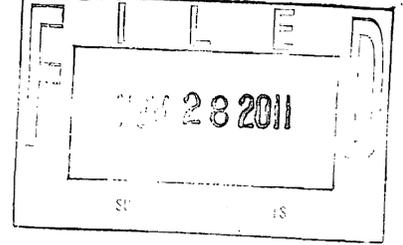


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 11-0915



**STATE OF WEST VIRGINIA,  
RESPONDENT,**

V.

**GARY RICHARD BAKER,  
PETITIONER.**

Appeal from a final order of  
the Circuit Court of Greenbrier  
County (09-F-100)

**PETITIONER'S BRIEF**

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## ASSIGNMENTS OF ERROR

1. Petitioner Baker was denied a fair trial when the Court improperly admitted evidence of his criminal history under Rule 404(b).
2. Petitioner's life sentence under the habitual offender act is void because the Information omits mandatory information regarding the predicate convictions that is required by statute.

## STATEMENT OF CASE

At approximately 11:30 p.m. on Sunday, March 15, 2009, a masked man attempted to rob the Subway restaurant in Fairlea, West Virginia and successfully robbed Subway employee Whitney Smith. (A.R. 237-40, 449). After a brief investigation, Greenbrier County Sheriff's Deputy Brandon Hunt suspected that Petitioner Gary Baker may have been involved. (A.R. 244-45). At the time, Baker was on parole and residing in Huntington, West Virginia under the supervision of parole officer Judy Fitzgerald. Id. Investigating officers in Greenbrier County contacted Fitzgerald and she confirmed that Baker had been in Greenbrier County on the day in question. (A.R. 412-13). Fitzgerald spoke with Baker in Huntington on the following Monday and searched his vehicle, finding a black air pistol among other items. (A.R. 246). Baker reported to Judy Fitzgerald that he left Lewisburg between nine and ten o'clock p.m. on March 15. (A.R. 413).

At trial, Smith identified the pellet pistol as the same one used during the robbery but she was not able to visually identify Baker as the robber. (A.R. 334). Although Baker's mother testified that Baker called her between 11:30 p.m. and midnight and told her he was past Charleston on his way to Huntington, the State elicited evidence that a

phone found in Baker's possession on the day of his arrest was in the Lewisburg area around midnight of the night in question. (A.R. 297, 386, 419, 448-58). The defense explained, however, that Baker took a nap in his car prior to the long drive back to Huntington, and he "fibbed to his mama" to keep her from worrying about the late night drive. (A.R. 528). Despite less than ideal viewing conditions, Kristin Smith testified that she saw a car resembling Baker's near the Subway on the night in question. (A.R. 364). Also, State witness Lisa Arbogast viewed the Subway surveillance video and testified that "it could possibly be" Baker in the video but "it's hard to say." (A.R. 376, 378). Baker, a former employee of the Subway restaurant in question, has never admitted involvement in the robberies. The State's evidence against Baker, although somewhat persuasive, is not uncontroverted and is entirely circumstantial. The most damning evidence the State presented was that Baker had been in prison for ten years immediately prior to the alleged offenses and was on parole at the time of his arrest. The Court's admission of this evidence devastated Baker's right to a fair trial.

On November 23, 2009, the State filed a "motion to admit the testimony of Judy G. Fitzgerald." (A.R. 4-5). In this motion, the State informed the Court that not only did it want Ms. Fitzgerald to testify, but "it is necessary to present into evidence that the Defendant was serving a period of parole at the time relevant hereto and that Ms. Fitzgerald was his parole officer." (A.R. 4). The defense filed an opposing motion to exclude any evidence of Baker's prior criminal record and his status as a parolee. (A.R. 11-12). After a hearing on December 4, 2009, the lower court ruled that it would permit Ms. Fitzgerald to testify, but it denied the State's request to tell the jury that Baker was on parole and to identify Fitzgerald as Baker's parole officer. (A.R. 78, 797-98).

Not to be deterred, the State filed a Rule 404(b) motion to admit evidence of Baker's criminal history. (A.R. 93-95). The State argued three reasons for admission: first, that Baker used a scanner during his commission of the 1999 felony and a scanner was found in his possession prior to his arrest in the 2009 case, therefore this evidence would show Baker's *modus operandi*. The Court rejected this argument, finding that there was no evidence that the perpetrator of the robbery had a scanner in his possession during the commission of the crime. (A.R. 165).

