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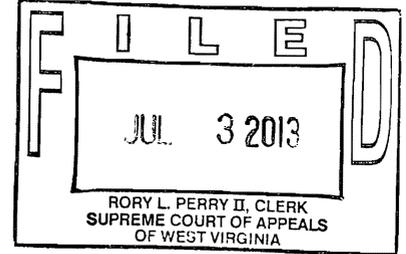
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 12-0301

**BRYAN MAGGARD,**  
Petitioner,

V.)

**STATE OF WEST VIRGINIA,**  
Respondent.



**PETITIONER'S AMENDED BRIEF**

**Counsel for the Petitioner**

Richard W. Weston (WVSB 9734)  
Connor D. Robertson (WVSB 11460)  
WESTON LAW OFFICE  
621 Sixth Avenue  
Huntington, WV 25701  
Phone: 304.522.4100  
Fax: 304.250.3000  
rww@westonlawoffice.com

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## **ASSIGNMENT OF ERROR**

- I. TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO QUESTION THE VICTIM REGARDING PETITIONERS SEXUAL PAST AND PORTRAYING HIM AS A PAST SEXUAL PREDATOR
- II. THE TRIAL COURT ERRED BY EXCLUDING STATEMENTS MADE ON TWITTER BY THE ALLEGED VICTIM BASED ON THE RAPE SHIELD STATUTE.
- III. THE TRIAL COURT ERRED BY REFUSING TO STRIKE JUROR NUMBER 38 TERESA FERGUSON-CROSSAN FOR CAUSE.
- IV. THE TRIAL COURT ERRED BY STRIKING A POTENTIAL JUROR FOR CAUSE AFTER THE ATTORNEYS HAD SELECTED A JURY.
- V. THERE WAS INSUFFICIENT EVIDENCE BEFORE THE JURY TO SUSTAIN A CONVICTION OF COUNT I OF THE INDICTMENT.
- VI. THE JURIES VERDICT WAS ONE OF COMPROMISE AND NOT BASED UPON THE EVIDENCE PROVIDED DURING THE TRIAL.

## **STATEMENT OF THE CASE**

In September of 2008, Marshall University student Bryan Maggard logs onto Facebook and sees a “friend request” from a female named J.C. (alleged victim referred to by initials pursuant to W.V Rules of Appellate Procedure 40(e)). (See Appx. Vols IV, V pgs. 151; 296-97). Although to his knowledge he had never met J.C., Petitioner accepts the friend request. (See Appx. Vol IV pg. 107). The two begin flirting by trading messages. (See Appx. Vols IV, V pg. 107-08; 297). About a week after their Facebook relationship begins, the couple decide to meet in person on Friday night. (See Appx. Vol IV pg. 112). That night, J.C. is working as a “shooter girl” at the then Huntington dance club named “Fluid.” (See Appx. Vol IV pg. 113). J.C.’s shift ends at approximately 3:30

a.m. and Petitioner meets her outside the club shortly thereafter. (See Appx. Vol IV pg. 115-16). They talk with others outside for a few minutes and then J.C. drives herself and Petitioner to his shared rental house on Fifth Avenue. (See Appx. Vol IV pg. 117-18).

Due to the late hour, none of Petitioner's roommates were still awake so they proceed directly through the house to Petitioner's bedroom. (See Appx. Vol IV pgs. 121; 154) Upon arriving in the bedroom, J.C. sits in a chair while Petitioner turns on the television and lights several candles. (See Appx. Vol IV, V pgs. 121-25; 299). J.C. then watches as Petitioner takes off his shirt, pants and shoes and then jumps in bed. (See Appx. Vols IV, V pgs. 121-25; 299). Petitioner then asks J.C. if she would like to join him in the bed. (See Appx. Vol IV pgs.156-57). She says yes and crawls into bed with him. (See Appx. Vol IV pgs.156-57).

Soon they turn face to face and begin kissing each other. (See Appx. Vol IV pgs. 129). While kissing, Petitioner starts rubbing J.C.'s crotch over her shorts. This leads to Petitioner fingering, or digitally stimulating the vagina, her beneath her shorts. (See Appx. Vol. IV pgs 130-31). J.C. never tells Petitioner "no," nor tells Petitioner to stop rubbing her or fingering her in any way. (See Appx. Vol IV pgs. 158-59).<sup>1</sup> The rubbing and fingering then led to sexual intercourse.<sup>2</sup> (See Appx. Vol. V pg. 300).

The Petitioner and J.C. then have sexual intercourse in several different positions. ( See Appx. Vol. V pg. 301). Petitioner ejaculates after the intercourse but not inside J.C.. (See Appx. Vol. IV pg. 145). Petitioner then travels down the hall, uses the bathroom,

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<sup>1</sup> J.C. testified at trial during direct examination that she pushed his hand away from her vagina and said "no." (See Appx. Vol IV pg. 130). During the preliminary hearing she testified that she did not say "no" and only pushed his hand away. (See Appx Vol II pg.26). When confronted about this on cross-examination at trial, J.C. admitted that she never said "no" but maintained she pushed his hand away from her vagina. Obviously, Petitioner disputes that either occurred.

<sup>2</sup> J.C. alleged the sexual intercourse was also nonconsensual but the jury acquitted Petitioner of this charge.

and then comes back into the bedroom. (See Appx. Vol. V pg. 301). J.C. is still in the room when Petitioner comes back, never tries to leave and never yells or screams. (See Appx. Vol IV pg. 145). When Petitioner came back in the room he gets back in bed and asks J.C. to stay with him. (See Appx. Vol IV pg. 146). J.C. and Petitioner then stay in bed until Petitioner fell asleep (See Appx. Vol IV pg. 146). Upon awaking in the morning, Petitioner discovered that J.C. had left.

