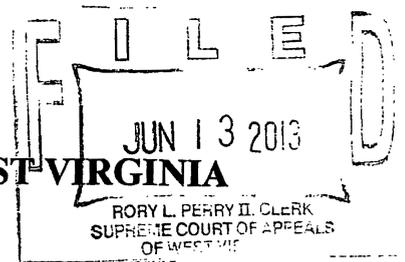


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NUMBER: 13-0270



STATE OF WEST VIRGINIA
Respondent,

COPY

v.

**APPEAL FROM A FINAL ORDER OF THE:
CIRCUIT COURT OF MERCER COUNTY (12-F-3-WS)**

BYRON BLACKBURN,
Petitioner.

Petitioner's Brief

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ASSIGNMENTS OF ERROR

- I. **THE IN-COURT IDENTIFICATION OF THE PETITIONER BYRON BLACKBURN AS THE ROBBER BY THE WENDY'S RESTAURANT EMPLOYEE DANIEL BACK WAS SO UNRELIABLE AND TAINTED THAT IT SHOULD HAVE BEEN EXCLUDED AS EVIDENCE.**

- II. **THE PETITIONER BYRON BLACKBURN'S CONFESSION TO ROBBING WENDY'S RESTAURANT WAS NOT FREELY AND VOLUNTARILY GIVEN BASED ON THE "TOTALITY OF ALL THE SURROUNDING CIRCUMSTANCES" AND IT WAS NOT RELIABLE.**

STATEMENT OF THE CASE

On November 28, 2011, the Wendy's Restaurant in Bluefield, West Virginia, was the location of an attempted robbery. (See Appendix page, hereinafter "P", 35). A person, wearing clothing that covered his face and head entered the restaurant with a machete. The disguised person jumped over the counter, walked into the kitchen, held the machete up to a Wendy's employee's throat, and demanded money. P236, 245, 252-253, 298. Two other Wendy's employees were also in the kitchen at the time and witnessed the assault. *Id.*

The assaulted employee got away from the disguised person and ran out of the restaurant through the back door. *Id.* The two other Wendy's employees told the disguised person that the cash register could not be opened. *Id.* The two Wendy's employees then ran out of the restaurant through the back door. The disguised person, obtaining no money, fled the restaurant through the front door of the restaurant. P285.

A video containing footage of the attempted robbery was obtained from Wendy's by the Bluefield City Police Department and released to the news' media. P297. The Police were allegedly contacted by an individual who saw the video footage and stated that they believed the disguised person was the Petitioner Byron Blackburn. P299.

A week after the robbery, on December 5, 2011, Mr. Blackburn was arrested on the charge of domestic terrorism. *Id.* That night, Mr. Blackburn was extremely intoxicated and called 911 making threats that he was going to hurt someone if he didn't get a cigarette. P73-77 and P420-440. Mr. Blackburn had no weapons in his home and he had cigarettes on his dining room table. P145.

Later that night he was arrested and sustained a broken arm while being taken into custody. P158-159. He was charged with domestic terrorism and was taken to the hospital to have his arm evaluated. P163-164. He was arraigned later that evening and requested and appointed counsel. P133-136.

Despite his request and appointment of counsel, the police interrogated Mr. Blackburn that evening regarding the Wendy's robbery. The police would continue interrogating Mr. Blackburn for a total of 9 times. After denying robbing Wendy's over and over again, Mr. Blackburn finally gave in and confessed on December 6, 2011, the 9th interrogation. P184-191.

During this interrogation, Mr. Blackburn was told that he was facing 25 years to life on the domestic terrorist criminal charge and that "Osma Bin Laden would have a better chance of getting out of jail then he would." P181-189. Mr. Blackburn was promised that he would not be prosecuted on the domestic terrorism charge if he confessed to the robbery charge. P186. Mr. Blackburn was also told by police that he had failed a polygraph test he had taken and was told "everyone knows you did it" and to "just come clean." P178.

Mr. Blackburn, at this time was in a questionable state of mind. He testified that at the time he made his confession he felt helpless. P156 and 191. He was facing a three year sentence

on the driving under the influence conviction.¹ *Id.* He was facing a 25 year to life domestic terrorism charge. He believed he was going to spend the rest of this life in jail. *Id.*

He was also in excruciating pain from a hairline fracture and fracture above the elbow he had sustained during his arrest on December 5th. P159. He was under the influence of powerful narcotics, morphine and Lortab at the time of his confession prescribed to elevate his pain from his injury. P171-173, P178-179, P208-209 and P477-481.

He had thoughts of ending his life. He testified that the reason he made the call leading to the domestic terrorism criminal charge is because he wanted to end his life. P362-364. He was hoping that he would be killed by the police, committing what is known as “suicide by police.” *Id.*

Mr. Blackburn was deeply depressed. He was struggling with an alcohol problem. He was unemployed and estranged from his wife. P443. He was taking Chantix to help him stop smoking but it caused him to have suicidal thoughts. P156-157. He felt that he had put his family through enough and believed it would be better to just end his life.

Mr. Blackburn’s confession was also not reliable a clear indication that it was false. The police were unable to locate the clothing or the machete that Mr. Blackburn allegedly wore and used on the night of the robbery, despite Mr. Blackburn telling them where he hide these items. P379-381.