Second, the State argued that Baker had a revenge motive to rob the Fairlea Subway because he had a "toe-to-toe" argument with Donald Baker, the former owner of the restaurant and Baker's former employer, after Baker was fired. This argument occurred ten years prior to the robbery, and the State wanted to tell the jury about Baker's intervening ten year period of incarceration to explain the lapse of time between Baker's firing in 1999 and the robbery in 2008. The Court found, however, that this evidence fails the Rule 403 balancing test. (A.R. 167). The Court further found that Baker's prior felony conviction in case 99-F-80 is irrelevant because it has

nothing to do with Mr. Smith and [does] not have any relevance in proving or disproving a fact in consequence – namely the Defendant's motive against Mr. Smith. Further, the Defendant's termination by Mr. Smith and his knowledge of the location of the crimes charged in 09-F-100 is not derived from the Defendant's conviction in 99-F-80. ... To the extent that the State wishes to prove the motive of the Defendant without using the conviction of the Defendant in 99-F-80 (e.g., the threats, the termination of his employment, the knowledge of the crime scene), it is of course free to do so. (A.R. 167-68).

Third, the State wanted to admit evidence of Baker's prior conviction in 99-F-80 to explain why he had an air pistol, rather than a firearm, in his possession, i.e., it is illegal for felons to possess firearms. The Court denied this rationale as well, stating that

[t]he Defendant's conviction in 99-F-80 does not make it more probable or less probable that the perpetrator in 09-F-100 is the Defendant. Just because the Defendant is a convicted felon and therefore not able to legally possess a firearm does not make it more probable or less probable that the Defendant used an air-pistol in the commission [of the crimes charged] .... Even assuming, *arguendo*, that the Defendant's conviction in 99-F-80 were relevant under WVRE Rule 401 (which this Court is not conceding), it would be generally admissible under WVRE Rule 402; however, what little probative value it would have (in proving the identity of the perpetrator in 09-F-100) would be substantially outweighed by the danger of unfair prejudice to the Defendant, in that the jury may conclude that because the Defendant committed the crimes charged in 99-F-80 he is more likely to have committed the crimes charged in 09-F-100. (A.R. 168-69).

After denying the State's motions to admit evidence of Baker's parole status and ten year stretch of incarceration, however, the Court reversed itself during the trial and admitted this evidence because it found that the defense opened the door to it. (A.R. 321). The following is the sequence of events that led to the Court's admission of this evidence. Donald Smith, the former owner of the Subway restaurant in question, testified during the State's case-in-chief. During Smith's direct examination, the State elicited the following testimony:

Q How are you familiar with Gary Richard Baker?

A He was an employee of mine for a little over a week, in December of '99.

Q You hired him in the summer of '99?

A Yes, I did.

Q And, at some point, you dismissed his employment, in the summer of '99. Is that correct?

A That's correct.

(A.R. 304). Smith continued that Baker was fired because of sub-standard job performance, and that Baker voiced his displeasure with the firing when he came to pick

up his check. At this point, the State has opened the door to the ten year lapse of time between Baker's firing and the 2009 robberies.

On cross-examination, the defense had the following colloquy with Mr. Smith:

Q And summer of '99, is when the confrontation between you and Gary Baker took place?

A That's when the incident occurred, yes.

Q 10 years ago, this past summer?

A That's correct.

(A.R. 307). Prosecutor Via did not pose an objection to these questions by the defense until the following morning. Although Via himself introduced evidence that Baker worked at Subway in 1999, he argued that by asking if that was "10 years ago, this past summer," the defense opened the door to evidence that rebuts the implication of this lapse of time. Via claimed that if he is denied the opportunity to inform the jury that Baker was in prison from 1999 to 2008 and that he was on parole when the robberies occurred, this would "thwart greatly our efforts at motive." (A.R. 315). This is an interesting argument given the Court's prior ruling that Baker's criminal history has nothing to do with his motive against Donald Smith. (A.R. 167). Nevertheless, Via maintained that defense counsel "clearly made an effort and was successful in an effort to demonstrate that the revenge motive was not plausible due to the continuing passage of time." (A.R. 315). Via further asserted that "the jury is entitled to hear the full story. We stayed away from it; the defense didn't, and the door is now open for us to do that...." (A.R. 317).

Despite Via's protestations to the contrary, even a cursory review of Donald Smith's testimony makes it clear that the State, not the defense, opened the door to the

lapse of time between Baker's firing and the robbery. The defense pressed this point with the court, correctly stating that Via "brought up [on direct examination] that this man worked there in 1999." (A.R. 318). Further, defense counsel argued that he did not plan on exploiting the ten year lapse to counter the State's theory of motive and that he would welcome a ruling from the Court ordering him not to do so, rather than allowing evidence of Baker's incarceration and parole status. (A.R. 320).

