaniel*, “any jury, no matter how well instructed, would be sorely tempted to convict a defendant simply because of such prior act, regardless of the quantum of proof of the offense for which the defendant was actually charged.” *State v. McDaniel*, 211 W.Va. 9, 560 W.Va. 484 (2001)

**C. THE PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED WHEN SGT. DROPPLEMAN WAS PERMITTED TO TESTIFY ABOUT TESTIMONIAL STATEMENTS MADE TO HIM DURING THE COURSE OF HIS INVESTIGATION BY A WITNESS NOT CALLED TO TESTIFY AT TRIAL**

On direct examination, the State asked Sgt. Droppleman how he identified the Petitioner's vehicle. September 26, 2011 Trial Transcript, p. 197, paragraph 3. In response thereto, Sgt. Droppleman stated, "...I want to be careful about what I say – but after the second robbery, there had been another witness come forward and said that, that vehicle was near the scene." September 26, 2011 Trial Transcript, p. 197, paragraph 8 Petitioner's Counsel immediately objected and the Court called all counsel to the bench and the following dialogue ensued, *to-wit*;

State: There's a witness that would say this car was at the Taste of Town a couple days prior to the second robbery. It's not really relevant, but that is what led him to start going to see Mr. Bruffey.

Court: He was there a couple days before the second one?

State: Yeah, I think it was two days.

Petitioner's Counsel: Sounds about right, yeah.

Court: Alright. I'm going to let him do it.

The Court overruled the Petitioner's objection and stated, "[g]o ahead, Sergeant Droppleman. You said another witness had given you some information." September 26, 2011 Trial Transcript, p. 198, paragraph 5 Sgt. Droppleman continued with his testimony and proceeded to tell the jury that a witness by the name of John Brown told him two days before the second robbery that he saw a vehicle parked in the parking lot behind Taste of the Town restaurant that belong to "a fellow that lived on Route 46, just down from Ray's Texaco." September 26, 2011 Trial Transcript, p. 198, paragraph 14 Sgt. Droppleman continued by testifying that "the reason

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why he knew this was because the vehicle has a really unique paint on it, depending on what angle you look at it, it could be green or it could be purple. And it changes colors depending on how the light shines on it or what angle you're looking at it." September 26, 2011 Trial Transcript, p. 198, paragraph 17

Petitioner submits that his Sixth Amendment right to confrontation was violated and the trial court committed reversible error by allowing Sgt. Droppleman to testify to the facts and circumstances surrounding the observations Mr. Brown made regarding the vehicle parked behind the Taste of Town two days before the February 26, 2010 robbery. In the seminal case of *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause contained within the Sixth Amendment to the United States Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36 (2004). This Court held similarly in *State v. Mechling* by citing to the *Crawford* case and Section 14 of Article III of the West Virginia Constitution. *State v. Mechling*, 219 W.Va. 366, 633 S.E. 2d 311 (2006)

In *Crawford*, the defendant was convicted of assault and the evidence admitted to convict the defendant included a tape recorded incriminating statement given to the police by the defendant's wife. The defendant's wife did not testify at trial and the trial court allowed the statement to be introduced. On appeal, the defendant argued that his wife's statement should not have been admitted because he was not afforded an opportunity to confront his wife about the statement. The United States Supreme Court held that the statement made by the defendant's wife should not have been allowed into evidence. More specifically, the *Crawford* Court held, "[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant

is unavailable, and only where the defendant had had a prior opportunity to cross-examine.”  
*Crawford* at 59.

In *Mechling*, this Court interpreted *Crawford* to only include “testimonial statements” subject to the constraints of the Confrontation Clause. *Mechling* at 373 As such, *Crawford* and *Mechling* only bar the admission of a “testimonial statement” by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness. The *Crawford* Court did not clearly define the term “testimonial statements.” However, in *Davis v. Washington* and *State v. Mechling* the issue was addressed.

In *Davis*, two cases were consolidated. In the first case, the prosecution admitted a recording of a 911 call by the victim as the crime was occurring. In the second case, police officers responded to the scene of a domestic disturbance. The victim was located alone on the front porch of her residence and the defendant was inside the house in the kitchen. The parties were kept separated and the police obtained an affidavit from the victim that described how she was assaulted. The *Davis* Court distinguished the two cases and held that the statements made in the first case were “non-testimonial” and the statements contained in the affidavit in the second case were “testimonial.” *Davis v. Washington*, 547 U.S. 813 (2006) More specifically, in the first case the circumstances objectively indicated that the primary purpose of the victim's statement in the 911 call was to appeal for police assistance to meet an ongoing emergency. The victim was not “acting as a witness; she was not testifying.... No ‘witness’ goes into court to proclaim an emergency and seek help.” *Id.* The *Davis* Court reasoned that “witness statements made to law enforcement officers that are comparable to those that would be given in a courtroom – that is, statements about “what happened” – are testimonial statements, the use of which is proscribed the Confrontation Clause.” *Id.* However, in the second case the statements

taken by the police officer took place sometime after the events described were over, and the statements were “neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation.” *Id.* In distinguishing between “non-testimonial” and “testimonial” statements, the *Davis* Court set forth the following rule, *to-wit*;

