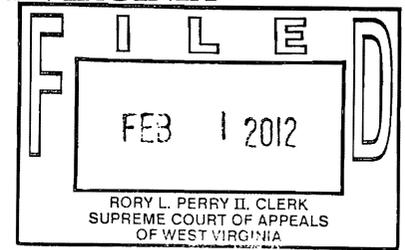


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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)

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**PETITIONER'S REPLY BRIEF**

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I. The Court abused its discretion when it admitted evidence of Baker's prior conviction and incarceration.

A. The defense did not open the door to the lapse of time.

The State implicitly concedes that the Court erred when it ruled that the defense opened the door to the admission of Baker's criminal history.<sup>1</sup> (R.B. 11-12). Even a cursory review of the record makes it clear that prosecutor Via first broached the subject of the ten year lapse of time between Baker's dismissal from Subway and the robberies. (A.R. 304). Further, Via did not timely object when the defense followed up with questions on cross-examination. (A.R. 307); see West Virginia Rules of Evidence, Rule 103(a)(1).

This erroneous ruling, instigated by prosecutor Via, is the only reason that Baker's prior conviction and incarceration was admitted in evidence. (A.R. 315-22). This initial error caused a procession of poor decisions by the Court that allowed Baker's criminal history to be admitted into evidence, and this is the ultimate reason why Baker was denied a fair trial.

B. Baker's prior conviction and incarceration in 1999 is not intrinsic to the 2009 robbery.

The State claims that the link between Baker's incarceration on August 30, 1999 and the robberies "is intrinsic evidence to which Rule 404(b) does not apply." (A.R. 458-59, R.B. 24). The State theorizes that Baker's incarceration is intrinsic because it

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<sup>1</sup> The State argues that neither party opened the door, "the door was opened by Mr. Smith." (R.B. 12). Donald Smith may have opened the door, but he did so during the State's direct examination and prosecutor Via followed with repeated questions about the year of Baker's firing. The State now attempts to explain Via's questions by hypothesizing that Via "did not want Mr. Smith to have given erroneous testimony under oath, that the hiring and firing was in December of 1999, when it was in fact in the summer of 1999." (R.B. 11-12, fn. 4). This interpretation of Via's intention, however, is belied by his repeatedly rebuffed attempts to admit evidence of Baker's criminal history, coupled with his false claim that the defense opened the door to the lapse of time issue. (A.R. 315-22). Another explanation may be that Via manipulated this situation so that he could inform the jury of Baker's criminal history.

prevented him from immediately exacting revenge on Donald Smith or the Fairlea Subway for his dismissal from employment in 1999. Although it is arguable whether Baker's discharge from employment at Subway is intrinsic to the robberies, the timing of his discharge and his intervening incarceration are definitely not intrinsic. This Court has repeatedly held that "[o]ther act evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." State v. LaRock, 196 W.Va. 294, 312, 470 S.E.2d 613, 631, fn. 29 (1996). In this case, Baker's prior conviction and incarceration are so causally remote from the alleged crimes that adoption of the State's argument will greatly distort this Court's definition of intrinsic evidence. See State v. Hutchinson, 215 W.Va. 333, 599 S.E.2d 736 (2004) (per curiam) (evidence of Hutchinson's threats made to others on the day in question is admissible context evidence); State v. Dennis, 216 W.Va. 331, 607 S.E.2d 437 (2004) (incidents that occurred up to three months before the crime is admissible context evidence "in light of the domestic violence overlay to the pattern of behavior"); State v. Youngblood, 217 W.Va. 535, 618 S.E.2d 544 (2005) (overruled on other grounds) (evidence of threats to others on the day in question is intrinsic because it "completes the story of an extended criminal transaction"); State ex. rel. Wensell v. Trent, 218 W.Va. 529, 625 S.E.2d 291 (2005) (per curiam) (evidence of uncharged incidents of physical and sexual abuse occurring up to four years before the crime are intrinsic because there is credible evidence that they occurred and they explain why the victims delayed disclosure of abuse); State v. Cyrus, 222 W.Va. 214, 664 S.E.2d 99 (2008) (per curiam) (evidence of uncharged incidents of physical and sexual abuse are

admissible because they occurred during the same time span as the alleged crimes); State v. Minigh, 224 W.Va. 12, 680 S.E.2d 127 (2009) (per curiam) (Minigh's 2004 arrest for attempting to operate a clandestine drug lab is near enough in time and place to his 2006 arrest for conspiracy to manufacture methamphetamine to be intrinsic); State v. Grimes, 226 W.Va. 411, 701 S.E.2d 449 (2009) (Grimes' beating of Moneypenny on the day he killed Kidrick is intrinsic to "the events of a turbulent evening").

Although the State cites numerous cases in support of its position that the ten year gap fills in a "chronological and conceptual void in the government's case," all of the cases cited to support this position are factually distinct from the instant case. (R.B. 29); United States v. Lashmett finds Lashmett's incarceration to be intrinsic because he committed his crimes with the help of others while he was in prison. 965 F.2d 179, 184-85 (7<sup>th</sup> Cir. 1992). United States v. Holmes finds Holmes' incarceration to be intrinsic because Holmes was charged with escape. 822 F.2d 802 (8<sup>th</sup> Cir. 1987). Muhammad v. United States finds a 1994 seizure of \$ 92,000 in drug proceeds from Muhammad at an airport in St. Louis to be intrinsic in a drug distribution case because it showed why he and his co-conspirators began traveling through different airports. 2010 WL 3001757 (E.D. Mo. 2010). United States v. Smith finds Smith's prior convictions to be intrinsic because Smith was charged with perjury for submitting a false document in support of his post-conviction motion for relief from a federal sentence imposed under the Armed Career Criminal Act. 2007 WL 1072200 (W.D. Okla. 2007). None of these cases provide the State any relief from the inescapable conclusion that Baker's prior conviction and incarceration is "mere propensity evidence" that is in no way related to Donald Smith or the Fairlea Subway; therefore, it is not intertwined with nor is it part of the *res gestae*

of the robberies. State v. McGinnis, 193 W.Va. 147, 155, 455 S.E.2d 516, 524 (1994); see Larock at 312, 631, fn.29.

