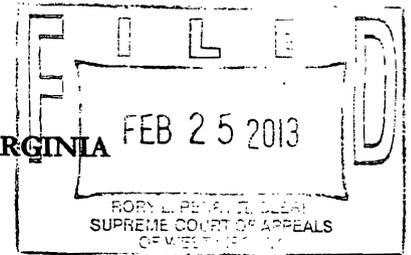


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET No. 12-1183

**STATE OF WEST VIRGINIA,**  
**Respondent/Appellee,**

v.  
**ROY FRANKLIN HILLBERRY, II,**  
**Petitioner/Appellant.**

Appeal from a jury conviction and  
all relevant orders from the Circuit Court  
of Marion County, West Virginia (09-F-  
194) and a recidivist conviction from the  
Circuit Court of Marion County, West  
Virginia (12-F-83)

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**Petitioner's Brief**

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## TABLE OF CONTENTS

Table of Contents .....	2
Table of Authorities .....	3
Assignment of Error .....	4
Statement of the Case .....	5
Summary of Argument .....	6-7
Statement Regarding Oral Argument and Decision .....	8
Argument .....	9-19
1.    The Trial Court erred by permitting comments to the jury during the State's closing arguments regarding the Appellant's failure to present evidence and failure to "contest" the State's case .....	9-12
2.    The Trial Court erred by permitting testimony that specifically referenced the Appellant's exercising of his right to counsel and right to remain silent during a police interview .....	12-14
3.    The recidivist information filed by the State was fatally flawed as it did not set forth the records of the Appellant's prior convictions and sentences as required by law .....	14-15
4.    The Trial Court erred when it refused to suppress the pretrial photographic lineup and prohibit any in-court identification of the Appellant by the victim because the pretrial photo array was unduly and impermissibly suggestive .....	15-19
Conclusion .....	19
Certificate of Service	
APPENDIX	

## TABLE OF AUTHORITIES

### W.Va. Supreme Court Cases

<u>McDougal v. McCammon</u> , 455 S.E.2d 788, 193 W.Va. 229 (1995) .....	13
<u>State ex rel. Grob v. Blair</u> , 214 S.E.2d 330, 158 W.Va. 647 (1975) .....	10
<u>State ex rel Ringer v. Boles</u> , 157 S.E.2d 554, 151 W.Va. 864 (1967) .....	16
<u>State v. Barker</u> , 281 S.E.2d 142, 161 W.Va. 1 (1981) .....	17
<u>State v. Bennett</u> , 304 S.E.2d 35, 171 W.Va. 131 (1983) .....	10
<u>State v. Boyd</u> , 233 S.E.2d 710, 160 W.Va. 234 (1977) .....	13
<u>State v. Cavallaro</u> , 557 S.E.2d 291, 210 W.Va. 237 (2001) .....	16
<u>State v. Green</u> , 260 S.E.2d 257, 163 W.Va. 681 (1979) .....	10
<u>State v. Guthrie</u> , 461 S.E.2d 163, 194 W.Va. 657 (1995) .....	10
<u>State v. Hamilton</u> , 355 S.E. 400, 177 W.Va. 611 (1987) .....	13
<u>State v. Keesecker</u> , 663 S.E.2d 593, 222 W.Va. 139 (2008) .....	10
<u>State v. Marple</u> , 475 S.E.2d 788, 197 W.Va. 47 (1995) .....	13-14
<u>State v. Noe</u> , 160 S.E. 2d 10, 230 W.Va. 826 (1976) .....	10
<u>State v. Nuckolls</u> , 273, S.E.2d 87, 166 W.Va. 259 (1980) .....	10
<u>State v. Starcher</u> , 282 S.E.2d 877, 168 W.Va. 144 (1981) .....	10
<u>State v. Watson</u> , 318 S.E.2d 603, 173 W.Va. 553 (1984) .....	18
<u>Turner v. Holland</u> , 332 S.E.2d 164, 175 W.Va. 202 (1985) .....	16

### Federal and U.S. Supreme Court Cases

<u>Simmons v. United States</u> , 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) .....	17
<u>United States v. Loayza</u> , 107 F.3d 257 (4 <sup>th</sup> Cir. 1997) .....	10
<u>U.S. v. Marson</u> , 408 F.2d 644 (4 <sup>th</sup> Cir. 1968) .....	18