Apparently, after leaving Petitioner's house, J.C. started driving to her home in Ohio but stopped half way there because she decided to go back to Cabell Huntington Hospital where she made the accusation that she had been sexually assaulted. (See Appx. Vol IV pg. 147). Upon her arrival at Cabell Huntington Hospital a nurse performed a "Rape Kit" on J.C.. The rape kit displayed there were no vaginal injuries. (See Appx. Vol IV pg. 193). J.C. then gave a statement to Huntington Police Department Officer, Todd Veazey. (See Appx. Vol IV pg. 250). Upon taking her statement Officer Veazey turned in his report in and had no further involvement in the case. (See Appx. Vol IV pg. 256-57). The report was assigned to Huntington Police Department Office Rodney Pell who began and concluded his investigation of the matter by taking written statements from both J.C. and Petitioner. (See Appx. Vol IV pg. 237-238). Because he felt that there were inconsistencies with Petitioner's statement when compared to J.C.'s statement, he felt that there was probable cause to charge Petitioner. (See Appx. Vol IV pg. 238). No member of law enforcement ever went to the alleged scene of the crime.

As a result of the above-mentioned investigation, Petitioner was originally charged with one count of Second Degree Sexual Assault in Magistrate Court on October 29, 2008. A preliminary hearing was held on November 18, 2009 in which Petitioner was

bound over to the Grand Jury. The Grand Jury Indicted Petitioner on two (2) counts of Second Degree Sexual Assault and the Indictment was filed with the Court on March 16, 2010 with the Circuit Clerk (See Appx. Vol I pg 4). The case went to Trial on Tuesday, April 5, and concluded on Wednesday, April 6, 2011.

The jury deliberated for several hours, starting at 10:47 a.m., on Wednesday April 6, 2011 until they, at 1:25 p.m, asked the judge for the definition of reasonable doubt. The trial judge re-read the definition of reasonable doubt to the jury after the jury foreman explained that they were having difficulty reaching a verdict based on the evidence. (See Appx. Vol V pg. 391.) The jury resumed their deliberations at 1:32 p.m until 2:09 p.m. where the jury foreman again sent out a signed note stating that they were at 8-4. (See Appx. Vol V pg. 394). The trial judge did not know what the jury meant by this note and called them out into the jury box to ask them if there was a problem. (See Appx. Vol V pg. 395). Upon questioning the jury foreman what he meant by the note, the jury foreman responded that “our situation evolves around the evidence.” (See Appx. Vol V pg. 396). “There isn’t solid – there is not enough solid evidence.” *Id.* The trial judge then asks them if they would like a break and to continue their deliberations and the jury chooses to continue. The jury then continues its deliberations, at 2:32 p.m., after being read the “Allen Charge” and finally reaches a verdict at 3:36 p.m. (See Appx. Vol V pg. 401).

The jury found Petitioner not guilty of having forced sex with J.C. as contained in Count II of the indictment. Curiously, the jury found Petitioner guilty of Count I of the Indictment that charged him with placing his fingers inside of J.C.’s vagina without her consent, which occurred before the acquitted conduct of sexual intercourse.

Upon concluding the reading of the Verdict of Guilty against Petitioner the Court asked the Jury Foreman which side the 8-4 split was at that time that they could not originally reach the verdict and the Jury Foreman stated that it was 8-4 in favor of a Not Guilty on both Counts. (See Appx. Vol V pg. 404).

Petitioner was finally sentenced on January 30, 2012 to incarceration in the custody of the Department of Corrections for a period of 10 to 25 years, but that sentence was suspended and Petitioner was placed on probation for a period of 5 years and extended supervision for 10 years. Petitioner was also Ordered to register for life and comply with any and all requirements of the West Virginia Sexual Offenders Registration Act. It is this conviction and sentence that Petitioner now appeals.

### **SUMMARY OF ARGUMENT**

First, the Petitioner argues that the Trial Court improperly allowed the prosecution to introduce 404(a) character evidence stating that the victim of the sexual assault “heard how he (defendant) is” and stating that “he just wants to get one thing from girls” despite the fact that the defendant had not placed his character in issue. Further, these statements portray the Petitioner as a sexual predator without any supporting evidence. These statements, when made in the context of a sexual assault case, are the exact reason 404(a) was enacted.

Second, the Trial Court improperly excluded the victim’s public Twitter post “I do things with people I shouldn’t although I am old enough to know better” because this type of statement is not afforded protection under the Rape Shield Statutes. The statement was not referencing a specific instance of the victim’s past sexual conduct; the statement

was not “opinion evidence:” the statement was not “reputation evidence;” and finally, the statement is not the traditional type of statement which accuses the victim of making other false accusations.

Third, the Trial Court failed to strike a potential juror for cause even after it was apparent that she was biased due to her 20-year employment as the Court Clerk for the City of Huntington and her working relationships with all of the City of Huntington Police Officers.

Fourth, the Trial Court improperly struck a potential juror for cause after the parties had exercised their peremptory strikes to select a jury and despite the fact that the record clearly evidenced that she was in no way biased to either side.

Fifth, the Trial Court again struck a different potential juror for cause even after he repeatedly stated that he could be fair and neutral.

Finally, that there was insufficient evidence presented at trial to convict the Petitioner of Count I (sexual intrusion) of the indictment especially when taking into consideration that the jury found the Petitioner not guilty of Count II (sexual intercourse) which occurred immediately after the acts of Count I took place.

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

The Petitioner requests oral argument in this matter as he believes it proper under Rule 19 in that 1) this case involves assignments of error in the application of settled law and 2) this case claims an unsustainable exercise of discretion where the law governing the discretion is well settled.

## ARGUMENT

### **I. TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO QUESTION THE VICTIM REGARDING PETITIONERS SEXUAL PAST AND PORTRAYING HIM AS A PAST SEXUAL PREDATOR**

#### Standard of Review

“Rulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.” *State v. Mills*, 219 W.Va. 28; 631 S.E.2d 586 (2005).

