

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

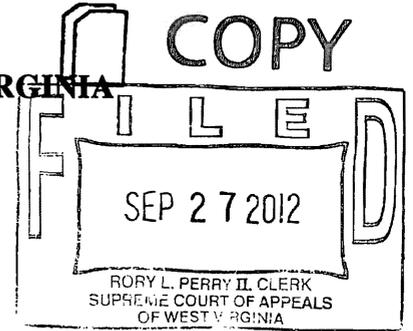
DOCKET NO. 11-1674

CHRISTOPHER WAYNE BOWLING,
Petitioner,

V.)

STATE OF WEST VIRGINIA,
Respondent.

Appeal from a final order
Of the Circuit Court of Raleigh
County (10-F-142-H)



PETITIONER'S REPLY BRIEF

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Table of Contents

TABLE OF AUTHORITIES 3
SUMMARY OF ARGUMENT..... 4
ARGUMENT..... 4
CONCLUSION 18
CERTIFICATE OF SERVICE..... 20

TABLE OF AUTHORITIES

<i>Crawford v. Washington</i>	13, 14
541 U.S. 36, 124 S.Ct. 1354 (2004)	
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i>	8, 10
509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993)	
<i>Gentry v. Mangum</i>	8, 10
195 W.Va. 512, 466 S.E. 2d 171	
<i>Montana v. Sanchez</i>	15
177 P.3d 444 (2008)	
<i>O’Dell v. Miller</i>	5, 6, 7,
211 W.Va. 285, 565 S. E. 2d 407 (2002)	
<i>State v. Beard</i>	8
194 W.Va. 740, 461 S.E. 2d 486	
<i>State v. Beegle</i>	10
188 W.Va. 681, 425 S.E. 2d 283 (1992)	
<i>State v. Bradshaw</i>	17
193 W.Va. 519, 457 S.E. 2d 456	
<i>State v. Dennis</i>	16
216 W.Va. 331, 607 S.E.2d 437 (2004)	
<i>State v. Hayes</i>	12
136 W. Va. 199, 67 S.E.2d 9 (1951)	
<i>State ex re Herald Mail Co. v. Hamilton</i>	4
165 W.Va. 103, 267 S.E. 2d 544 (1980)	
<i>State v. Kaufman</i>	14
227 W. Va. 537, 711 S.E. 2d 607 (2001)	
<i>State v. Leonard</i>	10
217 W.Va. 603, 619 S.E. 2d 116 (2005)	
<i>State v. Miller</i>	5, 6, 7
197 W.Va. 588, 476 S.E. 2d 535 (1996)	

<i>State v. Smith</i>	12
156 W. Va. 385, 193 S.E.2d 550 (1972)	
<i>State v. Smith</i>	10
198 W.Va. 441, 448 S.E. 2d 747 (1996)	
<i>Wilt v. Buracker</i>	8, 10
191 W.Va. 39, 443 S.E. 2d 1996 (1993)	

SUMMARY OF ARGUMENT

The State’s reply brief is a microcosm of the trial. Long on unsubstantiated facts properly excluded based upon Constitutional and evidentiary grounds and short on adherence to the applicable law. The blatant unfairness of the trial began at the pretrial hearings when the Court allowed countless instances of hearsay with no analysis and failed to make proper 404(b) findings. It continued in jury selection when jurors that had already deemed Mr. Bowling guilty through pretrial publicity were not struck for cause. The unjust nature of the trial continued throughout and ended with the prosecution’s closing argument when it called Mr. Bowling a “homegrown terrorist” without any plausible justification. To ensure the integrity of the justice system, this case demands a new trial.

ARGUMENT

I. THE TRIAL COURT COMMITTED ERROR BY FAILING TO PROPERLY CONDUCT AN IN CAMERA HEARING REGARDING 404(B) EVIDENCE.

The defense did not waive its right to an in camera 404(b) hearing. To the contrary, it requested the court to remove all press from the courtroom; the court refused.

Appx IV 247-249; V 20-31, 338-342.