### Statutes and Rules

West Virginia Code 61-11-19 .....	15
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### ASSIGNMENTS OF ERROR

1. The Trial Court erred by permitting (and the State committed reversible error by making) comments to the jury during closing arguments regarding the Defendant's failure to present evidence and failure to "contest" the State's case.
2. The Trial Court erred by permitting (and the State committed reversible error by eliciting) testimony that specifically referenced the Defendant's exercising of his right to counsel and right to remain silent during an interview with the police.
3. The Recidivist Information was fatally flawed because it did not set forth the records of Defendant's prior convictions as required by law.
4. The Trial Court erred when it refused to suppress the pretrial photographic lineup and prohibit any in-court identification of the Appellant by the victim because the pretrial photo lineup was unduly and impermissibly suggestive.

## STATEMENT OF THE CASE

This is a criminal case wherein the Appellant is accused of robbing a High Life gambling parlor by gunpoint in Fairmont, West Virginia, on July 15, 2009. On October 5, 2009, the Appellant was indicted for First Degree Robbery. (A.R. 46-47). Prior to trial, the Appellant's previous attorney filed a *Motion to Preclude In-Court Identification Based Upon Improper Photo Array* (A.R. 10-11), but the matter was never heard nor decided upon by the Court. In addition, just prior to trial, the Appellant filed two motions *in limine* to prevent the State from making any reference to the Appellant's assertion of his constitutional rights to remain silent and to retain counsel (A.R. 16) and to prevent the State from making any reference to the Defendant's failure to testify and/or present evidence. (A.R. 18) These motions were ruled upon, as evidenced in the transcripts, but no written order was generated. On April 11 and 12, 2012, the Appellant was tried by jury, after which the jury convicted the Appellant of Robbery in the First Degree.

On May 14, 2012, the State of West Virginia filed a recidivist information charging the Appellant with being a recidivist, having committed a third or subsequent offense felony in violation of W.Va. Code 61-11-18 and 19. (A.R. 33-35)

On August 29, 2012, a recidivist trial was convened, after which a jury found the Appellant guilty of being a recidivist. Immediately after the verdict was rendered, the Trial Court sentenced the Appellant to life and ordered the life sentence to run consecutive to a 5-18 year sentence the Appellant was already serving as a result of a conviction from Monongalia County, West Virginia. (A.R. 40-45)

The Appellant, through counsel, filed post trial motions in both cases. (A.R. 23-24 and 38-39) which were summarily denied by the Trial Court without hearing. (A.R. 27 and 40)

## SUMMARY OF ARGUMENT

Appellant first argues that the Trial Court erred by permitting (and the State committed reversible error by making) comments to the jury during closing arguments of both his armed robbery trial and recidivist trial regarding the Defendant's failure to present evidence and failure to "contest" the State's case. Having heard the prosecutor, Jeffrey Freeman, give a closing argument in a different, unrelated trial, counsel for the Appellant knew the prosecuting attorney's propensity to make comments to the jury regarding the Defendant's failure to testify and/or failure to present evidence. Knowing this, counsel for the Appellant filed a pretrial *Motion in Limine* asking the Court to direct the State from making any such comments during the Appellant's robbery trial. The Court indicated that this was clearly forbidden and actually a part of the Court's instructions. Hence, the motion was obviously granted. However, during his closing argument, in direct violation of the Court's Order, the prosecuting attorney made no less than four comments to the jury regarding the Defendant's failure to testify or present evidence on his behalf, to which Appellant's counsel did object. The Appellant argues this was plain error and prejudicial to the Appellant.

Second, the Appellant argues that the Trial Court erred by permitting (and the State committed reversible error by eliciting) testimony that specifically referenced the Appellant's exercise of his right to counsel and right to remain silent during an interview with the police. Again, counsel for the Appellant filed a pretrial *Motion in Limine* asking the Court to direct the State to refrain from making any references to or eliciting any testimony regarding the Appellant exercising his right to counsel and right to remain silent. The Court denied that motion, finding that such evidence was admissible. During trial, the arresting officer was asked questions regarding the interview process and testified that the Appellant stopped the interview and requested a lawyer. The Appellant argues that this evidence was prejudicial and should have been precluded.

