

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

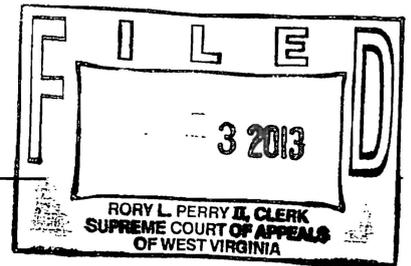
**DOCKET NUMBER: 13-0270**

**STATE OF WEST VIRGINIA**  
**Respondent,**

**COPY**

**v. APPEAL FROM A FINAL ORDER OF THE:  
CIRCUIT COURT OF MERCER COUNTY ( 12-F-30-WS)**

**BYRON BLACKBURN,**  
**Petitioner.**



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**Petitioner's *Reply* Brief**

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**REPLY ARGUMENT**

**I. THE BLUEFIELD CITY POLICE INTERROGATED MR. BLACKBURN AFTER HE HAD REQUESTED COUNSEL AT HIS INITIAL APPEARANCE AND OBTAINED A CONFESSION THAT PURSUANT TO STATE V. BEVEL WAS IN VIOLATION OF HIS RIGHT TO COUNSEL.**

Pursuant to article III, section 14 of the Constitution of the State of West Virginia Mr. Blackburn had the right to counsel at the time the police promised to “help” him on the domestic terrorist charge in return for his confession to the robbery at Wendy’s.

The Supreme Court of Appeals of West Virginia stated in State v. Bevel, No. 11-1675, 14 (January 2013 Term) “[t]he right to counsel is guaranteed by both the United States Constitution and the West Virginia Constitution.” The Court stated:

The Sixth Amendment to the United States Constitution declares, “in all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” Likewise, the West Virginia Constitution requires that “in all [trials of crime and misdemeanors], the accused . . . shall have the assistance of counsel.” (*citing* W. Va. Const. art. III, § 14). *Id.*

The West Virginia Supreme Court in Syllabus pt. 1 of State v. Bowyer, 181 W.Va. 26, 380 S.E.2d 193 (1989), held that the right to counsel attaches at the initiation of judicial proceedings. The Court stated in State v. Bowyer, “[w]hile the Sixth Amendment right to counsel is not limited to participation in a trial and may be asserted at earlier “critical” stages of the criminal justice process, it is well established that this right generally” does attach “*at the initiation of judicial proceedings* by way of *formal charges*, preliminary hearing, indictment, information, or arraignment.” (*Emphasis added*).<sup>1</sup>

The right to counsel under the United States Constitution and the West Virginia Constitution differ with regard to whether or not the police can interrogate a defendant after the

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<sup>1</sup> See also Davis v. United States, 512 U.S. 452, 456-57, 114 S.Ct. 2350 2354, 129 L.Ed.2d 362, 369-71 (1994) (“The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings); Maine v. Moulton, 474 U.S. 159, 170, 106 S.Ct. 477, 484, 88 L.Ed.2d 481, 492 (1985).

right to counsel attaches. The West Virginia Supreme Court has stated that the West Virginia Constitution places a higher standard and held in Syl. pt. 5 of State v. Bevel, No. 11-1675, 14 (January 2013 Term), “[i]f police initiate interrogation after a defendant’s assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant’s right to counsel for that police-initiated interrogation is invalid because it was taken in violation of the defendant’s right to counsel under article III, section 14 of the Constitution of West Virginia.”

Mr. Blackburn was arrested and arraigned on the domestic terrorist criminal charge on December 5, 2011. P133-138 & P173. At that time, judicial proceedings had been initiated against him by the filing of a formal criminal complaint against him and his initial appearance before a magistrate. Id. At that time, the right to counsel under the Sixth Amendment to the United States Constitution and under article III, section 14 of the West Virginia Constitution attached. Thereafter, officers of the Bluefield City Police began to interrogate Mr. Blackburn with regard to the robber that occurred at Wendy’s on November 28, 2011.