Mr. Blackburn also stated in his confession that he found the machete at his parents’ home, where he was staying, under a trailer in the yard. P347-348. Mr. Blackburn’s step-father testified that he had never owned a machete and had never seen a machete anywhere near his house where Mr. Blackburn was living. P472-474.

¹ Mr. Blackburn had previously been charged and pled guilty to third offense driving under the influence. He was awaiting sentencing on this conviction at the time he was arrested for the domestic terrorism charge on December 5, 2011.

Mr. Blackburn's confession was also inconsistent about what he allegedly wore that night. Mr. Blackburn stated in his confession that he wore a green jacket and black pants and nothing covering his head. P331-334. The statements from the Wendy's employees, Daniel Back indicated that the robber wore a dark colored jump suit and a hoodie over his head. P263-264.

At the pre-trial hearing, counsel for Mr. Blackburn filed a Motion to Suppress his confession. P13. The circuit court denied Mr. Blackburn's Motion and allowed the jury to hear his confession during the State's case in chief. P2-4.

The Defense was able to point out the many inconsistencies in the confession, introduce evidence that indicated Mr. Blackburn had only confessed because he was in an extremely depressed mental state, and was promised a deal from the police. Evidence was also introduced that Mr. Blackburn had a history of giving false confessions. A private investigator testified that Mr. Blackburn had in the past confessed to a murder that the investigator knew he did not commit. P482-486.

The State also introduced the testimony from the assaulted Wendy's employee, Daniel Back, who testified that Mr. Blackburn was the robber. Mr. Back provided this testimony despite the fact that he admitted the robber's face was covered and the only part of his face visible was his eyes and a part of his cheekbones. P259. During cross-examination, the employee testified that he could identify Mr. Blackburn as the robber because he saw his booking picture ("mug shot") on the internet a week after the robbery and read on the internet that Mr. Blackburn had been arrested for the robbery and had confessed to the crime. P256-260.

Despite Mr. Blackburn counsel's objection and arguments to prohibit Mr. Back from testifying during the *in camera* hearing, the circuit court allowed the State to call Mr. Back to provide an in-court identification at trial that Mr. Blackburn was the robber. P5-9.

On November 28, 2012, the jury found Mr. Blackburn guilty of Robbery in the First Degree. P10-12. The circuit court sentenced Mr. Blackburn on January 4, 2013, to a determined term of 40 years in prison. *Id.*

Mr. Blackburn seeks a reversal of his conviction and a new trial, with the findings that his confession was not freely and voluntarily given based on the “totality of all the surrounding circumstances” and that Daniel Back’s identification was unreliable and tainted and that this evidence is to be excluded from the new trial.

SUMMARY OF ARGUMENT

Daniel Back was a Wendy’s employee that was assaulted by a robber on the night of November 28, 2011. He told the police less than an hour after the robbery, that the robber’s face was covered and the only part of his face visible were his eyes and cheekbones.

During an *in-camera* hearing and again at trial, the prosecutor verbally pointed to Mr. Blackburn and prompted Mr. Back to acknowledge that Mr. Blackburn was the man who robbed Wendy’s the night. Mr. Back was faced with only one option in the courtroom, one person to identify as the robber, Mr. Blackburn.

He testified during the *in-camera* hearing and at trial, that despite never seeing the robber’s face, despite only having a second or two to observe the robber, he could identify the robber as Mr. Blackburn because he saw and read an article on the internet 12-months prior to his testimony, that showed Mr. Blackburn’s booking picture (“mug shot”) and stated that Mr. Blackburn had been arrested and confessed to the robbery. P256-260.

Furthermore, the State obtained a false and an involuntarily confession from Mr. Blackburn regarding the robbery. At the time of Mr. Blackburn’s confession, he was in a deeply depressed mental state. He was an alcoholic, estranged from his wife, unemployed, and suicidal.

Mr. Blackburn only confessed to the robbery after he was interrogated 9 times, within 2 days, regarding the robbery. He only confessed to the robbery after he was told that he was facing a possible lifetime in prison on another unrelated criminal charge, but if he confessed to the robbery, the unrelated criminal charge would be dismissed. He only confessed to the robbery after he was told that he failed a polygraph test and that the results were going to be used against him in his criminal trial.

The circuit court committed error by allowing Mr. Back to testify at trial and by allowing Mr. Blackburn's false and involuntarily confession to be submitted into evidence at trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The principle issues in this case have been authoritatively decided by the Court. Oral argument under Rule 18(a) of the West Virginia Rules of Appellate Procedure is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 of the West Virginia Rules of Appellate Procedure argument and disposition by memorandum decision.

STANDARD OF REVIEW

In State v. Lilly, this Court explained the standard of review of a circuit court's ruling on a motion to suppress is a two-tier standard:

[W]e first review a circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. Second, we review de novo questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action. Under the clearly erroneous standard, a circuit court's decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made. When we review the denial of a motion to suppress, we consider the evidence in the light most favorable to the prosecution." State v. Lilly, 194 W.Va. 595, 461 S.E.2d 101, 106 (1995).