Third, the Appellant argues that his recidivist conviction should be reversed and his sentence voided due to the fact that State's recidivist information was fatally flawed. More specifically, the information did not set forth the records of the Appellant's prior convictions and sentences as specifically required and mandated by the law.

Finally, the Appellant contends that the Trial Court erred by permitting the victim to make an in-court identification of the Defendant as the photographic lineup presented to the victim eight days after the incident was unduly suggestive. Moreover, the trial court should not have permitted the in-court identification after the prosecuting attorney told her where the Appellant was sitting in the courtroom. More specifically, while questioning the victim, Beverly Lee, the prosecutor informed the victim that the Appellant, Mr. Hillberry, was seated in the courtroom to her right, after which, counsel for the Appellant immediately objected to any in-court identification. The objection was overruled and the victim was permitted to make an in-court identification, which was subsequently commented upon during the State's closing arguments a number of times. The Appellant argues that the photo lineup and the in-court identification were both impermissibly suggestive and prejudicial and constitute reversible error.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Appellant believes this appeal presents an issue proper for consideration by oral argument under this Rule 20 of the *West Virginia Rules of Appellate Procedure* as it involves issues of fundamental public importance and involves constitutional questions regarding the validity and interpretation of a statute and court ruling.

## ARGUMENT

### 1. THE TRIAL COURT ERRED BY PERMITTING (AND THE STATE COMMITTED REVERSIBLE ERROR BY MAKING) COMMENTS TO THE JURY DURING CLOSING ARGUMENTS REGARDING THE DEFENDANT'S FAILURE TO PRESENT EVIDENCE AND FAILURE TO "CONTEST" THE STATE'S CASE.

West Virginia Code 57-3-6, as amended, provides that a defendant's failure to testify shall not be the subject of any comment before the court or jury by anyone. Likewise, this Court has held that "[r]emarks made by the State's attorney in closing argument which make specific reference to the defendant's failure to testify, constitute reversible error" and entitle a defendant to a new trial. Syl. Pt. 6, State v. Keesecker, 663 S.E.2d 593, 222 W.Va. 139 (2008)(citing Syl. Pt. 5, State v. Green, 163 W.Va. 681, 260 S.E.2d 257 (1979)). Moreover, this Court has held that "[i]t is prejudicial error in a criminal case for the prosecutor to make statements in final argument to a comment on the failure of the defendant to testify." Syl. Pt. 1, State v. Bennett, 204 S.E.2d 35, 172 W.Va. 131 (1983)(citing Syl. Pt. 3, State v. Noe, 230 S.E.2d 826, 160 W.Va. 10 (1976)(overruled on other grounds by State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)); see also State v. Starcher, 282 S.E.2d 877, 168 W.Va. 144 (1981); State v. Nuckolls, 273, S.E.2d 87, 166 W.Va. 259 (1980). And, where an objection is made to the improper comments, the comments are reviewed for harmless error, rather than just plain error. United States v. Loayza, 107 F.3d 257 (4<sup>th</sup> Cir. 1997). Finally, this Court has "consistently held that '[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. Pt. 5, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975).

In the case at bar, as stated, two trials were held. During the Appellant's first trial for Robbery in the First Degree, the Appellant did not testify and did not present any witnesses on his behalf as the evidence he wanted to elicit came in through the State's witnesses. A few weeks prior to this trial, counsel for the Appellant had observed a separate, unrelated trial handled by

Prosecuting Attorney Jeffrey Freeman wherein Mr. Freeman had made numerous references during his closing arguments pertaining to that Defendant's failure to testify or present evidence. Unfortunately, there was no objection from defense counsel in that case.

Regardless, knowing Mr. Freeman's propensity to make such comments, counsel for Appellant filed a Motion *in Limine* asking the Court to direct the State from making any comments relative to the Defendant's failure to call witnesses and/or introduce evidence. (A.R. 18) This motion was heard, *in limine*, on the first day of the Defendant's robbery trial and was granted by the Court, without any objection from the State. More specifically, the Court ruled that "[t]he state cannot comment on the defendant's failure to testify or present evidence. That's a clear instruction." (Robbery Trial Transcript, p. 36)