#### Argument

During J.C.’s direct examination, the prosecutor questioned her about arriving at Petitioner’s house and his “persistently” asking her to accompany him into the residence.<sup>3</sup> (See Appx. Vol IV pg. 118). The prosecutor then asked J.C. why she didn’t want to go inside with the Petitioner and she replied “I heard how he is.” (See Appx. Vol IV pg. 119). Defense counsel objected immediately to which the court simply stated “[i] will let her answer that.” *Id.* The prosecutor followed up the previous answer with “and you said you knew?” J.C. responded “Yes. And how he was that he just wants to be with – he just wants to get one thing from girls.” (See Appx. Vol IV pg. 119). This colloquy portrays Petitioner as a sexual predator, attacks his character, and could reference alleged specific instances of conduct. Further, it was never disclosed to Petitioner before trial. Emboldened by the court’s allowance of this testimony, the prosecutor then highlighted the error by commenting upon it during closing argument. “You heard what J.C. said. ‘I had heard what he was like. I mean, I had heard these things about him.’” (See Appx. Vol V pg. 371).

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<sup>3</sup> During the preliminary hearing in this matter J.C. never mention her hesitancy of entering the residence and stated it was prearranged with her consent. (See Appx. Vol II pg. 8-9).

The testimony is properly barred by Rule 404 of the West Virginia Rules of Evidence. First, Rule 404(a) states that “evidence of a person’s character or a trait of character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion.” These statements portray Petitioner as a sexual predator and that J.C. was just next in line. The statements do so without any supporting evidence. Petitioner never put his character in evidence at any point in the trial therefore there was no need for the prosecution to rebut the same.

Second, the testimony could also be characterized as improper 404(b) testimony for which no pretrial notice or findings were made. While it is not clear if J.C. is referring to character evidence or specific instances of conduct, her remarks were certainly prejudicial. As other courts have warned:

The evidence produced by the prosecutor's line of cross-examination is not rendered more acceptable by the fact that it is less focused and more subtly adduced than traditional "other crimes" evidence. Quite the contrary. Where the "other crime" alleged is not specified, it is more difficult for the defendant to refute the charge or to demonstrate its insignificance. Where the evidence was presented by innuendo, it is less likely that the jury will guard against manipulation. Therefore, the likelihood that a jury will draw on improper inference is even greater in a case like the one before us than it is in the traditional “other crimes” case.

*U.S. v. Shelton*, 628 F.2d 54, 57 (D.C. 1980). In that case, David Shelton was charged with assaulting a federal officer and firearms charges. *Id.* at 54. The officer testified he pulled over and then approached a car with Shelton in the passenger seat and Clifton Duke driving. The officer testified that as he approached the car, Shelton braced his hand on the roof, pointed a gun at him and then fled. *Id.* at 55. Clifton Duke and Ms. Hailes, a

disinterested eyewitness testified that Shelton did not have a weapon and made no threatening gestures toward the officer.<sup>4</sup> *Id.*

During Clifton Duke's cross examination, the prosecution established that he had been in the area before, was unemployed, and possessed a large amount of cash. *Id.* During Shelton's cross-examination they established he was unemployed. The appellate court noted that although the prosecution did not openly present evidence of other crimes, by innuendo they made Shelton and Duke "seedy and sinister characters." *Id.* at 57. "We cannot avoid the conclusion that...the prosecutor sought to persuade the jury that the defendant and one of his principal witnesses were members of the drug underworld involved in all sorts of skullduggery." *Id.*

J.C.'s accusations were not made by innuendo, they were direct statements without any foundation. They were statements made about her hesitation to enter Petitioner's residence which are contradicted by her preliminary hearing testimony. The line of questioning is improper and only elicited to portray Petitioner as a sexual predator that was acting according to his character and now preying on J.C..

## **II. THE TRIAL COURT ERRED BY EXCLUDING STATEMENTS MADE ON TWITTER BY THE ALLEGED VICTIM BASED ON THE RAPE SHIELD STATUTE.**

### Standard of Review

"Our standard of review when considering a rape shield challenge is twofold. First, an interpretation of the *West Virginia Rules of Evidence* presents a question of law subject to *de novo* review. Second, a trial court's ruling on the admissibility of testimony is

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<sup>4</sup> The Court noted that "It is in the context of this sharp disagreement between the witnesses for the prosecution and the witnesses for the defense that the challenged line of cross-examination must be set." *Id.* at 56. In our case, the facts are similarly disputed.

reviewed for an abuse of discretion, but to the extent the circuit court's ruling turns on an interpretation of the *West Virginia Rules of Evidence*, our review is plenary. *State v. Sutphin*, 195 W.Va. 551, 560, 466 S.E.2d 401, 411 (1995).

### Argument

During J.C.'s cross-examination, Petitioner's counsel attempted to question her concerning statements she publicly posted on Twitter after the alleged assault. (See Appx. Vol IV pg. 168). After establishing that the Petitioner and J.C.'s relationship started via the internet, she readily admitted that she made statements regarding her life on these types of websites. (See Appx. Vol IV pg. 168). Finally, Petitioner's counsel asked J.C. if she made the following statement on her Twitter site "I do things with people I shouldn't although I am old enough to know better." (See Appx. Vol IV pg. 168). Immediately, the State objected to this line of questioning claiming protection of "West Virginia's Rape Shield Statute" The following colloquy took place:

Ms. Neal: My objection goes if he is trying to get into anything that has anything to do with what she does with anyone else, that is protected by the Rape Shield. I don't know where he is going."

Mr. Weston: It is what it is your Honor. I am not taking it anywhere.

Ms. Neal: Well, it's protected.

Mr. Weston: How? It is after the fact, for one.

Ms. Neal: It doesn't matter if it's after the fact.

Mr. Weston: Two, if she is wanting to talk about her demeanor and how she is still affected by it, this goes straight to whether she is affected by it or not.

