

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

Docket No. 15-1198

**STATE OF WEST VIRGINIA, ex rel.  
PAMELA JEAN GAMES-NEELY, Prosecuting Attorney,**

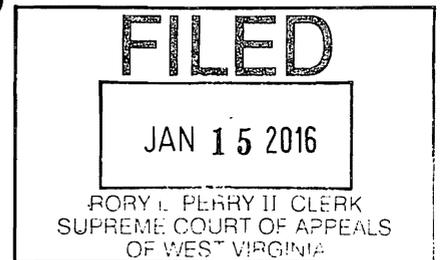
Petitioner,

v.

Petition for Writ of Prohibition Against  
the Circuit Court of Berkeley County  
(Case No. 14-F-220)

**HONORABLE JOHN C. YODER,  
Circuit Judge, 23<sup>rd</sup> Judicial Circuit,  
and DENNIS E. STREETS,**

Respondents.



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**RESPONDENT STREETS' BRIEF**

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**I. RESPONDENT'S REBUTTAL TO ASSIGNMENTS OF ERROR**

- A. THE CIRCUIT COURT DID NOT EXCEED ITS LEGITIMATE POWER OR DEPRIVE THE STATE OF A VALID CONVICTION BY GRANTING A NEW TRIAL WHEN THE DEFENDANT FAILED TO SPECIFICALLY OBJECT TO THE ALLEGED ERROR DURING THE STATE'S CLOSING BUT HAD MADE A CONTINUING OBJECTION AT THE BEGINNING OF THE TRIAL TO ALL RELATED IMPROPER EVIDENCE; ALTERNATIVELY ANY POSSIBLE ERROR WAS PLAIN.**
  
- B. THE CIRCUIT COURT DID NOT EXCEED ITS LEGITIMATE POWER OR DEPRIVE THE STATE OF A VALID CONVICTION BY GRANTING A NEW TRIAL ON THE GROUNDS THAT THE STATE IMPROPERLY ATTACKED THE DEFENDANT'S CHARACTER, AS THE DEFENDANT'S REBUTTAL OF THE REASONS FOR HIS FINANCIAL PROBLEMS DID NOT AMOUNT TO PLACING HIS CHARACTER IN ISSUE OR INVITE ERROR.**
  
- C. THE CIRCUIT COURT DID NOT EXCEED ITS LEGITIMATE POWER OR DEPRIVE THE STATE OF A VALID CONVICTION BY GRANTING A NEW TRIAL AS THE ALLEGED ERROR WAS PLAIN.**

**II. STATEMENT OF THE CASE**

1. The Respondent, Dennis E. Streets, was indicted by the Grand Jury of Berkeley County, West Virginia, at the October 2014 Term of Court, in a two (2) count superceding indictment charging him with Felony Embezzlement in violation of West Virginia Code §61-3-20 in Count One and Felony Fraudulent Schemes, in violation of West Virginia Code §61-3-24d in Count Two. (Appendix Record, hereinafter referred to as A.R. Pg. 5).

2. The indictment alleged that the Respondent, a 32 year veteran of the Berkeley County Sheriff's Department, embezzled thirteen (13) guns from that Department and sold them to a local gun dealer, Glockcop, LLC. (A.R. Pg. 5).

3. On April 16, 2015, a jury acquitted the Respondent upon the charge of Felony Fraudulent Schemes but was unable to reach agreement upon Count One, Embezzlement.

Accordingly, a mistrial was declared by the Circuit Court. (A.R. Pg. 8).

4. The State elected to proceed to a second trial on Count One, Embezzlement and on August 4, 2015, filed a Notice of Intent to Use Rule 404(b) Evidence including certified copies of six (6) judgment entries and supporting documents against the Respondent in various suits involving wrongful occupation and default on residential rental agreements, default on a furniture installment agreement, non-payment of medical bills against the Respondent and garnishment of his wages with the Berkeley County Sheriff's Department. These documents referenced debt owed by the Respondent in excess of \$38,000.00. The State also sought to introduce multiple documents regarding the foreclosure of the Respondent's home including the Trustee's Report of Sale, Publication of Sale, Notice of Trustee's Sale to Respondent and creditors holding liens on said property, etc. (A.R. Pgs. 171-237).