However, during his closing argument, the prosecuting attorney, Jeffrey Freeman, made several comments to the jury that violated the Court's order and clearly prejudiced the Appellant. More specifically, Mr. Freeman, during his closing argument, argued to the jury that the case was "all one-sided." (Robbery Trial Transcript, p. 359) Moreover, Mr. Freeman commented that "[t]hat's all that was presented by the defense at any point in time." (Robbery Trial Transcript, p. 362) Finally, the most egregious comment made by the prosecutor was when he posed the question to the jury "[d]id anybody under oath testify to that? Not a one." (Robbery Trial Transcript, p. 368) It was at this point that counsel for the Appellant objected to Mr. Freeman's argument and insinuations. *Id.* The trial court directed the prosecutor to "avoid any references whatsoever to the defendant's obligation to provide evidence of any kind" and to "take another angle." *Id.* The State will obviously argue that the first two comments were not directed specifically at the Defendant's failure to testify. However, by making reference to the fact that "nobody testified under oath for the defense," this was undoubtedly directed at the Defendant's failure to testify and was, thus, improper and not harmless error.

Similarly, in the Appellant's recidivist trial a few weeks later, the Appellant did not testify nor did he call any witnesses. There, the same prosecuting attorney, Mr. Freeman, again, made several improper comments regarding the Defendant's exercising of those rights and argued to the jury three separate and distinct times that the State's evidence was "uncontested." More specifically, Mr. Freeman stated that "the issues not only are very simple and limited in this case, they've virtually been *uncontested*." (Recidivist Trial Transcript, p. 68) Just a few moments later, Mr. Freeman said "[n]ot only beyond a reasonable doubt, but beyond any doubt. This evidence has been *uncontested*." (Recidivist Trial Transcript, p. 69) Finally, Mr. Freeman argued to the jury that he had presented "[o]verwhelming evidence which was *uncontested*." (Recidivist Trial Transcript, p. 71) It was at this point that counsel for the Appellant objected by saying "[y]our Honor, I let it go the first two times, that's the third time that ..." *Id.* And, again, the court sustained the objection and directed the prosecuting attorney to "[r]efrain to (sic) references to any contest by the defendant." *Id.*

The facts in these two cases are eerily similar to those in *Bennett*. There, the defendant, likewise, did not testify, nor did he present any evidence. As a result, the prosecutor repeatedly stated in his summation that the State's evidence was uncontradicted or had not been denied and that certain evidence had not been introduced by the defendant. *Id.*, 304 S.E.2d at 38-39. There, the prosecutor had been "warned by the judge" not to make such comments, but did so anyway. Here, prior to the Appellant's first trial, there was a motion *in limine* specifically addressing this very issue that had been granted *without objection* from the State. However, in blatant disregard of that order, the prosecutor made no less than three comments to the jury during his closing arguments. And, in the Appellant's recidivist trial, again, the prosecutor made three comments that the State's evidence was "uncontested." Given the nature of the trial, obviously, the only person who could have reasonably "contested" the evidence was the Appellant himself. So, just as in *Bennett*, this Court can reach no other conclusion but that these comments were improper, inflammatory and prejudicial in

both of the Appellant's trials and clearly amount to reversible error in both cases. In addition, the Appellant contends that if this Court does, in fact, find reversible error in the Appellant's first trial, this Court must, in turn, vacate the recidivist conviction as the Appellant's conviction for First Degree Robbery was a predicate, triggering offense for the recidivist information.

2. **THE TRIAL COURT ERRED BY PERMITTING (AND THE STATE COMMITTED REVERSIBLE ERROR BY ELICITING) TESTIMONY THAT SPECIFICALLY REFERENCED THE DEFENDANT'S EXERCISING OF HIS RIGHT TO COUNSEL AND RIGHT TO REMAIN SILENT DURING A POLICE INTERVIEW.**

"Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury." Syl. Pt. 1, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977); see also Syl. Pt. 1, State v. Hamilton, 177 W.Va. 611, 355 S.E.2d 400 (1987). More specifically, "it is reversible error for the prosecutor ... to comment on the [pretrial silence of a defendant] to the jury." *Id.*, Syl. Pt. 3. "The evidentiary rulings of a circuit court, including those affecting constitutional rights, are reviewed under an abuse of discretion standard." State v. Marple, 197 W.Va. 47, \_\_\_, 475 S.E.2d 47, 51 (W.Va., 1996); see also McDougal v. McCammon, 193 W.Va. 229, 235, 455 S.E.2d 788, 794 (1995). However, "[e]ven if [the Court finds] the circuit court abused its discretion, the error is not reversible unless the defendant was prejudiced." *Id.*

