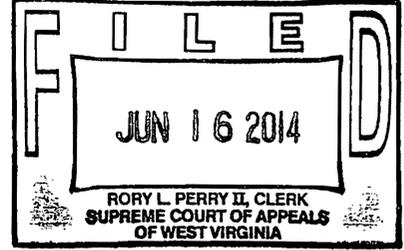


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0614



STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,

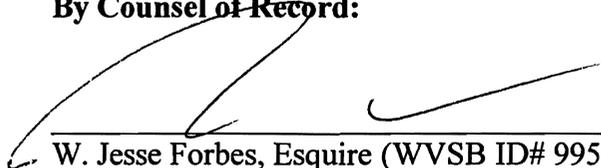
vs. Docket No. 13-0614

MITCHELL COLES, Defendant Below,
Petitioner.

AMENDED BRIEF OF PETITIONER

FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
Criminal Case Numbers 99-F-28 & 99-F-175

Submitted by:
MITCHELL COLES, Petitioner,
By Counsel of Record:



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Counsel of Record for Petitioner, Mitchell Coles

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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vs. Docket No. 13-0614

**MITCHELL COLES, Defendant Below,
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**MITCHELL COLES, Defendant Below,
Petitioner.**

AMENDED BRIEF OF PETITIONER

Now, comes the Petitioner, MITCHELL COLES, by counsel of record, W. Jesse Forbes, Forbes Law Offices, PLLC, and pursuant to the Order of this Honorable Court, hereby files his amended brief upon this appeal.

III. ASSIGNMENT OF ERROR

A. THE TRIAL COURT ERRED IN DENYING PETITIONER’S MOTION TO CORRECT SENTENCE IN CASE NUMBER 99-F-28, AS THE CONVICTION AND SENTENCING FOR COUNT TWO, “OBTAINING MONEY BY FALSE PRETENSES” AND COUNT FIVE, “FRAUDULENT SCHEME”, SUBJECTED HIM TO DOUBLE JEOPARDY OF MULTIPLE CONVICTIONS AND MULTIPLE PUNISHMENTS FOR THE SAME CONDUCT. Therefore, pursuant to the authority of *State v. Rogers*, 209 W.Va. 348, 547 S.E.2d 910 (W.Va. 2001), one of the convictions and sentences should be vacated upon this appeal.

IV. STATEMENT OF THE CASE

A. Background

In 1998, while a student at West Virginia University, Petitioner was involved in a check kiting ploy to obtain money to meet his college tuition obligations. Between July 1998 and August 1998, Petitioner deposited four (4) of his own personal checks from his United Bank

checking account into his One Valley bank personal checking account and requested a cash back portion of each check from One Valley Bank. The remainder of each check deposited on their respective dates, would be placed on hold pursuant to bank policy until cleared. However, One Valley Bank did not authorize cash back on any of the Petitioner's deposits except for one occasion, which occurred on July 20, 1998, as contained in Count Two of Indictment 99-F-28. (A.R. p. 1), of which Petitioner was convicted and sentenced. On the other three (3) occasions referenced above and contained in indictment 99-F-28 at Counts One, Three and Four, July 20, 1998; July 24, 1998; and August 6, 1998), the deposit of the check was made but One Valley Bank did not authorize any instant cash back withdraws on those checks, and each of these counts of indictment 99-F-28 was dismissed under the plea agreement. (AR pp. 1-2, p. 5). Thus, on the face of the indictment, all Counts of the indictment 99-F-28 related to the sole victim of One Valley Bank. (AR pp. 1-2).

Subsequently, between November 1998 and February 7, 1999, Petitioner presented personal checks in Monongalia County for merchandise, money, and/or services from six victims: U.S. Airways; Sears Department Store; One Valley Bank; Wal-Mart; Kroger's and Chuck's Furniture Mart, which were charged by way of Information 99-F-175, Counts 1, 2, 3, 4, 5 and 6. (AR pp. 3-4).

