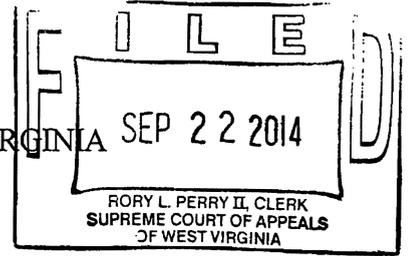


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 14-0639



STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

vs.

Appeal from a final order of the
Circuit Court of Harrison County
(Case No. 13-F-76-3)

DARNELL CARLTON BOUIE,
Defendant Below, Petitioner.

PETITIONER'S BRIEF

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TABLE OF CONTENTS

Table of Contents.....i

Table of Authorities.....iii

Assignments of Error.....1

Statement of the Case.....1

Summary of Argument.....15

Statement Regarding Oral Argument and Decision.....17

Standard of Review.....17

Argument.....17

 1. The Circuit Court committed reversible error by permitting the admission of Petitioner’s co-defendant’s confession, in violation of the West Virginia Rules of Evidence and the Confrontation Clause of the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution.....17

 2. The Circuit Court committed reversible error by permitting the admission of statements allegedly made by Petitioner to the investigating officer in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution and Article III Section 14 of the West Virginia Constitution.....23

 3. The Circuit Court committed reversible error by permitting the admission of Petitioner’s jail phone calls which the State did not demonstrate were obtained in compliance with West Virginia Code § 31-20-5e.....29

 4. The Circuit Court committed reversible error by permitting the admission of exemplar footwear evidence and attendant lay opinion testimony of the investigating officer in violation of the West Virginia Rules of Evidence.....32

 5. The Circuit Court committed reversible error by denying Petitioner’s Motion for Judgment of Acquittal and Motion for New Trial insofar as the evidence presented was wholly insufficient to support the convictions.....36

Conclusion.....39

Certificate of Service.....41

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Brewer v. Williams</i> , 430 U.S. 387 (1977).....	26, 28
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	28
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	18
<i>Damron v. Haines</i> , 223 W.Va. 135, 672 S.E.2d 271 (2008).....	23, 24
<i>Davis v. Washington</i> , 547 U.S. 813 (2006).....	19
<i>Edwards v. Arizona</i> , 451 U.S. 477 (1981).....	25
<i>In Interest of Anthony Ray</i> , 200 W.Va. 312, 489 S.E.2d 289 (1997).....	22
<i>Massiah v. U.S.</i> , 377 U.S. 201 (1964).....	26
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	23
<i>Overton v. Fields</i> , 145 W.Va. 797, 117 S.E.2d 598 (1960).....	33
<i>Rhode Island v. Innis</i> , 446 U.S. 291 (1980).....	24
<i>State v. Bevel</i> , 231 W.Va. 346, 745 S.E.2d 237 (2013).....	23
<i>State v. Blevins</i> , 231 W.Va. 135, 744 S.E.2d 245 (2013).....	37
<i>State v. Crouch</i> , 178 W.Va. 221, 358 S.E.2d 782 (1987).....	24, 26, 27
<i>State ex rel. Grob v. Blair</i> , 158 W.Va. 647, 214 S.E.2d 330 (1975).....	28
<i>State v. Guthrie</i> , 194 W.Va. 657, 461 S.E.2d 163 (1995).....	37, 39
<i>State v. Jenkins</i> , 195 W.Va. 620, 466 S.E.2d 471 (1995).....	29
<i>State v. Jessie</i> , 225 W.Va. 21, 689 S.E.2d 21 (2009).....	31
<i>State v. Kaufman</i> , 227, W.Va. 537, 711 S.E.2d 607 (2011).....	17
<i>State v. Kennedy</i> , 229 W.Va. 756, 735 S.E.2d 905 (2012).....	17, 18
<i>State v. Ladd</i> , 210 W.Va. 413, 557 S.E.2d 820 (2001).....	20

<i>State v. Less</i> , 170 W.Va. 259, 294 S.E.2d 62 (1981).....	37, 38
<i>State v. Lively</i> , 226 W.Va. 81, 697 S.E.2d 117 (2010).....	20
<i>State v. Lucas</i> , 178 W.Va. 686, 364 S.E.2d 12 (1987).....	28
<i>State v. Mason</i> , 194 W.Va. 221, 460 S.E.2d 36 (1995).....	21
<i>State v. Mechling</i> , 219 W.Va. 366, 633 S.E.2d 311 (2006).....	18, 19, 28
<i>State v. Nichols</i> , 208 W.Va. 432, 541 S.E.2d 310 (1999).....	16, 32, 33, 34, 36
<i>State v. Parker</i> , 181 W.Va. 619, 383 S.E.2d 801 (1989).....	28
<i>State v. Smith</i> , 156 W.Va. 385, 193 S.E.2d 550 (1972).....	36
<i>State v. Stevens</i> , 190 W.Va. 77, 436 S.E.2d 312 (1993).....	37
<i>State v. Stewart</i> , 192 W.Va. 428, 452 S.E.2d 886 (1994).....	23
<i>State v. Vance</i> , 207 W.Va. 640, 535 S.E.2d 484 (2000).....	17
<i>State v. Williams</i> , 162 W.Va. 309, 249 S.E.2d 758 (1978).....	24
<i>State v. Wyer</i> , 173 W.Va. 720, 320 S.E.2d 92 (1984).....	27, 28
<i>U.S. v. Hoffner</i> , 777 F.2d 1423 (10 th Cir. 1985).....	32
<i>U.S. v. Lyon</i> , 567 F.2d 777 (8 th Cir. 1977).....	32
<i>U.S. v. Fowler</i> , 932 F.2d 306 (4 th Cir. 1991).....	33
<i>U.S. v. Cortez</i> , 935 F.2d 135 (8 th Cir. 1991).....	33
<i>U.S. v. Rea</i> , 958 F.2d 1206 (2d Cir. 1992).....	34
<i>Whorton v. Bockting</i> , 548 U.S. 406 (2007).....	18
<u>Statutes</u>	
West Virginia Code § 31-20-5e.....	7, 16, 29, 30, 31
Fifth Amendment to the United States Constitution.....	21, 23, 24
Sixth Amendment to the United States Constitution.....	18, 20, 23

Section 10 of Article III of the West Virginia Constitution.....	39
Section 14 of Article III of the West Virginia Constitution.....	18, 23
<u>Rules of Evidence</u>	
West Virginia Rule of Evidence 402.....	35
West Virginia Rule of Evidence 403.....	35
West Virginia Rule of Evidence 602.....	32
West Virginia Rule of Evidence 701.....	32
West Virginia Rule of Evidence 804.....	15, 20, 21
Fed. R. Evid. 701, Advisory Committee Note on 1972 Proposed Rules.....	34

ASSIGNMENTS OF ERROR

1. The Circuit Court committed reversible error by permitting the admission of Petitioner's co-defendant's confession, in violation of the West Virginia Rules of Evidence and the Confrontation Clause of the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution.
2. The Circuit Court committed reversible error by permitting the admission of statements allegedly made by Petitioner to the investigating officer in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution and Article III Section 14 of the West Virginia Constitution.
3. The Circuit Court committed reversible error by permitting the admission of Petitioner's jail phone calls which the State did not demonstrate were obtained in compliance with West Virginia Code § 31-20-5e.
4. The Circuit Court committed reversible error by permitting the admission of exemplar footwear evidence and attendant lay opinion testimony of the investigating officer in violation of the West Virginia Rules of Evidence.
5. The Circuit Court committed reversible error by denying Petitioner's Motion for Judgment of Acquittal and Motion for New Trial insofar as the evidence presented was wholly insufficient to support the convictions.

STATEMENT OF THE CASE

The genesis of this criminal matter is the death of Jayar Poindexter, who was found deceased at the Overlook apartments in Clarksburg, West Virginia, in the early morning hours of January 13, 2010. Appendix Record ("A.R.") 14-15. An investigation into the death of Mr. Poindexter ensued, and on or about September 17, 2012, warrants were issued for the arrest of Ennis Charles Payne, II, and Darnell Carlton Bouie, the Petitioner. A.R. 111:9-17; 1415:8-14.

On or about October 5, 2012, Mr. Bouie was arrested in Butler County, Pennsylvania, on the charge of murder with respect to this matter. A.R. 42 ¶ 2. On or about October 25, 2012, Mr. Bouie was transported from Pennsylvania to the North Central Regional Jail in Doddridge County, West Virginia, by lead investigating officer of the Clarksburg Police Department, Sgt. Joshua Cox. A.R. 1415:17-1416:5.

Petitioner was subsequently indicted, along with co-defendant Ennis Payne, on two counts; namely, (1) first degree murder, and (2) conspiracy to commit burglary. A.R. 14-15. By Order entered November 13, 2013, the Circuit Court severed the trails of co-defendants Payne and Bouie. A.R. 58. The State's theory of prosecution was that of felony murder. The State alleged that Petitioner and co-defendant Payne went to the victim's apartment in the early morning hours of January 13, 2010, to burglarize the residence and steal drugs and money. A.R. 724:13-19. Further, the State theorized that upon attempting to gain entry through a window at the rear of the apartment, Jayar Poindexter confronted Petitioner and co-defendant Payne at which time Mr. Payne shot and killed the victim (Jayar Poindexter). A.R. 613.