ARGUMENT

I. **THE IN-COURT IDENTIFICATION OF MR. BLACKBURN BY THE WITNESS DANIEL BACK WAS SO TAINTED AND UNRELIABLE IT SHOULD HAVE BEEN SUPPRESSED AT TRIAL.**

“At stake is the very integrity of the criminal justice system and the courts’ ability to conduct fair trials.” State v. Henderson, 27 A.3d 872, 879 (N.J. 2011). A statement made by the New Jersey Supreme Court after it had conducted a thorough inquiry into eyewitness identifications. The New Jersey Supreme Court added that “[s]tudy after study revealed a troubling lack of reliability in eyewitness identifications.” State v. Henderson, 27 A.3d at 878. The in-court identification of Mr. Blackburn by Daniel Back was tainted and unreliable and it was error for the circuit court to allow him to testify.

The West Virginia Supreme Court of Appeals held in Syl. Pt. 3, State v. Casdorph, 159 W. Va. 909, 230 S.E.2d 476 (1976), “[i]n determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification a court must look to the totality of the circumstance and determine whether the identification was reliable, even though the confrontation procedure was suggestive.” (*vacated on other grounds*, see State v. Persinger, 169 W.Va. 121, 286 S.E.2d 261 (1982)).

Essentially, for an eye witness identification to be admissible at trial, the trial court must perform a two part examination. The Court must first determine, was there “impermissible suggestive procedure” by the State in the identification. If the answer is yes, then the trial court must determine whether under the “totality of the circumstances” the identification was reliable even though the “impermissible suggestive procedure” was present. State v. Kennedy, 162 W. Va. 244, 249 S.E.2d 188, 190 (1978)(*citing* Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)).

In this case, clearly there was “substantial impermissible suggestive procedure” and clearly Mr. Back’s identification of Mr. Blackburn was completely unreliable. Despite Mr. Blackburn’s counsel’s objections and arguments to the circuit court, the court allowed Mr. Back to testify. P5-9. The Court clearly committed error by allowing Mr. Back to testify because “when suggestive procedures are connected with an identification of questionable reliability exclusion is the only remedy.” State v. Kennedy, 249 S.E.2d at 191.

1. Impermissible suggestive procedures

a. The State *verbally pointed* to Mr. Blackburn as the robber.

“Impermissible suggestive procedure” was committed by the State in the identification of Mr. Blackburn as the robber. “It is well settled law that a prosecutor cannot verbally or physically point to a defendant and ask a witness if the defendant is the person who committed the crime.” United States v. Warf, 529 F.2d 1170, 1171 (5th Cir. 1976). “The law is plain: A prosecutor cannot point to the defendant, or direct the witness’s attention to the defendant, and then elicit identification or resemblance testimony.” United States v. Green, 704 F.3d. at 311. Directing the witness’s attention to Mr. Blackburn is *exactly* what the prosecutor did in this case.

The witness, Daniel Back was the Wendy’s Restaurant employee who was assaulted by the robber on the night of November 28, 2011. P218-219. Mr. Back was interviewed by the Bluefield City Police Department an hour after the robbery and provided a statement to the police identifying the robber as a male, of a certain height, of a certain weight, of a certain age, wearing a hoodie over his head, and a bandana over his face.P219-220. Mr. Back was *unable to identify the robber* because of the hoodie and bandana hiding the robber’s face. P259.

Mr. Back, however, testified that a week after the robbery he saw a mug shot of Mr. Blackburn on a news website and read a story that indicated Mr. Blackburn had confessed to the

robbery. P220-221 and P226. It was only after seeing Mr. Blackburn's picture on the website with a story stating that he had confessed to the robbery did Mr. Back testify that he realized that Mr. Blackburn was the robber. *Id.* Mr. Back testified he was convinced that Mr. Blackburn was the robber, despite the fact that he never saw the robber's face that night because he was wearing a hoodie and a bandana over his face. *Id.*

Although he realized who the robber was, Mr. Back did not contact the police and inform them that the man he saw on the internet was the man who robbed him. P226. The police never contacted Mr. Back to ask him to identify Mr. Blackburn as the robber. Mr. Back never participated in any line-up nor was he ever shown any pictures to identify Mr. Blackburn as the robber. P220. One year later, Mr. Back was subpoenaed by the State to appear at trial and testify about what happened at Wendy's the night of the robbery and identify the person who attacked him.

During the *in camera* hearing to determine if Mr. Back would be permitted to provide an in-court identification of Mr. Blackburn as the robber, the prosecution, asked:

Q. Mr. Back, did the detectives that were investigating this case ever show you any sort of identification lineup or did they show you any photographs?

A. No, but I saw a picture on the news website of the...after they arrested him and they showed a picture. And I was able to...I recognized his eyes because they're blue. And his skin color is kind of pinkish, reddish tone, kind of I mean you're just able to tell the color of his skin and eyes. I was able to tell when I saw the picture and I was like yea that's him. I was...and he...and I just could tell.

Q. *When you indicate yeah it's him do you mean that Byron Blackburn the defendant whose seated here in the court is the person that attacked you at the Wendy's?*

A. Um...

Is he the one that I...that he's the one that come in there?