In the case at bar, prior to the Appellant's first trial, the Appellant filed a motion *in limine* asking the Court to direct the State to refrain from eliciting testimony relative to the Defendant's post-Miranda exercising of his right to counsel and right to remain silent. (A.R. 16) After hearing arguments from counsel, the Court denied the Appellant's motion *in limine*, accepting the prosecutor's rationale that the evidence was admissible to explain "why certain conduct by the police

was terminated” and to “explain logically why an interview stopped.” (Robbery Trial Transcript, pp. 36-38)

In *Marple*, the following exchange occurred between the prosecuting attorney and the officer:

Q. Once you read James Marple his Miranda rights, would you describe his attitude or what he said at that time?

A. He simply refused to acknowledge his rights. He wouldn't talk to us. He basically wasn't even paying attention to us. At that time we attempted not to talk to him or we did not attempt to talk to Mr. Marple.

Just as in *Marple*, the Appellant, herein, was not cross-examined on his pretrial silence, but the evidence was elicited from the investigating officer. More specifically, the testimony went as follows:

Prosecutor: Was Mr. Hillberry attired and wearing the same style of clothing as in the videos.

Det. Piggott: I don't recall as far as his trousers and shirt that type he had on. But I noted that he did not have the Nike Air Jordan tennis shoes on that you see in the video or that I took the photographs of.

Prosecutor: Did he provide you an explanation of what happened to those shoes?

Det Piggott: When I asked him what happened to those shoes, he advised me that he did not wish to speak with me any further and that he would like to have a lawyer. (Robbery Trial Transcript, p. 98)

In *Marple*, the Court found reversible error, even though defense counsel did not object to the evidence at trial, finding, specifically, that “*Hamilton and Boyd* inform us it was error for this exchange to occur before the jury.” *Id.* at 53. Again, Appellant filed a motion *in limine* seeking to exclude this very evidence. However, it was permitted and obviously had no other purpose but to inflame and prejudice the jury. The officer could have simply answered “no” to the prosecutor’s question regarding what happened to the shoes and the State’s case would not have been affected in any way whatsoever. However, by introducing evidence of the Appellant “lawyering up,” it gave the jury the

impression that he had something to hide. Given such, the trial court clearly abused its discretion by allowing the evidence in at trial and there can be no disputing the prejudicial impact it had on the Defendant's case.

3. **THE RECIDIVIST INFORMATION FILED BY THE MARION COUNTY PROSECUTING ATTORNEY WAS FATALLY FLAWED IN THAT IT DID NOT SET FORTH THE RECORDS OF THE DEFENDANT'S PRIOR CONVICTIONS AND SENTENCES AS REQUIRED BY LAW.**

West Virginia Code 61-11-19, as amended, states in relevant part that:

It shall be the duty of the prosecuting attorney when he has knowledge of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court *immediately upon conviction and before sentence*. Said court shall, before expiration of the term at which such person was convicted, cause such person or prisoner to be brought before it, and upon an information filed by the prosecuting attorney, *setting forth the records of conviction and sentence, or convictions and sentences*, as the case may be, and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he is the same person or not. (emphasis added)

In the instant case, the recidivist information that was filed by the State did contain the case number from the Appellant's triggering conviction that led to the filing of the information. (A.R. 33-35) However, the State blatantly failed to include the case numbers for the Defendant's other prior convictions from May 2004 and March 1997. *Id.* Moreover, the information fails to indicate what the Defendant's sentence was for each of those prior convictions, only that the convictions were "felony offenses punishable by confinement in a penitentiary." *Id.* Likewise, when the information was filed, there were no records attached evidencing the Defendant's prior convictions. Finally, the Order Filing the Information states that the information is to be forwarded to the Defendant, but makes no reference to the records. (A.R. 35)

The “[p]rovisions in habitual statute are mandatory, and statute *must be complied with fully* before an enhanced sentence for recidivism may be imposed.” See State v. Cavallaro, 557 S.E.2d 291, 210 W.Va. 237 (2001). And, “[b]eing in derogation of common law, habitual statutes are generally held to require strict construction in favor of the prisoner.” State ex rel Ringer v. Boles, 157 S.E.2d 554, 151 W.Va. 864 (1967); see also Turner v. Holland, 332 S.E.2d 164, 175 W.Va. 202 (1985)(holding that recidivist statute should be strictly construed since it is penal and in derogation of the common law).