The parties filed numerous pretrial motions concerning the admissibility of evidence, which were briefed and argued. A.R. *passim*. Ultimately, the Circuit Court issued a ruling on some of the most contentious evidentiary issues by *Order Ruling on Pre-Trial Motions*, entered March 12, 2014. A.R. 459. This Order, as well as certain other rulings made by the Circuit Court pre-trial and maintained during trial, permitted the State to utilize evidence which Petitioner deemed objectionable, improper, and, in at least some instances, violative of his Constitutional rights.

Petitioner's trial was held March 17-21, 2014. A.R. 711-1701. During the trial, Petitioner's counsel again objected to the admissibility of improper evidence utilized by the State, but the Circuit Court maintained its pre-trial position on such matters. Following the close of evidence, the jury returned a verdict finding Petitioner guilty of first degree murder, with a recommendation of mercy (count 1), and guilty of conspiracy to commit burglary (count 2). A.R. 1692:5-15. Petitioner timely filed post-trial motions including a *Motion for Judgment of Acquittal*, and alternatively, a *Motion for a New Trial*. A.R. 588 and 594, respectively. The

Circuit Court heard and denied these motions at sentencing on May 16, 2014 - finding the evidence presented at trial sufficient to substantiate the verdict, and maintaining its pre-trial rulings concerning evidentiary issues raised by Petitioner. A.R. 675-676 (Transcript pages 27:21-30:20), A.R. 624. The Order denying Petitioner's post-trial motions was entered May 19, 2014. A.R. 624. The Circuit Court sentenced Petitioner to life with parole eligibility after 15 years for the first degree murder conviction, followed by an indeterminate sentence of 1-5 years for the conspiracy conviction. A.R. 631-32.

By this appeal, Petitioner seeks an Order vacating the convictions and awarding him a new trial in which the improper evidence outlined in this brief is excluded. Pursuant to Rule 10(c)(4) of the Revised Rules of Appellate Procedure, the following are the facts of the case relevant to each assignment of error:

1. Co-Defendants' statements:

At trial, the State elicited the testimony of witness Aaron Carey who was permitted to testify, over Petitioner's objection, to certain self-inculpatory statements allegedly made by Petitioner's co-defendant, E.C. Payne, in the days following the crime. A.R. 1486:1-1487:24. Specifically, Carey testified that he had a conversation with Mr. Payne on or about January 15, 2010. A.R. 1486:12-14. With respect to the substance of this conversation, Mr. Carey testified as follows:

- Q. And what did Mr. Payne state to you during that conversation?
A. That he had shot somebody in a robbery.
Q. And did he advise you what the robbery was for, what the purpose of the robbery was for?
A. Money and drugs.

A.R. 1486:15-20. The testimony of Mr. Carey was brief (all told, it comprises a mere 5 pages of trial transcript - A.R. 1485:19 - 1490:24), but undoubtedly influenced the jury in its verdict

insofar as it constituted the confession of Petitioner's co-defendant to the crimes charged.

The admissibility of Mr. Carey's hearsay testimony was the subject of the *State's Motion to Admit Statements of Co-Defendant as Statements Against Interest* and was fully briefed and argued by the parties pre-trial. A.R. 65, Def.'s response - A.R. 338, State's reply - A.R. 360, State's proposed findings of fact and conclusions of law - A.R. 368, Def.'s proposed findings of fact and conclusions of law - A.R. 404, argument - A.R. 318:6-320:2, 328:13-330:3. By *Order Ruling on Pretrial Motions*, the Circuit Court deemed certain portions of Mr. Carey's testimony admissible. A.R. 476.

At trial, the Circuit Court found Mr. Payne unavailable insofar as he asserted his rights under the Fifth Amendment and refused to testify. A.R. 1352:13-1357:8. With that anticipated circumstance established, Petitioner once again preserved his objection to the admissibility of co-defendant Payne's statements, through the testimony of Aaron Carey. A.R. 1354:6-18; 1491:6-9. The Circuit Court denied Petitioner's renewed motion to exclude the subject hearsay testimony of Aaron Carey, but recognized that such objection was preserved. A.R. 1357:5-8; 1491:10.

Petitioner submits that such statements are not sufficiently trustworthy to gain admission, and violated his rights provided by the Confrontation Clause (Sixth Amendment to the U.S. Constitution). Accordingly, the interest of justice demands that Petitioner be afforded a new trial in which the subject statements of Mr. Payne are excluded.

2. Petitioner's alleged statements:

At trial, the State elicited the testimony of Sgt. Josh Cox of the Clarksburg Police Department who was permitted to relate to the jury, over Petitioner's objection, certain statements which Petitioner allegedly made to him concerning the crime at issue. A.R. 1415:12-1418:10. Sgt. Cox testified that Petitioner and he engaged in a discussion in Sgt. Cox's police

cruiser on October 25, 2012. On this date, Petitioner was transported by Sgt. Cox from the Butler County Jail in Butler, Pennsylvania, to the Clarksburg Police Department for processing, then to the Clarksburg City gas pumps to refill his cruiser, and ultimately to the North Central Regional Jail in Doddridge County, West Virginia. A.R. 1415:12-1418:10. Petitioner's transport to West Virginia followed the commencement of judicial proceedings in this case, and Petitioner's waiver of extradition. A.R. 463. Petitioner was not read his *Miranda* rights prior to this conversation (A.R. 112:15-16, 121:9-11, 126:11-13), but was certainly "in custody" at the time that the alleged statements were made to Sgt. Cox. A.R. 117:1-4. Further, not only had Petitioner's right to counsel attached, Sgt. Cox knew that Petitioner was represented by counsel at that time. A.R. 127:24, 128:19-23.

Sgt. Cox testified pre-trial that while at the Clarksburg Police Department, Mr. Bouie requested a cigarette, which Sgt. Cox provided. A.R. 114:24-115:4. Sgt. Cox further testified pretrial, and at trial, that while at the city fuel pumps, Mr. Bouie requested a copy of the criminal complaint filed against him, and Sgt. Cox provided the same. A.R. 115:7-11; 1417:18-19. Sgt. Cox testified that during the final leg of the journey- from the city fuel pumps to the North Central Regional Jail, when Sgt. Cox and Petitioner were alone in car - a conversation between he and Petitioner took place. The objectionable trial testimony concerning this conversation is as follows:

- Q. What did Mr. Bouie request once you got to the gas pumps?
- A. To look at the criminal complaint.
- Q. Once Mr. Bouie looked at the criminal complaint what did he say?
- A. He asked me why he was charged because he was not the shooter.
- Q. What was your response?
- A. I said because you guys went up there to break into his house.
- Q. And at that point in time what did he respond with?
- A. He stated that he just walked around the residence, and that he and the victim were friends.

- Q. Okay. Did he state that he was there at the window at the time that this happened?
A. No, he just said he walked around the residence.

A.R. 1417:18-1418:8. Such testimony should have been ruled inadmissible as the statements attributed to Petitioner were elicited in violation of his rights under the Fifth and Sixth Amendments to the U.S. Constitution, and Art. III § 14 to the West Virginia Constitution.

Sgt. Cox testified pre-trial that he answered Petitioner's questions regarding the charges against him (A.R. 121:23, 122:3-4, 123:10, 123:19-20, 129:1-2), told Petitioner that he could prove that Petitioner was at the crime scene, advised that not all of the evidence was identified in the criminal complaint (A.R. 124:23-125:2), and advised Petitioner that he had been trying to get his side of the story for three years (A.R. 125:15-126:1). *See also* A.R. 464.

Sgt. Cox's testimony regarding his alleged police cruiser discussion with Petitioner was the subject of the State's *Motion to Admit Defendant's Statements*, filed on or about June 3, 2013. A.R. 16. An evidentiary hearing was held on the subject on October 31, 2013 (A.R. 89), and further argument was heard by the Circuit Court at a pre-trial hearing convened on February 13, 2014. A.R. 317:4-318:5, 328:2-12. Thereafter, the parties submitted proposed findings of fact and conclusions of law on the issue. A.R. 368, 404. Ultimately, by Order Ruling on Pre-trial Motions, the Circuit Court deemed Sgt. Cox's testimony about the substance of his conversation with Petitioner largely admissible. A.R. 467. Petitioner preserved his objection to this testimony at trial. A.R. 1417:10-14. The admission of such testimony at trial constitutes reversible error which should result in a remand back to the Circuit Court for a new trial.

3. Jail phone calls:

At trial, the State was permitted, over Petitioner's objection, to introduce into evidence and to play for the jury, portions of three recorded phone conversations of Petitioner while

incarcerated at the Central Regional Jail awaiting trial in this matter. More specifically, the State played portions of three calls made by Petitioner on October 31, 2012, November 2, 2012, and December 4, 2012. A.R. 1123:10-14. Petitioner's statements made in these three calls were transcribed by the Circuit Court's *Order Ruling on Pre-Trial Motions* as follows:

Oct. 31, 2012 - "I know the only thing they got is that print man, that's the [expletive] it. And that ain't enough to convict nobody of no murder or nothing."