Ms. Neal: Judge, that is what Rape Shield –

Eventually, the Trial Court sustains the prosecutions objection.

(See Appx. Vol IV pg 169-70).

The “Rape Shield” protection afforded to victims of sexual abuse is codified by West Virginia Code § 68-8b-11(b) and by Rule 404(a)(3) of the West Virginia Rules of Evidence. These provisions are set forth as follows:

**W. Va. Code § 61-8b-11(b)** – In any prosecution under this article evidence of specific instances of the victim’s specific instances of the victim’s sexual conduct with persons other than the defendant, opinion evidence of the victim’s sexual conduct and reputation evidence of the victim’s sexual conduct shall not be admissible: *Provided*, That such evidence shall be admissible solely for the purpose of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.

**Rule (a) – Character evidence generally** – Evidence of a person’s character or trait of character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except.

**Rule(a)(3) – Character of victim of a sexual offense.** In a case charging criminal sexual misconduct, evidence of the victim’s past sexual conduct with the defendant as provided for in W.Va. Code § 61-8B-11; and as to the victim’s prior sexual conduct with persons other than the defendant, where the court determines at a hearing out of the presence of the jury that such evidence is specifically related to the act or acts for which the defendant is charged and is necessary to prevent manifest injustice.

This Court has held that the above-captioned statute and rule encompass the “West Virginia’s ‘rape shield law.’” *State v. Guthrie*, 205 W.Va. 326, 334; 518 S.E.2d 83, 91 (1999). In interpreting this statute, the *Guthrie* Court broke the statute and rule down to its express provisions and their exceptions. First, the Court stated that W.Va. Code §61-8B-11(b) “bars the introduction of evidence, in a sexual assault prosecution, concerning (1) specific instances of the victim’s sexual conduct with persons other than the defendant, (2) opinion evidence of the victim’s sexual conduct and (3) reputation evidence of the victim’s sexual conduct. *Id.* at 333; 518 S.E.2d at 90. Second, the Court

stated the first exception to this rule was that the above-mentioned evidence can be introduced “solely for the purpose of impeaching the credibility of the victim only if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.” *Id.* Finally, the Court stated that the second exception, under Rule 404(a)(3), allows for the introduction of “prior sexual conduct of a rape victim when the trial court determines *in camera* that the evidence is (1) specifically related to the act or acts for which the defendant is charged and (2) necessary to prevent manifest injustice. *Id.* at 334; 518 S.E.2d 91.

The trial court abused its discretion in sustaining the State’s objection to the introduction of the statement “I do things with people I shouldn’t although I am old enough to know better,” which J.C. posted on her internet site because such a statement is not within the scope of the rape shield law. First and foremost, this statement does not on its face mention anything to do with sexual conduct and at the point that Petitioner’s counsel asked J.C. about the statement it was unclear if that was what the statement was referring to. Secondly, and corresponding to the Court’s interpretation of the main rule, this evidence does not refer to specific instances of the victim’s sexual conduct with persons other than the defendant. Again, it makes no mention of sexual conduct at all. Thirdly, this statement is not soliciting or attempting to introduce any opinion evidence of the victim’s sexual conduct. Lastly, this statement is not and cannot be considered reputation evidence of J.C.’s sexual conduct. Therefore, since J.C.’s statement does not mention any sexual conduct or make any attempt to solicit the three types of evidence listed within the statute and rule, the rape shield statute does not apply to this statement and the trial court’s ruling was an abuse of discretion.

In further support that this statement is not within the scope of the rape shield statute the Petitioner asks the Court to distinguish this statement from those types of statement right at the heart of the rule. Traditionally, this Court has dealt with those statements or questions of a victim that contemplate that the victim has slept with multiple other persons or made false accusations against other sexual offenses. *See State v. Jessica Jane M.*, 226 W.Va. 242 (2010), *State v. Quinn*, 200 W.Va. 432 (1997), and *State v. Wears*, 222 W.Va. 439 (2008). It is clear that the statement in the instant case is not similar to those types of questions or statements as Petitioner’s counsel was not asking J.C. about her previous sexual history or attempting to impeach her regarding other false accusations.

In this case, the prosecutor was simply making a preemptive objection to this statement because she assumed that further questioning would lead to something that was protected by the rape shield law; however, at the time the objection was made there was nothing on the record to support her argument. The prosecutor even states she didn’t know where the line of questioning was leading. (See Appx. Vol IV pg. 168). Accordingly, the trial courts evidentiary ruling on this matter was an abuse of discretion because it was a ruling on a line of questioning that never existed.

**III. THE TRIAL COURT ERRED BY REFUSING TO STRIKE JUROR NUMBER 38 TERESA FERGUSON-CROSSAN FOR CAUSE.**

Standard of Review

“In reviewing the qualifications of a jury to serve in a criminal case, we follow a three-step process. Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial

judge.” *State v. Miller*, 197 W.Va. 588, 600-01; 476 S.E.2d 535; 547-48 (1996).

### Argument

The next assignment of error raised by Petitioner is that the Trial Court refused to strike Juror Number 38, Teresa Ferguson-Crossan, for cause which resulted in the Petitioner having to strike the juror using one of his peremptory strikes. The Petitioner’s first argument under this section is that Juror Ferguson-Crossan should have been struck for cause due to her employment by the City of Huntington as their Court Clerk. The Petitioner’s second argument is that, because Juror Ferguson-Crossan, was not struck for cause, his automatic right to have a panel of 20 members, free from bias, to choose from was violated.