Here, again, the statute is clear and unambiguous. Moreover, it is obvious that the State failed to follow the statute by failing to set forth the records of convictions and sentences, either in the information or as attachments to the information, and this is a fatal flaw. Given such, if the Court is going to strictly construe the statute in favor of the Appellant, as required by *Cavallaro* and *Boles*, the Appellant’s recidivist sentence should be vacated.

**4. THE TRIAL COURT ERRED WHEN IT REFUSED TO SUPPRESS THE PRETRIAL PHOTOGRAPHIC LINEUP AND PROHIBIT ANY IN COURT IDENTIFICATION OF THE DEFENDANT BY THE VICTIM BECAUSE THE PRETRIAL PHOTO DISPLAY WAS UNDULY AND IMPERMISSIBLY SUGGESTIVE.<sup>1</sup>**

The next assignment of error proposed by the Appellant is that the trial court erred in allowing a photographic lineup into evidence at trial and the subsequent in-court identification of Appellant by the victim. In this case, the victim was presented a photographic lineup eight days after the alleged incident which contained the Appellant’s picture and five other individuals. First of all, the victim had described the Appellant as a “light skinned black male” with very little hair and a

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<sup>1</sup> The undersigned counsel was appointed as substitute counsel for the Appellant’s first attorney, Mr. Scott Shough. Prior to being relieved, Mr. Shough had filed a pretrial motion to preclude any in-court identification due to the photo lineup being unduly suggestive. (A.R. 10-11) The undersigned was under the impression that this motion had been heard by the Court and decided upon. However, upon review of all transcripts and the record, it does not appear that this motion was ever addressed by the Court prior to trial.

mustache.<sup>2</sup> (Robbery Trial Transcript, p.142) Despite this description, there were no black males put in the lineup, light skinned or otherwise. Moreover, the Appellant was the only individual depicted in the lineup that *fully* fit the description of the assailant. More specifically, two of the individuals had a full head of hair and the victim testified that this easily excluded them. (Robbery Trial Transcript, pp. 142-143) And one of those individuals didn't have a mustache, so this person had two characteristics the assailant clear did not have. In addition, one of the pictured men had glasses, which were not part of the description of the assailant, and he did not have a mustache even remotely close to the one pictured in the robbery video, which was, again, admitted by the victim. (Robbery Trial Transcript, p. 143) The fourth individual, while having a bald head, did not have a mustache. *Id.* Finally, the fifth and final man depicted had a substantial head of hair and, again, no mustache. *Id.* When cross-examined about the lineup, the victim admitted that the Appellant was the only person depicted in the photo array that had a bald head and a mustache, the two main characteristics of the robber. (Robbery Trial Transcript, p. 144) She further admitted that he was the only man who matched the description given to the police. *Id.*

Over the years, the United States Supreme Court and the West Virginia Supreme Court have both addressed the issue of suggestive photographic lineups on several occasions. The U.S. Supreme Court has held that:

[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on the ground only if the photographic identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *see also* State v. Barker, 161 W.Va. 1, 281 S.E.2d 142 (1981).

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<sup>2</sup> The Appellant is Caucasian.

In State v. Watson, this Court was faced with a similar scenario to that in this case, wherein the trial court refused to find a photographic display unduly suggestive where three of the photographs showed men with facial hair while the defendant was clean shaven. 173 W.Va. 553, 318 S.E.2d 603 (1984). In *Watson*, the Court did not find that such a display was unduly suggestive merely because of the difference in physical features. (Citations omitted) However, as stated *supra*, the victim in this case had described the assailant as a “light skinned black male” and the robbery video clearly showed that he was bald and donned a mustache. And, none of the men depicted in the photographic lineup fully matched the description of the assailant other than the Appellant, by the victim’s own admission on cross-examination.