Nov. 2, 2012 - "I already know what they got - they got that one [expletive] print and that's the [expletive] it. E needs to get that discovery."

Dec. 4, 2012 - "If I would have [expletive] listened I wouldn't even be in none of this shit, I should have then changed my [expletive] life around. I don't think that [expletive] E.C. is saying nothing man."

A.R. 459-60.

Petitioner has maintained since the filing of his *Motion to Suppress Recorded Phone Conversations* on September 13, 2013 (A.R. 30), that the subject phone calls were recorded in violation of W.Va. Code § 31-20-5e. More specifically, despite calling three witnesses to testify from the Central Regional Jail, and numerous arguments at pre-trial hearings, the State wholly failed to demonstrate that the required notice that calls may be monitored was prominently displayed near the telephones used by Petitioner on the dates on which the subject phone calls were placed. On or about November 8, 2013, the State filed a Designation of Telephone Calls of Defendant from Jail which it may use at trial. A.R. 55. In its filing, the State identified the three calls ultimately published to the jury at trial.

In order to demonstrate compliance with W.Va. Code § 31-20-5e, at a pre-trial hearing on October 31, 2013, State witness James Hamrick (Central Regional Jail booking clerk) was specifically asked if there were signs posted by the inmate phones advising that calls may be

recorded. Mr. Hamrick testified, “[n]o, sir, I don’t believe, no, sir.” A.R. 109:3-5. Following Mr. Hamrick’s testimony, the Circuit Court advised the State that it was going to have to present evidence that the requisite warning sign was posted on the days that the subject calls were made by Mr. Bouie. A.R. 140:24-141:4. The State advised this was not a problem and was accordingly given a second shot to present the necessary evidence to gain admission of Petitioner’s calls at a subsequent hearing.

At a pre-trial hearing on February 13, 2014, the State called Sgt. Tonya Peters (Central Regional Jail corrections officer) to testify regarding the evidence required by W.Va. Code § 31-20-5e when recording and producing an inmate’s calls. During Sgt. Peters’ testimony, the State admitted into evidence a copy of the notice which she advised was posted next to the phones throughout the facility. A.R. 248:6-9, 252:6-9. Sgt. Peters advised that each “pod rover” is charged with the responsibility of checking that such phone notices are still posted each evening and recording this ‘check off’ in a tower log. A.R. 248:6-9, 262:20-23, 263:10-14. Such ‘check off’ is apparently necessary because the notices are merely temporarily affixed to the wall with tape. A.R. 255:7-13. At no time pre-trial, nor at trial, however, did Sgt. Peters bring with her to Court, nor did the State introduce, the daily logs which would purportedly confirm that the warning notices were posted next to the particular phone(s) Petitioner used on the three dates in question. A.R. 263:15-16. Moreover, Sgt. Peters could not testify from personal knowledge that she observed the requisite warnings posted next to the particular phones in question. A.R. 255:16-24, 263:17-20; A.R. 1074:21-1075:3. Also at the February 13, 2014, hearing, the State called Margaret Cook (Central Regional Jail employee whose duties include managing the inmate phone system). A.R. 264:16-283:18. Ms. Cook did not offer any testimony concerning the posting of notices next to inmate phones.

The Court heard argument concerning the admissibility of Petitioner's jail calls at hearings on October 31, 2013, (A.R. 133:15-141:11, 176:2-3), February 13, 2014, (A.R. 320:3-325:21, 327:12-328:1), and February 21, 2014, (226:8-230:24). Ultimately, the Circuit Court deemed Petitioner's jail calls admissible in its *Order Ruling on Pre-Trial Motions*. A.R. 462.

Thereafter, based upon newly-obtained evidence, Petitioner filed a Motion for Reconsideration of the issue on March 14, 2014. A.R. 565. Specifically, Petitioner submitted photographs of the subject inmate phones in Petitioner's "pod" evidencing that no required notices are present warning inmates that their calls may be monitored, as required by W.Va. Code § 31-20-5e. The Court heard argument on Petitioner's Motion for Reconsideration at jury selection on March 14, 2014 (A.R. 639-641 (Transcript page 24:11-32:5)), took the matter under advisement, and ultimately denied Petitioner's Motion before trial on March 17, 2014. A.R. 719:1-720:9. Undeterred by the Court's rulings, Petitioner again argued the point at trial - clearly preserving his valid objection to the admissibility of the three subject jail calls. A.R. 1070:14-17, 1085:5-1088:17. The Petitioner also vouched the record at trial - outside of the presence of the jury - with witness Sgt. Tonya Peters. A.R. 1096:15 - 1105:24. Sgt. Peters confirmed that it was not her job, during the time period Petitioner made the three subject calls, to be in the inmate pods and check to ensure that the requisite warnings are posted. A.R. 1096:21-1097:2; see also 1104:18-22. Further, Sgt. Peters testified that the photographs of telephones in Petitioner's jail pod submitted with Petitioner's Motion for Reconsideration (A.R. 565) did not reflect the presence of the phone-calls-may-be-recorded notice which is required to be prominently displayed by inmate phones. A.R. 1100:16-18.

4. Exemplar footwear evidence:

There was snow on the ground in the early morning hours of January 13, 2010, in

Clarksburg, West Virginia. Part of the evidence collected at Jayar Poindexter's apartment included photographs and castings of shoe impressions left in the snow outside the decedent's bedroom window. A.R. 209, 229. This shoe impression evidence was sent to the FBI for analysis. A.R. 1366:3-1367:9. Most basically, the shoe impressions were found to be of two types of footwear - boots and sneakers. A.R. 1331:1-11. Several pairs of footwear were obtained by police from the home of co-defendant Payne and compared by the FBI to the prints found at the victim's apartment. A.R. 1332, 1366. No shoes were collected from Petitioner. A.R. 1392:23-1393:1. An FBI analyst opined that a Timberland boot collected from co-defendant Payne's residence corresponded in outsole design and physical size with an impression from the crime scene. A.R. 1511:12-20. With respect to the sneaker prints found at the crime scene, the same FBI analyst's findings were inconclusive. A.R. 1519:6-8.

The police also collected video surveillance footage depicting an individual alleged to be Petitioner on Main Street in Clarksburg on the night of the incident. A.R. 1367:10-1368:9. The footwear worn by the individual purported to be Petitioner was somewhat visible in the surveillance video. A.R. 1387:10-17. This video was sent to the FBI video lab for analysis. Sgt. Cox provided the FBI video lab with photos of the shoe impressions in the snow found at the crime scene, images and footage from surveillance video recorded on the night of the incident, as well as "a pair of identical Air Jordan Fusion shoes that are similar to the shoes worn by the suspect." A.R. 529; A.R. 1409:20-1410:6. Sgt. Cox had ordered the Air Jordan shoes from eBay because he believed they were the kind that Petitioner was wearing in the surveillance video. A.R. 1400:15-17; 1398:12-22. It is undisputed that these were not Petitioner's shoes (A.R. 1399:2-4), but merely examples of shoes which Sgt. Cox believed matched the image of the shoes worn by Petitioner on the night of the incident in surveillance footage. A.R. 1398:21-

1399:10. The FBI video lab was asked to compare Sgt. Cox's internet shoes with the video surveillance footage of the individual alleged to be Petitioner. A.R. 1528:19-22. The FBI video analyst could not determine that Sgt. Cox's exemplar shoes matched those worn by Petitioner in surveillance video. A.R. 1531:14-17.

When the State listed Sgt. Cox's internet shoes as exemplar exhibits which it intended to introduce into evidence at Petitioner's trial, Petitioner filed a Motion in Limine to preclude such evidence as well as Sgt. Cox's lay opinion that the shoes which he ordered from the internet were of the same brand, style and color as those worn by Petitioner on the night of the incident. A.R. 495. The Court heard Petitioner's motion prior to jury selection on March 14, 2014, but denied the same. A.R. 643 (Transcript page 40:17-22). The Court felt that any prejudice attendant the admission of such evidence could be cured with an appropriate cautionary instruction. *Id.*

There was further argument at trial regarding the admissibility of the exemplar shoes as Petitioner preserved his objection. A.R. 1393:9 - 1398:8; 1403:14-1406:5; 1409:10-16; 1401:8, 21. The Court nonetheless allowed the State to introduce the exemplar shoes via Sgt. Cox's lay opinion testimony, maintaining that a cautionary instruction could cure any prejudice. A.R. 1397:11-24.

In addition to the improper admission of exemplar shoes, Sgt. Cox was permitted to offer the following lay opinion testimony at trial:

that the exemplar shoes were "similar to the shoes that [Petitioner] was wearing", (A.R. 1398:21-22),

that the exemplar shoes "were [the] exact design on the face value and also the sole value [as the shoes shown in the surveillance video footage]," (A.R. 1399:7-8);

Q. Sgt. Cox, is it fair to say that in your comparison of the Exemplar shoes to the still photos that you took from the Biometric video that you observed similarities in coloration and design of your Exemplar shoes to the shoes that Mr. Bouie was wearing in the Biometrics video?