5. The State's Notice of Intent to Use Rule 404(b) Evidence recited the purpose for which such evidence, other than character, was to be used, to-wit: "[t]he State argues that the records of the judgments, home foreclosure, evictions and wage garnishment are offered to show 'motive.' More specifically, these records demonstrate that the Respondent was in deep financial trouble on or about the time of the alleged thefts, and that his financial trouble was his motive to steal guns from the Sheriff's department and sell them for personal gain." (A.R. Pg. 172).

6. The Respondent filed a Motion in *Limine* to Restrict the State's Use of said Rule 404(b) evidence on August 14, 2015 arguing that the purported evidence failed to establish motive or plan but was in reality submitted to improperly influence the jury and that any probative value the evidence might have for the State was substantially outweighed by the undue prejudice against the Respondent. (Not part of the Appendix Record submitted by the Petitioner, however, referenced at

A.R. Pg. 213).

7. On August 20, 2015 the Circuit Court held a *McGinnis* hearing and determined that the Respondent was indebted as referenced in the said judgments, foreclosure and garnishment; that the proffered evidence did establish a possible motive for the alleged crimes against the Respondent and that the probative value of said evidence outweighed the danger of unfair prejudice to the Respondent. The Respondent's objection was noted by the Court and properly renewed during trial and acknowledged by the Court as *continuing in nature* throughout the entire proceedings. (A.R. Pg. 213).

8. On August 25, 2015, the second trial against the Respondent commenced with the jury returning a verdict of guilty to Embezzlement on August 28, 2015. (A.R. 264). The Respondent testified at trial explaining to the jury that he had mistakenly commingled guns he had received from his father's estate with firearms belonging to the Berkeley County Sheriff's Department (Department issued guns or guns stored in evidence) when he had brought his inherited weapons to the Sheriff's Department to run their serial numbers to verify they were not stolen. (A.R. 80-92; 159-160).

9. On September 8, 2015, the Respondent filed his Motion for New Trial or Motion for Judgment of Acquittal Notwithstanding the Verdict of the Jury arguing that in closing the State made several comments regarding how the Respondent "just walked away from his mortgage" and other words to that effect, clearly implying that the Respondent was a bad person who simply cheated people by not paying his bills. The Respondent argued the State clearly used the 404(b) evidence outside of scope of its stated purpose, i.e., motive. The Respondent argued that he had preserved all objections to this on the record at trial and that the 404(b) evidence clearly had a substantial and unfair prejudicial effect upon the Respondent as the jury wasted no time in finding him guilty versus

the first trial when the jury was deadlocked. (A.R. Pg. 266). The State filed an Objection to said Motion. (A.R.276).

10. The Respondent then obtained a transcript of his trial cross-examination by the State as well as the State's closing argument and subsequently filed a Supplemental Motion for New Trial wherein the Respondent cited specific examples during the State's closing where references were made to the his bad character as it related to his financial difficulties. (A.R. 271).

11. Specifically, the Respondent cited the following examples of what he believed to be improper comments made by the State in its closing argument regarding the Respondent's financial problems which exceeded the State's purported purpose for such evidence, to-wit, motive to steal, and went on to comment upon his bad character:

"The motive. You know, we talked about his motive that he was in debt. Not just in debt. He was in debt up to his neck with \$38,000, six different judgments. He'd been foreclosed on, evicted. I believe three times we have records of three different evictions and his wages were being garnished. You know, everybody has financial problems at one point and I wouldn't hold that against him but it is a motive and could cause somebody under extreme financial pressure to do something you would normally expect of them. Ladies and gentlemen, I would argue that when he got up there and started explaining some of these records if he was asked about his home foreclosure and he just said, you know, I'm sorry it's tough financial times I couldn't afford the payments it went into foreclosure you know what I can't fault the guy for that. That happens to *good people* and I'd have probably just left it at that. But do you recall his explanation of the home foreclosure? That didn't sound *right* to me he said he just walked away from it he said he walked away from it because of the neighbors across the street. It was a drug house across the street and he felt justified walking away, and further he said that he had been approved for another home. I can't recall if it was building or purchasing some other home in Back Creek. He had gotten loan approval for it to go there. So his testimony was he walked away from his house because he didn't like what was going on across the street and he had a better situation somewhere else. Is that really believable? And then the other situation didn't work out so he has to rent instead. He doesn't just go back to the house he's at. Well, I think ladies and gentlemen, he wasn't being completely honest about that. *But let's assume that he was being honest about that don't you think that gives a little bit of insight about his character? If the story is as he described*

***that he just walked away from it because he didn't like the situation he felt justified in doing that what else might he feel justified in doing?"*** Emphasis added.

