
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0270

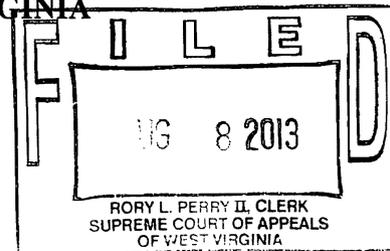
STATE OF WEST VIRGINIA,

Respondent,

v.

BYRON BLACKBURN,

Petitioner.



BRIEF OF RESPONDENT

**PATRICK MORRISEY
ATTORNEY GENERAL**

**ROBERT D. GOLDBERG
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
Fax: (304) 558-5833
State Bar No. 7370
E-mail: robert.goldberg@wvago.gov
*Counsel for Respondent***

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I.

STATEMENT OF THE CASE

On February 15, 2012, a Mercer County Grand Jury returned a true bill of indictment charging Byron Blackburn (“Petitioner”) with one count of First Degree Robbery¹ by presentment of a dangerous and deadly weapon, *i.e.*, a machete. (Case No. 12-F-30.) The trial court appointed Ryan Flanigan and Lynn Fuda defense counsel. The State was represented by Mercer County Assistant Prosecutor, George Sitler. Trial was originally scheduled for April 3, 2012, but was continued three times and did not begin until November 28, 2012 (Sadler, J.) Following a two-day jury trial, a Mercer County petit jury found the Petitioner guilty of Robbery. (J.A. 39.) The Petitioner filed a Motion for a New Trial on December 13, 2012. (J.A. 26.) The trial court convened an evidentiary hearing on Petitioner’s motion on January 4, 2013. Neither the Petitioner nor the State presented testimony. The Petitioner’s only argued ground for reversal was that his client had

¹W. Va. Code § 61-2-12(a).

been the victim of an unconstitutional in-court identification.² (J.A. 502.) After considering oral argument from both sides, the trial court denied the motion. (J.A. 505, 508.)

After denying the Petitioner's motion, the trial court moved on to sentencing. The court sentenced the Petitioner to a determinate term of 40 years for the Robbery, and an additional 1 to 3 years concurrent upon his guilty plea to Third Offense Driving Under the Influence.³ (Case No. 11-F-263.) (J.A. 261.)

II.

SUMMARY OF ARGUMENT

The Petitioner has slanted the record, and constructed legal arguments based upon this slanted recitation. If this Court were to read the Petitioner's brief, it would believe that the police brutalized and browbeat the Petitioner for hours at a time. Neither the trial court nor the jury saw it that way. This Court has previously ruled, "where credibility was the sole issue in the suppression hearing, we [will] not conclude that a judge abused his discretion in holding a confession [or statement] admissible." *State v. Wilson*, 170 W. Va. 443, 445, 294 S.E.2d 296, 298 (1982). In fact, every "fact" alleged in the Petitioner's brief was soundly rejected at least three times. Petitioner seeks nothing more than to re-litigate an issue that was litigated before trial, during a lengthy suppression hearing; at trial before the jury; after trial; and, in each instance, the Petitioner's version of the events.

²This same issue was addressed in a pre-trial *in camera* hearing. (J.A. 502.) The trial court ruled against the Petitioner after that hearing. Defense counsel also fully explored this issue during trial. (J.A. 507.)

³Prior to trial, the Petitioner had pled guilty to Driving Under the Influence Third Offense. At the time he committed this offense he was awaiting sentencing on that charge. (J.A. 4.)

The facts as set forth in the record reflect that the Petitioner was *Mirandized* on several occasions, voluntarily agreed to a polygraph test, and continually lied about his role in this incident until speaking with a Mercer County Police Officer who also happened to know him personally. His choice to confess was voluntary.

This Court has held, “The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense are voluntary before such may be admitted into the evidence of a criminal case.” *State v. Starr*, 158 W. Va. 905, 906, 216 S.E.2d 242, 244 (1975). This Court has adopted the “totality of the circumstances” test, employed in federal court. *See State v. Middleton*, 220 W. Va. 89, 101, 640 S.E.2d 152, 164 (2006) (overruled on other grounds by *State v. Eiola*, 226 W. Va. 698, 704 S.E.2d 698 (2010)). *See also Colorado v. Connelly*, 479 U.S. 157, 176 (1986). No single factor is determinative: the ultimate issue is the existence of police overreaching

An honest reading of the record shows no coercion, or overreaching. As stated above, this issue has been thoroughly briefed, and argued below. There is nothing different here. The Petitioner is recycling the same arguments and hoping this Court will substitute its judgment for the trial courts. There is no cogent reason for it to do that.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents no issues of first impression. Nor does it require a complex analysis of already existing case law. Therefore, oral argument is not necessary. *See W. Va. R. App. P. 18(a)(1)*.

IV.

STATEMENT OF FACTS⁴

On November 28, 2011, the Petitioner attempted to rob a Wendy's fast-food restaurant ("restaurant"), on Cumberland Road, Bluefield, by presenting a machete. (J.A. 102.)

A. The Suppression Hearing.

On November 5, 2012, the trial court convened an evidentiary hearing on the Petitioner's motion to suppress. (J.A. 13, 41.) The Petitioner was present, as was his counsel, Ryan Flannigan and Lynn Fuda. The State appeared by Assistant Prosecutor George Sitler. Defense counsel informed the trial court that the purpose of the hearing was to suppress the Petitioner's December 6, 2011, confession.

The State's first witness was Detective Bobby Hamm of the Bluefield Police Department. (J.A. 44.) Detective Hamm was the lead investigator in the attempted robbery of the restaurant. Detective Hamm initially released surveillance footage of the robbery taken from the restaurant's surveillance cameras to the media. Upon this release, he began getting anonymous phone calls identifying the Petitioner as the individual portrayed in the tape.⁵ Despite the tape, and the phone calls, the Petitioner was not arrested.

⁴Although defense counsel has an obligation to vigorously advocate for his client, he also is an officer of the court with a duty of candor. Defense counsel's brief omits significant facts. Instead, counsel depends on the Petitioner's self-serving testimony from the November 5, 2012, suppression hearing and presents it to this Court as if it were the totality of the record. Counsel then builds its legal arguments upon this slanted recitation. It is counsel for the Respondent's position that defense counsel's one-sided factual recitation lacks any credibility, violates counsel's duty of candor to this Court, and should be carefully scrutinized by this Court.

⁵Detective Hamm testified that he received between eight and ten calls.