The Court did not accept this remedial measure, however, and ruled that it would allow the State to present evidence of Baker's parole status and term of incarceration to "explain the passage of time" between Baker's acrimonious dismissal from Subway in 1999 and the robbery in 2008. (A.R. 321). The Court glossed over the elements of the McGinnis test for the admission of this Rule 404(b) evidence and rationalized that the admission of Baker's criminal history is justified because the defense placed "a lot of emphasis ... upon the fact that there's a 10 year span." (A.R. 322). This is plainly wrong. The defense asked one question about the ten year span. It was Via, not the defense, that placed so much emphasis on this issue that Via himself introduced during Donald Smith's direct examination. (A.R. 304).

As a result of the Court's erroneous admission of this Rule 404(b) evidence, parole officer Judy Fitzgerald testified during the State's case-in-chief that: 1) Baker was on parole when the robberies occurred, 2) she cooperated with investigating officers by questioning Baker and searching his car, 3) as Baker's parole officer she was aware that he was behind on his rent at the Oxford House when the robberies occurred, and 4) Baker was released from prison and started parole on February 21, 2008. (A.R. 409-21). The

jury was instructed that the purpose of this evidence is “to show the passage of time.” (A.R. 407-08).

In addition, Sergeant Jan Cahill testified that Baker was convicted of a felony on August 30, 1999, and he was incarcerated from that date until February 21, 2008. (A.R. 458-59). After Cahill testified on direct, the Court instructed the jury that this information is to be used only “for the limited purpose of the passage of time.” (A.R. 461). Baker was convicted of second degree robbery and attempted second degree robbery.

Subsequently, the State filed a recidivist information alleging that Baker had two prior felony convictions. The information, however, does not comply with the statutory requirements because it does not include the sentences imposed or the dates of sentencing. (A.R. 551-53). Despite this, the matter went to a jury and Baker was ultimately sentenced to life in prison.

#### **SUMMARY OF ARGUMENT**

First, Baker did not have a fair trial because the trial court allowed the State to admit evidence of his criminal history in violation of Rule 404(b) of the West Virginia Rules of Evidence. Second, the trial court’s additional life sentence for Baker is void because the Information filed in the habitual offender proceeding omits the dates of sentencing and sentences imposed for the predicate convictions that are required by statute.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is necessary pursuant to Rule 18(a) criteria. A Rule 19 argument is requested in this case because of the novel facts involved in the Court's erroneous application of otherwise settled law.

### ARGUMENT

- A. The Court abused its discretion and denied Baker a fair trial when it admitted evidence of Baker's criminal history under Rule 404(b).
1. Initially, the Court erred when it determined that the defense opened the door to evidence of Baker's imprisonment and parole status.

In its pretrial motions, the State tried many different ways to introduce evidence of Baker's prior incarceration, prior felony conviction, and parole status. First, prosecutor Via wanted to offer proof of Baker's incarceration and prior felony conviction to explain to the jury why Baker would have a motive to rob the Subway in 2008 if he was fired from there in 1999. (A.R. 93-94). Second, Via wanted to offer proof of Baker's felony conviction to prove why Baker would have robbed the Subway with a pellet gun found in his possession. Id. Third, Via wanted to tell the jury that Baker had a scanner in his possession the last time he committed a felony, and he had a scanner in his possession when he was arrested in the instant case, therefore this is evidence of Baker's *modus operandi*. Id. Fourth, Via wanted to tell the jury that Baker was on parole so that the jury would know why Judy Fitzgerald cooperated in the investigation of the robberies. (A.R. 4-5). The Court correctly rejected all of those arguments and ordered the prosecutor to try the case without offering evidence of Baker's criminal history. (A.R. 159-69, 797-98).

Although Via was unable to get Baker's criminal history in the front door, he shrewdly managed to convince the court to allow it in the back door. During his direct

examination of Donald Smith, Via was the first to elicit evidence that Baker was hired and fired from the Fairlea Subway in 1999. (A.R. 304). After Smith testified that Baker was an employee “for a little over a week, in December of ’99,” Via followed with two more questions verifying the fact that Baker was both hired and fired by Smith in 1999. Id. This is the first time that the jury heard that Baker was fired from the Fairlea Subway in 1999, and it was at this point that the State opened the door to evidence of the lapse of time between Baker’s employment at the Subway and the robbery ten years later. On cross examination, defense counsel merely did the math and asked Smith if Baker worked there “ten years ago, this summer.” (A.R. 307). Via did not object to this question. Rather, he waited until the following morning to induce an erroneous ruling from the court, and he profited from the legal consequence of this ruling by introducing the evidence he so desperately wanted to tell the jury about: Baker’s criminal history.

The next morning of trial, Via belatedly objected, falsely claiming that he had “stayed away from [the lapse of time]; the defense didn’t, and the door is now open” to introduce Baker’s criminal history to counter a purported effort by the defense “to demonstrate that the revenge motive was not plausible due to the continuing passage of time.” (A.R. 315, 317). The defense, on the other hand, correctly pointed out that Via is the one that first elicited testimony that Baker “worked there in 1999.” (A.R. 318). The defense then offered to avoid any future reference to this issue rather than informing the jury about Baker’s criminal history. (A.R. 320-21). The Court rejected this solution, however, and abused its discretion by allowing prosecutor Via to introduce Baker’s criminal history to cure an error that the State itself committed.