C. Baker's prior conviction and incarceration was not admitted for a proper purpose under Rule 404(b).

The State further makes the bare assertion that Baker's incarceration "demonstrated that the plan for revenge against Subway was in limbo." (R.B. 30). The State does not, however, explain how this fact is relevant to the jury's determination of Baker's guilt. See Syllabus Point 2, State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994). As the trial court initially noted, Baker's incarceration 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). There is simply no evidence in the record proving that Baker's incarceration nudged his will to rob Subway. See State v. Johnson, 179 W.Va. 619, 627, 371 S.E.2d 340, 348 (1988). There is also no evidence of any change in the Court's understanding of the facts to justify the trial court's arbitrary and irrational change of its ruling on the admissibility of Baker's criminal history. See State v. Ricketts, 219 W.Va. 97, 632 S.E.2d 37 (2006) (per curiam).<sup>2</sup> On the contrary, the Court's decision is solely based upon its erroneous ruling that the defense opened the door to the ten year lapse during Donald Smith's testimony. (A.R. 320-21). The result of this error is an unfair trial because the only evidentiary value of Baker's prior conviction and incarceration is to prove criminal propensity. See McGinnis, 193 W.Va. at 155, 455 S.E.2d at 524.

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<sup>2</sup> The State attempts but fails to distinguish the instant case from Ricketts. This Court explicitly ruled in Ricketts that "the improper admission of 404(b) evidence can be reversible error ... [and] we find that such is the case here...." 219 W.Va. at 102, 632 S.E.2d at 42. The State's argument that Ricketts is inapplicable because it "was not really a 404(b) case at all" is frivolous and misleading. (R.B. 14).

- II. Baker's recidivist conviction is void because the information does not comply with statutory requirements.

This Court cannot grant the State's request to apply harmless error analysis to the defective recidivist information. Again, the State implicitly concedes error and admits that the information is defective, but argues that this error is excused by the failure of Baker's trial counsel to object to the defective information before the trial. (R.B. 31). In doing so, the State attempts to analogize a defective indictment in a criminal proceeding to a defective information in a habitual offender proceeding. (R.B. 31-32). Although it is true that the Rules of Criminal Procedure require a defendant to file a motion to dismiss a defective charging instrument before trial, this is not the case in a habitual criminal proceeding because the procedure therefore is wholly statutory. See W.Va. Rules of Criminal Procedure, Rule 12(b)(1); W.Va. Code § 61-11-19; Syllabus Point 1, State ex rel. Ringer v. Boles, 151 W.Va. 864, 157 S.E.2d 554 (1967). This Court has consistently held that the procedural requirements of the habitual offender statute are mandatory and jurisdictional, therefore Rule 12(b)(1) of the Rules of Criminal Procedure cannot be applied to habitual offender proceedings. See Syllabus Point 1, State ex rel. Ringer v. Boles, 151 W.Va. 864, 157 S.E.2d 554 (1967); Syllabus Point 2, Wanstreet v. Bordenkircher, 165 W.Va. 523, 528, 276 S.E.2d 205, 209 (1981); Syllabus Point 1, State ex rel. Albright v. Boles, 149 W.Va. 561, 142 S.E.2d 725 (1965); Syllabus Point 1, State ex rel. Yokum v. Adams, 145 W.Va. 450, 114 S.E.2d 892 (1960); State ex rel. Nutter v. Boles, 150 W.Va. 93, 144 S.E.2d 238 (1965); Syllabus Point 1, Justice v. Hedrick, 177 W.Va. 53, 350 S.E.2d 565 (1986); Syllabus Point 1, State v. Jones, 187 W.Va. 600, 420 S.E.2d 736 (1992); State v. McMannis, 161 W.Va. 437, 242 S.E.2d 571 (1978); see also Moore v. Coiner, 303 F. Supp. 185 (N.D. W.Va. 1969); State v. Cavallaro, 210 W.Va.

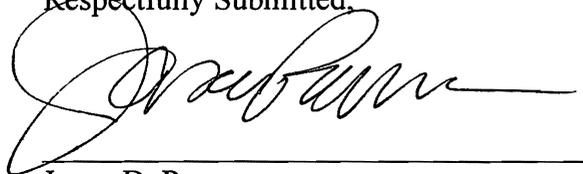
237, 557 S.E.2d 291 (2001). Consequently, this Court has no common law power to analyze a defective recidivist information for harmless error.

There is no dispute that the recidivist information violates statutory requirements because it does not allege the sentences imposed in the underlying convictions. (R.B. 31). However, if the Court accepts the State's position and applies a harmless error analysis in this case, it will overturn decades of established precedent and it will render Baker's life sentence subject to collateral attack in a habeas corpus proceeding. See State ex rel. Yokum v. Adams, 145 W.Va. 450, 453, 114 S.E.2d 892, 895 (1960). Therefore, this Court should consistently apply the law in this case and find that Baker's habitual offender conviction is void, and remand for a new trial.

#### 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 reply brief by first class mail on the 1<sup>st</sup> day of February, 2012 upon:

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