Pursuant to State v. Williams, 226 W. Va. 626, 704 S.E.2d 418 (2010), much like the United States Supreme Court case of Texas v. Cobb, 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001), the right to counsel under the West Virginia Constitution attaches when judicial proceedings have been initiated against an individual but that right is specific as to that offense. Thus, the Bluefield City Police were permitted to speak with Mr. Blackburn regarding the robbery at Wendy’s.

However, during the 9<sup>th</sup> *interrogation* on December 6, 2011, the Bluefield City Police promised to help Mr. Blackburn with regard to the domestic terrorist charge in return for a

confession to the robbery at Wendy's.<sup>2</sup> P186-191. At that point in time, the State melded the domestic terrorism charge with the robbery charge by making a promise to help Mr. Blackburn on the domestic terrorism charge in return for his confession to the Wendy's robbery.

Essentially, what the police were offering Mr. Blackburn was a plea bargain. Since the right to counsel had attached to Mr. Blackburn with regard to the domestic terrorism charge, Mr. Blackburn's counsel was required to be present and he had the right to seek the advice of counsel because his cooperation with the police in confessing to the robbery, directly affected the possible outcome of the domestic terrorist charge (e.g. dismissing the charge).<sup>3</sup>

As stated in State v. Bevel, "[i]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid because it was taken in violation of the defendant's right to counsel under article III, section 14 of the Constitution of West Virginia." Thus, the confession obtained by the police with regard to the robbery was invalid and should have been suppressed at trial.

Certainly, had Mr. Blackburn's counsel been present he would have been able to advise Mr. Blackburn that the offer to "help" from law enforcement was really no offer at all. Had Mr. Blackburn's counsel been present he could have advised him that the punishment for robbery was just as severe as the punishment for domestic terrorism. According to the Petitioner's

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<sup>2</sup> The Petitioner's counsel believes the circuit court's findings of fact clearly indicate that the circuit court did find that the police made the Petitioner promises about helping him on the domestic terrorism criminal charge if he confessed to the robbery at Wendy's. According to the circuit court's ruling on the record:

The Court finds no evidence of coercion, threats, uh *there's some question that there may be some vague promises made that if he gave a statement that it would be easier on him in the case that he was under arrest on*. Even the Court does not find that sufficient evidence of I guess that type of coercion to uh to violate the voluntariness by preponderance of the evidence. P3:16-20(*Emphasis added*).

<sup>3</sup> The Petitioner did not testify that he was told by the police if he confessed that the police would dismiss the domestic terrorism criminal charge. The Petitioner only testified that he was assured by the police they would help him with regard to the charge; however, it would be naive to think the promises made by the police to "help" him did not imply that the police might dismiss the domestic terrorism charge altogether.

testimony, Officer Davis of the Bluefield City Police Department told him that the domestic terrorism charge carried a sentence of 25 years to life. P189. When the Petitioner asked about the sentence for robbery Officer Davis told him “it was a lot less.” Id.

Had Mr. Blackburn’s counsel been present he may have advised his client to remain silent and not give into the State’s overwhelming pressure it placed on him to confess to a robbery he didn’t commit. There can be no doubt in such a situation, being placed between a rock and a hard place by the State, Mr. Blackburn needed the advice of counsel. The United States Supreme Court stated in Brewer v. Williams, 430 U.S. 387, 398, 97 S.Ct. 1232 1239, 51 L.Ed.2d 424, 436 (1977), “whatever else it may mean, the right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him”.

**II. UNDER THE “TOTALITY OF THE CIRCUMSTANCES” STANDARD, THE STATE OBTAINED A NON-VOLUNTARY CONFESSION FROM MR. BLACKBURN REGARDING THE ROBBERY AT WENDY’S .**

Under the “totality of the circumstances” standard Mr. Blackburn’s confession was not voluntary and coerced because Mr. Blackburn was interrogated multiple times, was made promises that he would be “helped” if he confessed, was presented fabricated polygraph results to pressure his confession and was taken advantage of because of his depressed mental state.

The circuit court in its ruling on the record with regard to the suppression of Mr. Blackburn’s confession found that there was not sufficient evidence to find Mr. Blackburn’s confession was coerced. The circuit court stated:

[T]he Court does not find that sufficient evidence of I guess that type of coercion to uh to violated the voluntariness by preponderance of the evidence. Ultimately it will be up to the jury whether or not they determine whether they determine the statements are voluntary or not. P3, 20-23.