The Court's finding that the defense opened the door to the lapse of time issue is clearly wrong and it turns the invited error doctrine on its head. See Syllabus Point 2, State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120 (1986); Franklin D. Cleckley, *Handbook on West Virginia Evidence*, § 1-7(I)(1) (2007) ("Courts apply the [invited error] doctrine to prevent a party from complaining about an error caused by that party.") In sum, the Court committed error when it found that the defense, not the State, opened the door to the lapse of time, and abused its discretion by allowing Baker's criminal history to be admitted as a cure for this imaginary fault by the defense.

2. Evidence of Baker's criminal history was not admitted for a proper purpose under Rule 404(b).

During Baker's trial, the Court admitted evidence that he was incarcerated from 1999 to 2008 and that he was on parole when the robberies occurred. The trial court ruled that "the sole purpose of permitting this evidence is to explain the passage of time." (A.R. 321). However, the passage of time is not a legitimate purpose of the admission of evidence under Rule 404(b). The first admissibility requirement for Rule 404(b) evidence is that it must be "offered for a proper purpose." State v. McGinnis, 193 W.Va. 147, 155, 455 S.E.2d 516, 524 (1994). This Court reviews *de novo* whether the trial court correctly found the disputed evidence was admitted for a legitimate purpose under Rule 404(b). State v. LaRock, 196 W.Va. 294, 310, 470 S.E.2d 613, 629 (1996).

- a. Explaining the lapse of time is not a proper purpose to admit evidence under Rule 404(b).

After the State elicited evidence that Donald Smith fired Baker from the Fairlea Subway in 1999, ten years before the 2008 robbery, the Court curiously ruled that Baker's criminal history was admissible under Rule 404(b) not to prove motive, but "to

explain [this] passage of time.” (A.R. 321). The trial court repeated this purpose each time it read a limiting instruction. (A.R. 407-08, A.R. 461, A.R. 499-500). However, a plain reading of Rule 404(b) reveals that explaining the passage of time is not one of the enumerated purposes to admit evidence. West Virginia Rules of Evidence, Rule 404(b). Therefore, the Court clearly erred when it created another exception under Rule 404(b), thereby allowing the admission of Baker’s criminal history for an invalid purpose.

- b. Baker’s criminal history is not relevant to prove that he had a motive to rob the Subway.

Assuming, *arguendo*, that the Court admitted evidence of the lapse of time to allow the State to refute the argument that Baker had no motive to rob the Subway; this too was an abuse of discretion. This Court has adopted the following explanation of motive in the context of Rule 404(b):

Motive has been defined as “supply[ing] the reason that nudges the will and prods the mind to indulge the criminal intent.” Two evidentiary steps are involved. Evidence of other crimes is admitted to show that defendant has a reason for having the requisite state of mind to do the act charged, and from this mental state it is inferred that he did commit the act. Evidence of another crime has been admitted to show the likelihood of defendant having committed the charged crime because he needed money, sex, goods to sell, was filled with hostility, sought to conceal a previous crime, or to escape after its commission, or to silence a potential witness.

State v. Johnson, 179 W.Va. 619, 627, 371 S.E.2d 340, 348 (1988) (citations omitted).

Pretrial, the trial court correctly ruled that Baker’s criminal history is not relevant to prove motive under Rule 404(b). (A.R. 168-69). As the Court noted in its pretrial order, the crime for which Baker was incarcerated between 1999 and 2008 had nothing to do with Donald Smith or the Fairlea Subway nor does it “have any relevance in proving or disproving a fact in consequence – namely the Defendant’s motive against Mr. Smith.” (A.R. 167-68).

As the Court predicted, the State presented no evidence that Baker's imprisonment and parole status nudged his will to rob Subway. See Johnson at 627, 348. Moreover, if the State wished to prove that Baker had a motive to rob Subway, it could use Baker's prior employment, his contentious dismissal, and his knowledge of the crime scene, without delving into his criminal history. (A.R. 167-68). Simply put, Baker's criminal history has no impact on his purported intent to rob the Fairlea Subway. Baker's purported "motive" is merely a pretext for the admission of his collateral crimes.

In sum, Baker's criminal history was not offered for a proper purpose under Rule 404(b) because 1) explaining a lapse of time is not a proper purpose under Rule 404(b) and 2) Baker's criminal history is not relevant to his motive. The Court should have held fast to its pretrial ruling and excluded this evidence because it fails the first element of the McGinnis test. McGinnis at 155, 524.