A. That is Correct.

(A.R. 1408:15-20);

Q. Is it likewise correct that you observed similarities between the sole pattern of the Exemplar shoes and the sneaker foot impressions left outside the victim's apartment?

A. Yes, that's correct.

(A.R. 1409:2-5).

Sgt. Cox agreed that he is not a shoe expert, has no formal training or experience or background in footwear analysis, and has never been qualified to testify as an expert in the area of comparisons or anything of that nature. A.R. 1453:20-1454:3. Sgt. Cox testified that in addition to his consultations with the FBI analysts who testified at trial, he also consulted "an expert at Nike" as part of his investigation regarding the footwear evidence. A.R. 1454:22. The Nike expert could not offer anything definitive concerning the footwear evidence which the State planned to utilize against Petitioner. A.R. 1454:17-20, 1455:5-6.

At trial the State called FBI analyst Brian McVicker who testified about his background and training with the FBI, and was qualified as an expert in forensic footwear impression examination. A.R. 1492:19-1494:16. McVicker did not perform a comparison between the shoe impression found in the snow at the decedent's apartment with any video surveillance footage. A.R. 1512:14-23. McVicker stated that he was actually the second FBI analyst to review this evidence and reach conclusions. The first FBI expert, Michael Smith, issued a report in December 2010, and following McVicker's own analysis, he reached the same conclusions as

Mr. Smith two years prior. A.R. 1512:24-1513:19.

McVicker testified that from the shoe impression evidence collected, he could not determine the brand of shoe which left the impression, the contents of the “logo box” in the shoe’s tread pattern (i.e. whether it was a Nike Swoosh, an Air Jordan jumpman symbol, etc.), the model of the shoe, the color of the shoe, the size of the shoe, nor any of the shoe’s individual characteristics. A.R. 1514:3-1515:7. McVicker testified that the class characteristics of the shoe - specifically, the general concentric circle tread pattern - are similar to those of an Air Force 1 sole design. A.R. 1515:8-1516:3. McVicker stated that shoes having the Air Force 1 sole design has been manufactured since 1982, in thousands of different models. A.R. 1516:8-24. There are also copycat and counterfeit shoes which share this sole design. A.R. 1517:3-10. McVicker agreed that the Air Force 1 shoe was one of the most popular shoes manufactured in the last 30 years, and comprised half of the shoes in his caseload. A.R. 1517:11-17. Most basically, with respect to determining the identity of the shoes which made the sneaker impressions in the snow outside the decedent’s apartment, McVicker’s conclusion was ‘inconclusive’, which, in the FBI’s hierarchy of identification levels of certainty is fourth from the top (after “identification”, “probably made”, and “could have made”). A.R. 1519:6-1520:24.

The State also called FBI video analyst Kimberly Meline at trial who was qualified as an expert in forensic audio, video and image analysis. A.R. 1524:23-1527:10. Meline was specifically tasked with comparing the video surveillance footage of the individual alleged to be Petitioner, with the exemplar shoes purchased by Sgt. Cox from eBay. A.R. 1528:19-22. After performing her comparison examination based on standard methodology, Meline’s ultimate conclusion was “that there was not enough detail in the video itself in order to determine whether they were the same brand and model shoe.” A.R. 1531:14-17. She could not tell if the shoes

purportedly worn by Petitioner in the video were Nike brand, if they were Nike what style they were, or even what type of shoes the individual in the video was wearing. A.R. 816:18-4. Even with the sophisticated video analysis technology at her disposal, Meline could not identify the color, size, sole design, nor model of the shoes in the video. A.R. 819:24-821:4. She could only note that there were similarities in “tonality” between the exemplar shoes and shoes in the video. A.R. 816:11-14, 820:14-21. Most simply, tonality refers to the pattern of light and dark colors seen on a shoe. A.R. 820:3-13.

As with McVicker, Meline did not perform a comparison between the shoe impressions in the snow at the crime scene to the shoes allegedly worn by Petitioner in the surveillance video. A.R. 818:22-819:3. In fact, the State offered no expert to opine that the shoes worn by Petitioner in the surveillance video footage left the impressions in the snow at the crime scene. Notwithstanding this fact, Sgt. Cox went out and purchased a pair of shoes which *he* felt were similar to the shoes worn by Petitioner on the night in question, and made the impressions in the snow behind the decedent’s apartment. Admission of such suggestive evidence was improper and violative of the Rules of Evidence and common law.

Petitioner submits that the exemplar shoes and attendant lay opinion testimony of Sgt. Cox were admitted in error and substantially prejudiced his right to a fair trial. Further, no cautionary instruction (A.R. 1402:8-21) could cure this manifest injustice.

5. Insufficient evidence to support conviction:

Following the close of the State’s evidence, and again post-trial, Petitioner moved for judgment of acquittal insofar as the State failed to present sufficient evidence to warrant a conviction. A.R. 1605, 588. Petitioner also moved for a new trial which was denied by the Circuit Court at sentencing. The Circuit Court noted that Petitioner had preserved this error for

purposes of appeal. A.R. 676 (Transcript page 30:17-20).

The facts relevant to this assignment of error are simply that of the nearly 40 witnesses who testified at this trial, only two were with Petitioner on the night of the incident - Michael Moran and Leonard Hickey. Neither witness, nor any other evidence for that matter, could demonstrate to a rational trier of fact that (a) Petitioner and co-defendant Payne had an agreement to burglarize Jayar Poindexter's apartment, and that (b) Petitioner shared in the criminal intent to commit a burglary.

SUMMARY OF ARGUMENT

Petitioner asserts five (5) assignments of error in his appeal of the Circuit Court's denial of his Motion for New Trial. Four of these errors relate to admission of certain evidence which should have been excluded as violative of the applicable rules and Petitioner's rights. More specifically:

1. Co-Defendants' statements:

Petitioner asserts that his co-defendant's confession - admitted through the hearsay testimony of witness Aaron Carey - was admitted in violation of the Confrontation Clause and Rule 804(b)(3) of the West Virginia Rules of Evidence. Most basically, the hearsay testimony of Aaron Carey was substantially unreliable.

2. Petitioner's alleged statements:

Petitioner asserts that his alleged statements to Sgt. Joshua Cox were admitted in violation of his rights under the Fifth and Sixth Amendment. Petitioner was not read his *Miranda* rights prior to the alleged discussion with Sgt. Cox which constitutes an "interrogation" under the law. Further, it is undisputed that Petitioner's right to counsel had attached prior to this alleged conversation and in no manner did he knowingly, voluntarily, or intelligently waive his

right to counsel prior to Sgt. Cox's discussion with him.

3. Jail phone calls:

Petitioner asserts that his phone calls made while incarcerated were improperly obtained, and thus, admitted, insofar as the State failed in its attempts to demonstrate compliance with W.Va. Code § 31-20-5e. Specifically, the State presented insufficient evidence to demonstrate that notice that calls may be recorded was prominently placed on or immediately near every telephone that may be monitored, as explicitly required by § 31-20-5e(3). Petitioner respectfully submits that the Circuit Court erred in finding other facts 'good enough' to satisfy this explicit and independent requirement.

4. Exemplar footwear evidence:

Petitioner asserts that the Court erred in permitting the State to utilize exemplar shoes which were solely the product and illustrative of the lay opinion of Sgt. Josh Cox. Sgt. Cox's lay opinion did not satisfy the requirements of Rule 701, 402, nor 403, and attendant caselaw - namely, *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999). Sgt. Cox's opinions were not based upon his personal perception, and were not helpful to the jury.

5. Insufficient evidence to support conviction:

By way of his fifth assignment of error, Petitioner asserts that the State failed to satisfy its burden in proving an agreement existed (whether actual, implied or otherwise) between Petitioner and co-defendant Payne to burglarize the decedent's apartment on the night in question. Similarly, there was no evidence that Petitioner shared in the criminal intent to commit a burglary. As a result, there was not sufficient evidence by which a rational trier of fact could have convicted Petitioner of the offenses charged. Further, the cumulative effect of the aforementioned four errors prevented Petitioner from receiving a fair trial, and should result in

his conviction being set aside.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that oral argument is necessary upon this appeal under Rule 19 of the Revised Rules of Appellate Procedure as this appeal involves (1) assignments of error in the application of settled law; (2) an unsustainable exercise of discretion where the law governing that discretion is settled; (3) insufficient evidence; and (4) narrow issues of law. Therefore, Petitioner respectfully requests that this matter be scheduled for Rule 19 oral argument.

STANDARD OF REVIEW

By this brief, Petitioner appeals the Circuit Court's denial of his *Motion for New Trial*.

In considering such appeals, this Court has held that:

In reviewing challenges to finding and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

State v. Kennedy, 229 W.Va. 756, 763, 735 S.E.2d 905 (2012), quoting Syl. pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000). Further, “[i]t is well settled that a trial court’s rulings on the admissibility of evidence, ‘including those affecting constitutional rights, are reviewed under an abuse of discretion standard.’” *Id.* citing *State v. Kaufman*, 227 W.Va. 537, 548, 711 S.E.2d 607 (2011).