During the early morning hours of December 4, 2011, Bluefield Police Office Ronald Davis arrested the Petitioner and charged him with making Terroristic Threats.⁶ The Petitioner remained in custody the rest of the night and the following morning. Detective Hamm questioned him on December 5, 2011, in the Bluefield Police Department's kitchen, sometime between 8:00 and 9:00 a.m. The interview lasted five minutes. (J.A. 45-46, 56.) Detective Hamm did not *Mirandize* the Petitioner before questioning him. The Petitioner denied any involvement in the robbery and volunteered to take a polygraph. Sometime after his arrest, he was transported to the emergency room at Bluefield Regional Medical Center after he complained of pain in one of his arms.⁷ Detective Crook remained with him the entire time. (J.A. 77.) The Petitioner remained at the hospital for several hours. After his treatment was completed, he and Detective Crook went back to the Bluefield police department. The Petitioner was placed in a holding cell. (J.A. 121.)

On December 6, 2012, the Petitioner was transported from the Bluefield Police Department to the Bluefield Detective Bureau at Tiffany Manor, where State Trooper Smith administered the polygraph exam. Although Detective Hamm was at the Bureau, he was not present in the same room while the Petitioner took the exam.⁸ (J.A. 59.) He was present for the post-exam interview. (J.A. 59.) This lasted approximately thirty minutes. The officers told the Petitioner that the results of the

⁶This was a week after the attempted robbery, while the Petitioner was waiting to be sentenced on his felony DUI charge.

⁷Two Bluefield police officers arrested the Petitioner on the Terroristic Threats charge. During the course of that arrest, the Petitioner stated that he had injured his shoulder. (J.A. 88.)

⁸None of the investigating officers knew whether the Petitioner was given pain medication before taking the polygraph.

test suggested deception.⁹ Although one of the officers urged the Petitioner to come clean, they did not discuss the potential sentence, nor did any of the officers state that Osama Bin Laden would have a better chance of getting out of jail. (J.A. 61.) They did not attempt to plea bargain by promising him his Terroristic Threats charge would be dropped if he admitted to the robbery. They did not threaten him. (J.A. 66.) Although Detective Hamm could not say whether the Petitioner had taken any pain medication before his interview, he had not taken any medication before the post-interview. (J.A. 65.) The Detective's testimony was corroborated both by Detective Crook and Officer Davis. (J.A. 97-98, 108.)

The Petitioner never invoked his right to counsel, nor did he exercise his right to terminate the interview. (J.A. 51.) When Detective Hamm interviewed him, the Petitioner showed no signs of physical distress. He appeared sober, and oriented to time, place, and person.

After the post-polygraph interview, Detective Crook drove the Petitioner back to the police department where he took another statement. Shortly after his arrest, the Petitioner consented to a search of his apartment. He showed Detective Hamm a pair of boots he claimed to have worn during the attempted robbery. (J.A. 68.) The Petitioner claimed to have disposed of the rest of his clothing by the side of the road. Detective Hamm drove from the Petitioner's apartment to the Wendy's, but did not locate Petitioner's discarded clothing. (J.A. 69.) Nor did the search turn up the machete.¹⁰

The State next called Bluefield Police Officer, Ronald Davis. Officer Davis testified that he drove to the Petitioner's home sometime during the early morning hours of December 5, 2011, in

⁹He testified it was December 6th, at approximately 4:00 p.m. (J.A. 49.)

¹⁰This information was corroborated by Detective Crook. (J.A. 113).

response to a Terroristic Threats 911 dispatch. The dispatcher told Officer Davis that the Petitioner was threatening to shoot any law enforcement officers who came near his house. Although Officer Davis could not speak from first-hand knowledge, he had heard that the Petitioner had stated he would shoot someone if he did not receive a cigarette. (J.A. 74.) The dispatcher also stated that the Petitioner had weapons. (J.A. 76.)

Officer Davis knew the Petitioner and had dealt with him and his family before.¹¹ Because he had just gotten off duty, he showed up in civilian clothes. He also had a pack of cigarettes. Once he knocked on the front door, the Petitioner answered and was arrested by two other officers. Officer Davis testified that the Petitioner appeared distraught and moderately intoxicated.¹² (J.A. 77.)

Officer Davis' didn't see the Petitioner for another two days. He and the Petitioner spoke in the kitchen at the Bluefield Police Department after the Petitioner had taken the polygraph. (J.A. 124.) Detective Crook told Officer Davis that the Petitioner knew something about the robbery at Wendy's, but was not willing to give it up. Officer Davis asked for permission to talk to him. Both he and Detective Crook took the Petitioner back into the kitchen area. Officer Davis denied making any threats or promises, characterizing the conversation as more personal. He discussed the robbery, the video footage, and the Petitioner's family.

¹¹The officer testified that he was aware that the Petitioner was having family problems, was unemployed, and had legal issues. (J.A. 90.) He had never known the Petitioner to be suicidal. Officer Davis denied ever hearing the Petitioner say that he wanted the police to kill him that evening. (J.A. 91.)

¹²On cross-examination, Officer Davis testified that he knew the Petitioner was a drinker, but had no knowledge regarding any problems with alcohol. (J.A. 43.)

Because he knew him, Officer Davis testified that he sensed feelings of guilt coming from the Petitioner, and suggested he assuage that guilt by talking about the robbery. The Petitioner then confessed, telling Officer Davis that he had attempted to rob the restaurant so he could afford Christmas presents. He took the machete and threw it into the woods behind Wendy's parking lot. The entire conversation lasted five or ten minutes. (J.A. 94.)

The State's next witness was Detective Aaron Crook. (J.A. 61.) Detective Crook first met the Petitioner at the Bluefield jail after he had been arrested on the Terroristic Threats charge.¹³ They met in the kitchen at the Bluefield Police Department. He told the Petitioner that he was under arrest for making Terroristic Threats, and was a suspect in the Wendy's robbery. The Petitioner immediately denied any role in the robbery. The following day the Petitioner voluntarily took the polygraph.

West Virginia State Trooper Smith *Mirandized* the Petitioner at 11:00 a.m. and then administered the exam. After the examination, Detectives Crook and Hamm and Trooper Smith interviewed the Petitioner again. After the interview, Detective Crook drove the Petitioner back to the Bluefield Police Department. Before returning the Petitioner to his cell Officer Davis asked Detective Crook if he could speak with him. The Petitioner consented, and was taken back to the kitchen. While speaking with Officer Davis he confessed to attempting to rob the Wendy's. (J.A. 107.)

After he admitted to the attempted robbery, the Petitioner was *Mirandized* once again, and confessed to Detective Crook by taped statement. (J.A. 109.) Once again, Detective Crook did not

¹³The Petitioner was arrested on the 4th of December, 2011, for the Terroristic Threats charge. He was arraigned on the 5th. (J.A. 95.) Detective Crook first met him the afternoon of the 5th. (J.A. 103.) This was the day before the Petitioner was given a polygraph.

threaten or entice the Petitioner to confess. The Petitioner was coherent, and oriented to time and place. (J.A. 69.) There was no evidence that the Petitioner was under the influence of narcotics. (J.A. 376.) He was not under arrest for the attempted robbery yet. He was in custody for the Terroristic Threats charge, but Detective Crook and Officer Davis made it clear that they only wished to question him about the robbery. (J.A. 110.) Indeed, they even showed him the surveillance video from the restaurant. (J.A. 127.)