3. Evidence of Baker's criminal history is substantially more prejudicial than probative and the Court abused its discretion by allowing its admission.

The trial court was initially correct when it excluded Baker's criminal history because of the danger of unfair prejudice and confusion of issues. (A.R. 167-68). Because of the great potential for abuse of 404(b) evidence, it must be subjected to a Rule 403 balancing test to determine whether the probative value of the evidence "is substantially outweighed by its potential for unfair prejudice" and the standard of review is for an abuse of discretion. McGinnis, at 155, 524; LaRock at 310-11, 629-30. This Court has cautioned trial courts to be careful when considering Rule 404(b) evidence because if it is erroneously admitted, "prejudicial error is likely to result." Id. at 153, 522. Collateral crimes in particular have a great potential to be prejudicial because this is

in essence “mere propensity evidence” that encourages a jury to judge a person upon past misdeeds rather than the evidence in the instant case. Id.; see State v. Ricketts, 219 W.Va. 97, 632 S.E.2d 37 (2006) (reversing a conviction because the trial court erroneously admitted collateral crime evidence); State v. McFarland, No. 101413 (W.Va. Nov. 23, 2011) (per curiam) (reversing a conviction because of erroneously admitted collateral crime evidence); State v. Edward Charles L., 183 W.Va. 641, 647, 398 S.E.2d 123, 129 (1990) (evidence with the sole purpose of showing criminal disposition is inadmissible under Rule 404(b)); People v. Allen, 77 Cal.App.3d 924 (Cal.Ct.App. 1978) (evidence of defendant’s parole status at time of crime not harmless error); United States v. Hines, 943 F.2d 348 (4<sup>th</sup> Cir. 1991) (“[i]n the ordinary course of most criminal trials revelations of the defendant’s parole status might provoke a mistrial because it would inform the jury that the defendant had a prior criminal history”); State v. Ingram, 554 N.W.2d 833 (Wisc.Ct.App. 1996) (evidence of a defendant’s parole status and violation of parole conditions is inherently prejudicial); United States v. Calhoun, 544 F.2d 291, 296 (6<sup>th</sup> Cir. 1976) (knowledge that defendant was on parole at the time of the alleged offense is not harmless error because of the potential for an “emotional reaction among the jurors, especially those who harbor strong feelings about recidivism and the premature release of those in prison for crimes”); see also State v. McAboy, 160 W.Va. 497, 502, 236 S.E.2d 431, 434 (1977) (expressing a “nagging suspicion of the inherent prejudice involved in permitting a defendant to have his credibility attacked or impeached by cross-examination as to prior convictions”).

This Court has further articulated that

[a] trial court must understand that it alone stands as the trial barrier between legitimate use of Rule 404(b) evidence and its abuse. Adversarial

incentives predictably generate pretextual purposes that courts reject, and [the prosecution] must be ready to show that the probative force of the evidence on the specific point for which it is offered is sufficient to offset the danger of illegitimate use by the trier of fact as mere propensity evidence.

McGinnis at 155, 524 (citations omitted). The record is clear that prosecutor Via had a strong desire to inform the jury of Baker's criminal history. He tried repeatedly to do so, and in the end, he proved the McGinnis court to be correct by generating a pretextual purpose, the "passage of time," to introduce Baker's criminal history.

Moreover, as noted by the Court in its pretrial order, Baker's criminal history is not relevant to his motive to rob the Fairlea Subway. (A.R. 167-69). To the extent that the lapse of time may be relevant to prove motive, the Court initially, and correctly, ruled that

under Rule 403, the probative value of admitting this evidence merely to explain the lapse in time between the Defendant's threats to Mr. Smith and the commission of the crimes charged in 09-F-100 is substantially outweighed by the danger of unfair prejudice to the Defendant, in that the jury may conclude that because the Defendant was convicted of the crimes in 99-F-80 he is more likely to have committed the crime charged in the current manner. Therefore, WVRE Rule 403 bars the admission of the Defendant's conviction in 99-F-80 to explain the lapse in time between the Defendant's threats to Mr. Smith and the occurrence of the crimes charged in 09-F-100.

(A.R. 167). After this comprehensive Rule 403 analysis, it is baffling that the Court reversed itself. The State's pretrial argument regarding Baker's alleged motive and the lapse of time is identical to the State's argument during trial. The only explanation the Court provides to justify this stunning reversal is that "I certainly understand the prejudicial versus probative, and I think this is more probative than prejudicial, and I make that finding. And I accept the argument of the prosecutor as to his position on that, and that's my decision." (A.R. 323). This, however, is a conclusory rationale that in no

way adequately justifies the admission of Baker's criminal history under Rule 403 and McGinnis. This Court has made clear that it is error for a trial court to fail to conduct a Rule 403 balancing test when evaluating the admissibility of 404(b) evidence, and that is what occurred in this case. See McGinnis at 156, 525; McFarland at 21-22. The Court arbitrarily and irrationally abused its discretion when it allowed Baker's criminal history to be admitted for the same reasons that it had rejected prior to the trial. Because this evidence was offered for no purpose other than to prove that Baker has a propensity for criminality, the Court abused its discretion by allowing its admission because it is substantially more prejudicial than probative. See West Virginia Rules of Evidence, Rule 403; McGinnis at 523, 154.