The issue Mr. Blackburn has raised on appeal is that the circuit court's ruling was unsupported by substantial evidence. The West Virginia Supreme Court in Syl. pt. 2, in part, State v. Lacy, 196 W. Va. 104, 468 S.E.2d 719 (1996), held that "a circuit court's denial of a motion to suppress evidence will be affirmed *unless it is unsupported by substantial evidence*, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made."*(Emphasis added)*.

Mr. Blackburn's counsel disagrees with the Respondent's statement that the Petitioner has built its arguments on unsupported facts or is trying to pull the wool over this Court's eyes. Resp.'s Br. fn4 and pg. 32. On the contrary, Mr. Blackburn's arguments are supported by the limited findings of fact made by the circuit court and the testimony provided during the suppression hearing.

The circuit court *did make a finding of fact* that Mr. Blackburn was interrogated multiple times and that he was promised leniency in return for a confession. The circuit court, however, made no findings of fact as to whether or not the police intentionally fabricated evidence to use against him or whether or not his questionable mental state lead to his confession. The circuit court in its ruling on the record did not address these questions but Mr. Blackburn argues it should have taken this evidence into consideration and that all the evidence under the "totality of the circumstances" does not support the circuit court's ruling that Mr. Blackburn's confession was voluntary and not coerced.

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

The circuit court *did make a finding of fact that Mr. Blackburn was interrogated multiple times.*<sup>4</sup> According to the circuit court's ruling on the record:

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<sup>4</sup> Counsel for the Petitioner concedes that the circuit court did not make any findings of fact as to how many times the Petitioner was interrogated. The circuit court's ruling is completely silent as to how many times the

*And even though there were statements taken over an extended period of time the Court finds that the purpose of his detention was not for the purpose of obtain [sic] a statement. He was once again being detained on unrelated charges out of an unrelated incident and it wasn't like he was under a constant barrage the entire time that this questioning was taking place. That uh, he was periodically taken out of his cell where he was then mirandized and agreed to give the statements. I think one time he was transferred to the West Virginia State Police and a statement was taken there. P2-3(Emphasis added).*

It is Mr. Blackburn's argument that the multiple interrogations, in the course of 48-hours, was too many and lead to a coerced confession. The circuit court's ruling on the record makes no specific findings of fact with regard to how many times Mr. Blackburn was interrogated, however, Mr. Blackburn argues that this Court in reviewing the circuit court's ruling should believe his testimony, that he was interrogated 9 times in 48-hours.

First, Mr. Blackburn's testimony was credible because the circuit court found his testimony was credible. The Respondent asserts that Mr. Blackburn's testimony was not credible with regard to how many times he was interrogated<sup>5</sup> (Resp.'s Br. 32) but that is not what the circuit court determined. As previously stated, the circuit court's ruling indicates that Mr. Blackburn "was periodically taken out of his cell where he was then mirandized and agreed to give the statements." P2-3. Clearly, despite the Respondent's assertion, the circuit court believed that Mr. Blackburn's testimony was credible and he was interrogated multiple times.

Second, Mr. Blackburn's testimony was credible because his testimony was specific as to the number of times he was questioned, the days the questioning occurred, the time of day the

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Petitioner was interrogated; however, based on the circuit court's ruling the court clearly believed it was on multiple occasions.

<sup>5</sup> The Respondent makes the argument that the Petitioner's testimony was not credible without providing any reference to the record other than the police officers' testimony who testified that they did not interrogate the Petitioner 9 times. It is worth noting, however, that Bluefield City Police Detective Hamm testified to participating, attending or being aware of 5 occasions where the Petitioner was questioned about the robbery. P45-59.

questioning occurred, the location of the questioning, the law enforcement officers present during the questioning and the length of time of the questioning.<sup>6</sup>

Third, Mr. Blackburn's testimony was credible because it was not self-serving despite the Respondent's assertion. Res.'s Br. 32. Mr. Blackburn testified that during the majority of the times he was interrogated he was advised of his Miranda rights. Clearly, if Mr. Blackburn wanted to give a self-serving statement with regard to his interrogations he would have testified that he was never advised of his Miranda rights; however, Mr. Blackburn didn't do that, he admitted that the majority of times he was interrogated the questioning officer did advise him of his Miranda rights making it a non-issue. See footnote 6.