Q. Yes, sir.

A. Yes. P220-221(*emphasis added*).

Clearly, Mr. Back was *verbally prompted* by the prosecution to identify the man sitting at the defense table as the man he saw attack him the night of the Wendy's robbery. The United States Court of Appeals, Fourth Circuit, in U.S. v. Green, citing to US. V. Archibald, stated that "when the defendant is seated at the defense table throughout the trial, it is 'obviously suggestive' to ask witnesses to make an in-court identification." United States v. Green, 704 F.3d. at 307 (*citing* United States v. Archibald, 734 F.2d 938, 941 (2n Cir. 1984).

b. Mr. Back was presented with no other options other than Mr. Blackburn.

At the time Mr. Back made the identification of Mr. Blackburn as the robber during the *in camera* hearing, there was no one else in the courtroom for Mr. Back to look toward. Mr. Back was presented with *no options other than Mr. Blackburn*.

The only people in the courtroom were the judge, the prosecutor, the detective and three men sitting at another table to his right. Two of these men sitting at the table to his right had books and papers in front of them, pin and paper in hand taking notes; obviously these two men were the defense attorneys. The third man sitting at the table was sitting in between the defense attorneys, he had no books or papers in front of him and had no pin and paper in hand taking notes, this man was just sitting, quietly, listening to his testimony. There is no question Mr. Back knew exactly who the Defendant was and who the State was prosecuting as the robber.

The United States Court of Appeals, Second Circuit, in United States v. Archibald, stated that:

As is generally the case, the defendant here was seated next to defense counsel during the trial, a circumstance obviously suggestive to witnesses asked to make in-court identifications. Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the

defendant, which is the defense lawyer, and which is the prosecutor. United States v. Archibald, 734 F.2d at 941.

Additionally, the United States Court of Appeals, Fourth Circuit, in Smith v. Paderick stated that:

Positive identification testimony is the most dangerous evidence known to the law. That is true because it is easier to deceive ourselves than others: pressured to help solve a heinous crime, often conscious of a duty to do so, and eager to be of assistance, a potential witness may be readily receptive to subtle, even circumstantial, insinuation that the person viewed is the culprit. Unless such a witness is far more introspective than most, and something of a natural-born psychologist, he is usually totally unaware of all the influences that result in his say, That is the man. Smith v. Paderick, 519 F.2d 70, 75 (4th Cir. 1975).

Clearly, Mr. Back while sitting in the witness stand felt pressured to help solve the robbery. He was the victim of the crime, he was the one who had a machete held to his throat, the trial was all about what heinous crime he was subjected to and seeking justice for him. There is no doubt that Mr. Back was put into a position by the State where he was expected to be the star witness of the case, compelled to validate the prosecution's case against Mr. Blackburn.

With this amount of pressure put on him there is no question that he would perform just as the prosecution expected, especially after he was given the green light by the prosecution who verbally prompted him to point to the only person in the courtroom who was obviously the Defendant. "Even the best intentioned among us cannot be sure that our recollection is not influenced by the fact that we are looking a person we know the Government has charged with a crime." United States v. Green, 704 F.3d. at 307 (*quoting* United States v. Rogers, 126 F.3d 655, 659 (5th Cir. 1984).

After Mr. Back's identification of Mr. Blackburn as the robber his identification was confirmed by the prosecution. He was assured by the prosecutor that his eyewitness identification conformed to the State's evidence against Mr. Blackburn. Mr. Back carried that

confirmation of having successfully identified the robber according to the State, over into his in-court identification in front of the jury during the trial. As the appellant argued to this Court just last year in State v. Myers, “once the seed is sown...the corruption has by then taken root and any subsequent identifications bear that taint of the State’s initial misconduct.” State v. Myers, 229 W. Va. 238, 728 S.E.2d 122, 131 (2012).

In the presence of the jury, the prosecution again prompted Mr. Back into identifying Mr. Blackburn as the robber who held the machete up to his neck. Mr. Back’s courtroom view had not changed. No one new was in the court room, with the exception of 13 people sitting in one area of the courtroom to his left, obviously the jury. The prosecutor again, asked:

Q. Mr. Back, the person that attacked you at the Wendy’s on November 28th is he here in the courtroom today?

A. Um, he...he looks like the guy and he...he has his face and everything. I just look at him and I can see the guy that yelled at me and was telling me to give me the money.

Q. Who would that be? Can you indicate for the jury who you think is...is consistent with that person?

A. Uh...

Q. Where is he sitting in the courtroom?

A. Over there to the middle with those two on the end there. Right...Byron Blackburn. P256-257.

Mr. Back had just identified Mr. Blackburn as the robber during the *in camera* hearing. The prosecutor prompted Mr. Back in a similar way as he did during the *in camera* hearing, calling his attention to the only person in the courtroom that was obviously being charged with a crime. There is no question that Mr. Back was going to again identify Mr. Blackburn as the robber and there is no question that this was “impermissible suggestive procedure” on the part of the State.

2. The reliability of the identification

Mr. Back's identification of Mr. Blackburn as the robber was completely unreliable. To determine reliability, a trial court must look at the following factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Syl. Pt. 4 State v. Stacy, 181 W. Va. 736, 384 S.E.2d 347 (1989)(quoting Syl. pt. 3, State v. Casdorff, 159 W.Va. 909, 230 S.E.2d 476, 478 (1976).