In *State ex re. Herald mail Co. V. Hamilton*, 165 W. Va. 103, 267 S. E. 2d 544 (1980), the court refused to grant a closed hearing based upon a stipulation from both the defense and state who conceded there were not any issues that would cause prejudicial, pre-trial publicity. *Id.* at 552. In affirming, this Court noted that in most pre-trial/suppression hearings the issue is not primarily the substantive content of evidence to be suppressed, but rather the hearings test the procedural methods applied by law enforcement officials in obtaining questioned material, eg. the manner of taking a defendant's confession. *Id.* at 551

This Court recognizes the need for in-camera hearings when an open pre-trial hearing presents a clear likelihood there will be irreparable damage to the defendant's right to a fair trial. Factors include, the extent of prior public hostility, the probability that the issue involved at the pretrial hearing will aggravate the adverse publicity, or whether traditional judicial techniques insulate and ameliorate the jury from the consequences of publicity. *Id.* at 551.

In the instant case, Appellant moved to exclude the press from the 404(b) in camera hearings. The Court refused without affording any argument. Appx IV 247-248.

The requirement that 404(b) hearings be conducted in camera, is because by their very nature, these hearings contain explosive, prejudicial and substantive evidentiary content that may adversely mold public opinion against a defendant. This type of evidence requires an extra technique by the court to insure that explosive and substantive evidence is not used against a defendant unless and until that evidence has been ruled admissible. It is only after this extra step, and gate-keeping function by the court has

occurred, that a defendant enjoys the constitutional benefit of a fair trial free from prejudicial leaks to the prospective jury.

It was evident in this case that all the jurors had heard about this case through the media and press coverage from the in camera hearings¹. Had the 404(b) hearings been conducted in a traditional, in camera manner, then the closed hearing would have prevented all the jury issues that became problematic in this case. Our rules require in camera hearings have meaning; otherwise, it becomes just another pre-trial hearing, and can be effectively ignored even possibly in cases involving children.

II. THE TRIAL COURT DENIED THE APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY ABUSING ITS DISCRETION AND NOT STRIKING PROSPECTIVE JURORS WHO WERE CHALLENGED FOR MAKING CLEAR STATEMENTS OF BIAS – THEY THOUGHT APPELLANT WAS GUILTY.

In support of its response, the State cites *O'Dell v Miller*, 211 W. Va. 285, 565 S. E. 2d 407 (2002) and *State v. Miller*, 197 W. Va. 588, 476 S. E. 2d 535 (1996). In the *O'Dell* case a prospective juror revealed that he: 1) was currently being represented by the doctor's attorney; 2) that had been a patient of the doctor; and 3) understood that the result of the malpractice action affecting his doctor. The trial court refused to strike the prospective juror for cause.

In reversing the lower court, this Court cited to *State v. Miller, supra* and held that:

¹ Finally despite, the State's allegations to the contrary, the jurors, in the second trial, admitted to the court that they were talking among themselves about the facts in this case, including media coverage of the 404(b) hearings, while those same jurors were awaiting individual voir dire. Appx VIII 11, 13, 20-31, 48, 50-56, 127, 154, 174, 226, 245-249, 317, 338-342, 368.

Our Court has stated that actual bias can be shown either by a juror's own admission of bias or proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed. Bias, in its usual meaning, is an inclination toward one side of an issue rather than the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality. Prejudice is more easily defined, for it means prejudgment and consequently embraces, bias. . . The object of jury selection is to secure jurors who are not only free from improper prejudice and bias, but who are also free from the suspicion of improper bias or bias. *Odell*, 565 S.E.2d 407, 410.

Trial courts have an obligation to strike biased or prejudiced jurors for cause and West Virginia case law has long held that the trial courts must resolve any doubts of possible bias or prejudice in favor of the party seeking to strike for cause . . . A fair and impartial trial can only be ensured by removing for cause, prospective jurors who have experiences or attitudes that indicate a significant potential for prejudice in the matter at trial. Accepting such juror statements, that they can set aside their biases and be fair creates the great risk of seating biased jurors, and a clear appearance of prejudice to a party.

It is not enough if a juror believes that he can be impartial and fair. The court in exercising its discretion must find from all of the facts that the juror will be impartial and fair and not be biased consciously or subconsciously. A mere statement by the juror that he will be fair and afford the parties a fair trial become less meaning in light of other testimony and facts which at least suggest the probability of bias. *Id.* at 410-411.

The concerns raised in the *Odell and Miller* Court were literally at issue in the instant case, and the trial court abused its discretion by not striking prospective jurors Long and Collins.

Juror Long:

- Q: So do you think that right now, that based upon that evidence, that he's guilty? Appx VIII 419.
- A: Yes, until I would hear something different, to make me not believe that he did.
- Q: But as you sit here today, you still think he is guilty, right?
- A: At this point?
- Q: Yes
- A: Until I would hear something different, yes sir. Appx VIII 421.