(A.R. 242-43).

“And again I don't hold that against him it happens to a lot of honest people but he was dishonest about this when he testified. But consider this - - all right, let's give him the benefit of the doubt that when he says he walked away from all three of those situations and he says he just walked away and you want to believe well that means that your then going to trust the testimony of somebody who entered into a contract and decided he was justified in walking away from it and defaulting on his obligations just because he felt justified not because of his financial troubles. He said it was because he didn't like the neighbors across the street. It was because Pittsnogle was a slumlord. And remember his testimony of Monique Milas he said oh we could afford the payment it just kind of made things tough so we left. All right. ***He feels justified in doing that. What else might he feel justified in doing?"*** Emphasis added.

(A.R. 253-54).

12. In response the Petitioner also filed a Supplement to its Objection to Motion for New Trial arguing that the Respondent failed to object during the State's Closing Argument and thus waived the error complained of; that any error which occurred was harmless; and that the Respondent “opened the door” to the State's comments about his character during his cross-examination. (A.R. 282).

13. A hearing upon the aforesaid post-trial motions and pleadings was had before the Circuit Court on October 29, 2015. (No transcript is available from this proceeding as the State has not included the same in the Appendix Record. Counsel for the Respondent has inquired about obtaining such transcript, however, the presiding Court Reporter recently had foot surgery and is currently unavailable to transcribe the same.). During this hearing, the Court expressed reservations about having allowed the subject 404(b) evidence at trial and stated that its original concerns about the trial turning into a litigation over the Respondent's financial condition had been realized. The

Court then advised the parties to prepare proposed orders and file any additional pleadings they thought appropriate.

14. By Order entered on November 24, 2015, (A.R. 302), the Circuit Court granted the Defendant's Motion for New Trial. In that Order the Court stated the following in retrospect regarding allowing the State to present evidence of the Defendant's financial problems as a possible motive during trial:

"The Court, nevertheless, noted its reservations in allowing the subject evidence as it was afraid the trial would turn into a proceeding resting primarily upon the Defendant's financial problems rather than upon his guilt or innocence. In retrospect, the Court believes that it may have committed error by even allowing the evidence in as direct evidence, because the case turned into a sideshow on the Defendant's debts and the reasons for the debts. The Court questions how far down this road the State should be allowed to go in using the defendant's debts to try to prove that he or she had a motive for a crime. Are we going to start looking at credit reports to show that a person accused of committing a theft had a motive for the theft?"

15. The Circuit Court went on to find that "[c]learly the State insinuated that the Defendant was not a good person because his explanation of why his house was foreclosed upon was not simply because he was going through tough financial times. The State went on to comment that the Defendant's reasons for walking away from his mortgage weren't 'right.' These comments clearly go past the scope of the State's intended purpose for admission of this evidence, to-wit, motive to steal and are improper. Had the State simply argued that for whatever reason the Defendant was in tough financial straits and clearly had a motive to steal then no harm could have been attributed to the Defendant." (Id.).

16. The Court went on to note: "[s]ubsequently, the State went even further in its comments regarding the Defendant's character," citing this closing argument comment:

'But let's assume that he was being honest about that don't you think that gives a

little bit of insight about his character? If the story is as he described that he just walked away from it because he didn't like the situation he felt justified in doing that what else might he feel justified in doing.'

The Court then stated: "[t]his comment strikes at the heart of the prohibition against proving guilt by use of the prior character, bad acts or misconduct of the Defendant, i.e., to prove the bad character of a person in order to show that he acted in conformity therewith in the instant offense. The State even used the word "character" in its argument. Emphasis supplied by the Court. (Id.).