[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.*

In *Mechling*, this Court set forth the following rule in determining whether a statement is “non-testimonial” or “testimonial,” *to-wit*;

[f]irst, a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Second, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency. And third, a court assessing whether a witness's out-of-court statement is “testimonial” should focus more upon the witness's statement, and less upon any interrogator's questions. *State v. Mechling, 219 W.Va. 366, 377 (2006)*

In applying *Crawford*, *Davis* and *Mechling* to the case *sub judice*, it is clear that the statement by John Brown to Sgt. Droppleman is “testimonial” and subject to the Confrontation Clause. When Sgt. Droppleman gathered information from Mr. Brown it was absolutely clear that it was part of the underlying investigation into the M&T Bank robbery that previously occurred in Fort Ashby, West Virginia. There was no emergency in progress when the statement

was taken from Mr. Brown and the purpose was to determine what happened as opposed to what is happening. The primary purpose of the interrogation was to enable Sgt. Droppleman to “establish or prove past events potentially relevant to later criminal prosecution.” Consequently, since the statement to Sgt. Droppleman in the course of his investigation was “testimonial,” Mr. Brown did not appear at trial, and the Petitioner did not have a prior opportunity to cross-examine Mr. Brown, the Confrontation Clause contained within the Sixth Amendment to the United States Constitution clearly barred the admission of Mr. Brown’s statement. The statement taken by Sgt. Droppleman could not become a substitute for Mr. Brown’s live testimony. As such, the trial court committed reversible error.

**D. IT WAS CLEARLY ERRONEOUS FOR THE TRIAL COURT TO FIND THE INFORMATION CONTAINED WITHIN THE FOUR CORNERS OF THE AFFIDAVIT AND COMPLAINT FOR SEARCH WARRANT WAS SUFFICIENT TO SUPPORT PROBABLE CAUSE TO ISSUE THE MARCH 5, 2010 SEARCH WARRANT**

The Fourth Amendment provides that a warrant may be issued only upon probable cause, supported by oath or affirmation. Probable cause exists if the quantity of facts and circumstances provided to a magistrate in a written affidavit are sufficient to warrant the belief of a prudent person of reasonable caution that a crime has been committed and that the specific fruits, instrumentalities, or contraband from that crime presently may be found at a specific location. *State v. Lilly*, 194 W.Va. 595, 461 S.E.2d 101 (1995) An adequate showing of probable cause requires specific and concrete facts, not merely conclusory speculations. *Id.*

According to affidavit attached to the complaint for search warrant, Sgt. Droppleman relied heavily on the fact that John Brown observed a car parked in the lot behind the Taste of Town restaurant **two days before the second robbery**. [Appendix, **March 5, 2010 Search Warrants**] Sgt. Droppleman also heavily relied on the fact that when he mentioned to the Petitioner when he showed up at his residence unannounced in his police cruiser and began

questioning him regarding two bank robberies in Fort Ashby that the Petitioner became “very nervous.” February 9, 2011 Pre-Trial Hearing Transcript, p. 15, paragraph 19 Sgt. Droppleman further relied on the statement of Brett Crowder who stated that he observed an unidentifiable man in the Taste of Town parking lot the morning of the December 23, 2009 bank robbery. It is important to again point out that Deputy Smith testified on cross-examination that the parking lot was approximately 300 yards away from the bank, which is the length of three football fields.

September 26, 2011 Trial Transcript, p. 106

Despite the lower court’s ruling, the court stated that “Mr. D’Atri [Petitioner’s trial court Counsel] raises some good points and if they were singly, in and of themselves, would have been used for probable cause they might not individually add up. February 9, 2011 Pre-Trial Hearing Transcript, p. 30, paragraph 15 Petitioner submits it is illogical to find probable cause to support a search warrant based upon the facts set forth in the affidavit. The facts set forth by Sgt. Droppleman in the search warrant are merely conclusory speculations. Sgt. Droppleman was acting on a mere hunch, which certainly does not rise to the level of probable cause. As such, Petitioner submits that the facts as contained within the four corners of the affidavits do not individually add up to probable cause and the trial committed error by finding such.

**VIII. CONCLUSION AND RELIEF REQUESTED**

**WHEREFORE**, for all the reasons set forth above, the Petitioner prays for the following relief from this Honorable Court:

- a) A hearing;
- b) That the Court reverse the Petitioner's conviction for the charges in this Petition;
- c) That the Court expunge the Petitioner's criminal record to show no conviction and no arrest for the charges in this Petition;
- d) That the Court release the Petitioner from confinement or, in the alternative, set a bond;
- e) That the Court grant Petitioner a new trial;
- f) That the Court grant any further relief that it deems necessary.

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BY COUNSEL**



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 18<sup>TH</sup> day of May, 2012, I served a copy of the foregoing Petitioner's Brief and Appendix on the following by U.S. Mail, postage prepaid:

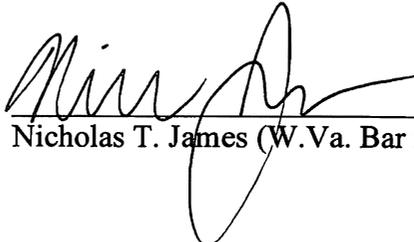
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