- a. **Juror Ferguson-Crossan should have been struck from the panel of jurors for cause due to her employment by the City of Huntington as their Court Clerk.**

The Petitioner asked the Trial Court to strike Mrs. Ferguson-Crossan from the jury panel for cause after finding out that she was a 22 year employee of the City of Huntington. (See Appx. Vol III pg. 24). Specifically, Mrs. Ferguson-Crossan is the City of Huntington’s Court Clerk. It was brought out during questioning of Mrs. Ferguson-Crossan that her job requirements was that she works with tickets issued by the Huntington Police Department and that she knew all of the police officers. (See Appx. Vol III pg. 23-24) In arguing his reason for striking Mrs. Ferguson-Crossan, it was clear that Petitioner’s counsel equated Mrs. Ferguson-Crossan as effectively being a member of the Huntington Police Department and Petitioner’s counsel stated that Mrs. Crossan “literally worked for the Police Department” (See Appx. Vol III pg. 34). Further, and despite the State’s attempt to rehabilitate Mrs. Ferguson-Crossan, it was clear that

Petitioner's counsel preserved his objection that he felt that Mrs. Ferguson-Crossan should be struck cause due to her bias.

The Court has dealt with the issues of juror bias many times and has set forth a detailed procedure in how to review these types of cases. In Syllabus points 4, 5, and 6 of *State v. Miller*, 197 W.Va. 588; 476 S.E.2d 535 (1996) the Court outlined the requirements that a Defendant had to prove to show bias.

Syllabus Point 4 states that:

The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.

Syllabus Point 5 states that:

Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed.

Finally, Syllabus Point 6 states that:

The challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for cause. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law.

In *Miller*, the Court was facing the accusation of the Petitioner that several jurors displayed bias surrounding 1) the likelihood that the Petitioner was guilty because he had been charged with a crime, 2) the Petitioner's intoxication defense, and 3) the Petitioner's sexual orientation. In applying these rules the *Miller* Court ultimately found that the facts in the transcript did not support the Petitioner's accusations. The Court found that all of

the jurors ultimately swore to the Trial Court that they would view the evidence and decide the case without bias. *Id.* at 606; 476 S.E.2d at 553. However, in the instant case, the Petitioner submits that the traditional rules set forth in *Miller* do not apply as this Court's opinion in Syllabus Point 5, in *State v. West*, 157 W.Va. 209, 200 S.E.2d 859 (1973) is applicable.

In the *West* case, the Defendant moved the Trial Court to strike a potential juror from the panel for cause due to the fact that he was a member of the Department of Public Safety of the State of West Virginia. *Id.* at 217; 200 S.E.2d at 864. After discussing the common law's inclination to disqualify jurors that had a tenuous relationship to a case, the Court held that it is "reversible error to permit a challenged juror who is an employee of the Department of Public Safety, a law enforcement arm of the State, to be a member of a panel of twenty. *Id.* In explaining its holding the Court stated that "as far as practicable the process of selecting jurors should endeavor to secure jurors who are not only free from prejudice, but who are also free from the *suspicion of prejudice*. *Id.* at 129; 200 S.E.2d at 866, citing *State v. Siers*, 103 W.Va. 30, 136 S.E. 503 (1927). (Emphasis Added). The Court went even further and stated that "when a defendant can demonstrate *even a tenuous relationship* between a prospective juror and any prosecutorial or enforcement arm of State government, defendant's challenge for cause should be sustained by the court. *Id.* (Emphasis added). Finally, the Court held that "doubt must be resolved in favor of the defendant's challenge, as jurors who have no relation whatsoever to the State are readily available. *Id.* at 220; 200 S.E.2d at 866.

Mrs. Ferguson-Crossan's employment by the City of Huntington as their Court Clerk is a job that is part of the "enforcement arm" of the State that the *West* opinion

contemplated. As stated above, it was brought out during jury questioning that Mrs. Ferguson-Crossan dealt with Defendant who were paying citations that were presumably issued by the Huntington Police Department, knew all of the Huntington Police Officers, and had done so for over 22 years. Her employment as a Court Clerk clearly forces her to work hand in hand with each police officer who issues a citation against a defendant and because she is charged with collecting the fines associated therewith it is clear that she is “enforcing” the City of Huntington’s law. Mrs. Ferguson-Crossan’s capacity as a Court Clerk for the City of Huntington is not the equivalent of the “elevator operator” or the “state road employee” that was found to be outside of the scope of having some interest. Her capacity as the City’s Court clerk, however, is the type of tenuous relationship of the “enforcement arm” of the City of Huntington that was contemplated and therefore leaving her on the jury panel was reversible error.

- b. Petitioner has an absolute right to have a jury panel of 20 members that are free from bias to choose from and it is reversible error if the Petitioner has to use a peremptory strike on a juror that should have been struck for cause by the Trial Court.**

West Virginia Code §62-3-3 states, in relevant part:

“In a case of felony, twenty jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel cannot be procured in this way, the court shall order others to be forthwith summoned and selected, until a panel of twenty jurors, free from exception, be completed, from which panel the accused may strike off six jurors and the prosecuting attorney may strike off two juror . . . .”

In interpreting this statute, the Court in Syllabus point 8 of *State v. Phillips*, 194 W.Va. 596; 461 S.E.2d 75 (1995), held that “[t]he language of W.Va. Code, 62-3-3, grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court’s error. *Id.* Therefore, based on the above-statute and analysis, the Petitioner second argument under this section is that he has an absolute right to have a 20 member panel, free from bias, in which to then use his peremptory strikes on and because Mrs. Ferguson-Crossan was biased as displayed above, and Petitioner had to use one of his peremptory strikes to disqualify her from the jury, his rights were violated.

**IV. THE TRIAL COURT ERRED BY STRIKING A POTENTIAL JUROR, MARY DOUTT, FOR CAUSE AFTER THE ATTORNEYS HAD SELECTED A JURY.**

Standard of Review

“In reviewing the qualifications of a jury to serve in a criminal case, we follow a three-step process. Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial judge.” *State v. Miller*, 197 W.Va. 588, 600-01; 476 S.E.2d 535; 547-48 (1996).