Juror Collins

- Q: Well, tell me what you remember, what kind of details do you remember.
- A: Well, you know, the lady was killed, shot in her head, and the little girl heard in another room, right?
- Q: If I told you that you were a juror in this case, that you would be required to put all that out of your mind and forget it, and base your decision only on the evidence that you hear in the courtroom and only on the law that I give you to apply to that evidence, could you do that?
- A: I don't know if I could or not.
- Q: Why is that?
- A: Just where, you know, I've been keeping up on the media. I mean, I think I could, but I'm not going to say for sure. Appx VIII 387.
- Q: So have you followed this [case] pretty closely from the beginning of it?
- A: Yeah. I mean, I've been watching it.
- Q: Did just what you had seen on the news though make you think he was guilty?
- A: Well, it just didn't. I mean, you know, I'm going to be honest, it didn't look good, but you know, I can't say he's guilty, I wasn't there, you know. Appx VIII 393-394.

These prospective jurors most definitely exhibited a suspicion, attitude or inclination that indicated a significant prejudice against Appellant. No reasonable litigant, except the State, would have any confidence in receiving a fair trial with these biased jurors deciding their fate. These prospective jurors had specific knowledge of this case and were clearly communicating their pre-judgment, prejudice and bias against the Appellant. Their eventual statements that they could be fair and afford the defendant a fair trial was meaningless in light of the context of their *voir dire*.

As mentioned before, the jurors in the second trial admitted they talked amongst themselves about the facts of this case, or what they had heard, while these same jurors were waiting individual *voir dire*. Appx VIII 20-31, 226, 249, 338-342.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE WHICH PREVENTED THE APPELLANT A FAIR OPPORTUNITY TO PRESENT A DEFENSE.

In support of its response, the State cites *Gentry v. Mangum*, 195 W.Va, 512, 466 S.E.2d 171 (1995). The *Gentry* case, involved a civil case where the lower court excluded a deputy sheriff's expert opinion regarding the impact of the Raleigh County Commission's policy on requiring shotguns be kept in the trunk of police cruisers rather than in the cabin of their vehicles.

This Court reversed the lower court's refusal to allow the expert testimony and stated that the admissibility of expert testimony was governed by the W. Va. Rules of Evidence, Rules 104a and 702, and restated its position from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993) and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 1996 (1993) and *State v. Beard*, 194 W. Va. 740, 461 S. E. 2d 486. Holding that the court must not decide whether the evidence is right, but whether the science is valid enough to be reliable, and in that regard, the court must engage in a two-prong analysis: 1) the court must determine whether the expert testimony reflects scientific knowledge, derived by scientific method and whether the work product amounts to good science; 2) the court must ensure that the scientific testimony is relevant to the task at hand. Finally, the Court must determine whether the specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

The State's lead detective and medical examiner testified that this was a homicide because the gun in question did not malfunction. The medical examiner stated her

opinion, regarding the ultimate issue of homicide, would have been different if the gun was in fact defective. Appx X 1018, 1030, 1067-1069.

The State claims that the gun was in good working order and functioned as designed. Appx VI 1735-1736. However, the court excluded evidence that the State's gun expert had to order new springs and replace those new springs before the expert could properly conduct any test firing on this particular gun. Appx VI 701-704, 729, 732, 740-743; Vol XI 1736, 1752-1753, 1776-1781; Vol XII 1821; Vol XI 1787-1794; Vol XII 2453-2460, 2501. The court also excluded exhibits depicting the gun springs protruding from this gun after certain test fires by the State's expert. Appx X 1770-1782.

The Appellant's only defense was the gun was defective, and due to its poor condition, the gun accidentally fired when the Appellant was attempting to right the gun back from its out of battery condition. The trial court prohibited the defense's expert from explaining in detail the poor functioning of this gun, and how its malfunctioning springs could affect the amount of pressure required to engage the trigger, or how the malfunctioning springs could have caused the gun to go out of battery a fact that supported the Appellant's defense. Appx Vol XIII 2470-2471, 2491, 2630-2632 Vol XII 2454-2460. This evidence was essential to this case and corroborated the Appellant's defense.

The Court's refusal to permit this evidence was improper. The court had already made findings that the defense expert met the *Daubert/Wilt* requirements; therefore, it was error for the court's to make a determination whether the proffered evidence was right or not. *Gentry*, at 466 S. E.2d, 171, 182. If this evidence would have assisted the

trier of fact in evaluating the Appellant's defense, it should have been admitted and was error for the court to exclude same.