In addition to the standards set down by this Court, the Fourth Circuit has also established several factors to be considered when determining the admissibility of photographic identifications, including: (1) the need for swift action for police; (2) the opportunity for misidentification at the locus of the crime; (3) the pressure for positive identification exerted by law enforcement authorities upon the eyewitness; and (4) the suggestiveness of the photo display. See U.S. v. Marson, 408 F.2d 644 (4<sup>th</sup> Cir. 1968). Appellant analyzes each in turn.

First, there was no need for swift action and the record does not support any such argument. Actually, the Appellant had been pulled over by the Fairmont City Police a few days after the robbery and was released even though the police *strongly* suspected he was the person who had committed the robbery. In fact, this was where the police obtained the picture of the Appellant that was eventually used in the lineup. So, there was absolutely no evidence that the Appellant was a threat to leave the state or that he was a threat to anybody, and, thus, there was no need for swift action.

Second, the opportunity for misidentification at the locus of the crime is fairly obvious due to the fact that victim had described the assailant as a “light skinned black man.” The video of the

robbery clearly shows that the robber had on a hat and sunglasses and the victim had her back to him much of the time he was in the building. Given all of these facts, it is fairly obvious that the opportunity for misidentification at the locus of the crime was substantial.

Third, there is no direct evidence of pressure for positive identification by the victim.

Lastly, as argued, *ad nauseum*, the photo display was terribly suggestive in that the Appellant was the only individual who fully matched the robber's description. So, based upon the factors set forth by *Marson*, it is evident that the pretrial identification process was fraught with impermissible suggestions.

Finally, as if the photographic lineup wasn't bad enough, prior to asking the victim to find the Appellant in open court, the prosecutor told her where he was sitting. More specifically, during direct examination of the victim, the following exchange took place:

Prosecutor: This individual on the screen or on the screen in front of you the person who robbed you on July 15, 2009?

Victim: Yes.

Prosecutor: Is that the same individual you selected from the photo array?

Victim: Yes

Prosecutor: Mr. Hillberry is seated here in the courtroom to your right –

Defense Counsel: Objection, your honor.

Court: What's the nature of your objection?

Defense Counsel: Well, I assume he is getting ready to ask her if she can identify him. It's pretty hard for her not to when he says he's sitting here to your right.

Court: He said Mr. Hillberry is sitting to her right.

(Robbery Trial Transcript, pp. 129-130)

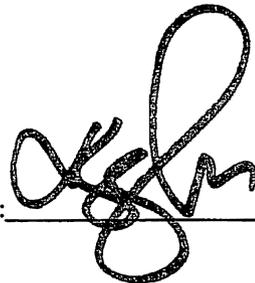
The prosecutor's comment was obviously suggestive and impermissible and the court should have disallowed the in-court identification to proceed. In fact, it was no different than if the officer had told the victim which picture to choose during the pretrial identification process. However,

counsel's objection was obviously overruled and the victim subsequently identified the Appellant, after which the prosecutor touted the in-court identification to the jury no less than two times during his closing arguments. (Robbery Trial Transcript, pp. 362 and 393) Counsel can find no case law where this issue has ever been addressed, probably because such action is unheard of. However, the facts speak for themselves. If there was evidence that the officer had told the victim which picture to choose out of the lineup, the lineup would have been suppressed and any in-court identification precluded. Here, the prosecutor committed the same sin and, hence, the same punishment should have been imposed.

### CONCLUSION

For all the reasons and arguments set forth herein, the Appellant asks that his robbery conviction be reversed and his recidivist conviction and sentence be voided.

Signed: \_\_\_\_\_

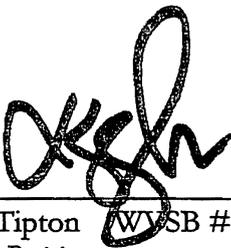
A handwritten signature in black ink, appearing to read 'Kevin T. Tipton', written over a horizontal line.

**Kevin T. Tipton (WV Bar #8610)  
Counsel of Record for Petitioner/Appellant**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22<sup>nd</sup> day of February, 2013, true and accurate copies of the foregoing **Petitioner's Brief and Appendix** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Marland L. Turner, Esq.  
Office of Attorney General  
812 Quarrier Street, 6<sup>th</sup> Floor  
Charleston, WV 25301

Signed:   
Kevin T. Tipton (WVSB #8610)  
*Counsel for Petitioner*