Petitioner was arrested on these offenses by the Morgantown Police Department.

B. Procedural History

During the January 1999 term of court, a Monongalia County Grand Jury indicted Petitioner in Case Number 99-F-28, on three (3) counts of "Attempted Obtaining Money by False Pretenses," a felony in Counts One, Three and Four; one (1) count of "Obtaining Money By False Pretenses," a felony in Count Two, and one count of "Fraudulent Scheme" a felony as

contained in Count Five. (AR p. 1-2). These offenses were based on the acts of Petitioner between July 1998 and August 1998 in writing checks to One Valley Bank attempting to receive and on one occasion receiving money from One Valley bank as a result of the deposited insufficient funds checks. *Id.*

In Prosecutor's Information Number 99-F-175, filed on December 28, 1999, Petitioner was charged with three (3) felony counts of "Fraudulent Schemes" in Counts 1, 2 and 3 of the information; and three (3) misdemeanor counts of "False Pretenses" as contained in Counts 4, 5 and 6 of the information. (AR pp. 3-4). These offenses were from acts of Petitioner between November 1998 and February 7, 1999, in writing checks to six individual merchants for money, merchandise and/or services.

As a result of a guilty plea, entered December 28, 1999, Defendant was convicted of Count Two, "Obtaining Money by False Pretenses" and Count Five, "Fraudulent Scheme" in Indictment Number 99-F-28. Petitioner was also convicted under the same plea agreement of Counts 1, 2, 3, 4, 5 and 6, Fraudulent Schemes and False Pretenses as contained in Prosecutor's Information No. 99-F-175, but two felony counts of Fraudulent Schemes were converted into two felony convictions for two felony counts of False Pretenses under the plea agreement.

On March 6, 2000, Petitioner was sentenced on Indictment Number 99-F-28, Count Two, Obtaining Money by False Pretenses, a felony, to a term and period of incarceration in the State Penitentiary, of one (1) to ten (10) years, and on Count Five Fraudulent Scheme as charged in Indictment 99-F-28, to one to ten years in the State penitentiary said sentences to run consecutively. (A.R. p. 8). Under the same sentencing order, on Prosecutor's Information 99-F-175, Petitioner was sentenced to one (1) to ten (10) years in the State Penitentiary on two felony counts of False Pretenses, which were charged as felony Fraudulent Schemes in the Information

(AR p. 3-4); and was sentenced on one count of felony Fraudulent Schemes to one to ten years in the State Penitentiary; and on the three misdemeanor counts of false pretenses as contained in Counts 4, 5 and 6 of the Information, Petitioner was sentenced to one (1) year in the Monongalia County Jail on each count. The sentences in Information Case No. 99-F-175 were ordered to run concurrent to each other, but consecutive to the sentences in 99-F-28. Thus, Petitioner's total aggregate term of incarceration under the sentencing order is 3-30 years. (A.R. pp. 7-9). Petitioner was also sentenced to pay restitution in the amount outline in the victim impact statement. *Id.*

Petitioner was represented by court-appointed counsel Edmund J. Rollo, Esquire. The State of West Virginia was represented by and through Michelle Demasi, Assistant Prosecuting Attorney for Monongalia County. The Honorable Robert B. Stone presided over the proceedings and entered the sentencing order. (A.R. pp. 7-9).

Petitioner remains in the custody of the West Virginia Division of Corrections and is presently incarcerated at the Beckley Correctional Center, 111 S. Eisenhower Drive, Beckley, WV 25801. Petitioner's next parole eligibility date is December 2014.

Between September 2000 and June 2011, Petitioner filed four separate motions for reconsideration of sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure. By circuit court orders, entered September 28, 2000, April 2, 2001, January 24, 2007, and June 21, 2011, the trial court denied each motion. (AR p. 10).