Although the Confrontation Clause violations are discussed below more fully, it is also a violation of the Confrontation Clause to limit cross-examination in this situation.

IV. THE TRIAL COURT ERRED IN DENYING THE APPELLANT MANSLAUGHTER JURY INSTRUCTIONS

In support of its response, the State cited to *State v. Leonard*, 217 W. Va. 603, 619 S. E.2d 116 (2005), *State v. Smith*, 198 W. Va. 441, 448 S.E.2d 747 (1996) and *State v. Beegle*, 188 W. Va. 681, 425 S.E. 2d 823 (1992) for the proposition that the court did not err by refusing a voluntary manslaughter instruction because there was no evidence of heat of passion or gross provocation.

The State is apparently wanting the best of both worlds. The State, over the objection of the Appellant called some 19 witnesses whose only purpose was to offer extensive evidence of provocation and malice of this Appellant against his wife, and to further prejudice him in the eyes of the jury, but then the State refused to acknowledge this same type of evidence vis-a-vis a manslaughter instruction.

Throughout the trial, and over the objection of Appellant, the State portrayed the Appellant as someone who was easily provoked into a patterned, malicious response against his wife, or others². However, the State contended that this same malicious pattern could not have surfaced on the night in question. The 404(b) evidence was extensive, some of these witnesses provided the following:

² The State went so far as to call the Appellant a home-grown terrorists. Appx XII 2931.

M.L. (Appellant's child) described Appellant dragging Teresa and banging her head on the car hood Appx IX 801-806.

M.L. described Appellant kicked down the door. Appx IX 811.

M.L. remained awake to hear Appellant arrive home he walked in the door, and then they started fighting about something and the last words she heard her mommy say it's not my fault then heard a gunshot Appx IX 814-815.

Mark Painter testified that Appellant stated that many times in the past that he wanted to kill her, and they had been in knock-down, drag out fights, but not on this night; they had a really good day . . . Appx XI 1513-1519

Phillip Jones related an incident in December 2009, that Appellant got into an altercation and pulled out his Kel-Tec causing his friends to duck, Appellant accidentally knocked Tresa off the bar stool, and later Tresa and Phillip Jones' wife were in front of a truck in which Appellant was sitting and Appellant repeatedly ordered the driver to run them over, kill them, get me out of here. During these events Appellant stated, I hate my wife. Appx XI 1423-1426.

Rebecca Jones, testified that in July 2009, Tresa called her in an upset condition because, Appellant had busted her head and she was bleeding Appx XI 1548-1550

Beth Jones, Tresa's sister, testified that Appellant had gashed her head open with grilling tongs. Appx XI 1675-1677.

Mary Ann Lilly, testified that Appellant threw a frozen margarita at her head after Appellant became angry and yelling loudly get the fuck out of my house. Appx XI 1627-1630. Lilly also related other incidents: she testified that one month before Tresa's death, Tresa had a large bruise on her calf and Lilly was told that Appellant had hit Tresa with a belt. In July 2008, Tresa had a black eye and confided in Lilly that Appellant had gotten into an argument with Tresa and he hit her [in the eye]. Lilly also described that Tresa would often call around searching for Appellant to determine if he was drunk or if in an angry mood. Appx XI 1635-1636. Cpl. Palmateer testified that Appellant had been abusive to her and . . . he had actually pulled his weapon out and fired a round off in the house Appx XI 1574-1575.

Appellant's former wife, Marita Judy testified that on an occasion, Appellant had been out all night, came home put his fist through the door,

grabbed Ms. Judy and held a hot curling iron against her face Appx X 1083-1087.

In *State v. Hayes*, 136 W. Va. 199, 67 S.E.2d 9 (1951), *State v. Smith* 156 W.Va. 385 193, S.E.2d 550 (1972) this Court held where there is competent evidence tending to support a pertinent theory of a case, it is error for the trial court to refuse a proper instruction, presenting such theory, when so requested. Obviously the lower court was of the opinion that all the 404(b) evidence was competent, inasmuch as it was admitted over Appellant's objection; therefore, this same 404(b) evidence supported a manslaughter instruction, and it was error for the court to refuse such instruction.