4. The admission of Baker's prior convictions, incarceration and parole status violates the curative admissibility rule.

Prosecutor Via's proposed solution to explain the lapse of time to the jury was disastrous for Baker, because it allowed the jury to judge Baker based upon his criminal history rather than upon the elements of the crimes alleged. Via proposed, and the Court agreed, to tell the jury that Baker was on parole and that he had been in prison from 1999 to 2008. As previously discussed, this ruling is wrong because 1) defense did not open the door to the lapse of time issue, 2) explaining a lapse of time is not a proper purpose for 404(b) evidence, 3) Baker's criminal history is not relevant to his motive to rob Subway, and 4) the evidence is substantially more prejudicial than probative. The fifth mistake that the Court committed by admitting Baker's criminal history is a violation of the curative admissibility rule. This Court has stated that

the curative admissibility rule allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has 'opened the door' by introducing similarly inadmissible evidence on the

same point. Under this rule, in order to be entitled as a matter of right to present rebutting evidence on an evidentiary fact: (a) The original evidence must be inadmissible and prejudicial, (b) the rebuttal evidence was similarly inadmissible, and (c) the rebuttal evidence must be limited to the same evidentiary fact as the original inadmissible evidence.

State v. Potter, 197 W.Va. 734, 748, 478 S.E.2d 742, 756, fn. 24 (1996), quoting Syllabus Point 10, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995). Justice Cleckley has further opined that when, as in the instant case, “the contested evidence comes in as a result of cross-examination (intrinsically), its admissibility is determined by the scope of cross-examination.” Potter at 748, 756, fn. 24. Cleckley further suggests that this Court should view the curative admissibility rule with disfavor because it acts as an end-around to a timely objection under Rule 402, and a trial court should apply the rule “only in the case of extreme prejudice.” Cleckley, *Handbook on West Virginia Evidence*, § 1-7(I)(2) (2007).

There is no extreme prejudice in this case because the State itself invited the error. Also, the defense offered to stay away from all future references to the passage of time rather than informing the jury of Baker’s criminal history, and the State could still rely on Baker’s contentious dismissal from the Subway to explain his motive to rob the Subway. (A.R. 320-21). The references to the year that Baker worked at the Subway are not that noticeable in the greater context of Donald Smith’s testimony and it is fair to say that Via hyperbolized the lapse of time issue that he created so that he could achieve his ultimate goal of bringing out Baker’s criminal history. (A.R. 302-09).

There are additional two reasons why evidence of Baker’s criminal history violates the curative admissibility rule. First, the original evidence admitted during Donald Smith’s direct examination is that Baker worked for Subway in 1999, ten years

before it was robbed. This is the “lapse of time” the State so vigorously complained about. The rebuttal evidence allowed by the Court is that Baker was in prison from 1999 to 2008 and Baker was on parole when the offense was committed. (A.R. 321).

Although Baker’s period of incarceration addresses the lapse of time, the fact that Baker was on parole is an additional evidentiary fact not raised by a lapse of time. This violates subsection (c) of the curative admissibility rule. See Syllabus Point 10, Guthrie.

Second, the admission of Baker’s parole status is outside the scope of the defense’s cross-examination of Donald Smith. (A.R. 306-08). The defense did not ask Donald Smith about Baker’s criminal history and did not in any way open the door to Baker’s parole status. Whether Baker was on parole was not addressed during Smith’s testimony and evidence of Baker’s parole status exceeds the scope of Smith’s cross-examination and was improperly admitted under the curative admissibility rule. See Potter at 748, 756, fn. 24.

The conditions under which otherwise inadmissible rebuttal evidence may be admitted under the curative admissibility rule are very specific. The Court did not follow these conditions and was clearly wrong when it allowed evidence of Baker’s criminal history to be admitted under the curative admissibility rule.