ARGUMENT

- 1. The Circuit Court committed reversible error by permitting the admission of Petitioner’s co-defendant’s confession, in violation of the West Virginia Rules of Evidence and the Confrontation Clause of the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution.**

a. Admission of the co-defendant's statements violated the Petitioner's Constitutional Rights under the Confrontation Clause.

In 2004 the U. S. Supreme Court made a “sweeping change”¹ to its application of the Confrontation Clause² in *Crawford v. Washington*, 541 U.S. 36 (2004). The U. S. Supreme Court later commented that “it is clear that *Crawford* announced a new rule. The *Crawford* rule was not ‘dictated’ by prior precedent. Quite the opposite is true: The *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled.” *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

In 2006, this Court adopted this “new rule” in holding that

the Confrontation Clause contained within the Sixth Amended to the United States Constitution and Section 14 of Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.

Syl. Pt. 6, *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006). The *Crawford* decision and the phrase “testimonial statement” has resulted in much discussion in the caselaw on the subject regarding what is testimonial (i.e. that which, at least pursuant to *Crawford*, is afforded Confrontation Clause protection) and what is non-testimonial, but two points are clear: (1) in *Crawford*, the U. S. Supreme Court refused to establish a precise definition as to what is testimonial and what is not,³ and the U.S. Supreme Court has offered little instruction to lower courts in subsequent decisions, and (2) this Court defines a testimonial statement as “generally, a

¹ *State v. Kennedy*, 229 W.Va. 756, 763 (2012).

² Most basically, the Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall. . . be confronted with the witnesses against him.” Sixth Amend. to U.S. Constitution.

³ The *Crawford* Court “[left] for another day any effort to spell out a comprehensive definition of ‘testimonial’” *Crawford*, 541 U.S. 36, 68.

statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Syl. Pt. 8, State v. Mechling*, 219 W.Va. 366 (2006). Based upon these two fundamental points, Petitioner submits that co-defendant Payne’s subject statements are testimonial in nature and should have been excluded from Petitioner’s trial as violative of the Confrontation Clause.

Initially, the U. S. Supreme Court and this Court have both recognized that statements made outside of a formal interrogation are not necessarily non-testimonial. *See Davis v. Washington*, 547 U.S. 813, 822, FN 1 (2006)(“The Framers were not more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.”); *State v. Mechling*, 210 W.Va. 366, 379 (2006)(“Until the U.S. Supreme Court holds otherwise, we interpret the Court’s remarks to imply that statements made to someone other than law enforcement personnel may also be properly characterized as testimonial.”).

The *Mechling* Court characterized testimonial statements as those relating “what happened”, whereas non-testimonial statements relate “what is happening”. 219 W.Va. at 379. In the instant matter, co-defendant Payne’s alleged conversation with Aaron Carey took place a few days after the January 13, 2010, incident giving rise to this action. Thus, if accurate, co-defendant Payne was clearly relating to Mr. Carey “what happened”, as opposed to what was currently happening.

Further, at the time these statements were allegedly made, co-defendant Payne was aware of the investigation into the death of Jayar Poindexter and/or that police were looking for him. (Carey - Payne “told me how retarded he was for even coming down there, that they were looking for him.” June 26, 2010, recorded interview, as cited by Petitioner’s Response to State’s

Motion to Admit Co-Defendant's Statements - A.R. 349). The fact that Defendant Payne knew he was a suspect in the Poindexter murder, coupled with the fact that Defendant Payne has an extensive history with the criminal justice system, should have led an objective person to reasonably anticipate that such statements would be used against Mr. Payne at a subsequent trial. As Justice Ketchum has opined, "[u]nder Syllabus Point 8 of Mechling, supra, almost any hearsay statement is testimonial, even if it is not tendered for the truth of the matter asserted." J. Ketchum, dissenting, *State v. Lively*, 226 W.Va. 81, 697 S.E.2d 117 (2010). Accordingly, co-defendant Payne's statements are testimonial and should have been deemed inadmissible at trial absent Payne's own testimony.

Even assuming *arguendo* that this Court deems the subject statements non-testimonial, they should have nonetheless been barred from Petitioner's trial because they are inherently unreliable, as described below. The Confrontation Clause

mandates the exclusion of evidence that does not bear adequate indicia of reliability. Reliability can usually be inferred where the evidence falls within a firmly rooted hearsay exception. [The West Virginia Supreme Court] has strongly intimated that Rule 804(b)(3) is **not** a firmly rooted hearsay exception.

Emphasis added, State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820, 834 (2001)(internal citations omitted). Insofar as statements against penal interest are not a firmly rooted hearsay exception in this state, a reliability analysis is necessary. The *Crawford* Court recognized that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the *Sixth Amendment* prescribes. 541 U.S. 36, 62.

b. The State did not satisfy its burden in order to gain the admission of hearsay statements pursuant to Rule of Evidence 804(b)(3).

In *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995), this Court set forth four

requirements to satisfy the admissibility standard of Rule 804(b)(3). More specifically, a trial court must determine:

- (a) the existence of each separate statement in the narrative;
- (b) whether each statement was against the penal interest of the declarant;
- (c) whether corroborating circumstances exist indicating the trustworthiness of the statement; and
- (d) whether the declarant is unavailable.

Id. at 230. As outlined *infra*, the State did not satisfy these four *Mason* elements.

With the help of the Circuit Court's *Order Ruling On Pre-Trial Motions*, elements (a) and (b) of the *Mason* test with respect to Mr. Carey's testimony were met pre-trial. Further, with co-defendant Payne exercising his rights under the Fifth Amendment and refusing to testify as a State witness, element (d) of the *Mason* test was met at trial (as Payne was found to be unavailable to testify). Nevertheless, the most important element - (c) concerning the trustworthiness of a statement from a declarant which the accused cannot cross-examine - was not satisfied.

Mr. Carey's testimony is terribly questionable insofar as he was admittedly under the influence of a controlled substance at the time he allegedly heard Mr. Payne's confession. More specifically, Mr. Carey admitted at the February 13, 2014, pretrial hearing in this matter that he, as well as Mr. Payne, were under the influence of marijuana at the time Mr. Payne allegedly confessed to shooting someone. A.R. 291:3-292:6. Mr. Carey testified that he probably had smoked marijuana before Payne arrived on the particular date in January 2010, and also smoked marijuana during Payne's visit - facts which he confirmed at trial. A.R. 1488-1489:13. Further, Mr. Carey could not remember the precise date of his alleged conversation with Mr. Payne (A.R.

1488:12-16), the statements allegedly made by Mr. Payne were not memorialized in a written nor recorded statement, and no one else overheard them. A.R. 1489-1490:4. Such conversation exists only in the mind of Mr. Carey and its occurrence was corroborated by no other evidence at trial.

At the February 13, 2014, pretrial hearing, Mr. Carey testified that Mr. Payne was known to brag about himself, and after allegedly telling Mr. Carey that he had shot someone, told Mr. Carey that he was merely joking with him (“I’m just [expletive] with you man.”). A.R. 293:9-10, 295:2-8. This Court has taken note of the fact that “[t]o the extent a conspirator feels safe, he may be motivated to misrepresent the affair to a listener he wishes to impress. . .” FN 19 *In Interest of Anthony Ray*, 200 W.Va. 312, 323, 489 S.E.2d 289 (1997)(quoting David S. Davenport, “The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1386 (1972). At the February 21, 2014, pre-trial hearing in his matter, another witness testified that Mr. Payne was a very boastful individual who claimed to have done everything, and did everything better than everyone else. A.R. 215:2-216:14. Mr. Payne’s boastful personality coupled with a perceived need to elevate his criminal status among others may well have caused him to make false statements to Mr. Carey.

Mr. Carey further acknowledged that he was friends with the victim, Jayar Poindexter, that he “very much” wanted Mr. Poindexter’s killer brought to justice and would do “anything in [his] power” to assist that endeavor. A.R. 293:16-22.

Accordingly, the trustworthiness of the particular statements which the State seeks to admit is questionable at best. Insofar as the State utilized these statements against Petitioner at trial, such questionable evidence is unworthy of admission wherein the declarant - Mr. Payne - is

not subject to cross-examination.

Because the subject co-defendant statements are testimonial and must be barred by the Confrontation Clause, and because the subject statements fail to meet the *Mason* elements, principally because they are not trustworthy, this matter should be remanded with an Order that Petitioner receive a new trial.

2. The Circuit Court committed reversible error in permitting the admission of statements allegedly made by Petitioner to the investigating officer in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution and Article III Section 14 of the West Virginia Constitution.

a. Standard of Review

This assignment of error involves suppression of an inculpatory statement. This Court has held that:

On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.