V. THE TRIAL COURT IMPROPERLY HEARSAY AND CONFRONTATION CLAUSE STATEMENTS

Appellant's initial brief already displays numerous instances of reversible hearsay where the Court abused its discretion and violated the Constitution's Confrontation Clause. Apparently, the State has chosen not to address them except in a few undetailed paragraphs where it simply cites its generic limiting instructions. A microcosm of how the Court handled the hearsay and confrontation clause issues in the trial is contained throughout the testimony of Charles Richmond. He first testified at a pretrial hearing. Appx. IV 128. At that hearing, Mr. Richmond was asked what Mrs. Bowling said she was afraid was going to happen. *Id.* After defense counsel objected to hearsay, the prosecutor simply stated "its asking for a promise." *Id.* Obviously, asking for a promise is not a well-settled hearsay exception and there was no analysis done to determine the reliability of the statement. There was also no assertion it was not for the truth of the matter asserted. The Court overruled the objection, responding to the prosecution by stating "yeah, what did he promise to do." He was then allowed to answer "[s]he made

me promise that if she were to be killed in her sleep that I would tell the police that it was no accident. *Id.* This testimony should not have been allowed and at the least the Court should have made factual rulings as to its admissibility.

At the first trial, Mr. Richmond testified again.³ Directly before, Charles Richmond was called as a witness, defense counsel asked to approach. The Court denied the request to approach and asked for the nature of the objection. Appx. V 925. Defense counsel responded “about this witness and a Crawford objection.” The Court’s reply was “overruled.” *Id.* A discussion was not allowed about the *Crawford* objection and the generic limiting instruction was read. *Id.* At 926.

Before the second trial began, the Court apparently decided that it would allow discussion about *Crawford* and the Confrontation Clause because it read the just issued Supreme Court opinion *State v. Kaufman* 227 W. Va. 537 (2001). Defense counsel informed the Court, again, that Mr. Richmond’s testimony should be barred by the Confrontation Clause. Appx. IX 748. The Court responded that it would “take it up and look at it because the –there are a number of – I’m sure Ms. Keller has a number of theories that she believed would make that statement admissible under certain hearsay exceptions. But that, you know – the real question is was it testimonial or was it a non-testimonial statement.” *Id.* The Court never took it up or looked at it. Ms. Keller never offered any theories.

³ Another example of the Court’s disregard for the rules of evidence and treatment of defense counsel’s objections, on the same transcript page as Mr. Richmond’s first trial testimony began, prosecution witness Beth Jones was finishing her testimony. Appx. V 925. The state moved to introduce the Women’s Resource Center form (Exhibit 43 at second trial) that contained hearsay information regarding the “tong incident.” The Court asked if there was a defense objection to which defense counsel simply responded “I think it contains triple hearsay your honor so I object.” The Court responded “I said state your objection, don’t give me a speech.” *Id.* How this is considered a speech is beyond counsel but certainly reflects the Court’s hostile attitude toward the defendant and proper objections throughout the trial.

Several days later, Mr. Richmond testified in the second trial. Appx. XI 1611.

He was asked by the prosecution:

Q. In the context of her discussions with you concerning her marriage to defendant, did she ask you to promise something?

A. Yes.

Mr. Weston: Objection, Your Honor, it calls for hearsay and confrontation clause issues.

The Court: Based upon my prior rulings, your objection is overruled.

.....

A. She asked me to promise her that –I think her words were, if I’m shot in my sleep, promise me that you’ll tell the police that it was no accident.” Appx. XI 1611.

The Court never made a prior ruling. There was never a prior discussion. There was never, in the three times Mr. Richmond testified, a hearsay exception stated. There was never a hearsay analysis regarding the reliability of the statement. There was never an assertion by the prosecution it was not for the truth of the matter asserted. No discussion was ever allowed. Only a generic limiting instruction read before the testimony that the jury had already been monotonously lulled to sleep with.

Therefore, the statement made by Mrs. Bowling to Mr. Richmond is clearly testimonial. See *Montana v. Sanchez*, 177 P.3d 444, 451-2 (Mt. 2008)(deceased victim wrote note stating if she unexpectedly became sick “you will have some answers.” The Court held the note testimonial.) Also see discussion in *Crawford v. Washington* of Lord Cobham’s letter implicating Sir Walter Raleigh for treason. 541 U.S. 36, 44-45 (2004). The statement is also hearsay that does not fit into a well-settled exception. Further, contrary to its statements, the Court never made a ruling of the admissibility on any grounds.