On November 2, 2011, Defendant presented a pro-se "Motion for Correction of Sentence" pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure alleging that his convictions and sentences in Indictment No. 99-F-28, were in violation of the prohibition against double jeopardy defined by the West Virginia Constitution, United States Constitution,

and this Court's ruling in *State v. Rogers*, supra. (AR pp. 11-19). The State, through Marcia Ashdown, Prosecuting Attorney, filed a response on December 16, 2011. (AR p. 20). The trial court scheduled a hearing for December 21, 2011, on Petitioner's motion. (AR p. 26). At the December 21, 2011, hearing the Court deferred its ruling on Petitioner's motion. Multiple times, between December 21, 2011 and November 16, 2012, Petitioner contacted the trial court and all parties requesting a final ruling and disposition on his motion, and no response was provided.

On November 16, 2012, the Petitioner's supplemental motion for correction of sentence was filed. (AR p. 27).

On March 29, 2013, Petitioner filed a pro-se Original Jurisdiction Petition for Writ of Mandamus to this Honorable Court (Docket NO. 13-0350), requesting this Court to compel the trial court to rule on Petitioner's Motion for Correction of Sentence. This Court promulgated a *Scheduling Order* requiring Judge Tucker, as successor to Judge Stone, to file a response to the petition on or before May 28, 2013. (AR p. 32).

On May 2, 2013, the trial court entered the final order, which is the subject of this appeal, entitled "Order Denying Defendant's Motion for Correction of Sentence." (AR p. 44-48). Judge Tucker also notified this Court on the same date of her ruling, and requested the petition for mandamus be considered moot. It is from this final order of May 2, 2013, that Petitioner now appeals, seeking reversal thereof, and vacation of one of his convictions and sentences of Count Two and Count Five, as the same are in violation of his constitutional rights against double jeopardy under the holding of this Court in *State v. Roberts*, supra.

V. SUMMARY OF ARGUMENT

In *State v. Rogers*, supra, this Honorable Court held that:

Based on the foregoing statutory comparison, we hold that every element necessary for a larceny conviction under West Virginia Code § 61-3-24 (false pretenses) is also an element for a larceny conviction under West Virginia Code §

61-3-24d (fraudulent scheme). Consequently, Appellant's convictions and related sentences under both statutes with regard to the money obtained from Elkins cannot stand based on double jeopardy proscriptions. 547 S.E. 2d at 921.

Likewise, herein, Count Two, false pretenses, and Count Five, fraudulent scheme as contained in Felony Indictment 99-F-28, constituted multiple convictions and multiple punishments for the same conduct against the same victim One Valley Bank. Therefore, pursuant to the authority of *State v. Rogers, supra*, cited above, the convictions and sentence have violated Petitioner's constitutional right to be protected from double jeopardy; therefore, one of such convictions and sentence must be vacated.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By Order entered the 14th day of March, 2014, this Honorable Court determined that this matter be scheduled for oral argument under Rule 20 of the Rules of Appellate Procedure, and further appointed the undersigned counsel, W. Jesse Forbes, to represent the Petitioner upon oral argument, and to file this amended brief on behalf of the petitioner.

VII. ARGUMENT

The trial court's order of May 2, 2013, erroneously denied Petitioner's motion for correction of sentence, based upon double jeopardy claims, improperly concluding that the two charges in Indictment No. 99-F-28 (Count Two-Obtaining Money by False Pretenses & Count Five-Fraudulent Scheme) were not based on the "same facts and circumstances because there were other acts against other victims (including crimes against Huntington National Bank, Sound Investments, Kroger's of Morgantown, and United National Bank)." The trial court's order erroneously misappropriated the facts between two separate and distinct cases (99-F-28 and 99-F-175) in the lower court. (AR pp. 1-2, pp. 3-4). The charging instrument in 99-F-28 was a five count indictment, which only charged offenses against One Valley Bank, while the charging

instrument in 99-F-175, was a six (6) Count Prosecutor's Information. *Id.* The lower court's clear errors in commingling the victims and offenses between these two separate cases in its erroneous order is apparent on the face of the charging instruments of record, and the plea agreement, when compared to the findings in the lower court's order. (*Id.* and AR p. 3-4, 6) Nowhere in either charging instrument was Petitioner charged with offenses against Huntington National Bank or Sound Investments, nor were the names of these "alleged victims" even mentioned in either charging instrument. (AR pp. 1-2, 3-4). Moreover, the trial court's order misstates the names of the victims from 99-F-175 as well as misstating the victim from the 99-F-28 indictment, wherein the only victim listed on the face of the indictment was One Valley Bank.