Argument

The second assignment of error raised by the Petitioner is that the Trial Court erred in striking Juror Number 54, Mary Douth, for cause. The Petitioner’s first argument under this section is that the Trial Court had no grounds to believe Juror Douth was in any

way bias, partial or unfit to serve. The Petitioner's second argument under this section is that the Trial Court improperly struck Juror Douth after the Petitioner had exercised his peremptory strikes and the jury panel had been narrowed to 12.

**a. The Trial Court did not have proper justification to strike Juror Douth for cause.**

During jury selection, Petitioner's counsel asked the following question: "Has anybody who is on the jury panel here ever been accused of something that they did not do?" (See Appx. Vol III pg. 57). In response to that question, Juror Mary Douth provided the following response: "I was accused of stealing." (See Appx. Vol III pg. 59). The following colloquy took place:

Mr. Weston: And where was that?

Prospective Juror Douth: Where I use to work.

Mr. Weston: And did you have any criminal charges or just at work?

Prospective Juror Douth: No.

Mr. Weston: And was there any type of process where they determined whether you were guilty or not?

Prospective Juror Douth: Yes.

Mr. Weston: And was there any type of process where they determined whether you were guilty or not?

Prospective Juror Douth: Yes.

Mr. Weston: And it was shown you did not do it?

Prospective Juror Douth: Right.

(See Appx. Vol III pg. 58-59).

The prosecution elected not to question Ms. Doult or move to strike her for cause regarding this instance and because Petitioner's counsel had no further questions, the *Voir Dire* of the jury was finished. The parties then proceeded to make their peremptory strikes of the jury and the same was selected. Upon returning from making their peremptory strikes of the jury down to 12 members, the Petitioner came back into chamber and was informed that the Prosecution, in the meantime, had the Victim's Advocate run a background check on Ms. Doult which showed that she had plead to a Misdemeanor embezzlement charge. (See Appx. Vol III pg. 63). Upon finding this information out, the Trial Court elected to bring Ms. Doult back for further questioning in which, in summary, she essentially stated that it was her understanding that she made restitution and did not have charges or a criminal record. (See Appx. Vol III pg. 64-67). The Trial Court then asked Ms. Doult "Do you think that would have any influence on your decision in this case at all?" (See Appx. Vol III pg. 67). To which Ms. Doult answered "No." (See Appx. Vol III pg. 67). Finally, as a result of the questioning the Trial Court removed her for cause and the Petitioner's counsel objected. Because she was removed for cause, the next in-line alternate was then placed in her spot. Then Petitioner had to use one of his peremptory strikes to strike Potential Juror Bruce Powers.

Under the *Miller, supra*, analysis listed in the Petitioner's first assignment of error, the Petitioner asserts that the Trial Court did not have any justification for striking Ms. Doult for cause. Ms. Doult answered Petitioner's counsel's questions honestly and explained to the court that it was her understanding that she was simply paying restitution. She was not aware that she had a criminal record against her. Originally, the prosecution did not move to strike Ms. Doult for cause prior to reducing the jury panel

down to 12 members and, perhaps most importantly, Ms. Doutt stated that this matter would have no influence on this case at all. Lastly, a review of the discussion held surrounding this criminal charge would not in anyway indicate that Ms. Doutt would be somehow be scorned or biased against the prosecution. From her answers, it was clear that Ms. Doutt flew through the Magistrate Court system in what she describes as “two seconds.” (See Appx. Vol III pg. 67).

Syllabus point 6 of *Miller* requires the challenging party, in this case the State, to persuade the trial court that the juror is partial and subject to being excused for cause. During the questioning of Ms. Doutt, the prosecution did not state how or why they felt she was biased, they did not state or point out any particular fact indicating that Ms. Doutt was prone to being partial to the Defendant. Further the Trial Court gave no indication as to why he was removing Ms. Doutt for cause. Simply stated, and pursuant to the requirements of *Miller*, there is no evidence on record indicating that Ms. Doutt was in any way an improper person for the jury, and therefore, shouldn't have been removed.

**b. The Trial Court improperly struck Juror Doutt for cause after the Petitioner had exercised his peremptory strikes and the jury had been narrowed to 12.**

The second argument of the Petitioner under this assignment of error is that he was prejudiced by the removal of Ms. Doutt from the jury due to the fact that Ms. Doutt was removed after the Petitioner has exercised his peremptory strikes to reduce the panel to 12 jurors. Because Ms. Doutt was removed from the final 12, the Petitioner had to exercise his peremptory strike on the newly appointed alternate juror, Mr. Bruce Powers.

**V. THE TRIAL COURT ERRED BY STRIKING POTENTIAL JUROR, MARK CALL, FOR CAUSE.**

### Standard of Review

“In reviewing the qualifications of a jury to serve in a criminal case, we follow a three-step process. Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial judge.” *State v. Miller*, 197 W.Va. 588, 600-01; 476 S.E.2d 535; 547-48 (1996).

### Argument

The third assignment of error raised by the Petitioner is that the Trial Court erred in striking Juror Number 21, Mark Call, for cause. In response to questioning, Mr. Call stated that his wife worked with one of the witnesses, Stacie King, who was going to testify and that the Petitioner had waited as a food server on his table at a restaurant a couple of times. The Petitioner’s Counsel, the State, and the Court adequately questioned Mr. Call regarding these issues and in all regards he stated that he could listen to the evidence and make a fair decision. For example, the Trial Court asked Mr. Call the following questions and he gave the following answers:

The Court: You haven’t heard any evidence and don’t know what the case is about really. Do you feel like you could sit here and listen to the evidence and go in the jury room and discuss it and base your decision and judge these - - As a juror you judge each witness as they testify.

Prospective Juror Call: Yes.

The Court: That is your responsibility. And then you go in and discuss it with all twelve of you as a group. Do you feel like you would automatically believe

everything the Defendant would testify to because you recollect he waited your tables just as if you didn't know him and so forth?

Prospective Juror Call: Uh-huh.

The Court: You all decide if she is telling the truth or does she know what she is talking about, these kinds of things. Do you feel like you couldn't do that in this case?