5. The jury’s consideration of Baker’s criminal history is not harmless error.

Collateral crime evidence that is substantially more prejudicial than probative and offered without a proper purpose is inadmissible because it is merely proves a propensity toward criminality. See West Virginia Rules of Evidence, Rule 404(b); McGinnis at 523, 154. When evaluating the wrongful admission of evidence, this Court has held that

the appropriate test for harmlessness ... is whether we can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence was independently sufficient to support the verdict and the jury was not substantially swayed by the error. In determining prejudice, we consider the scope of the objectionable [evidence] and [its] relationship to the entire proceedings, the ameliorative effect of any curative instruction given ... and the strength of the evidence supporting the defendant's conviction. ... Thus, only where there is a high probability that an error did not contribute to the criminal conviction will be affirm. High probability requires that this Court possess a sure conviction that the error did not prejudice the defendant. ... Where there is grave doubt regarding the harmlessness of errors affecting substantial rights, reversal is required.

State v. Guthrie, 194 W.Va. 657, 684, 461 S.E.2d 163, 190 (1995); see Syllabus Point 4, State v. Day, 225 W.Va. 794, 696 S.E.2d 310 (2010). Although the State presented some circumstantial evidence to support Baker's conviction, it was not uncontroverted and it cannot be said that there is a "high probability" that jury was not substantially swayed by the erroneous admission of Baker's criminal history. Id. Whitney Smith could not identify Baker as the robber but she thought that the pellet gun in evidence was the one used during the robbery, despite her admission that pellet guns are common items. (A.R. 343). Kristin Smith testified that she saw a car resembling Baker's near the Subway, despite having driven past it at night around 40 miles per hour and seeing it "for seconds." (A.R. 364). A cell phone found in Baker's possession was used in the Lewisburg area on the night of the robbery, but the defense asserted that Baker took a nap in his car before the long drive back to Huntington. (A.R. 528). Baker called his mother before driving back from Lewisburg after midnight, and "fibbed to his mama" that he was between Charleston and Huntington because he didn't want her to worry about driving so late at night. Id. Lisa Arbogast watched the Subway surveillance video but despite the great length of the video (nineteen minutes) and her familiarity with Baker,

she couldn't be sure it was him. (A.R. 378, 432-33). Baker was behind on his rent when the robberies occurred, but he was paid by his employer shortly after the robbery and was able to catch up. (A.R. 421-27). Baker has never admitted involvement in the robberies. When considered as a whole, the State's evidence is contested, circumstantial, and only somewhat persuasive. The State's case becomes much stronger, however, when combined with the evidence that Baker had just been released from prison after ten years and was on parole when the robberies were committed.

Because of the State's concerted efforts to get Baker's criminal history before the jury, the record is replete with references to it. Judy Fitzgerald testified that: 1) Baker was on parole when the robberies occurred, 2) she cooperated with investigating officers by questioning Baker and searching his car, 3) as Baker's parole officer she was aware that he was behind on his rent at the Oxford House when the robberies occurred, and 4) Baker was released from prison and started parole on February 21, 2008. (A.R. 409-21). Sergeant Jan Cahill also testified that Baker was convicted of a felony on August 30, 1999 and that he was in prison from that date until February 21, 2008. Three erroneous limiting instructions were read to the jury to remind them that Baker's criminal history could only be considered to show the passage of time. (A.R. 407-08, 461, 499-500). Also, during its closing, the State refreshed the jury's recollection "that on August 30, 1999, Gary Baker went to jail. He was released from prison on his felony conviction on February 21, 2008, and that he was, thereafter, placed on parole and subjected to parole regulations. The passage of time, attributable to Gary Baker's circumstance, which you are now aware of." (A.R. 514). Because of the references to Baker's history, the defense

was compelled to address Baker's criminal history during closing arguments, expressing concern that the jury should not misuse the evidence of it. (A.R. 530-31).

It is curious that the State used not one, but two witnesses, a parole officer and a State Police sergeant, to introduce evidence of Baker's criminal history. Absent any other reasonable explanation, it appears as though that this was done to neutralize the limiting instructions and reinforce the implication of this evidence, i.e., Baker is a bad man. Fitzgerald and Cahill were also the last two witnesses to testify for the State so prosecutor Via could take advantage of the recency of their testimony to stay fresh in the jurors' minds. Moreover, while the purpose of the limiting instructions is admirable, the ameliorative effect of the instructions is questionable since the purpose for which the evidence was offered, a lapse of time, is not a proper purpose under Rule 404(b).

In a similar case, this Court reversed a conviction after a trial court allowed the defendant to be cross-examined about his criminal history despite initially ruling that it was inadmissible. State v. Ricketts, 219 W.Va. 97, 632 S.E.2d 37 (2006) (per curiam). After Ricketts' testimony, his criminal history was again addressed during both parties' closing arguments. See id. at 100, 40. The trial court belatedly realized its error and instructed the jury before its deliberation to completely disregard all evidence of Ricketts' criminal history. See id. Ricketts, however, was convicted by the jury. See id.