The five count indictment, returned against Defendant in Indictment No. 99-F-28, charges Petitioner's acts against One Valley Bank where he did, on one occasion, obtain money from One Valley Bank by false pretenses, and **attempted**, on three occasions, to obtain money from One Valley Bank by false pretenses. (AR pp. 1-2). The fifth count (fraudulent scheme) is the cumulative of the preceding four counts. One Valley Bank is the only victim listed in the 99-F-28, indictment's five counts. The indictment is summarized as follows:

Count One- "...on or about the 6th day of August, 1998, in Monongalia County, West Virginia, committed the offense of "**Attempted Obtaining Money by False Pretenses**" by unlawfully, feloniously, knowingly, and with the intent to defraud, *attempting to obtain money*, by presenting check # 116, in the amount of Three Thousand Five Hundred Dollars (\$3,500.00) **to One Valley Bank**...";

Count Two- "...on or about the 20th day of July, 1998, in Monongalia County, West Virginia, committed the offense of "Obtaining Money by False Pretenses" by unlawfully, feloniously, knowingly, and with the intent to defraud, *obtaining money*, by presenting check #117, in the amount of One Thousand Five Hundred Dollars (\$1,500.00) **to One Valley Bank**...."

Count Three- "...on or about the 20th day of July, 1998, in Monongalia County, West Virginia, committed the offense of "**Attempted Obtaining Money by False Pretenses**" by unlawfully, feloniously, knowingly, and with the intent to

defraud, attempting to obtain money, by presenting check #108, in the amount of One Thousand Five Hundred Dollars (\$1,500.00) to One Valley Bank....”

Count Four-“...on or about the 24th day of July, 1998, in Monongalia County, West Virginia, committed the offense of “**Attempted Obtaining Money by False Pretenses**” by unlawfully, feloniously, knowingly, and with the intent to defraud, attempting to obtain money, by presenting check #121, in the amount of Three Thousand One Hundred and Seventy-Five Hundred Dollars (\$3,175.00) to One Valley Bank....”

Count Five-“...during July and August, 1998, in Monongalia County, West Virginia, committed the offense of “**Fraudulent Scheme**” by unlawfully, intentionally, willfully and feloniously depriving another person of any money, goods, property or services by means of fraudulent pretenses, representations or promises, of a total value in excess of One Thousand Dollars (\$1,000.00).....”

The “**attempted false pretenses**” offenses in counts One, Three and Four, were all dismissed pursuant to the plea agreement, where no money was obtained from One Valley Bank. However, Petitioner was convicted of the “**false pretenses**” offense in Count Two, where money was obtained from One Valley Bank on July 20, 1998. Petitioner was also convicted of the “**fraudulent scheme**” offense, in Count Five, for the same money Petitioner obtained from One Valley Bank on July 20, 1998. As such, the convictions and sentences on both counts (Count Two-False Pretenses and Court Five-Fraudulent Scheme), constitutes violation of the double jeopardy prohibition.

This Honorable Court in *State v. Rogers, supra*, expressly ruled that every element necessary for a larceny conviction under W.Va. Code § 61-3-24 (false pretenses) is also an element for a larceny conviction under W.Va. Code § 61-3-24(d) (fraudulent schemes); consequently convictions and related sentences under both statutes cannot stand based on double jeopardy proscriptions. 547 S.E. 2d at 921. This Court reached the aforementioned holding based on the statutory comparison analysis required by *Blockburger v. United States*, 284 U.S.