During this statement, the Petitioner told Detective Crook that he had initiated the Terroristic Threats call because he was suicidal and wanted the police to shoot him. He specifically asked for Officer Davis because he knew he was a good shot. (J.A. 129.)

After the confession, the Petitioner also signed a consent to search form. During a search of his apartment, Detective Crook found a pair of black Rocky brand boots size nine. (J.A. 139.) The Petitioner admitted that they were the boots he had worn during the robbery. (J.A. 112.) The investigating officers had found a boot print on the counter at the Wendy's which was consistent with the boots they found in the Petitioner's apartment. (J.A. 112.) Detective Crook was the State's last witness.

The Defense's first witness was the Petitioner's mother, Carolyn Collins. (J.A. 144.) Ms. Collins testified that she was not in town when her son was originally arrested, but returned soon thereafter. Upon her return, she spoke with the investigating officers. Detective Hamm told Ms. Collins that he intended to arrest her son for the Wendy's robbery. He refused to allow the Petitioner's parents see the surveillance video.

Defense counsel's next witness was the Petitioner. (J.A. 152.) The Petitioner stated that he had been drinking and taking prescription medication¹⁴ the day he was arrested. Although he initially testified that he barely recalled the evening he recalled making two 911 calls, and he recalled demanding that Officer Davis come before he came out of his house because he knew the officer was a good shot. The Petitioner testified that he was suicidal.

There is no doubt that the Petitioner was injured when he was first arrested. He had fractured his elbow when he was initially arrested, and his eyes had some bruises and cuts. He testified that these injuries were substantially painful. He also testified that he told the officers about this pain several times. He did not receive medical attention until the next day.

The morning after his arrest, Detective Hamm briefly spoke to him about the Wendy's robbery. The Petitioner was not *Mirandized* before this brief chat. He also claimed that Detective Crook questioned him while in the emergency room. The Petitioner denied any involvement in the robbery. Detective Crook sporadically questioned the Petitioner during the two to three hours he was waiting for treatment. The Petitioner claimed that Detective Crook did not read him his *Miranda* rights.¹⁵

¹⁴The Petitioner was taking Chantix, a drug designed to help smokers quit. The FDA has released preliminary studies linking the drug to suicidal ideation and related erratic behavior. www.medicalnewstoday.com/articles/89607.php.

¹⁵The Petitioner was arrested for the Terroristic Threats charge during the early morning hours of December 5, 2011. Defense counsel studiously avoids asking the Petitioner if he was *Mirandized* during that arrest. See *Edwards v. Arizona*, 451 U.S. 477, 484 (1981) (*Miranda* is not offense-specific, an invocation of a defendant's *Miranda* rights expresses a desire to deal with law enforcement only by counsel).

The hospital x-rayed the Petitioner's injured arm, then released him. They prescribed Loritab 7.5 mg¹⁶ and ice for inflammation, suggested he call an orthopedic surgeon.¹⁷ They also placed his arm in a sling. They did not admit him. From the time he was transported to the hospital to the time he was released, he claimed he was given three doses of morphine by EMS. After the hospital released him Detective Crook took him back to the Bluefield Police Station. Upon his return, the Detective Crook spoke with the Petitioner for another thirty minutes. The Petitioner was then returned to a holding cell.

The following morning, the Petitioner spoke briefly with Detective Hamm. He agreed to take a polygraph. Detective Crook transported him to the Bluefield Detective Bureau at Tiffany Manor. About an hour before taking the test, the Petitioner testified that he took a single Loritab.¹⁸ Trooper Smith administered a pre-interview before the polygraph. (J.A. 176.) He also read him his *Miranda* rights. After the test was completed Trooper Smith told the Petitioner that the results were consistent with deception. The Petitioner testified that he told Detective Crook and Trooper Smith that he was in pain and just wanted to go back to his holding cell. He continued to deny any role in the Wendy's robbery. Detectives Hamm and Crook and Trooper Smith conducted the post-polygraph interview. The Petitioner claimed that the interview lasted about an hour.

¹⁶Pain is the most obvious symptom of any fracture. Anti-inflammatories such as Celebrex, Motrin, Aleve, or Naprosyn are often prescribed to address the inflammation and pain. www.medhelp.org/posts/Orthopedics/hairline-fracture.com.

¹⁷On re-direct, the Petitioner was permitted to testify that he had fractured his left elbow, and left forearm. Both fractures were hairline (stress) fractures. (J.A. 206.)

¹⁸This was not the Petitioner's first experience with opiates. He had been taking both prescription and non-prescription opiates for an extended period of time prior to his arrest, thus building up a tolerance. (J.A. 197.)

After the interview, Detective Crook drove the Petitioner back to the Bluefield Police station. Upon their arrival, Detective Crook took him back to the kitchen where he interviewed him again. The Petitioner testified that he told Detective Crook that he had nothing to do with the robbery. On the way back, Officer Davis asked if he could speak with the Petitioner. Both he and Detective Crook took the Petitioner back to the kitchen. The dispatch officer gave the Petitioner an additional Loritab before the interview. Neither Officer Davis or Detective Crook read the Petitioner his *Miranda* rights before questioning him. The interview lasted approximately thirty minutes to an hour.

During his conversation with Officer Davis, the Petitioner confessed to attempting to rob the Wendy's. (J.A. 190.) When asked by defense counsel why he confessed, the Petitioner stated that he thought he would take his chances with the court, and that a confession might work to his advantage given the other charges he faced.¹⁹ The Petitioner never testified that the investigating officers told him they would drop these other charges if he agreed to confess to the attempted robbery charge. (J.A. 192.) Nor did he testify that he was threatened or coerced into making the confession. (J.A. 162.)

The Petitioner claimed that he made up the confession with Detective Crook's help. This was not the first time the Petitioner saw the surveillance video. He had seen it once before at his ex-wife's home a few days after the robbery, when one of the local news stations posted it on the internet. He conceded that he took Detective Crook to his home and showed him the boots he wore the day of the robbery. (J.A. 202.) He conceded that he was *Mirandized*, both verbally and in

¹⁹The Petitioner claimed that the investigating officers had told him that he faced a 25 to life charge on the Terroristic Threats charge. In addition to that charge, the Petitioner was awaiting sentencing on the felony DUI charge.

writing, the morning of December 6, 2011, and that he was *Mirandized* again, both verbally and in writing, before he gave the recorded statement to Detective Crook. (J.A. 203.)