Prospective Juror Call: I mean, I guess I could do that. I need to listen to her. I don't know that person.

(See Appx. Vol III pg. 30-31).

Other questions and answers were as follows:

The Court: Okay. Well, again, do you feel like you could be fair to both sides and listen to the evidence and base your decision solely upon the evidence presented in the courtroom?

Prospective Juror Call: I would think so.

The Court: Do you feel like you could – would you have any problem voting for a Not Guilty if the State didn't prove their case to your satisfaction beyond a reasonable doubt that this man did anything wrong at all?

Prospective Juror Call: No

(See Appx. Vol III pg. 32).

Finally, and as further example of Mr. Call's impartiality, he is asked the following questions by the State and gives the following answers:

Ms. Neal: You said you have only met him and don't know anything about him and you would be able to find him Guilty if the State proved their case beyond a

reasonable doubt. Do you have some hesitation of your ability to do that based on some reason that we are not aware of here?

Prospective Juror Call: I mean, I could listen to the facts, I think, and make a fair decision. I know the gentleman is likeable from when he waited on our tables. He waited on us more than once, on more than one occasion and was very likeable and very friendly to, you know, everybody at the table. And I don't want that to influence my decision, but I think I can listen in there and make a fair decision. So, he is a likeable person and that's the only way I have ever dealt with him when he waited on our table.

Ms. Neal: Do you think that you can keep away from that –

Prospective Juror Call: Yes.

Ms. Neal: Do you have any question as to whether or not you are able to decide this case fairly and impartially based upon the fact that you may have seen him as a likeable guy waiting on you and feel his is a likeable guy?

Prospective Juror Call: No, I can make a fair decision by listening, yes.

(See Appx. Vol III pg. 32-33).

After answering over and over that he could make a fair and impartial decision, Ms. Neal moved to strike juror Call for cause because he was “hesitant” in answering his questions. Petitioner's counsel asked him not to be struck. The Trial Court, however, struck Mr. Call for cause and stated his reason for doing so was “I think I'm going to strike him for cause because we have enough jurors.” (See Appx. Vol III pg. 34).

Pursuant to *Miller*, as cited above, the State has the burden in showing that Mr. Call was somehow biased or impartial. Nothing in Mr. Call's answers even comes close to

indicating that he would have somehow been bias or partial enough to have been struck for cause. In fact, the facts of the *Miller* case and this Court's analysis thereof, show why Mr. Call should not have been struck for cause because in the *Miller* case, the statements made by the perspective jurors were far worse than a juror stating that he met the guy at a restaurant once. In *Miller*, the prospective jurors made serious statements that called their impartiality in question by answering questions that 1) indicated the defendant was guilty just because he was charged, 2) that alcohol could not negate intent, and 3) that they had problems with the homosexuality of the defendant. Despite these statements, the Court found that each of the prospective jurors affirmed that they could be impartial and therefore found that it was proper not to strike them for cause.

Further, this Court recently decided the case of *Coleman v. Brown*, Docketing No. 11-0378 just this year stating that a woman on Mr. Coleman's murder jury who withheld the fact that her son was facing criminal charges in front of the same judge was impartial. In that case the Court found that the evidence on the record did not show anything but that she "maintained her impartiality" and that she "did not have bias." (Pg. 20).

The State had an affirmative burden to show that Mr. Call had some sort of "actual bias" and moving to strike him for cause base on the fact that he was "hesitant" does not qualify under this Court's precedent. The State cannot, and should not, have the benefit of this Court's stringent precedent requiring the Defendant to show affirmative bias in jury selection, but turn around and be allowed to simply argue that "hesitancy" is enough. Therefore, Mr. Call should not have been struck for cause.

**VI. THERE WAS INSUFFICIENT EVIDENCE BEFORE THE JURY TO SUSTAIN A CONVICTION OF COUNT I OF THE INDICTMENT.**

### Standard of Review

“The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant’s guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” Syl. pt. 1, *State v. Guthrie*, 194 W.Va. 657; 461 S.E.2d 163 (1995).

### Argument

The Petitioner was charged and later Indicted on two counts of Second Degree Sexual Assault. The first count was for allegedly placing his finger inside of J.C.’s vagina and the second count was for placing his penis inside J.C.’s vagina. Pursuant to the testimony developed at trial it was clear that J.C. alleged that the Petitioner first placed his finger inside of her vagina and moments later placed his penis inside of her and she did not consent to either one of those activities. The testimony at trial was essentially the same on both counts. That is, J.C. testified that she shoved the Petitioner’s hands away from her crotch when she alleges that he placed his finger inside of her and that she attempted to hold the Petitioner by the hips to keep him from placing his penis inside of her. However, the jury found the Petitioner guilty of only the first count and found him not guilty on the second count. This means that the jury somehow found from the evidence that J.C. did not consent to having the Petitioner’s fingers in her, but then later consented to having his penis place inside of her after she had been “raped.” This decision makes absolutely no sense and no “rational” trier of fact could have made this determination.

Despite the fact that the jury's decision to convict was logically inconsistent, the evidence submitted at trial solely on the issue of whether the Petitioner placed his fingers inside J.C.'s vagina without consent was also insufficient. Summarily stated, the evidence submitted on this issue alone was as follows:

**Testimony of J.C.:**

J.C. and the Petitioner became friends on Facebook and agreed to meet a week later on Friday the 26<sup>th</sup> of September. They met outside of the bar that she worked at that night and she agreed to take him home. J.C. gave the Petitioner a ride home and he invited her in. J.C. accepts the invitation and goes into the Petitioner's home following him up the stairs into his bedroom at which point the Petitioner turns on the television, lights candles, turns the lights off, strips down to his underwear and gets in bed. J.C. states that she is sitting on a chair at this point while the Petitioner is in bed. J.C. first states that the Petitioner pulls her on the bed, but later states that the Petitioner invited her on the bed and she voluntarily agreed. J.C. states that she and the Petitioner were laying down on the bed and they began to kiss. Importantly, J.C. routinely states that up until this point she is not uncomfortable with anything that is happening up until this point.