Regardless of the specific number of times Mr. Blackburn was interrogated it is clear the circuit court found he was interrogated multiple times. It is Mr. Blackburn's position that under the "totality of the circumstance" standard the multiple interrogations were too many and lead to a coerced confession.

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

The circuit court *did make a finding of fact that Mr. Blackburn was given some promises in return for his confession.* According to the circuit court's ruling on the record:

*The Court finds no evidence of coercion, threats, uh there's some question that there may be some vague promises made that if he gave a statement that it would be easier on him in the case that he was under arrest on. Even the Court does not find that sufficient evidence of I guess that type of coercion to uh to violate the voluntariness by preponderance of the evidence. P3:16-20(Emphasis added).*

Mr. Blackburn's counsel believes the circuit court's findings of fact as stated clearly indicates that the circuit court did find that the police made Mr. Blackburn promises about

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<sup>6</sup> The 1<sup>st</sup> interrogation P161-163; 2<sup>nd</sup> interrogation P164-166; 3<sup>rd</sup> interrogation P168-169; 4<sup>th</sup> interrogation P169-171; 5<sup>th</sup> interrogation P172-173; 6<sup>th</sup> interrogation PP175-178; 7<sup>th</sup> interrogation P178-182; 8<sup>th</sup> interrogation P182-183; 9<sup>th</sup> interrogation P183-189.

helping him on the domestic terrorism charge if he confessed to the robbery. P191-192.

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).

It is Mr. Blackburn’s argument that these promises by the police to “help” him on the domestic terrorism charge, which Mr. Blackburn was told by the police carried a possible sentence of 25 years to life (P188-189), coerced Mr. Blackburn to confess to the robbery which he was told carried less of a sentence. P189:9-18.

Mr. Blackburn testified that he was told if he confessed to the robbery the police would “help” him on the domestic terrorism charge on the morning of December 5<sup>th</sup>. P186-187. Mr. Blackburn denied his involvement in the robbery at that time. It was only after the police informed Mr. Blackburn that he was facing 25 years to life on the domestic terrorist charge, that “Osama Bin Laden would have a better chance of getting out of jail than he would” (P187-189) and was told by police that if he confessed to the robbery at Wendy’s they would “help” him, did he confess.

Clearly, discussing with Mr. Blackburn the fact that he could possibly face 25 years to life on the domestic terrorism charge and that they could help him on that charge if he confessed to the Wendy’s robbery was material to Mr. Blackburn’s confession. Mr. Blackburn refused to confess on the first occasion (December 5<sup>th</sup>) when he was offered help from the police (P186;8-22); however, after he was advised of the possible punishment for domestic terrorism during the 9<sup>th</sup> *interrogation* (December 6<sup>th</sup>) he confessed.P188-191.

The Respondent is correct in his statement that Mr. Blackburn did not testify that he was told by the police if he confessed that they would drop the domestic terrorism charge. Resp.'s Br. 32. Mr. Blackburn only testified that he was assured by the police they would "help" him with regard to the charge. As the circuit court stated in its ruling, the promises were vague.

It would be naive, however, to think the promises made by the police to "help" him did not imply that the police might dismiss the domestic terrorism charge altogether. Mrs. Collins, Mr. Blackburn's Mother, testified during the suppression hearing that she was told by Detective Hamm after her son confessed he would not be charged with the domestic terrorism charge. P144-146.<sup>7</sup>

Clearly, Mr. Blackburn gave a confession in return for promises made by police to help him on the domestic terrorist criminal charge. It is Mr. Blackburn's argument on appeal that these promises under the "totality of the circumstance" standard lead to a coerced confession.