299 (1932), because there was no clear legislative intent to define a separate and distinct offense with additional punishment related to the two statutes in question.

In the case at bar herein, the State argued in the trial court that the Petitioner was attempting to persuade the circuit court to conclude that all of his convictions, in both Indictment 99-F-28 and Prosecutor's Information 99-F-175 constituted a single crime of larceny and should be rolled into one sentence of one to ten years..." (AR p. 21). However, this misappropriation of the facts and the Petitioner's claim confused the circuit court, between two separate cases, thereby contributing to the trial court's erroneous and improper ruling.

Petitioner concedes that there were multiple victims between the two separate cases Indictment no. 99-F-28 and Prosecutor's Information 99-F-175. But, the double jeopardy claim herein is based solely on the two convictions and sentences in Indictment No. 99-F-28 of which the sole victim is One Valley Bank. As such, the state and circuit court's inclusion of victims from Prosecutor's Information 99-F-175 and/or the plea agreement relating to restitution to victims not charged (i.e. Huntington National Bank; Sound Investments, Kroger's of Morgantown, etc.), to where the Petitioner was separately convicted, sentenced, and **not** challenging is without merit and a purloin of the facts existing on the face of the indictment and information, as well as the plea agreement. (AR pp. 1-2, pp. 3-4, p. 6).

The trial court's order was the product of an unreasonably and unjustified delay in ruling on the motion for over 18 months, and then hastily making an erroneous ruling which denied the motion in response to Petitioner's petition for mandamus to compel such ruling. (AR p. 32, p. 43).

The State, in the lower court, made a blanket assertion that the double jeopardy claim should be deemed waived by the guilty plea. Petitioner provided an impressive body of legal authority

which details the exception to the waiver of all non-jurisdictional claims inherent in a guilty plea. (A.R. 27-30). However, the trial court ignored such authority and made no determination whether the double jeopardy ground was waived by the guilty plea, but instead erroneously commingled the victims from Prosecutor's Information No. 99-F-175, and denied Petitioner's meritorious claim of double jeopardy for Count Two and Count Five of Indictment No. 99-F-28.

According to this Court's decision in *State v. Proctor*, 227 W.Va. 352 (2011) Petitioner concedes that a double jeopardy claim can be waived by a guilty plea, but only in certain circumstances, which are not present herein. The defendant in *Proctor, supra*, could not prevail on a double jeopardy claim because the legislative intent was clear defining a separate and distinct offense with additional punishment related to the two relevant statutes therein, "first degree sexual abuse" under W.Va. Code § 61-8B-7 and "sexual abuse by a parent, guardian or custodian" under W.Va. Code § 61-8D-5. This Court did not have to proceed to the statutory comparison test under *Blockburger, supra*, as was done in *State v. Rogers, supra*. *State v. Rogers*, should be considered the controlling precedent and authority for the decision herein, which requires reversal of the lower court's order, and vacation of one of the convictions and sentences in Indictment 99-F-28 for Count Two (false pretenses) and Count Five (fraudulent scheme).

Further, there is an impressive body of authority stating that a guilty plea does not waive a double jeopardy claim. *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975); *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).

Therefore, Petitioner's double jeopardy claims were not and cannot be waived by the guilty plea in the instant case; the double jeopardy claim of Petitioner has merit, was properly raised in the lower court, and was erroneously denied by the lower court. Concededly, the U.S.

Supreme Court carved out an exception in *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed. 2d 927 (1989) called the “face of the indictment” exception. Under *Broce, supra*, if deciding a double jeopardy claim requires going beyond the existing record and holding a separate evidentiary hearing, a defendant’s guilty plea bars any antecedent constitutional violations. The justification for the *Broce* rule is that such a double jeopardy claim cannot be proven without contradicting the existing record “and that opportunity is foreclosed by the admissions inherent in the guilty plea.”