The first criterion as stated by the Court in State v. Stacy is the opportunity of the witness to view the criminal at the time of the crime. *Id.* Mr. Back's statement to the police immediately after the robbery as well as his testimony at the *in-camera* hearing and in-court identification was that he could not see the robber's face. P222-233. Mr. Back testified that the robber wore a hoodie over his head and a bandana over his face. *Id.* Mr. Back testified that the only part of the robber that he could see were his eyes and cheekbones. *Id.* Clearly, it was impossible for Mr. Back to positively identify Mr. Blackburn as the robber because he could only see the robber's eyes and cheekbones.

Additionally, Mr. Back had *only* a second or two to observe the robber. Mr. Back testified at trial that he felt someone grab him from behind at which time he looked back, moving his head, and saw the robber. P218-219. Mr. Back testified that he then got away from the robber and ran out the back door of the Wendy's restaurant. *Id.* Based on Mr. Back's testimony, he could only have had 1 or 2 seconds at the most to view the robber.

The second criterion is the witness' degree of attention. Mr. Back's degree of attention would have been relatively high, but for only a short period of time, 1 or 2 seconds, and would

have been more than likely focused on the machete at this neck. The Court in United States v. Green stated that based on the scientific research when a weapon is visible during a crime it can affect a witness's ability to describe a perpetrator. "Weapon focus can 'impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration." United States v. Green, 704 F.3d. at 308 (citing State v. Henderson, 27 A.3d 872, 904-905 (N.J.2011)). Clearly, Mr. Back's survival instinct caused him to focus more on the immediate danger, the machete and its location, as opposed to the details of the person wilding the machete.

The third criterion is the accuracy of the witness' prior description of the criminal. Mr. Back's description of the robber was inconsistent with his co-worker Kipp Davis and was also inconsistent with the statement he gave to the police an hour after the robbery.

Mr. Back was interviewed by the Bluefield City Police Department an hour after the robbery and provided a statement to the police. He identified that the robber was a male, of a certain height, of a certain weight, of a certain age, wearing a gray hoodie over his head, and a bandana over his face. P219-220. Mr. Back was unable to identify the robber because of the hoodie and bandana hiding the robber's face. P222. Mr. Back, however, at the *in camera* hearing and a trial, added that the robber was Caucasian and had blue eyes, facts he remembered a year after the robbery but did not remember to tell the police only an hour after the robbery. P222-228 and 260-261. It is unbelievable that Mr. Back would have forgotten to tell the police crucial facts an hour after the robbery.

Wendy's employee and witness to the crime, Mr. Kipp Davis, did not give a statement to the police, but testified that he thought that the robber was wearing a beanie on his head, was Caucasian and had blue eyes. P245. Mr. Back admitted that he and Mr. Davis had talked about

the events of the robbery before they testified at trial. P225-226. Clearly, Mr. Back's identification of the robber was contaminated by Mr. Davis.

The fourth criterion is the level of certainty demonstrated by the witness at the confrontation. Mr. Back was not able to give a positive identification after the robbery. He told the police in his statement that the robber was wearing a hoodie over his head and a bandana over his face. P219-222. There is no way that Mr. Back could have seen the robber's face.

Mr. Back testified that he was *only* able to identify the robber after he saw Mr. Blackburn's booking picture on the internet, which indicated he had been arrested for the robbery at Wendy's and had read that he had given a confession. P220-221. Mr. Back's basis for reasoning that Mr. Blackburn was the robber was essentially, *because the internet told him he was the robber*. The prosecutor's prompting clearly added to his identification.

The fifth criterion is the length of time between the crime and the suggestive confrontation. Mr. Back identified Mr. Blackburn as the robber almost 12-months after the robbery on November 27, 2012, after being prompted by the prosecuting attorney. P1. The United States Supreme Court in United States v. Biggers, stated that "a lapse of seven months between the crime and the identification would be a seriously negative factor in most cases." United States v. Green, 704 F.3d. at 309 (*citing* United States v. Biggers, 409 U.S. 188, 200, 93 S.Ct. 375, 34 l.Ed.2d 401(1972)). The Fifth Circuit in United States v. Rogers noted that a ten-month lapse "raises concerns about the accuracy of the memory." United States v. Rogers, 126 F.3d 655, 659 (Cir.5th 1997).

3. "Impermissible suggestive procedure" weighed against the reliability of the identification.

As previously stated, there was "substantial impermissible suggestive procedure" by the State involved in Mr. Back's identification as Mr. Blackburn as the robber. The prosecutor

clearly verbally pointed to Mr. Blackburn and prompted Mr. Back to acknowledge that he was the man who robbed him. The question asked by the prosecutor was “[w]hen you indicate yeah it’s him do you mean that Byron Blackburn the defendant whose seated here in the court is the person that attacked you at the Wendy’s?” P221:3-6. Clearly the prosecution was directing Mr. Back’s attention toward Mr. Blackburn. “The law is plain: A prosecutor cannot point to the defendant, or direct the witness’s attention to the defendant, and then elicit identification or resemblance testimony.” United States v. Green, 704 F.3d. at 311.

Mr. Back had been compelled by the State to come to court and testify as to who robbed him at Wendy’s that night. He was faced with only one option, one person to identify as the robber, Mr. Blackburn, sitting quietly between his two attorneys at the defense table.