Upon completion of the Petitioner's testimony, the defense rested its case. Defense counsel requested an opportunity to brief the issue. When the trial court asked if there were any other issues it needed to address, defense counsel stated it was the only one. (J.A. 211-12.)

On the first day of trial, Counsel for the State informed the Court that one of the restaurant employees, Daniel Back, was prepared to identify the Petitioner as the perpetrator. Mr. Back told counsel for the State that he had seen a photo of the Petitioner on the news, and identified him from that photo. There was no pre-trial line-up, nor was the Petitioner shown a photo array. The trial court ordered an *in camera* hearing. (J.A. 216.)

The State called Mr. Back. He testified that he was working at the Wendy's the evening of the attempted robbery. At some point he felt an unidentified person place his arm around him and pull, as if he were trying to wrestle. Mr. Back pushed him off. The individual then put his arm around him again, this time holding the machete.

When Mr. Back turned around he looked directly into the individual's face. He testified that he could see his eyes, his cheeks, and a part of his forehead. The individual ordered Mr. Back to "give him the money." Mr. Back told him he didn't have the key to the safe and tried to run away. The unidentified individual then placed the machete to Mr. Back's throat. The unidentified individual again ordered him to give him the money. Somehow, Mr. Backs escaped the robbers grip and ran away. (J.A. 219.)

Mr. Back had never seen this individual before, but was standing less than a foot away when he attempted to rob the restaurant. The area was well-lit. He told the investigating officers that he

had gotten a close look at his eyes, and parts of his face. (J.A. 220.) He conceded that the State never showed him a photo array, or had him pick the suspect out in a formal line-up. In fact, his identification was based on what he saw on the television news; there was no government involvement. He said he recognized his eyes as blue, and his skin as a pinkish, reddish color.

Mr. Back then identified the Petitioner as the person who had attempted to rob the Wendy's. (J.A. 221.) He denied being 100% certain, but stated that he was approximately 90% sure that the person who put his arm around him that evening was the Petitioner. (J.A. 222.)

On cross-examination, Mr. Back conceded that he could not see the individuals entire face because he was wearing a hoodie. On cross-examination he could not say whether the hoodie was grey or blue and he had a bandana over his nose and mouth. Immediately after the robbery, he told the police it was grey. He had never mentioned that the perpetrator had blue eyes or that his skin had a pinkish hue. Mr. Back and his friend, Kip Davis, were present the evening of the attempted robbery. Mr. Back admitted that he spoke with Mr. Davis before he testified. Mr. Back was the State's only pre-trial identification witness.

Although it would appear that the trial court admitted Mr. Back's identification testimony, the Petitioner's appendix is missing pages 27-30²⁰, in which the trial court explains its ruling. Indeed, large parts of the trial transcript are not in sequential order.

B. The Trial

The State's first witness was Wendy's cashier, Nikko Jansen. Mr. Jansen was working the drive through window the evening of the November 28, 2011. On cross-examination, he guessed that the attempted robbery occurred somewhere around 9:00 p.m. (J.A. 241.) As he was talking to

²⁰These are the original trial transcript numbers on the top right hand corner of each page. The J.A. numbering at the bottom center of the page goes from J.A. 233-234 despite this gap.

Mr. Back he noticed someone crouched near the front cash register. This same individual grabbed Mr. Back.²¹ After he escaped, this individual jumped over the counter and ran out of the store. This individual was wearing a bandana over his face, a hoodie, and black sweat pants. He was carrying a machete.

Mr. Jansen conceded that he did not get a good look at this individual, but that he did give a statement to the police. He described him as an African-American of average build wearing gloves. He also believed he saw some rust on the machete. At trial he conceded that the individual may not have been an African-American, but appeared to be because of the gloves.

He could not identify the Petitioner as the person who had attempted to rob the restaurant. Inexplicably, defense counsel chose to cross-examine this witness. Nothing of value was gained.

The State's next witness was Kip Davis. Mr. Davis was working the side grill the evening of the robbery. Mr. Davis stated he was cleaning the grill when he observed an individual grab Mr. Back and place a machete to his throat. After Mr. Back escaped, this individual approached Mr. Davis and ordered him to "give him the money." When Mr. Davis told him he didn't have a key, the individual ran back to the front of the store, and Mr. Davis ran out the back door. (J.A. 245.)

Because the individual was wearing a blue bandana and a hoodie, all he could see were his blue eyes and white skin. He also testified that the individual was approximately 5'11"²² and was wearing a grey sweat suit.

²¹The witness was standing approximately two feet away when this individual grabbed Mr. Back. (J.A. 237.)

²²Mr. Davis is 6'1 and stated that the robber was a little shorter than he was. He could not say that with any certainty. (J.A. 248.)

The State's next witness was Daniel Back. (J.A. 251.) Mr. Back testified that he was standing near the front of the restaurant talking to Mr. Jansen. His testimony was entirely consistent with his suppression hearing testimony. He felt someone come up behind him and grab him. When he tried to push them off, he saw the machete blade come around. When he looked back he saw an individual who ordered him to "give him the money." When Mr. Back said he couldn't, the individual demanded the money again. At some point Mr. Back was able to free himself and run from the restaurant. (J.A. 253.)

Although he was wearing a bandana and a hoodie pulled down low, Mr. Back testified that he could see the individual's eyes and part of his cheek bones. He said his skin had a pinkish, reddish tone, and that he was short. He could not estimate his weight. In response to a leading question by counsel for the State, Mr. Back said the individual was somewhere between skinny and medium build. He saw the Petitioner's face on an on-line local news site. There was also a story saying they had arrested the Petitioner for the attempted robbery. (J.A. 256.)

Mr. Back testified that he was certain that the person displayed on-line was the same person who attempted to rob the restaurant. (J.A. 261-62.) He recognized the Petitioner's blue eyes and his complexion. He identified the Petitioner as the person who had attempted to rob the restaurant. (J.A. 257.) He testified that he was a little uncertain, but upon being reminded he was under oath, Mr. Back stated that he was certain—a nine out of ten on his scale of certainty.

The State next called the Petitioner's ex-wife, Allison Blackburn.²³ At the suggestion of a neighbor, the witness watched the surveillance video on her computer. After she finished, she called

²³They were divorced on June 24, 2011. (J.A. 274).

the Petitioner and told him that some individuals had identified him as the person portrayed on the surveillance video.²⁴

The Petitioner drove to his ex-wife's house and they watched the video together. Neither of them believed that the person in the video was the Petitioner. According to Ms. Blackburn, he was thirty or forty pounds heavier. (J.A. 277.) The evening the Petitioner was arrested for Terroristic Threats he had texted Ms. Blackburn stating he was going to commit suicide. After he was taken into custody, Detectives Hamm and Crook visited Ms. Blackburn at her home. They showed her the surveillance video and she told the officers that the person in the video could be her ex-husband.