VI. THE TRIAL COURT ERRED BY IMPROPERLY ALLOWED CHARACTER EVIDENCE OF APPELLANT, INCLUDING PRIOR BAD ACTS OR PRIOR BAD HEARSAY RELATED TO APPELLANT'S CHARACTER

The State's response brief does not address this issue other than to cite the applicable law. Clearly, the Court did not make the requisite findings under *McGinnis* and the case should be reversed on this issue. The Court made several partial findings but did not make any complete 404(b) findings.

The worst part about the Court's rulings/nonrulings that allowed more 404(b)/intrinsic witnesses at trial than fact witnesses, is that Mr. Bowling was not allowed to introduce evidence of Mrs. Bowling's drug use or erratic behavior, such as wrecking cars and driving drunk, that led to many of the incidents allowed by the prosecution. Even worse, Mr. Bowling obtained a Domestic Violence Protection Order ("DVP") against Mrs. Bowling due to her erratic behavior several months prior to her death. Before the first trial, the Court stated the DVP would be admissible if Mr. Bowling testified. Appx. VI 6. He did testify yet the Court did not allow the DVP to be introduced into evidence. The State got to have its cake and eat it too during the trial. The prosecution was allowed to "complete the story" of the alleged crimes on trial by all the 404(b)/intrinsic testimony but defense counsel was not allowed to ask these same witnesses about Mrs. Bowling's substance abuse and other problems that led to many of the incidents. *State v. Dennis* 607 S.E.2d 437 (2004).

VII. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO RECALL AND REFERENCE OTHER MURDER CONVICTIONS IN RALEIGH COUNTY, WEST VIRGINIA, AND HOW THOSE CASES WERE RELATED TO OR SIMILAR TO THE INSTANT CASE AND OTHER ISSUES ON GUILT OF CONSCIOUSNESS

The prosecution's response mischaracterizes the law of regarding the issue of Lt. Bare testifying about four irrelevant cases and therefore the court should reverse on this ground. Resp. Brief at 45. To cover its own error, the prosecution cites Cleckley's handbook on evidence for the proposition that because defense counsel did not make a renewed objection, the objection was not properly preserved. Nothing could be further from the truth. The very first part of Cleckley's statement is "[w]hen evidence has been received under a promise that it will become relevant..." Cleckley, Franklin D., Handbook on Evidence, Vol. 1 § 4-1(F)(1), (4th ed. 2000). The problem with the prosecution's argument is that nobody ever promised the evidence would become relevant. The Court *sua sponte* decided it would somehow become relevant and should have tied up its own statement. As Cleckley states in the same section, "it is usually desirable to have a party offering the evidence first show facts that make it relevant." *Id.* The prosecution chose to introduce highly improper evidence, the defense made a proper objection, and the Court chose *sua sponte* to choose the wrong course of action regarding conditional relevancy. Therefore, Mr. Bowling should receive a new trial based upon this ground.

A. Lt. Bares Comments on Mr. Bowling's Fifth Amendment right against self-incrimination.

The prosecution brief fails to understand basic constitutional law regarding this issue. It argues that Mr. Bowling was not in custody or under interrogation at the time Lt. Bare telephoned him and therefore this is not reversible error. Resp. Brief at 38-9. It then cites *State v. Bradshaw* 193 W.Va. 519 for the proposition that a defendant cannot invoke Miranda rights outside of custodial interrogation. While that is correct statement of law, it is not responsive to Mr. Bowling's argument. Every citizen of the United States has the Fifth Amendment right against self-incrimination. This right existed long before *Miranda*. Mr. Bowling does not argue he should have been given *Miranda* warnings at that time. He is asking that the Fifth Amendment to the Bill of Rights apply to his murder trial and that the State not be allowed to comment on his expression of that right.

B.Lt. Bares comments opining Mr. Bowling is guilty beyond a reasonable doubt

Again, the prosecution attempts to hide behind the magic wand of a limiting instruction. Apparently, the prosecution believes that if a witness is vigorously cross-examined, then a witness can testify without regard to law on ultimate issue of fact.

CONCLUSION

Wherefore based on the above, Petitioner Christopher Wayne Bowling, respectfully requests this Court grant him a new trial.

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STATE OF WEST VIRGINIA,
Respondent.

CERTIFICATE OF SERVICE

I, Richard W. Weston, do hereby verify that I served the "Petitioner's Reply Brief" this 27th day of September 2012, via U.S. Mail, postage prepaid, addressed to the following:

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