State v. Bevel, 231 W.Va. 346, 351, 745 S.E.2d 237 (2013), quoting Syl. pt. 3, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

b. Admission of Petitioner's cruiser statements violated his 5th Amendment rights.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the U. S. Supreme Court established that a defendant must be advised of certain rights when in custody.⁴ If the police fail to advise a

⁴ Specifically, “[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” *Damron v. Haines*, 223 W.Va. 135, 141, 672 S.E.2d 271, n. 9 (2008) citing *Miranda*, 384 U.S. 436, 444-45.

defendant of his rights, statements made by the defendant must be excluded from the trial as violative of the defendant's rights pursuant to the Fifth Amendment to the United States Constitution. "The special safeguards outlined in *Miranda* are not required where a suspect is simply taken into custody, but rather only where a suspect in custody is subjected to interrogation." Syl. pt. 3, *Damron v. Haines*, 223 W.Va. 135, 672 S.E.2d 271 (2008).

'Interrogation' under *Miranda*

refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police.

Rhode Island v. Innis, 446 U.S. 291 (1980). When making a determination whether a defendant's Fifth Amendment rights were violated by the police officer's failure to advise him of his *Miranda* rights, the court should consider the "totality of the circumstances" surrounding the statements made by the defendant. Syl. pt. 1, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987).

As this Court has recognized, police custody in "inherently coercive". *State v. Williams*, 162 W.Va. 309, 316, 249 S.E.2d 758 (1978). Petitioner's circumstance on October 25, 2012, giving rise to his alleged statements becomes even more coercive when one considers that the trip from Butler, PA, to Clarksburg took approximately 2.5 hours, and then add to that the 45 minutes to 1 hour of time spent at the Clarksburg Police station for processing (A.R. 113:20) plus a couple of minutes to fuel up the police cruiser before heading to jail (A.R. 115:12-16) which took about another 45 minutes (A.R. 119:15-17). All told, Petitioner was with Sgt. Cox for over

3.5 hours at the time of the alleged cruiser conversation.

At no time did Sgt. Cox - an experienced police officer and lead investigator on this case - advise Petitioner of his *Miranda* rights. What Sgt. Cox did do was provide Petitioner with a cigarette and a copy of the criminal complaint against him, and engage in a colloquy concerning the facts of the case and fruits of his investigation. The State acknowledged that this colloquy was a “two-sided conversation”, a “give and take”. A.R. 151:8-15. Such a mutual exchange of dialog can constitute “interrogation” under the Fifth Amendment analysis, as recognized by the U.S. Supreme Court. FN9 *Edwards v. Arizona*, 451 U.S. 477, 486 (1981)(“If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be ‘interrogation.’”). Further, Sgt. Cox challenged Petitioner by stating that he could prove that he (Petitioner) was at the crime scene, advised that not all of the evidence against Petitioner was identified in the criminal complaint (A.R. 124:23-125:2), and advised Petitioner that he had been trying to get his side of the story for three years (A.R. 125:15-126:1).

As stated in the quote from *Rhode Island v. Innis* above, the determination of whether a police discussion with an accused constitutes ‘interrogation’ for *Miranda* purposes hinges not on the intent of the officer, but on the perceptions of the suspect. Petitioner submits that the totality of these circumstances reflect that Sgt. Cox’s discussion with Petitioner rose to the level of “interrogation” which warranted advising Petitioner of his *Miranda* rights because Sgt. Cox should have reasonably expected to elicit incriminating information from Petitioner. Accordingly, Petitioner’s Fifth Amendment rights were violated by Sgt. Cox’s failure to administer *Miranda* warnings prior to the elicitation of inculpatory statements.

c. Admission of Petitioner’s cruiser statements violated his 6th

Amendment rights because his right to counsel had attached, and no knowing, voluntary and intelligent waiver occurred.

In *Massiah v. U.S.*, the United States Supreme Court held that once criminal proceedings have commenced, an accused's right to counsel attaches, and the state cannot elicit statements from the accused without presence of his attorney, or the accused's knowing, voluntary and intelligent waiver of the right to counsel. 377 U.S. 201 (1964). Further, "[t]his right, guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 397-98 (1977).

In its pretrial ruling on this issue, the Circuit Court recognized that at the time of Petitioner's alleged conversation with Sgt. Cox on October 25, 2012, Defendant's right to counsel had previously attached. A.R. 467 ("Because adversarial judicial proceedings commenced against the Defendant by way of an executed arrest warrant and extradition proceedings, the Defendant's Sixth Amendment right to counsel had attached before his interactions with Sgt. Cox."). Therefore, for the aforementioned inculpatory statements to be admissible at trial, Petitioner must have initiated the conversation and knowingly, voluntarily, and intelligently waived his Sixth Amendment right to counsel. Syl. pt. 1, *State v. Crouch*, 178 W.Va. 221 (1987). Even assuming that the Petitioner initiated the conversation with Sgt. Cox, no valid waiver of his Sixth Amendment right to counsel occurred.

In ruling that the subject cruiser statements were admissible, the Circuit Court found that because Petitioner had prior "significant contact with law enforcement" (i.e. prior arrests), he was "not unfamiliar with police procedure, his rights, and the consequences of making any statements in the presence of police." A.R. 467. Therefore, the Circuit Court concluded that by

not stopping his conversation with Sgt. Cox or remaining silent, Petitioner “knowingly and intelligently waived his right to counsel.” *Id.* Petitioner respectfully submits that such holding constitutes reversible error and is contrary to the heightened standard required to waive one’s Sixth Amendment right to counsel.

This Court has recognized that

no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights.

State v. Wyer, 173 W.Va. 720, 739, 320 S.E.2d 92 (1984). Accordingly, Petitioner submits that to rely upon the assumption that because of his prior experience with law enforcement that he was previously advised of his constitutional rights, that he understood those rights, and then remembered those rights on October 25, 2012, while being transported by Sgt. Cox for a totally separate offense was improper by the Circuit Court. Petitioner is aware of no exception for individuals experienced with the criminal justice system to the *Miranda* requirements.

Moreover, relying upon an accused’s prior criminal history certainly does not satisfy the “stricter standards” by which a waiver of the Sixth Amendment right to counsel should be judged juxtaposed to a waiver of the Fifth Amendment right to counsel. *State v. Wyer*, 173 W.Va. 720, 733 (1984).

Further, the Circuit Court cited this Court’s decisions of *State v. Crouch*, *State v. Parker*, and *State v. Lucas* in support of its holding. These cases are distinguishable from the facts of the instant matter. In *State v. Crouch*, before initiating a discussion with a police officer, the accused had been read his *Miranda* rights, **signed a waiver form**, and initialed each *Miranda* right thereon. 178 W.Va. 221, 223. In that situation, the *Crouch* Court found that, under a

totality of the circumstances, the defendant had knowingly and intelligently waived his right to counsel. *Id.* Similarly, in *State v. Parker*, this Court affirmed the trial court's decision to permit admission of the defendant's statements made after his right to counsel had attached. 181 W.Va. 619, 383 S.E.2d 801 (1989). In *Parker*, as in *Crouch*, the defendant had been given the *Miranda* warnings and **signed a written waiver**. *Id.* at 626. In *State v. Lucas*, the defendant also was informed of his *Miranda* rights and **executed a written waiver** before making inculpatory statements deemed admissible by the Court. 178 W.Va. 686, 690, 364 S.E.2d 12 (1987).

In the case at bar, the evidence reflects, and Sgt. Cox admits, that no *Miranda* warnings were given to Defendant in the police cruiser prior to the Petitioner making the alleged statements. Further, no written waiver of any kind was executed, and Petitioner made no recorded acknowledgment of his *Miranda* rights. Most basically, to knowingly and intelligently waive one's right, he must first be advised of the right. The U.S. Supreme Court has said "that the right to counsel does not depend upon a request by the defendant. . . and that courts indulge in every reasonable presumption against waiver. . ." FN 19 *State v. Wyer*, 173 W.Va. 720, 730 (1984), quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977). With the heightened standards regarding waiver of one's right to counsel pursuant to the Sixth Amendment, Petitioner submits that his alleged statements to Sgt. Cox in the police cruiser should have been excluded at trial.

This Court has 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).⁵ The prejudicial effect of the

⁵ Additionally, "[a]n error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot. . . be conceived as harmless." *State v. Mechling*, 219 W.Va. 366, 371 (2006), quoting *Chapman v. California*, 386 U.S. 18, 23-24 (1967). "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation

Circuit Court's error in permitting this evidence is evident in that there was no other evidence presented putting Petitioner behind the victim's apartment building. Leonard Hickey and Michael Moran - the only witnesses to testify who were with Petitioner on the night in question - merely put Petitioner at the decedent's apartment complex, not behind the decedent's apartment hundreds of feet away where the crime allegedly occurred. A.R. 1151:4-1153:11, 1184:8-12, 1185:22-1186:9; 1202:3-4, 1225:7-23. As discussed below, any shoe impression evidence used by the State to put Petitioner at the victim's window is inconclusive at best. In pre-trial argument on the issue, the State acknowledged the significance of Petitioner's cruiser statements to its prosecution. A.R. 148:12-16 (“[A]s the Court’s aware from a review of the materials that have been filed heretofore this is a circumstantial evidence case, and any evidence that the State has that puts Mr. Bouie at the location of the crime at the time the crime occurred is important and it’s relevant.”).