The State's next witness was Detective Hamm. Once again, he denied ever saying that Osama Bin Laden had a better chance of getting out of jail than the Petitioner. He had never said it to the Petitioner or to the Petitioner's ex-wife. (J.A. 283.) He also testified that Ms. Blackburn identified the Petitioner in the video as her ex-husband with a greater degree of certainty than when they interviewed her on the December 4, 2011.

On cross-examination, Detective Hamm conceded that, apart from the video tape, there was no physical evidence linking the Petitioner to the robbery. The officers had searched his home twice. Although the Petitioner stated that he had discarded his clothing along the route home, the officers never found them, nor did they find a machete.

Detective Hamm spoke with the Petitioner on the morning of December 5, 2011. The Petitioner had been arrested the night before for making the threatening phone calls. Detective Hamm told the Petitioner that he was a suspect in the Wendy's robbery, and he would like to talk

²⁴WVVA is a local news station out of Bluefield. It has its own website www.wvva.com which posts stories of local interest and videos. Obviously, the surveillance video was posted on this website.

to him. (J.A. 290.) He also spoke with the Petitioner two times on December 6, 2011; once at Tiffany Manor, and once after he was returned to the Bluefield Police Department. (J.A. 290-91.) Once again, Detective Hamm denied ever telling the Petitioner he could get 25 to life on the Terroristic Threats charge, but that they would drop it if he would confess to the robbery. (J.A. 291-92.)

The State next called Detective Crook. He first became involved in the robbery investigation on the evening of the robbery at about 9:00 p.m. Initially he spoke with Mr. Back, Mr. Davis and Mr. Jansen. He also obtained a copy of the surveillance tape. Detective Crook described what was on the disk as:

The imagery shows an individual in dark . . . dark clothing come into Wendy's, jump the counter to near the register in Wendy's. Grab an employee with a machete in his hand. Wraps his . . . wraps the machete around an employee's neck. When he grabs him also has another knife in his hand, what appears to be another knife. And the employee gets away. It shows him make a few more gestures towards the employees. And then turns around and jumps back over the counter and exits the store.

(J.A. 298.)

Neither the tape, nor the employee interviews, led to an arrest, but several individuals who had seen the tape on a local news website called the Bluefield Police and identified the Petitioner.

(J.A. 299.)

Detective Crook's first conversation with the Petitioner regarding the robbery occurred on the morning of December 5, 2011. The Petitioner was in custody because of the Terroristic Threats charges.²⁵ The Petitioner denied any involvement in the robbery. He was then transported to the

²⁵The Petitioner was taken into custody on the Terroristic Threat charges at midnight on December 5, 2011. He had made the calls on the December 4, 2011.

hospital. Detective Crook testified that he did not question the Petitioner while they were at the hospital. (J.A. 301.) He next attempted to interview the Petitioner on December 6, 2011. Initially, State Trooper Smith conducted a pre-polygraph interview. Trooper Smith *Mirandized* the Petitioner before this interview. After he had taken the polygraph, Detective Crook spoke with the Petitioner once again. Detective Hamm also spoke with him. The Petitioner continued to deny any role in the robbery.

Detective Crook transported him to the police department after this interview. It was at this time that he spoke with Officer Davis. (J.A. 303.) After speaking with him, the Petitioner advised Detective Crook that he wished to give a complete confession to the attempted robbery. (J.A. 303.) It was 3:55 p.m. on December 6, 2011. (J.A. 307.) Once again, Detective Crook *Mirandized* the Petitioner verbally and in writing. (J.A. 304.) He confessed to robbing the Wendy's and gave an audiotaped confession. The State distributed a transcript of the confession to each member of the jury and played the audio tape. (J.A. 305.)

Before playing the tape, the trial court delivered the standard instruction emphasizing that the contents of the tape was the evidence, not the transcript.

The Petitioner was fully oriented to time, place and date. The Petitioner stated he was 5'6 or 5'7, and that he had brownish hair and blue eyes. He was able to recite his social security number. He understood that the purpose of the interview was the attempted robbery of the Wendy's on Cumberland Road. He also told the Petitioner he was not under arrest for the robbery. (J.A. 310, 315.) Prior to taking the statement, Detective Crook reviewed the Petitioner's *Miranda* rights with him. (J.A. 111-15.)

The Petitioner stated that he had lost his job six weeks ago. (J.A. 320.) Because his then-wife had fallen and hurt her back she was also unemployed. This lack of employment had caused the Petitioner a great deal of stress. Then he was indicted for felony DUI, and he was abusing alcohol and prescription drugs. He was also taking Chantix to help him quit smoking.

Although counsel for the Respondent has tried repeatedly to decipher what comes after this, he lacks the intelligence. What cannot be denied is that the Petitioner confessed to walking into the Wendy's with a machete, jumping over the counter, and attempting to rob the store. When this attempt failed, he ran out and threw the machete into the woods and walked home. (J.A. 328.) He was wearing a dark green jacket and dark green cargo pants. He also wore a black t-shirt and jeans under his top layer of clothing. He had a bluish bandana around his face, but nothing on top. The Petitioner claimed that he very intoxicated. (J.A. 340.)

The Petitioner admitted that, at first, he didn't want to confess, but changed his mind after Officer Davis talked to him. (J.A. 358.) The officer told the Petitioner that he knew him and the guilt from this would eat him alive. He told the Petitioner that he could see that he regretted what he had done, and was about to cry. (J.A. 359.) Officer Davis said the best way to ease his conscience was to admit what he had done. He knew that the Petitioner was not that kind of person.²⁶

After the State played the Petitioner's statement for the jury, it played the surveillance video. (J.A. 168.) Detective Crook also testified that he spoke with Allison Blackburn after taking the Petitioner's confession. Unlike Ms. Blackburn's testimony at trial, Detective Crook testified that she immediately identified the Petitioner from the surveillance tape.

²⁶By this time the Petitioner was awaiting sentencing on a felony DUI, and had just been arrested for Terroristic Threats. He was abusing both alcohol and opiates.

The first time Detective Crook spoke with the Petitioner was the morning of the December 5, 2011. After their brief conversation, Detective Crook accompanied him to the hospital. He denied talking during the transport or at the hospital (J.A. 386), nor did he speak to him during the transport back to the Bluefield Police Station. He next spoke to the Petitioner about the robbery on December 6, 2011, while at Tiffany Manor. After he had spoken to him, he drove him back to the Bluefield Police Department where, once again, he spoke to the Petitioner about the attempted robbery.