**3. Law enforcement intentionally fabricated evidence to use against Mr. Blackburn.**

Despite the issue being raised in Mr. Blackburn's Motion to Suppress, the circuit court *made no findings of fact* on whether or not the police intentionally fabricated evidence to use against Mr. Blackburn. The circuit court in its ruling on the record did not address this issue but on appeal this Court can.P1-3.

It is Mr. Blackburn's argument on appeal that the Police did intentionally fabricate evidence to use against him. During the 7<sup>th</sup> *interrogation* Mr. Blackburn was intimidated by the news that he had failed the polygraph test. P178-183. After the test was conducted, Mr. Blackburn was approached by West Virginia State Trooper Smith who gave him the test,

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<sup>7</sup> Obviously, the Petitioner had already been charged on the domestic terrorism charge. It seems what Detective Hamm meant was that the Petitioner would not be indicted on the domestic terrorism charge and he was not.

Bluefield City Police 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. It was implied to Mr. Blackburn that the evidence would be used against him. P183. Clearly, Trooper Smith, Detective Hamm and Crook’s statements to Mr. Blackburn were intended to place additional pressure on Mr. Blackburn in order to make him confess.

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.

The police did more than tell Mr. Blackburn that he did not do well. The police told him that the results proved he was guilty and told him it could be used against him. This evidence under the “totality of the circumstances” standard does not support the circuit court’s ruling on the record that Mr. Blackburn’s confession was not coerced.

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

Despite the issue being raised in Mr. Blackburn’s Motion to Suppress, the circuit court *made no findings of fact* on whether or not Mr. Blackburn’s questionable mental state lead to his confession. The circuit court in its ruling on the record did not address this issue but on appeal this Court can. P1-3.

Mr. Blackburn testified that at the time he made his confession he felt helpless. P191. He was told 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. 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. P178; P184; P208-209. 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.

The circuit court did state in its ruling on the record that “he did not appear to be under the influence of alcohol or drugs at the time the statements were taken” (P2:20-21; P3:1); however, there can be little doubt that the narcotics Mr. Blackburn had received were still in his system and still had some effect on him. 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. P171-173, 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, who he knew 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").

This evidence, under the "totality of the circumstances" standard does not support the circuit court's ruling on the record that Mr. Blackburn's confession was not coerced.

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

The prosecutor clearly committed "impermissible suggestive procedures" when he verbally pointed to Mr. Blackburn and prompted Mr. Back to acknowledge that he was the man who robbed him. Additionally, Mr. Back's eye witness identification was completely unreliable because he admitted that he never saw the robber's face and admitted he was only able to identify Mr. Blackburn as the robber after he saw his mug shot and read where he confessed to the crime on the internet.

The circuit court in its ruling on the record with regard to the suppression of witness Daniel Back's eyewitness identification held that there was no "impermissible suggestive procedure" by the State.

The circuit court stated:

With regards to the suggestiveness by the State, obviously the State, the representatives of the State had nothing to do with the identification either out of Court or in Court of, uh, of the Defendant so there's nothing that the Court can

find that the State has done that would make the witness's identification overly suggestive. P6:15-21.<sup>8</sup>

The circuit court noted that the eye witness identification was "not great"<sup>9</sup> and held that the problems with the eye witness identification goes to the credibility of the witness and not whether the eye witness identification is admissible. P7-8. Again, the issue Mr. Blackburn has raised on appeal is that the circuit court's ruling was unsupported by substantial evidence.

**1. The "impermissible suggestive procedures" committed by the Prosecution**

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

The Respondent is wrong about Mr. Blackburn's argument on appeal. The Respondent argues that the Bluefield Police Department "did not operate an overly suggestive identification procedure." Mr. Blackburn's argument on appeal is not that the Bluefield Police Department was involved in "impermissible suggestive procedure." The "impermissible suggestive procedure" committed in this case was by the prosecution and occurred during the suppression hearing and during the trial. P498-501.

"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 (5<sup>th</sup> 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

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<sup>8</sup> The Respondent's brief states on page 14 and in footnote 20 that transcript pages 27-30 (top right hand corner of each page), which address the circuit court's ruling with regard to the eye witness identification, are missing from the Appendix. Transcript pages 27-30 are Appendix transcript pages P5-P9 (bottom center of each page) and were put in the front of the Appendix along with the circuit court's other orders to organize the Appendix. Please see Appendix Table of Contents.