Therefore, based upon the foregoing, this Court should find that the statements elicited from Petitioner were obtained in violation of his rights under the Fifth and Sixth Amendment, and that their admission worked a substantial prejudice to Petitioner's guarantee of a fair trial. Accordingly, the interest of justice demands that Defendant be afforded a new trial in which the subject statements are excluded.

3. The Circuit Court committed reversible error by permitting the admission of Petitioner's jail phone calls which the State did not demonstrate were obtained in compliance with West Virginia Code § 31-20-5e.

West Virginia Code § 31-20-5e concerns the procedures and restrictions for monitoring

contributed to the conviction.” *Id.* quoting *State v. Jenkins*, 195 W.Va. 620, 629, 466 S.E.2d 471 (1995). “Moreover, once an error of constitutional dimensions is shown, the burden is upon ‘the beneficiary of a constitutional error’ usually the State - ‘to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Id.* citing *Chapman*, 386 U.S. at 24.

and recording inmates' telephone calls. The statute which took effect June 3, 2002, states:

The Executive Director or his or her designee is authorized to monitor, intercept, record and disclose telephone calls to or from inmates housed in regional jails in accordance with the following provisions:

- (1) All inmates housed in regional jails shall be notified in writing that their telephone conversations may be monitored, intercepted, recorded and disclosed;
- (2) Only the Executive Director and his or her designee shall have access to recordings of inmates' telephone calls unless disclosed pursuant to subdivision (4) of this subsection;
- (3) **Notice shall be prominently placed on or immediately near every telephone that may be monitored;**
- (4) The contents of inmate' telephone calls may be disclosed to the appropriate law-enforcement agency only if the disclosure is:
 - (A) Necessary to safeguard the orderly operation of the regional jails
 - (B) Necessary for the investigation of a crime;
 - (C) Necessary for the prevention of a crime;
 - (D) Necessary for the prosecution of a crime;
 - (E) Required by an order of a court of competent jurisdiction; or
 - (F) Necessary to protect persons from physical harm or the threat of physical harm;
- (5) Recordings of telephone calls may be destroyed after twelve months unless further retention is required for disclosure pursuant to subdivision (4) of this subsection or, in the discretion of the executive secretary, for other good cause; and
- (6) To safeguard the sanctity of the attorney-client privilege, an adequate number of telephone lines that are not monitored shall be made available for telephone calls between inmates and their attorneys. Such calls shall not be monitored, intercepted, recorded or disclosed in any matter.

Emphasis added. Despite presenting the testimony of three Central Regional Jail employees to testify concerning the recording and production of Petitioner's phone calls, the State nonetheless failed to demonstrate that notice was prominently displayed near the telephones utilized by Petitioner on the specific dates in question advising that his calls may be monitored. Such notice

is required by paragraph 3 of W.Va. Code § 31-20-5e.

By *Order Ruling on Pre-Trial Motions*, entered on or about March 12, 2014, the Circuit Court concluded, based upon the testimony and exhibits presented, that the State had sufficiently demonstrated that the notice required to be on or by inmate phones pursuant to West Virginia Code § 31-20-5e was prominently displayed at the Central Regional. A.R. 462. The Circuit Court acknowledged, however, that “no testimony was provided that a notice was up at the exact phone used by the Defendant at the specific time and date when the calls were made. . .” *Id.* The Circuit Court had previously noted that to gain admission of these calls, the State was going to have to demonstrate just that. A.R. 141:3-4.

In any event, when an appeal involves a question of law involving an interpretation of a statute, this Court applies a *de novo* standard of review. Syl. pt. 1 *State v. Jessie*, 225 W.Va. 21, 689 S.E.2d 21 (2009). Petitioner requests that this Court conduct a *de novo* review of W.Va. Code § 31-20-5e(3) and hold that the statute requires the State to demonstrate that notice that an inmate’s calls may be recorded was prominently placed on or immediately near the telephone at the time a call was made before that call can be admitted into evidence. Insofar as such evidence was clearly not presented by the State in this matter, Petitioner submits that his jail phone conversations were admitted in error. Further, the admission of such evidence was not harmless because those calls represented the only evidence the jury heard attributable to the Petitioner. The State utilized these calls to suggest that Petitioner knew he had left a shoe print at the crime scene and was thus involved in the death of Jayar Poindexter. The admission of Petitioner’s calls was not harmless, constituted a manifest injustice to his trial, and should result in remand with award of a new trial.

4. The Circuit Court committed reversible error by permitting the admission of exemplar footwear evidence and attendant lay opinion testimony of the investigating officer in violation of the West Virginia Rules of Evidence.

a. Rule 701

The exemplar shoes selected based upon Sgt. Cox's lay opinion, were admitted in violation of Rule 701 of the West Virginia Rules of Evidence. Rule 701 states that

[i]f the witness is not testifying as an expert, his or her testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

This Court has held further that

[i]n order for a lay witness to give opinion testimony pursuant to Rule 701 of the West Virginia Rules of Evidence (1) the witness must have personal knowledge or perception of the facts from which the opinion is to be derived; (2) there must be a rational connection between the opinion and the facts upon which it is based; and (3) the opinion must be helpful in understanding the testimony or determining a fact in issue.

Syl. pt. 2 *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999).

With respect to the first *Nichols* element, Sgt. Cox did not have personal knowledge nor perception of the shoes Petitioner was wearing on the night of the incident. He did not personally observe Petitioner on the night in question. Sgt. Cox merely viewed video footage after the fact, no different than the jurors at trial or the State's FBI experts. Therefore, his opinion testimony concerning Petitioner's footwear should have been excluded pursuant to Rule of Evidence 602, which "furnishes the basis for the first prong of the test under Rule 701." *Id.* at FN7, citing *U.S. v. Hoffner*, 777 F.2d 1423, 1425 (10th Cir. 1985), *see also U.S. v. Lyon*, 567 F.2d 777, 783-84 (8th Cir. 1977)(Rule 602 "excludes testimony concerning matter the witness did not observe or had the opportunity to observe"). Further, "[a] lay witness may testify in the form of inferences or opinions only when from the nature of the subject matter no better or more specific

evidence can be obtained.” *Id.* citing *U.S. v. Fowler*, 932 F.2d 306, 312 (4th Cir. 1991). In the instant case, better/more specific evidence on the subject was available - namely, the testimony of the State’s FBI experts. As outlined above, those experts could not reach the conclusions which Sgt. Cox offered at trial. Accordingly, the State should not have been permitted to substitute the lay opinion of its lead investigator for those of its experts.

Even if the Court concludes that Sgt. Cox’s testimony and selection of the exemplar shoes is merely an expression of his beliefs, and does not rise to the level of opinion, such testimony must be excluded. *Id.* at 438, citing *U.S. v. Cortez*, 935 F.2d 135, 139-40 (8th Cir. 1991)(“Where a lay witness’s testimony is based upon perceptions, which are insufficient to allow the formation of an opinion but, instead, merely expresses the witness’ beliefs, then the opinion testimony should be excluded.”). Most basically, Sgt. Cox had no “peculiar knowledge” concerning Petitioner’s shoes, and thus, the admission of his opinion testimony, and the product of such lay opinion - the exemplar shoes - was clearly erroneous.

With respect to the third *Nichols* element, Sgt. Cox’s opinion testimony about Petitioner’s footwear was not helpful, but rather suggestive, to the jury. This Court has recognized that

[w]hen the opinion of a witness, not an expert, is offered in evidence, and he is no better qualified than the jurors to form an opinion with reference to the facts in evidence and the deductions to be properly drawn from such facts, his opinion evidence is not admissible.

Id. at 440, quoting Syl. pt. 4, *Overton v. Fields*, 145 W.Va. 797, 117 S.E.2d 598 (1960). “In other words, where the jury is capable of drawing their own conclusions, the lay witness’s testimony is unhelpful and thus should not be permitted.” *Id.* citing Blanchard & Chin, *Identifying the Enemy in the War on Drugs*, 47 Am. U.L. Rev. at 611 n. 235. In the case at bar,

Sgt. Cox fully conceded that he was no expert in footwear comparison/identification and merely reviewed the video evidence which was published to the jury at trial in selecting the exemplar shoes. Therefore, Sgt. Cox's opinions were not helpful to the jury and should have been excluded.