Furthermore, Mr. Back’s identification of Mr. Blackburn as the robber was completely unreliable. Mr. Back had only a second or two to observe the assailant that night. P218-219. Mr. Back’s degree of attention was relatively short and his attention would have been more focused on the machete at this neck then what the details of the robber.

The most compelling evidence proving the Mr. Back’s identification was unreliable was his description of the robber. Mr. Back’s statement immediately after the robbery and his testimony at the *in camera* hearing were completely inconsistent. P219-220, P222-226, P260-261. Mr. Back testified that he was not entirely positive that Mr. Blackburn was the robber. P219-222. He admitted that he only saw his eyes and cheekbones and did not know who the robber was until he saw Mr. Blackburn’s booking picture on the internet identifying him as the robber. *Id.* Mr. Back’s basis for reasoning that Mr. Blackburn was the robber, because the internet told me.

Finally, the length of time between the crime, November 28, 2011, and the in-court identification, November 27, 2012, was almost 12-months. The United States Supreme Court stated that a 7-months lapse “would be a seriously negative factor in most cases.”

In-court identifications are “the most dangerous evidence known to the law” because of the very appreciable danger of convicting the innocent. United States v. Greene, 704 F.3d. at 311 (*quoting* Smith v. Paderick, 519 F.2d 70, 75(4th Cir. 1975). Clearly, there was “substantial impermissible suggestive procedure” and clearly Mr. Back’s identification of Mr. Blackburn was completely unreliable. “When suggestive procedures are connected with an identification of questionable reliability exclusion is the only remedy.” State v. Kennedy, 162 W. Va. 244, 249 S.E.2d 188, 191 (1978). “Tainted identification evidence cannot be allowed to go to a jury because they are likely to accept it uncritically.” United States v. Greene, ---F.3d ---, 2013 WL 28556 (C.A.4 (N.C.)(*quoting* Smith v. Paderick, 519 F.2d 70, 75(4th Cir. 1975).

II. THE STATE OBTAINED A FALSE AND IN-VOLUNTARILY CONFESSION FROM BYRON BLACKBURN REGARDING THE ROBBERY AT WENDY’S RESTAURANT.

The State obtained a non-voluntarily confession from Mr. Blackburn regarding the robbery at Wendy’s Restaurant when it obtained a confession from him *only after* (a) he was interrogated 9 times regarding the robbery; (b) was threatened and given hope of leniency if he confessed to the robbery; (c) was confronted with fabricated evidence; and (d) was in a questionable mental state.

Mr. Blackburn’s attorneys filed a motion moving for the suppression of Mr. Blackburn’s involuntary confession; however, the trial court denied the motion and committed error by allowing the State to submit his confession into evidence. P13 and P1-4.

The West Virginia Supreme Court of Appeals held in State v. Singleton, that “[i]t is axiomatic in our jurisprudence that in order for an extra-judicial confession of an accused made

to one in authority to be admissible in evidence, it must appear that the confession was freely and voluntarily made, without threats or intimidation, or some promise or benefit held out to the accused.” State v. Singleton, 218 W. Va. 180, 624 S.E.2d 529, 531(2005),

The Court held in In Syllabus Point 7 of State v. Farley, 192 W.Va. 247, 452 S.E.2d 50 (1994) that “[i]n determining the voluntariness of a confession, the trial court must assess the totality of all the surrounding circumstances.” The Court referenced the United States Supreme Court’s decision of Schneckloth v. Bustamonte, where the Supreme Court explained the application of this standard stating “[i]n determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854, 863 (1973),

1. “Totality of the Circumstances”

a. Mr. Blackburn was interrogated 9 times by the Bluefield City Police Department.

The *1st interrogation* occurred on December 5, 2011, in the kitchen of the Bluefield City Police Department with Detective Crook and Hamm. P161-163. This interrogation according to Mr. Blackburn lasted approximately 30 minutes. *Id.* Mr. Blackburn denied any involvement in the robbery at the Wendy’s Restaurant. *Id.*

The *2nd interrogation* occurred on December 5th, at the Bluefield Regional Medical Center by Detective Crook of the Bluefield City Police Department, while Mr. Blackburn was receiving medical treatment on his broken arm. P164-166. Mr. Blackburn testified that Detective Crook asked him questions off and on during the two to three hours he was at the hospital. *Id.* Mr. Blackburn denied any involvement in the robbery at the Wendy’s Restaurant. *Id.*

The 3rd *interrogation* of Mr. Blackburn occurred on December 5th, after he received medical treatment and on the ride back to the Bluefield City Police station. Mr. Blackburn was being transported by Detective Crook who was talking to him about the robbery. P168-169. Mr. Blackburn denied any involvement in the robbery at the Wendy's Restaurant. *Id.*

The 4th *interrogation* of Mr. Blackburn occurred on December 5th, after he received medical treatment, in the kitchen of the Bluefield City Police station by Detective Crook. P169-171. The interrogation according to Mr. Blackburn lasted approximately 20 or 30 minutes. *Id.* Mr. Blackburn denied any involvement in the robbery at the Wendy's Restaurant. *Id.*

Mr. Blackburn was also in severe pain at this time and requested that he be given his pain medication as prescribed by the hospital. P172-173. The police officers refused to give him any pain medication that night. *Id.*