<sup>9</sup> The Respondent's brief contributes the statement "not great" to the Petitioner's counsel (Resp.'s Br. Pg. 25); however, this statement was made by the circuit court. The circuit court stated on the record:

*"This is not a great, what the Court would call a great identification but I think it's at least the, you know, I think the issues that...that the problems that we have with the identification as pointed by the Defendant goes to the weight. Not necessarily the admissibility of the identification. I think that it's proper, all the items that the Defense has brought out is proper areas of cross examination. It goes to the credibility of that, uh, of the identification but I think there's a sufficient amount of reliability there for the Court to allow. P7-8. (Emphasis added).*

resemblance testimony.” United States v. Green, 704 F.3d at 311 (4<sup>th</sup> Cir.). Directing the witness’s attention to Mr. Blackburn is *exactly* what the prosecutor did in this case.

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, relying on 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, 704F.3d at 307)(*citing United States v. Archibald*, 734 F.2d 938 (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*.

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. Especially, since the State had never shown him any pictures of any other possible assailants prior to the hearing but brought him into a courtroom and showed him one man who was charged with the crime. 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, and the trial was all about what heinous crime he was subjected to and seeking justice for him.<sup>10</sup> "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 (5<sup>th</sup> Cir. 1984).

After Mr. Back's identification of Mr. Blackburn as the robber his identification was confirmed by the prosecution. As the appellant argued to this Court in State v. Myers just last year, "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). Mr. Back carried that confirmation of having successfully identified

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<sup>10</sup> 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 (4<sup>th</sup> Cir. 1975).

the robber according to the State, over into his in-court identification in front of the jury during the trial.

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. The prosecutor again, asked:

Q. Mr. Back, the person that attacked you at the Wendy's on November 28<sup>th</sup> 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.

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. Mr. Back's unreliable eye witness identification.**

Furthermore, Mr. Back's identification of Mr. Blackburn as the robber was completely unreliable. First, it was impossible for Mr. Back to positively identify Mr. Blackburn as the robber because he only saw the robber's eyes and cheekbones. P259-260. 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 the robber wore a hoodie over his head and a bandana over his

face. P219-222 & P263. Mr. Back testified that the only part of the robber that he could see was his eyes and cheekbones. Id.

Second, 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 and P256. 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.

Third, Mr. Back identified Mr. Blackburn as the robber almost 12-months after the robbery on November 27, 2011, 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).

Fourth, based on Mr. Back's testimony, he could only have had 1 or 2 seconds at the most to view the robber on the night of November 27, 2011. 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.

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 New Jersey v. Henderson, 27 A.3d 872 (N.J.2011)).

Fifth, Mr. Back's description of the robber was inconsistent with other witnesses and was also inconsistent with his statement to the police an hour after the robbery. Mr. Back identified the robber an hour after robbery as 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. P219-222 &P263. 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. P223-226 and 260. It is unbelievable that Mr. Back would have forgotten to tell the police such crucial facts an hour after the robbery but recalled these facts a year later. P261.<sup>11</sup> Clearly, under the criteria as stated in State v. Stacy Mr. Back's identification of Mr. Blackburn as the robber was completely unreliable.<sup>12</sup>

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<sup>11</sup> Wendy's employee and witness to the crime, Mr. Kipp Davis, did not give a statement to the police after the robbery, but testified at trial 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.

<sup>12</sup> 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 Court stated to determine reliability of an eye witness identification 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."

## CONCLUSION

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

The State obtained a non-voluntary confession from Byron Blackburn regarding the robbery without his right to counsel in violation of the United States Constitution and the Constitution of the State of West Virginia.

The State obtained a non-voluntary 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 questionable mental state.

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).

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**CERTIFICATE OF SERVICE**

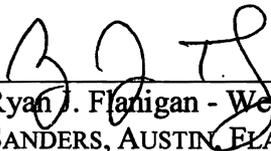
I hereby certify that on this 3<sup>rd</sup> day of September, 2013, true and accurate copies of the foregoing **Petitioner's Reply Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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