Detective Crook denied telling the Petitioner, or overhearing anyone else telling the Petitioner, that he would receive 25 to life for the Terroristic Threats charge. (J.A. 391.) Nor did he or anyone else promise to dismiss the Terroristic Threats charge if the Petitioner pleaded guilty to the attempted robbery charge. (J.A. 392.) He was not sure whether the Petitioner was intoxicated the evening he called in the threats.

On the second day of Petitioner's trial, defense counsel made a motion for a judgment of acquittal. Counsel argued that the State had failed to identify the Petitioner as the person who attempted to rob the restaurant, that the Petitioner's confession was inconsistent, and that his confession was involuntary. (J.A. 398.) The Defense objected based upon the identification testimony, and the Petitioner's confession. (J.A. 399.) The trial court found that the State's identification testimony was weak, but the Petitioner's statement, along with the testimony from the State's case-in-chief, was sufficient to overcome the Petitioner's motion. Defense counsel preserved his objection to that ruling. (J.A. 400).

The following day, the State recalled Detective Crook. (J.A. 405.) He recounted taking the same path the Petitioner took after the attempted robbery to his home, but conceded this would have

been a week later. (J.A. 407.) He described the neighborhood as “nice” and testified that if a resident identified his discarded clothes they would not have left them scattered on the street. (J.A. 407.) He also said that he did not check for fingerprints because the Petitioner was wearing gloves. (J.A. 409.)

Detective Crook was the State’s last witness. Before the defense commenced its case-in-chief, the trial court reviewed the Petitioner’s rights under *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988), with him. (J.A. 414.)

Before the defense called any witnesses, they played the 911 tapes from the evening of December 4, 2011. The Petitioner was aggressive, abusive and profane during the first call. He demanded that the police be sent to provide him with a cigarette, and that he was heavily armed. (J.A. 422.) The dispatcher told him not to call 911 while he was intoxicated. After the officers arrived, the Petitioner refused to come out of the house, and engaged in an argument with the 911 dispatcher. The entire situation soon got out of hand.

Officer Davis, who had been listening on his police scanner, volunteered to come and help. (J.A. 437.) The dispatcher informed the Petitioner that Officer Davis would ring his doorbell once he arrived.

Defense counsel next called the Petitioner’s mother, Carol Collins. She opined that the voice on the tape was her son’s, but that he was severely intoxicated. She testified that he would abuse alcohol and prescription drugs on a daily basis. She described him as depressed to the point of suicidal ideation. Although she saw the surveillance video, she never believed it was her son. (J.A. 458.)

The Petitioner's step-father, Harold Collins, testified next. (J.A. 465.) His testimony mirrored Ms. Collins' testimony.

The defense's next witness was Thomas Evans of the Bluefield Rescue Squad. (J.A. 475.) Mr. Evans testified that he was dispatched to the Bluefield jail on December 5, 2011. Upon his arrival, he examined the Petitioner. It was his opinion that the Petitioner had suffered a bad traumatic injury to his right elbow and forearm area. Mr. Evans gave him several low doses of morphine for the pain. (J.A. 272.) Mr. Evans opined that he was in a great deal of pain.

The defense next called private investigator, Ted Jones. Prior to his career as a private investigator, Mr. Jones was a Bluefield police officer for 28 years. During that time, he became acquainted with the Petitioner. In 2002, the Petitioner confessed to a murder. After several questions, it soon became obvious to Mr. Jones that the Petitioner had not committed the murder, and had confessed because he wanted to get arrested that night.

Mr. Jones was defense counsel's last witness. Upon instruction by the trial court, summation by both sides, and due consideration of the evidence before them, the jury found the Petitioner guilty of first degree robbery.

The trial court convened an evidentiary hearing on Petitioner's Motion for a New Trial. Defense counsel argued that Mr. Back's in-court identification did not satisfy the criteria set forth by this Court in *State v. Stacy*, 181 W. Va. 736, 384 S.E.2d 347 (1989). Defense counsel argued that Mr. Back's identification was unreliable, and that the State had used an unnecessarily suggestive means of obtaining Mr. Back's identification. It was the television broadcast, coupled with the news, that Mr. Back used to identify Petitioner.

The trial court denied the Petitioner's Motion to Suppress, but did observe that the question as to whether the Petitioner received a fair trial does not end with this ruling. The Appellate Court has the obligation to review the totality of the circumstances. (J.A. 504.)

The trial court considered several factors before coming to a decision: (1) Mr. Back openly testified to his limitations, and was forthright in his testimony; (2) the identification involved no State action; and, (3) Mr. Back's identification, when taken within the entire context of the trial, was sufficiently reliable to send the issue to the jury.

After denying the Petitioner's Motion, the trial court moved on to sentencing. Upon consideration of argument from counsel, and the Petitioner's drug and alcohol history, the Petitioner asked the trial court for alternative sentencing and accepted full responsibility for the consequences of his actions.

The trial court denied Petitioner's petition for probation, as it would denigrate the seriousness of his conduct, and noted that the Petitioner committed this offense while on bond and awaiting sentence on a pending felony DUI; he had a recent history of bizarre behavior; and the trial court sentenced him to a determinate sentence of 40 years on the Attempted Robbery Charge, and an indeterminate term of not less than 1 nor more than 3 years on the felony DUI. The trial court chose to run these to run theses sentences concurrently.

V.

ARGUMENT

A. **THE TRIAL COURT'S RULING DENYING THE PETITIONER'S MOTION TO SUPPRESS WAS CORRECT.**

1. **The Standard of Review.**

When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

[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 law, or, based on the entire record, it is clear that a mistake has been made.

Syl. Pt. 2, in part, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

2. **The Petitioner's due process rights were not violated as the Petitioner never proved government involvement in Mr. Back's identification of the Petitioner.**

The Petitioner described the State's identification evidence as "not great." Despite this, it ruled that any conflicts were questions of weight for the jury, and could not form the exclusion of the testimony as a matter of law. (J.A. 8.)

Unduly suggestive identification proceedings may be so flawed under the due process clause when it creates a "very substantial likelihood or irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 198, (1972). But Mr. Back did not make a positive identification until after he viewed the surveillance tape on his local new broadcast. The State had nothing to do with it.

In *State v. Addison*, 8 A.3d 118, 124 (N.H. 2010) held:

We address the defendant's claim under the State Constitution²⁷ and cite federal opinions for guidance only. *Ball*, 124 N.H. at 231-33, 471 A.2d 347. The defendant argues that "[t]he admissibility of identification evidence over a due process objection is governed by" the *Biggers* test. See *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). The *Biggers* test requires a two-step

²⁷As the federal constitution is the floor, any findings under a state constitution may afford equal or greater protection as their federal counterpart, but never less.

analysis. *State v. King*, 156 N.H. 371, 373–74, 934 A.2d 556 (2007). In *King*, we articulated the analysis as follows:

Initially, we inquire into whether the identification procedure was impermissibly or unnecessarily suggestive. At this stage of the inquiry, the defendant has the burden of proof. Only if the defendant has met his burden must we then consider the factors enumerated in *Neil v. Biggers* ... to determine whether the identification procedure was so suggestive as to render the identification unreliable and, hence, inadmissible. At this stage of the inquiry, the State bears the burden.