The 5th *interrogation* of Mr. Blackburn occurred on December 6, 2011, in the holding cell of the Bluefield City Police station by Detective Hamm. P173-174. He was asked by Detective Hamm if he wanted to clear his name and take a polygraph test. *Id.* Mr. Blackburn agreed. *Id.*

The 6th *interrogation* of Mr. Blackburn occurred on December 6th, before the polygraph test was conducted. P175-178. The interrogation was conducted by West Virginia State Police Trooper Smith. *Id.*

The 7th *interrogation* of Mr. Blackburn occurred on December 6th, after the polygraph test at the West Virginia State Police barracks and was conducted by Trooper Smith, Detective Crook and Hamm. P178. The interrogation lasted over an hour. P182. Mr. Blackburn denied any involvement in the robbery at the Wendy's Restaurant despite the police telling him that the polygraph had proved that he was lying. P179-182. Mr. Blackburn had also taken Lortab 45 minutes prior to his polygraph. P179.

The 8th *interrogation* of Mr. Blackburn occurred on December 6th, at the Bluefield City Police station, in the kitchen, after the polygraph test was conducted. P182-183. The interrogation was conducted by Detective Crook and Hamm. P184.

Mr. Blackburn was again complaining that he was in severe pain. He asked the officers if he could go back to the holding cell to rest but his request was denied. P184. The interrogation lasted approximately 30 minutes to an hour. P185.

The 9th *interrogation* of Mr. Blackburn occurred on December 6th, at the Bluefield City Police station, in the kitchen. Detective Crook was concluding his interrogation and Officer Davis asked if he could interrogate Mr. Blackburn. P183-185. Mr. Blackburn was told by Officer Davis that he was facing 25 years to life on the domestic terrorist criminal charge and that "Osma Bin Laden would have a better chance of getting out of jail than he would." P188-189. He was told that the sentence for the robbery charge was less than the domestic terrorism charge. P189.

During this 9th *interrogation* Mr. Blackburn was told by Detective Hamm and Crook that if he confessed to the robbery at Wendy's Restaurant, they would make the domestic terrorism criminal charge disappear. P185-186. Mr. Blackburn, feeling scarred and desperate not to be convicted under the criminal charge of domestic terrorism which he was told carried 25 years to life sentenced, gave in to the interrogation and gave a confession to robbing the Wendy's Restaurant. P190-191.

Q. Okay.

How did you feel when they told you that, the domestic terrorist charge carried 25 to life?

A. Oh, helpless. I mean, it was just like everything just ended right there. I'm ... was 35 at the time so –

Q. And you knew you –

A. – I felt like I would never ... never get out again. You know that I would spend the rest of my life in prison. P191.

Mr. Blackburn testified that when he confessed he thought he was helping himself by confessing to a lesser offense. P192. “Yes, sir. Like I said I thought I was doing...helping myself. Like that’s what I thought I was help...taking a lesser charge.” *Id.*

The United States Supreme Court in Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L. Ed. 1192 (1944), reversed and remanded the appellants conviction after it determined that 36-hours of interrogation by the police was excessive and lead to the appellants coerced confession. Clearly, being interrogated 9 times in the course of two days is a factor that renders Mr. Blackburn’s confession involuntary.

b. Mr. Blackburn was threatened and given hope of leniency if he confessed to the robbery.

During the *9th interrogation* of Mr. Blackburn, he was told by Officer Davis that he was facing 25 years to life on the domestic terrorist criminal charge and that “Osma Bin Laden would have a better chance of getting out of jail then he would.” P187-189. Mr. Blackburn was also told by Detective Hamm that if he confessed to the robbery at Wendy’s Restaurant, they would make the domestic terrorism criminal charge disappear. P186.

The West Virginia Supreme Court in State v. Farley, stated that

Police expressions of sympathy or compassion are certainly not prohibited. These expressions, like adjurations to tell the truth, are not likely by themselves to cause an innocent defendant to provide a confession. *On the other hand, ‘any statement which is intended to imply or may reasonably be understood as implying that the suspect will not be prosecuted or punished’ is absolutely forbidden.* State v. Farley, 192 W. Va. 247, 452 S.E.2d 50, FN16 (1994)(quoting Phillip Johnson, A Statutory Replacement for the Miranda Doctrine, 24 Am.Crim.L.Rev. 303, 305 (1987)(emphasis added).

In this case, Mr. Blackburn was clearly promised that he would not be prosecuted on the domestic terrorism charge if he confessed to the robbery charge. As previously stated, Mr.

Blackburn was specifically promised by Detective Hamm, that if he confessed to the robbery at Wendy's Restaurant, they would make the domestic terrorism charge disappear and they did, Mr. Blackburn was not indicted for domestic terrorism. P35.

Mr. Blackburn testified that the reason he confessed was that he thought he was helping himself based on what had been told by Detective Hamm "Yes, sir. Like I said I thought I was doing...helping myself. Like that's what I thought I was help...taking a lesser charge." P192. Mrs. Collins, Mr. Blackburn's mother, testified that she was told by Detective Hamm that Mr. Blackburn would not be charged with the domestic terrorism charge after Mr. Blackburn gave his confession. P144-146.

c. The Police intentionally fabricated evidence to use against Mr. Blackburn.