J.C. testifies that right after she and the Petitioner began to kiss that the Petitioner kept attempting to put his hand near her crotch and rub it. J.C. testifies that she prevented him from doing so each time by pushing his hands away and telling him "no". However, she states on cross examination that she didn't actually tell him "no" verbally. She also states that he never touched her crotch area at that point. J.C. then testifies that the Petitioner shoved his hands down her pants and placed his fingers inside of her vagina. J.C. testifies again that she never verbally told him "no" and never screamed, but did

attempt to pull his hand away. J.C. then testifies that he finished fingering her then took her underwear off. (From this point on J.C.'s direct examination testimony concludes as to the events alleged in Count I and, as stated above, the Petitioner was found Not Guilty on Court II). J.C. then eventually testifies that the Petitioner went to the bathroom and she got her clothes back on. She testified that she lay down with the Petitioner until he fell asleep and she left the Petitioner's home and started to drive home, but decided to turn around and go to the hospital to be evaluated. (See Appx. Vol IV pgs. 96-192).

**Testimony of Stacie King:**

It was the testimony of Stacie King that J.C. appeared at Cabell Huntington Hospital on the early morning hours of September 27, 2008 and stated that she had been sexually assaulted. Ms. King took a statement from J.C.. Ms. King found J.C. to be emotional and she performed a "Rape Kit" which indicated a bruise on J.C.'s left hip and a scratch on her left wrist where her bracelet had been. She testified that there was no vaginal bruising or tearing. Finally, she testified that she was not at the scene when this event took place and did not know what happened. Specifically, Ms. King never testified regarding whether or not the Petitioner placed his fingers inside of J.C.'s vagina. (See Appx. Vol IV pgs. 192-225).

**Testimony of Todd Veazey:**

Huntington Police Officer, Todd Veazy testified that he received a call from a friend stating that one of her friends had been a victim of a sexual assault. Officer Veazey reported to Cabell Huntington Hospital and took a statement from J.C.. Officer Veazey stated that he had no other involvement in the case. Other than reading her statement into

the record, Officer Veazey did not mention anything involving whether or not the Petitioner placed his finger inside of J.C.'s vagina. (See Appx. Vol IV pgs. 248-58).

**Testimony of Rodney Pell:**

Huntington Police Detective Rodney Pell testified that he was the Detective assigned to investigate this matter and that he reviewed J.C.'s statements and took a voluntary statement from the Petitioner. He stated that his entire investigation consisted of reviewing J.C.'s statement and taking the Petitioner's statement. He did not go to the scene where the event took place or read the medical report from Cabell Huntington Hospital. He stated he chose to charge the Petitioner because of inconsistencies in their stories. Other than reading the statements into the record, Detective Pell did not mention anything to involving whether or not the Petitioner placed his finger inside of J.C.'s vagina. (See Appx. Vol IV pgs. 227-248).

**Testimony of Byran Maggard:**

The Petitioner's testimony was that most of the events that were testified to that night were accurate except for the fact that J.C. did not give him consent.

A review of the testimony on record in this case, as summarized above, shows that there is absolutely no evidence in which a rational jury could have found the Petitioner guilty of count one of the indictment. The only piece of testimony that was contested in count one of this case was J.C. attempted to pull the Petitioner hand away when he inserted his finger inside of her to which he says never happened. Nothing in Ms. King's testimony confirms or denies anything having to do the Petitioner putting his finger in her vagina. Although, she testified that J.C. was emotional and distraught, that testimony also went towards the charge in count two of the indictment in which the jury

found the Petitioner not guilty. This is the same with Officer Veazey and Detective Pell. These officers read the statements into the record and testified to nothing that could confirm or deny J.C.'s consent toward the Petitioner placing his finger inside her.

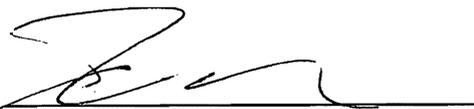
Plain and simply, the only evidence that this jury heard about J.C.'s lack of consent as to the Petitioner placing his finger inside of her vagina was that she claims that she pulled his hands away, she had a superficial scratch on her wrist and a small bruise on her left hip. This evidence was strongly contested by the Petitioner. One statement claiming that something happened after the fact is nowhere near beyond a reasonable doubt and as such the evidence was insufficient to find the Petitioner guilty of Count I. This is especially in light of the fact that the same Jury found the Petitioner not guilty of Count II.

### **CONCLUSION**

Wherefore, the Petitioner would respectfully request this Court to set aside his conviction and remand his case back to the trial court for a new trial.

**Bryan Maggard,  
Petitioner,**

By Counsel:



Richard W. Weston (WVSB 9734)  
Connor D. Robertson (WVSB #11406)  
WESTON LAW OFFICE  
621 Sixth Avenue  
Huntington, WV 25701  
Phone: 304.522.4100  
Fax: 304.250.3000

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

DOCKET NO. 12-0301

**BRYAN MAGGARD,**  
Petitioner,

V.)

**STATE OF WEST VIRGINIA,**  
Respondent.

**CERTIFICATE OF SERVICE**

I, Richard W. Weston, do hereby verify that I served the “Petitioner’s Amended Brief” this 1st day of July, 2013, via U.S. Mail, postage prepaid, addressed to the following:

Scott Johnson, Esquire  
Assistant Attorney General Appellate Division  
812 Quarrier Street Sixth Floor  
Charleston, WV 25301



Richard W. Weston (WVSB 9734)  
Connor D. Robertson (WVSB 11460)  
WESTON LAW OFFICE  
621 Sixth Avenue  
Huntington, WV 25701  
Phone: 304.522.4100  
Fax: 304.250.3000