But the Court went on the find:

The majority of federal and state courts agree that an allegedly suggestive pre-trial identification must be the result of state action in order to affect the admissibility of a later in-court identification. *See, e.g., United States v. Kimberlin*, 805 F.2d 210, 233 (7th Cir.1986) (refusing to find a due process violation where a witness had not been shown a picture of the defendant by a government agent, but rather had seen it on television), *cert. denied*, 483 U.S. 1023, 107 S.Ct. 3270, 97 L.Ed.2d 768 (1987); *United States v. Zeiler*, 470 F.2d 717, 720 (3d Cir.1972) (refusing to find the identification suggestive and violative of due process, reasoning that when “there is no evidence that law enforcement officials encouraged or assisted in impermissible [*sic*] identification procedures, the proper means of testing eyewitness testimony is through cross-examination”); *Green v. State*, 279 Ga. 455, 614 S.E.2d 751, 754-55 (2005) (refusing to find the identification unduly suggestive and violative of due process because the State had no involvement in televising the defendant’s arrest); *Com. v. Colon–Cruz*, 408 Mass. 533, 562 N.E.2d 797, 805 (1990) (stating that the “crucial question” in an allegedly suggestive identification procedure “is whether any possible mistake was the result of improper procedures on the part of the Commonwealth”); *State v. Pailon*, 590 A.2d 858, 863 (R.I.1991) (refusing to find a due process violation by an in-court identification of a witness after an allegedly suggestive identification absent state action); *State v. Reid*, 91 S.W.3d 247, 272-73 (Tenn.2002) (finding identification testimony properly admitted because there was no evidence of State involvement in the witness's identifications of the defendant), *cert. denied*, 540 U.S. 828, 124 S.Ct. 56, 157 L.Ed.2d 52 (2003).

Addison, 8 A.3d 118, 126 (N.H. 2010).

In *Perry v. New Hampshire*, 132 S.Ct. 716 (2012), the Supreme Court approached the issue in the same fashion. To decide whether an out-of-court identification was so suggestive they use the

same two-pronged test. Initially, the Court will inquire whether the identification was both suggestive and unnecessary. (*Id.* at 724.) Second the Court will examine the totality of the circumstances to determine whether the other indicia of reliability outweigh [] . . . the corrupting effect of law enforcement suggestion. (*Id.* at 725.)

Courts will only consider the second prong if the first prong does not pass muster. Both prongs are fact-based inquiries. The first prong focuses on police conduct. In contrast, the second prong focuses on the identifying witness and the witnesses' knowledge of the suspect absent the suspect procedure.

In the case at bar, there was no evidence to satisfy the first bar. The police did not operate an overly suggestive identification procedure. Indeed, apart from asking Mr. Back to describe the perpetrator, they didn't use any specific identification procedure. There was no government action, thus the Petitioner's claim must fail.

B. THE PETITIONER'S CONFESSION WAS VOLUNTARY.²⁸

The Petitioner next claims that his December 6, 2011, confession was involuntary. According to the Petitioner the State: (1) interrogated the Petitioner nine times regarding the robbery while in custody on the Terroristic Threats charge; (2) threatened and then given hope of leniency

²⁸The Petitioner also argued that the State violated his Sixth Amendment right to counsel. Once he was arrested on the Terroristic Threats charge, the Petitioner was arraigned before Magistrate Judge Susan Honaker the morning of December 5th. (J.A. 136.) The Petitioner did check the box on the pre-printed form requesting the assistance of counsel. But in *Texas v. Cobb*, 532 U.S. 162 (2001) the Supreme Court held that a Petitioner's Sixth Amendment right to counsel is offense specific. The Petitioner had not yet been arraigned on the attempted robbery charge.

on the Terroristic Threats charge if he confessed to the robbery; (3) was confronted with fabricated evidence; and, (4) was in a questionable mental state.

The due process or involuntariness has three underlying values and goals. It bars the use of confessions: (a) which are unreliable because of the police methods used to obtain them (b) which were produced by offensive methods even though the reliability of the confession was not in question; and, (c) which were involuntary in fact (e.g. obtained from a drugged person) even though and the confession was entirely untrustworthy.

At the outset, however, the primary (and perhaps the exclusive) basis for excluding confessions under the due process clause “voluntariness” test was the “untrustworthiness” rationale, the view that the confession rule was designated merely to protect the integrity of the fact-finding process. This rationale sufficed to explain the exclusion in *Brown v. Mississippi*, 297 U.S. 278 (1936).

But, as time went by, and the jurisprudence developed, the aim changed. “The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.” *Lisenba v. California*, 314 U.S. 219 (1941). The Court found that fairness could only be reached by a close examination of the totality of the circumstances. *Spano v. New York*, 360 U.S. 315 (1959).

These include, but are not limited to, the characteristics of the suspect, the suspect’s prior engagement with the law-enforcement community, his personal characteristics such as his intelligence or education, and the morality of law-enforcement’s conduct, such as exploitation of a suspects religious nature. There is nothing in this record that remotely suggests that the State’s conduct overbore the Petitioner’s will and forced him to perform an involuntary act.

Apart from the injury sustained by the Petitioner when he attempted to resist arrest the evening of the December 4, 2011²⁹, there is no evidence that the officers beat a confession out of him.³⁰ He didn't raise the issue of the pain until the morning of the December 5, 2011, when Detective Hamm informed him that he was a suspect in the Wendy's robbery. Detectives Hamm and Crook told the Petitioner of their suspicions in the kitchen at the Bluefield Police Department. (J.A. 56.) Detective Hamm did not interrogate him; the entire conversation lasted five minutes. He merely told him what he believed; thus there was no need for a *Miranda* warning. The Petitioner denied playing any role in the robbery and volunteered to take a polygraph exam. (J.A. 45-46, 55-56.)

That same morning, Detective Crook took him to the hospital.³¹ (J.A. 48.) They released him with a prescription of Loritab, ice and a sling. (J.A. 96.) He took a sum total of two Loritabs. An accused medical condition will render his statement involuntary only if his injuries are so severe and the accused does not appear alert and responsive-oriented. *See Mincey v. Arizona*, 437 U.S. 385, 398-399 (1999) (holding that a defendant's statements were not voluntary when he was questioned in a hospital bed in the ICU, encumbered by tubes and a breathing apparatus, the pain in his leg was unbearable, he was depressed almost to point of coma, he appeared confused, many of responses appeared incoherent, and he expressed a desired not to be interrogated.”)