Moreover, the 'helpfulness' prong of the *Nichols* test is "designed to provide 'assurance against the admission of opinions which would merely tell the jury what result to reach.'" *Id.* quoting *U.S. v. Rea*, 958 F.2d 1206, 1215 (2d Cir. 1992). Petitioner respectfully submits that Sgt. Cox's opinion testimony and selection of exemplar shoes amounted to suggestive evidence, telling the jury what conclusion to draw. More specifically, the State had two FBI experts (McVicker and Meline) whose findings were inconclusive with respect to the shoe impression/footwear evidence. McVicker also testified that his conclusions were in accord with another FBI footwear expert who had analyzed the evidence previously (Michael Smith). In addition to consulting with the FBI in trying to determine the footwear worn by Petitioner on the night of the incident, Sgt. Cox acknowledged that he had contacted an expert at Nike who similarly could not offer Sgt. Cox a conclusive identification of Petitioner's shoes. Therefore, despite the fact that at least four "experts" contacted by Sgt. Cox and who reviewed the evidence in this case could not identify (a) the sneaker type shoes which made the impressions in the snow behind the decedent's apartment, nor (b) the shoes worn by Petitioner in surveillance video footage, Sgt. Cox was permitted to offer his own opinion as to the shoes worn by Petitioner - shoes which fit the State's case. Such lay opinion testimony was simply an attempt to "introduce meaningless assertions which amount to little more than choosing up sides," and in such cases "exclusion for lack of helpfulness is called for by [Rule 701]." *Id.* at 440, quoting Fed. R. Evid. 701, Advisory Committee Note on 1972 Proposed Rules.

b. Rule 402

The lay opinions of Sgt. Cox had no “tendency to make the existence of any fact that is of consequence to the determination of [this] action more probable or less probable than it would be without the evidence.” W.Va. R. Evid. 402. As stated above, the jury was privy to the same footwear evidence as Sgt. Cox in reaching his opinion concerning the type of shoes worn by Petitioner on the night of the incident giving rise to this matter. More specifically, the jury viewed the surveillance video footage, saw the photographs of the impressions made in the snow behind the decedent’s apartment, and heard the testimony of the State’s FBI experts. Therefore, the jurors are entitled to reach their own conclusions and Sgt. Cox’s suggestion on the conclusion which the jury should reach is irrelevant.

c. Rule 403

Even if somehow Sgt. Cox’s lay opinion testimony survives Rule 701 and 402 scrutiny, any probative value of the exemplar shoes is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. W.Va. R. Evid. 403. As stated previously, not one of the State's experts opined that the exemplar shoes (1) made the impressions in the snow, or (2) were worn by the individual alleged to be Petitioner in the surveillance footage. Accordingly, by allowing the State’s lead investigator to offer his own self-serving opinion and introduce the shoes illustrative of that opinion, the Circuit Court exposed the jury to the substantial danger of unfair prejudice and confusion.

Most basically, when multiple State experts could not offer the State the opinion which it desired, allowing Sgt. Cox to unilaterally select a single brand/model/style/size shoe for use at trial represents an ‘end-around’ by which the State could introduce prejudicial evidence which it could not otherwise obtain from its witnesses. Such a tactic contravenes the firmly-rooted

protections afforded an accused by the Rules of Evidence. The State was allowed to make the facts fit their theory of the case rather than adopting a theory which fit the facts. This is perhaps best evidenced by Sgt. Cox's selection of exemplar shoes which he believed were the kind worn by Petitioner on the night in question, despite four experts being unable to reach such conclusion.

This Court has recognized that "[a] reviewing Court is obligated to reverse where the improper inclusion of evidence places the underlying fairness of the entire trial in doubt or where the inclusion affected the substantial rights of a criminal defendant." *State v. Nichols*, 208 W.Va. 432, 441 S.E.2d 310 (1999). Petitioner submits that the admission of the exemplar shoes and attendant lay opinion testimony of Sgt. Cox clearly placed the underlying fairness of the jury's verdict in doubt. Accordingly, Petitioner's conviction should be reversed and he be awarded a new trial.

5. The Circuit Court committed reversible error by denying Petitioner's Motion for Judgment of Acquittal and Motion for New Trial insofar as the evidence presented was wholly insufficient to support the convictions.

The State presented no evidence to substantiate its charge that Petitioner participated in an attempted burglary, nor evidence that he and co-defendant Payne had an agreement to commit a burglary on the night in question. Moreover, the cumulative effect of the aforementioned errors prevented Petitioner from receiving a fair trial, and accordingly, his conviction should be set aside. *See, e.g.*, Syl. pt. 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

With respect to challenges to the sufficiency of evidence to support of conviction, this Court has held:

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether after viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

State v. Blevins, 231 W.Va. 135, 744 S.E.2d 245 (2013), quoting Syl. pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

As the State readily admits, this was a case of circumstantial evidence. A.R. 724:21. There were no fingerprints, no murder weapon, no DNA evidence, no video footage and no eyewitness putting Petitioner at the decedent's apartment window where the crime occurred. A.R. 725:4-6. Nevertheless, there must be more than argument and insinuation to convict Petitioner of these crimes.

a. No evidence of agreement

As dictated/limited by the indictment and the theory of the case advanced by the State from its inception, the State had to prove beyond a reasonable doubt that Petitioner *conspired* with co-defendant Payne to commit a *burglary* at the victim's apartment on January 13, 2010, and that during this attempted burglary, Jayar Poindexter was killed. Of the necessary elements to convict Petitioner of Count II of the indictment, conspiracy, the State had to prove, beyond a reasonable doubt, that Petitioner (a) agreed with co-defendant Payne to commit a burglary on this night, and (b) that some overt act was taken by one of them to carry out that burglary. *State v. Stevens*, 190 W.Va. 77, 436 S.E.2d 312 (1993). Petitioner recognizes that an *agreement* to commit an offense "may be inferred from the words and actions of the conspirators, or other circumstantial evidence, and the State is not required to show the formalities of an agreement." *State v. Less*, 170 W.Va. 259, 265, 294 S.E.2d 62 (1981). However, Petitioner submits that there must be some evidence of an agreement nonetheless, or else the agreement element of conspiracy would lose all significance. After all, as this Court has recognized, "[t]he agreement to commit

an offense is the essential element of the crime of conspiracy. . .” *Emphasis added, Id.*

Only two witnesses testified at trial who were with and among Petitioner and co-defendant Payne on the night of the incident giving rise to this action: Michael Moran, and Leonard Hickey. Importantly, neither saw Petitioner and Payne alone together on this night whereby they could have formulated their intent to burglarize Jayar Poindexter (A.R. 1166:3-14, 1171:2-4, 1218:4-22, 1223:2-4, 1227:1-3); and neither knew of any plan to burglarize Jayar Poindexter (A.R. 1170:16-1171:4, 1173:10-1174:9, 1187:3-8, 1219:16-1220:2).

At sentencing, the Circuit Judge commented that he has not seen a clearer case of tacit understanding than this. A.R. 676 (Transcript page 30). Petitioner disagrees that there was even sufficient evidence of a “tacit” understanding/agreement between him and co-defendant Payne, but submits that such a comment from the bench evidences the minimal amount of evidence, if any, which the State presented of an agreement between the co-conspirators. Very simply, there was none, and to allow this verdict to stand would render the agreement prong of conspiracy wholly meaningless.

b. No evidence of shared criminal intent

Similar to the elements necessary to prove conspiracy to commit burglary, in order to prove Petitioner guilty of felony murder (Count I), the State had to demonstrate, beyond a reasonable doubt, that Petitioner shared the criminal intent to commit a burglary. More specifically, and as outlined by the Circuit Court’s instructions to the jury, one of the necessary elements of felony murder is that Petitioner must have participated in an attempt to commit burglary. A.R. 1621. Further, in order to find that Petitioner engaged in an attempt to commit burglary, the State had to prove that Petitioner shared the criminal intent to burglarize Jayar Poindexter’s apartment on the night in question. A.R. 1622. The State failed in its attempt to

provide any evidence of Petitioner's intent to commit a burglary.

Again, the deficiencies in the State's evidence are apparent from the testimony of Leonard Hickey and Michael Moran that: neither could put Petitioner behind Jayar Poindexter's apartment (510:7-23); neither testified that they saw Petitioner any further than a matter of feet from them while at the Overlook apartment complex (A.R. 1151:7-10, 1185:22-1186:11, 1202:3-4); and neither observed Petitioner or co-defendant Payne with any weapon or implement commonly used to perpetrate a burglary (A.R. 1171:14-1172:7, 1205:2-6, 1218:23-1219:13). There was simply no evidence presented that Petitioner knew of co-defendant Payne's criminal intent on January 13, 2010, much less shared in it. The evidence failed to prove beyond Petitioner's mere presence at the decedent's apartment complex on the night in question.

Most basically, the State asked the jury to take a leap of faith and rely upon mere conjecture, assumptions, and speculation in order to convict Petitioner of the crimes charged. The jury was aided in this endeavor by the improperly-admitted evidence addressed by assignments of error 1-4 above. The cumulative effect of these errors was evident by the verdict rendered by the jury. Accordingly, the failure of the Court to grant Petitioner's *Motion for Judgment of Acquittal*, or at least *Motion for New Trial* constitutes an abuse of discretion and should result in a remand of this matter for a new trial.

CONCLUSION

This Court is obligated to ensure that Petitioner's guarantee of a fair trial under Section 10 of Article III of the West Virginia Constitution is honored. Syl. pt. 11, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Based upon the foregoing, Petitioner submits that it is very likely that the jury placed much emphasis and reliance upon improperly admitted evidence in reaching its verdict. Therefore, Petitioner's conviction should be reversed and a new trial should

be awarded.

Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 14-0639

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

vs.

Appeal from a final order of the
Circuit Court of Harrison County
(Case No. 13-F-76-3)

DARNELL CARLTON BOUIE,
Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "PETITIONER'S BRIEF" was served upon the following counsel of record, by hand delivery, on September 22, 2014:

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