During the 7th interrogation Mr. Blackburn was intimidated by the news that he had failed the polygraph test. P178-182. The polygraph test was given by Trooper Smith. After the test was conducted, Mr. Blackburn was approached by Trooper Smith and Detective Crook and Hamm and was told "everyone knows you did it" and to "just come clean" referring to the results of the polygraph test which allegedly indicated Mr. Blackburn failed the test. *Id.* It was implied to Mr. Blackburn that the evidence would be used against him.

Mr. Blackburn was interrogated for 1 ½ hours after the polygraph test under the belief that he had failed the polygraph test and he was going to be charged with the robbery of Wendy's Restaurant, a criminal charge he admittedly denied committing during the previous 6 interrogations. *Id.*

The Court held in footnote 13 of State v. Farley, 192 W.Va. 247, 452 S.E.2d 50 (1994) that "[w]e do not believe that merely telling the defendant that he did not do well on a polygraph examination without further elaboration is likely to encourage an innocent person to confess."

State v. Farley, 192 W.Va. 247, 452 S.E.2d 50, FN13 (1994). However, the Court stated that if “the police intentionally fabricated more *specific* false results to obtain a confession, our view may very well be different.” *Id.*

Clearly, Trooper Smith, Detective Hamm and Crook’s statements to Mr. Blackburn that “everyone knows you did it”, “to just come clean”, we are going to charge you with the robbery based on the test results and implying that the test results would be used as evidence against him were more specific statements than he had failed the polygraph test. Clearly, Trooper Smith, Detective Hamm and Crook’s intention were to place additional pressure on Mr. Blackburn in order to make him confess. Clearly, Trooper Smith’s statement was a fabrication of admissible evidence.

d. Mr. Blackburn was in a depressed and questionable mental state at the time of his confession.

Mr. Blackburn testified that at the time he made his confession he felt helpless. P191. He was facing a three year sentence on the driving under the influence criminal charge. *Id.* He was facing a 25 year to life domestic terrorism charge. *Id.* He believed he was going to spend the rest of this life in jail. *Id.*

He was in excruciating pain from his severe injury, a hairline fracture to his forearm and fracture above the elbow. P184. Mr. Blackburn described his pain as being a 10 on a scale of 1 to 10, with 10 being the worst pain possible. P159. He was given some pain reliever by the hospital but it was not administered on a consistent basis to be effective by Bluefield Police Department.

He was under the influence of powerful narcotics, morphine and Lortab at the time of his confession. Mr. Blackburn was given 3 doses of morphine, one on the ambulance ride to the hospital and two at Bluefield Regional Medical Center on December 5, 2011. P477-481. Mr.

Blackburn was also given Lortab on two different occasions on December 6, 2011, the day of the confession. P178-179 and P208-209.

He already had thoughts of ending his life as he testified that the reason he made the call leading to the domestic terrorism criminal charge is because he wanted to end his life. P155. He wanted to commit “suicide by police.” That night he specifically asked for a police officer, Officer Davis, to come to his house, because “he’s military and that he’s a clean shot and I knew that if something went down ... I knew he was a clean shot.” P155:15-22 and P156:4-6.

He was also struggling with an alcohol problem. P156-158. He was unemployed and estranged from his wife. *Id.* He was taking Chantix to help him stop smoking but caused him to have suicidal thoughts. *Id.* He felt that he had put his family through enough and believed it would be better to just end his life.

The Supreme Court of Kansas following the United States Supreme Court’s “totality of the circumstance” approach in considering admissible confessions stated that an accused’s mental status is also a relevant factor. Syl. Pt. 6, State v. Walker, 283 Kan. 587, 153 P.3d 1257 (2007)(*quoting* “[f]actors to be considered in determining whether a confession is voluntary include the accused’s mental condition”).

CONCLUSION

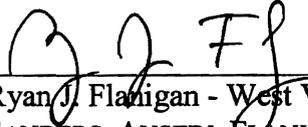
Mr. Blackburn seeks a reversal of his conviction and a new trial, with the findings that his confession was not freely and voluntarily given based on the “totality of all the surrounding circumstances” and that Daniel Back’s testimony was unreliable and tainted and that this evidence is to be excluded from the new trial.

The in-court identification of Mr. Blackburn by the witness Daniel Back was so tainted and unreliable it should have been suppressed at trial. Clearly, there was “substantial

impermissible suggestive procedure” and clearly Mr. Back’s identification of Mr. Blackburn was completely unreliable. “When suggestive procedures are connected with an identification of questionable reliability exclusion is the only remedy.” State v. Kennedy, 162 W. Va. 244, 249 S.E.2d 188, 191 (1978).

Furthermore, the State obtained a false and involuntarily confession from Byron Blackburn regarding the robbery *only after* he was interrogated nine times regarding the robbery, was threatened and given hope of leniency if he confessed to the robbery, was presented with intentionally fabricated evidence, and was in a depressed mental state.

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CERTIFICATE OF SERVICE

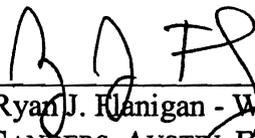
I hereby certify that on this 12th day of June, 2013, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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