²⁹Bluefield Police Officer Davis arrested the Petitioner that evening. (J.A. 53.)

³⁰Bluefield Police Officer Davis testified that the Petitioner appeared moderately drunk the evening of the 4th. (J.A. 77.) The hospital did not prepare a toxicology report.

³¹The rescue squad transported the Petitioner. Detective Crook took his own car. (J.A. 48.)

On December 6, 2011, the Petitioner underwent the polygraph examination. Trooper Chris Smith administered the exam at the Bluefield Detective Bureau. (J.A. 51.) Detective Hamm transported the Petitioner to the Detective Bureau. The ride took two minutes. (J.A. 59.) Because he was working another case, Detective Crook *Mirandized* the Petitioner and handled the bulk of the post-polygraph interview. Trooper Davis was also present. (J.A. 51.) Contemporaneous paperwork indicated that the post-interview started at 3:55 p.m. and lasted thirty minutes. (J.A. at 60.) Detective Hamm submitted a transcript of the interview to the grand jury as part of his report. According to Detective Hamm, the Petitioner never invoked his right to be silent or his right to counsel. (J.A. 51.) He did deny any participation in the Wendy's attempted robbery. After the interview, Detective Crook drove the Petitioner back to the Bluefield Police Department. Upon their arrival, Detective Crook and Officer Davis interviewed the Petitioner again.

Once again, the interview took place in the Bluefield Police Department's kitchen. Detective Crook remained throughout the entire statement. Officer Davis testified that he did not threaten or improperly entice the Petitioner to give a statement. Since they had known each other for about five years before the incident, he kept it on a personal level. The Petitioner soon began to speak about personal problems with his employment, his ex-wife and his cash flow. He stated that he had no money for the Christmas holidays. He then admitted to Officer Davis that he had done it.

While finalizing the statement for Officer Crook, Officer Davis went into the woods behind the Wendy's but could not find the machete. The Petitioner did not seem to be under the influence of narcotics or other controlled substances and was oriented to time, place and person. All three of the officers testified that the Petitioner appeared oriented to time and place when they took his statement. His answers were coherent and responsive. There is nothing in the record linking his

medical condition to his ability to freely and voluntarily agree to speak with the officers. His testimony was wholly self-serving. More importantly, defense counsel failed to connect this pain to Petitioner's medical condition, or to any predisposition to confess. There was no evidence that the police promised to make the pain go away if he confessed, or to seek further medical treatment.

The Petitioner also claims that he was interrogated nine times by Detectives Crook and Hamm. The trial court found the following facts:

“Even if there were statements taken over an extended period of time the Court finds that the purpose of [the Petitioner's] detention was not for the purpose of obtained statement. He was once again being held on unrelated charges and it wasn't like he was under a constant barrage the entire time that this questioning was taking place.”

(J.A. 3.)

The Petitioner was arrested on the Terroristic Threats charge on the early morning hours of December 5, 2011. Detective Hamm spoke to the Petitioner between 8:30 and 9:00 a.m. on the morning of December 5, 2011. The conversation did not last thirty minutes. Detective Hamm told the Petitioner that he was a suspect in the attempted robbery and that he would like to talk to him about it. (J.A. 136.)

Detectives Hamm and Crook spoke with the Petitioner's mother at the Bluefield Police Station. (J.A. 103.) Ms. Collins could not tell the officers why the Petitioner would demand a cigarette when he had a full pack in his apartment. Detective Hamm told Ms. Collins that he was going to charge the Petitioner with the attempted robbery at the Wendy's and showed the surveillance video. (J.A. 146.) Ms. Collins denied ever hearing Detective Hamm say that they were charging the Petitioner in exchange for the Terroristic Threats charge. (J.A. 148.)

Once again, defense counsel is attempting to pull the wool over this Court's eyes. The Petitioner claims that Detective Crook interrogated him about the robbery on the way to the hospital. Detective Crook denied it. Counsel's out and out failure to mention this credibility issue is taken in bad faith. (Pet'r's Br. 17.) Defense counsel also fails to mention that both Detectives Crook and Hamm denied ever telling the Petitioner that he would go to jail from 25 years to life if he was convicted on the Terroristic Threats charge. (J.A. 61.) The only "evidence" adduced by the defense was his client's self-serving testimony.

The Petitioner then concocted a story about the officers offering to drop the Terroristic Threats charge in exchange for an admission about robbing the Wendy's. Once again, the only "evidence" supporting this fairy tale is the Petitioner's own self-serving testimony. To pass this off as uncontested evidence, as defense counsel did, wholly ignores their duty of candor to this Court

Defense counsel then accuses the State of "fabricating evidence." Specifically, telling the Petitioner that the results of his polygraph exam were consistent with deception. The Petitioner's argument is absurd on its fact. There is no evidence that the police lied to the Petitioner about the results of his exam. In fact, given the jury's verdict, the investigating officers may very well have been honest. The Petitioner denied attempting to rob the Wendy's, and then was convicted of attempting to rob the Wendy's. This does not constitute fabricating evidence. *Farley* discusses trickery designed to make an *innocent* person confess.

The Petitioner next claims that the officers took advantage of the Petitioner's depressed and helpless mood. There is no doubt that the Petitioner told the arresting officers that he had made the calls because he wanted them to shoot him. (J.A. 129.) But defense counsel failed to call a single expert witness on this issue. Instead, counsel requested psychiatric opinions from unqualified

witnesses such as law enforcement, based on their prior experience. Counsel's effort miserably failed to render an accurate, reliable psychological profile of the Petitioner, or to link any alleged psychological defects to the Petitioner's conduct. The Petitioner was never diagnosed as suffering from suicidal ideation. If he had wished to kill himself, he had plenty of opportunities the evening of December 4, 2011.

VI.

CONCLUSION

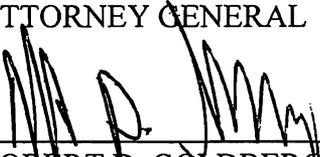
For the foregoing reasons, the judgment of the Circuit Court of Mercer County should be affirmed by this Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



ROBERT D. GOLDBERG
ASSISTANT ATTORNEY GENERAL
Office of the Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
Fax: (304) 558-5833
State Bar No. 7370
E-mail: robert.goldberg@wvago.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Robert D. Goldberg, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the herein *Brief of Respondent* upon the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 8th day of August, 2013, addressed as follows:

Ryan J. Flanigan
Sanders, Austin, Flanigan & Flanigan
William H. Sanders, II Memorial Hgwy.
320 Courthouse Rd.
Princeton, WV 24740

Thomas L. Fuda
Fuda Law Offices
P. O. Box 1066
Princeton, WV 24740



ROBERT D. GOLDBERG