In explaining its departure from *Blackledge, supra*, and *Menna, supra*, the Supreme Court made the following distinguishing analysis:

Both *Blackledge* and *Menna* could be (and ultimately were) resolved without any need to venture beyond the record as it existed at the plea proceedings. In *Blackledge*, the concessions implicit in the defendant’s guilty plea were simply irrelevant, because the constitutional infirmity in the proceedings lay in the State’s power to bring any indictment at all. In *Menna*, the indictment was facially duplicate of the earlier offense of which the defendant had been convicted and sentenced so that the admissions made by *Menna*’s guilty plea could not conceivably be construed to extend beyond a redundant confession to the earlier offense. 488 U.S. at 575-576, 109 S.Ct. at 765-766, 102 L.Ed.2d at 940.

Of course the issue herein, is not whether the Petitioner is guilty of the crime charged in Indictment 99-F-28, but whether he had already been punished or punished twice for it, under Counts Two and Count Five, and Petitioner’s double jeopardy claim can be found meritorious on the existing record and face of the indictment herein (A.R. p. 1-2).

This Honorable Court stated in *State v. Greene*, 196 W.Va. 500, 473 S.E.2d (1996) as follows:

Broce is inapposite and its holding in no way limits the opportunity for a criminal defendant to challenge the imposition of double jeopardy. If *Broce* means anything, it means that claims litigated below that are inconsistent with an admission of guilt are waived by a guilty plea. Clearly, the admission of guilt in no way impacted the issue of double jeopardy.

Therefore, the order of the Circuit Court of Monongalia County which denied Petitioner's motion for correction of sentence, must be reversed, as the final order misstated and/or misconstrued the plain language of the indictment 99-F-28, confused and/or commingled the facts and terms of the plea agreement with respect to the victims of record in two separate charging instruments, and ignored the applicable authority of this Honorable Court. The lower court's order further ignored the Constitutional principles against Double Jeopardy, as Count Two and Count Five of the indictment in 99-F-28 constituted multiple charges and multiple punishments for the same conduct against the same victim, to wit: One Valley Bank. A meaningful review of the face of the indictment in Case Number 99-F-28, will clearly reveal that the only victim is, in fact, One Valley Bank and all the allegations in Count Two (obtaining money by false pretenses) are based on the same conduct against the same victim as Count Five (fraudulent scheme).

The other victims, which the circuit court erroneously attempts to include in case number 99-F-28, were the victims of the offenses for which Petitioner was convicted and sentenced by information in case 99-F-175, or were otherwise victims in the underlying investigation for which Petitioner was not charged. (AR p. 6, AR p.3-4). Therefore, Petitioner's Rule 35(a) motion for correction of sentence, should have been granted, and the final order of the circuit court was clearly wrong and should be reversed upon this appeal as said order subjected Petitioner to unconstitutional violations of his rights against double jeopardy in conviction and sentencing in Case No. 99-F-28, and one of the convictions and sentence for either Count 2, "obtaining money under false pretenses" or Count 5, "fraudulent schemes" thereof should be vacated under the authority of *State v. Rogers*, 209 W.Va. 348, 547 S.E. 2d 910 (W.Va. 2001).

Petitioner was convicted and sentenced, by plea agreement, upon indictment 99-F-28, on one (1) count of “fraudulent scheme” for the alleged act of presenting bad checks and receiving money, from One Valley Bank between July and August 1998, as contained in Count Five of the indictment. Under the same indictment, Count Two of 99-F-28, Petitioner was convicted on one (1) count of “obtaining money by false pretenses” for the alleged act of presenting a check and receiving money from One Valley Bank on July 20, 1998. The convictions and sentences on Count Two and Count Five were in violation of the double jeopardy clause of the 5th Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution. Pursuant to *State v. Rogers*, 209 W.Va. 348, 547 S.E.2d 910 (W.Va. 2001), every element necessary for a conviction of larceny by fraudulent scheme is also an element for conviction of larceny by false pretenses. Therefore, convictions and related sentences under both statutes cannot stand based on double jeopardy proscriptions. 547 S.E.2d at 921. In *State v. Rogers, supra*, this Honorable Court discussed the double jeopardy proscriptions as follows:

We set forth the protections afforded by the double jeopardy clauses of the United States and West Virginia Constitutions in syllabus points one and two of *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992):

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

"The Double Jeopardy Clause in Article III, Section 5 of the *West Virginia Constitution*, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense." Syllabus Point 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977). 187 W.Va. at 138, 416 S.E.2d at 255, as cited in *State v. Rogers*, 547 S.E. 2d at 918.

Therefore, the final order of the lower court was clearly erroneous in holding that *State v. Rogers* was inapplicable to Petitioner's convictions and sentences on Count Two and Count Five of the indictment in 99-F-28, and Petitioner seeks reversal of that order upon this appeal. The lower court confuses the offenses of which Petitioner was convicted under 99-F-175, with the offenses in 99-F-28, in its findings of multiple victims, and therefore, the order was clearly wrong. At the time Petitioner entered his plea, the authority of this Court was silent on the double jeopardy implications of charges for "fraudulent scheme" and "obtaining by false pretenses" based on the same underlying offense, and *State v. Rogers, supra*, was decided after the Petitioner had already been convicted and sentenced.

Thus, the final order of the lower tribunal erroneously denied the Petitioner's "Motion for Correction of Sentence," which was made pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure, which provides that an illegally imposed sentence may be corrected at any time. The circuit court misconstrues the facts and the record in 99-F-28, with the charges in the information of 99-F-175, and erroneously found that the crimes of Count Two and Count Five in 99-F-28, were against multiple victims by misconstruing and/or commingling the plea agreement, the two separate charging instruments and sentencing order, and thereby erroneously held that *State v. Rogers*, 209 W.Va. 348 (W.Va. 2001) was inapplicable to Petitioner's case. Petitioner maintains that Count Two, for obtaining money by false pretenses from One Valley Bank, and Count Five of the Indictment in Case No. 99-F-28, for Fraudulent Scheme, constituted multiple charges and punishments for the same underlying offense against One Valley Bank in violation of the Petitioner's constitutional rights and protections against double jeopardy, and therefore, the order of the lower tribunal should be reversed herein to vacate one of these convictions and sentences.

VIII. CONCLUSION

WHEREFORE, for all the foregoing reasons, and pursuant to the authorities cited herein, the Petitioner, Mitchell Coles, prays that this Honorable Court will reverse the final order of the Circuit Court of Monongalia County denying the Petitioner's Motion for Correction of Sentence, with instructions to vacate the conviction and sentence in Count 2 or Count 5 of Indictment 99-F-28, accordingly. Petitioner prays for all such further relief as the Court deems fair, just and appropriate.

**Respectfully submitted,
MITCHELL COLES, Petitioner,
By Counsel of Record:**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0614

**STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,**

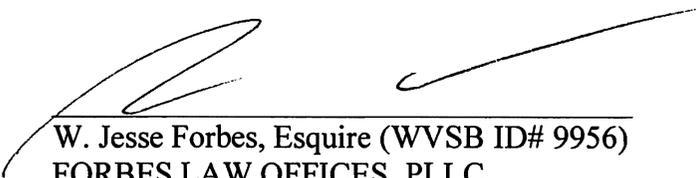
vs. Docket No. 13-0614

**MITCHELL COLES, Defendant Below,
Petitioner.**

CERTIFICATE OF SERVICE

I, W. Jesse Forbes, counsel of record for Petitioner, MITCHELL COLES, hereby certify that a true and exact copy of the foregoing "*Amended Brief of Petitioner*" was duly served upon counsel of record for the Respondent, State of West Virginia, by depositing the same in the first-class, U.S. mail, postage pre-paid, on this the 16th day of June, 2014, addressed as follows:

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