On Ricketts' appeal, this Court accorded great weight to the trial court's pretrial ruling excluding the prior conviction, and found that it was "certainly arbitrary and irrational and ... an abuse of discretion" to reverse itself and allow this evidence over the defense's objection. Id. at 101, 41. This Court found no justification under the McGinnis test for the admission of Ricketts' criminal history, and as discussed *supra*, the same is

true in the instant case. Id. at 102, 42. This Court further found the instruction to Ricketts' jury to completely disregard evidence of his criminal history to be insufficient, because the criminal history evidence was so prejudicial "that the bell could not be unrung." Id. The Ricketts instruction striking all evidence of his criminal history from the record goes above and beyond the erroneous limiting instructions given to Baker's jury, and it was still insufficient to cure the erroneous admission of Ricketts' prior conviction.

In addition, the evidence introduced in the instant case is more prejudicial than in Ricketts. Baker's criminal history was brought up through two witnesses, not just one as in Ricketts. Further, the witnesses that testified about Baker's criminal history were a parole officer and a State Police sergeant, clothed with the authority of the State. Also, the specific information admitted is more prejudicial than in Ricketts. In Ricketts, the jury was informed that he had been convicted of delivery of a controlled substance, to-wit, marijuana. Baker's jury, however, was informed that he had been in prison for the ten years immediately preceding the robbery and that he was on parole when the crime was committed, living in a halfway house in Huntington. Although Ricketts was painted to be a drug dealer, Baker's jury was invited to conclude that he is a hardened, repeat offender that came to Greenbrier County to commit a robbery in flagrant disregard of the conditions of his parole, which is even more likely to inflame a jury.

A defendant's criminal history has a great potential to have a distracting and prejudicial effect on the jury, particularly when it is repeatedly reminded of it. In light of the record as a whole and the extremely prejudicial propensity evidence presented by the State, it cannot be said that there is a high probability that the Court's erroneous

admission of Baker's criminal history did not contribute to his conviction. See Guthrie at 684, 190. Accordingly, this Court should find that there is grave doubt regarding the harmlessness of this error, and remand for a new trial as it did in Ricketts.

B. Baker's life sentence is void because the recidivist information does not comply with statutory requirements.

After Baker's trial on the robbery charges, the State filed a "Notice of Intent With Regard to Sentencing" and an "Information Regarding Sentencing" in an attempt to institute a habitual criminal proceeding. (A.R. 549-53). However, the Information filed by the State does not comply with statutory requirements; therefore the life sentence rendered by the jury is void.

In order to be valid, a recidivist information must set forth "the records of conviction and sentence, or convictions and sentences." W.Va. Code § 61-11-19. Failure to comply with this statutory directive voids the additional sentence imposed. Syllabus Point 2, State ex rel. Yokum v. Adams, 145 W.Va. 450, 114 S.E.2d 892 (1960).

Although the State presented evidence of Baker's convictions and sentences at the habitual offender trial, neither the date of sentencing nor the sentence imposed is contained in the Information filed by the State. (A.R. 551-53). The relevant portion of the Information reads as follows:

Upon information and belief, Defendant has been convicted of the following:

1. On or about November 2, 1988, in the Circuit Court of Greenbrier County, West Virginia. Defendant pled guilty to the felony offense of Grand Larceny.
2. On or about April 10, 1989, in the Circuit Court of Greenbrier County, West Virginia, Defendant pled guilty to the felony offense of Grand Larceny.

3. On or about March 22, 2000, in the Circuit Court of Greenbrier County, West Virginia, Defendant pled guilty to four counts of the felony offense of Wanton Endangerment Involving a firearm.

(A.R. 551). Although this may seem to be a harmless clerical error,

[h]abitual criminal proceedings providing for enhanced or additional punishment on proof of one or more prior convictions are wholly statutory. In such proceedings, a court has no inherent or common law power or jurisdiction. Being in derogation of the common law, such statutes are generally held to require a strict construction in favor of the prisoner.

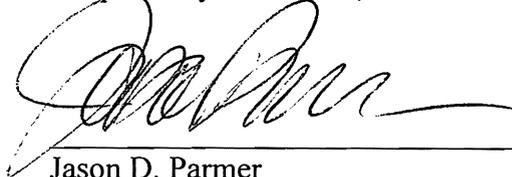
Syllabus point 1, State of West Virginia v. Jones, 187 W.Va. 600, 420 S.E.2d 736 (1992).

Because this Court has historically strictly construed the habitual offender statute in favor of the prisoner, and because the Information filed by the State does not comply with the requirements of the statute, this Court must void the additional life sentence imposed in this case.

### CONCLUSION

The Petitioner prays that this Court will reverse his underlying robbery convictions and remand the case for a new trial; and void the life sentence imposed herein, and all other relief deemed just and proper.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Jason D. Parmer, hereby certify that I have served the foregoing petition for appeal by first class mail on the 28<sup>th</sup> day of November, 2011 upon:

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