17. The Court then concluded that the comments by the State in its closing were improper and clearly prejudicial to the Defendant, citing *State v. Rollins*, 233 W.Va. 715, 760 S.E.2d 529 (2014):

When reviewing the propriety of remarks made to the jury by the prosecutor, the Court has held that "[a] judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice. Syl. Pt. 5, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995). See also syl. Pt. 1, *State v. Dunn*, 162 W.V. 63, 246 S.E.2d 245 (1978). ("A judgment of conviction will not be reversed because of improper remarks by a prosecuting attorney in his opening statement to a jury which do not clearly prejudice the accused or result in manifest injustice.") *State v. Coulter*, 169 W.Va. 526, 530, 288 S.E.2d 819, 821 (1982) (applying syllabus point 1 of *Dunn* to an evaluation of a prosecuting attorney's closing argument.).

(Id.).

18. The Court next addressed the issue that the Respondent failed to object to such comments during the State's closing argument, acknowledging the rule laid down in Syl. Pt. 5, *in part*, in *State v. Grubbs*, 178 W.Va. 811, 364 S.E.2d 824 (1987), (If either the prosecutor or defense counsel believes the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks.), and *State v. Coulter*, 169 W.Va. at 530, 288 S.E.2d at 821 (1982), ("In order to take advantage of remarks made

during an opening statement or closing argument which are considered improper an objection must be made and counsel must request the court to instruct the jury to disregard them.”). Nevertheless, the Court agreed with the Respondent’s argument that the State’s improper comments were so egregious that even if an objection had been timely made, the damage or “taint” to the Respondent had already occurred and could not have been corrected by any corrective measures the Court might employ.

19. The Court then found that the lack of objection by the Respondent was not fatal to his Motion for New Trial noting the same was plain error, citing Syl. Pt. 7 of *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 144 (1995), (To trigger the plain error doctrine there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.). The Court then analyzed the application of the plain error doctrine finding: “[f]irst, there was obviously an error in that the prior bad character or misconduct of the Defendant was used not only to prove motive, but clearly to insinuate that he [defendant] acted in conformity with that bad character by committing the instant offense. In fact, the whole tenor of the trial became one of an attack upon the Defendant’s mismanagement of his financial affairs. Second, the error was plain, undeniable, and well recognized at law. Third, the Defendant had a substantial right against the use of character evidence against him to prove guilt as prohibited by Rule 404(a) of the West Virginia Rules of Evidence and therefore injection by the State of the Defendant’s bad character or prior misconduct (not just for motive) substantially prejudiced and affected that right. Finally, the State’s improper comments, in the Court’s opinion, did seriously affect the fairness, integrity, and public reputation of the judicial proceedings.” (Id.).

20. The Court concluded that “[a]lthough the Court believes that there was substantial

evidence against the Defendant without the State's improper comments for a jury to convict him of the offense, the Court cannot say beyond a reasonable doubt that the Defendant would have been convicted if such comments had not been made. On this point the Court notes that the statements about debts and the judgments against the Defendant were not introduced as direct evidence in a prior trial of this matter involving two counts against the Defendant. In that trial, the jury acquitted the Defendant of one count and hung on the instant count. So it does appear that these statements could have been prejudicial and very well made a difference in the jury's ruling." (Id.).

21. As to the State's argument that the Respondent "opened the door" to allow the State to introduce character evidence, the Court stated the same is "misplaced." The Court stated "[t]he Defendant testified and presented explanations in response to the State's barrage of financial misconduct adduced against him. The Court finds that the Defendant's attempt to rehabilitate himself regarding the possibly prejudicial 404(b) evidence introduced against him does not fall under Rule 404(a)(2)(A) as the State argues. The Court noted that Rule 404(a)(2)(A) states that "[A] defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it." (Id.).

22. Lastly, the Court citing the holding in *State v. McDonald*, 204 W.Va. 352, 512 S.E.2d 865 (1988), that "[t]his Court has previously said that when a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it." Citing Syl. Pt. 4, *Laslo v. Griffith*, 143 W.Va. 469, 102 S.E.2d 894 (1958) and Syl. Pt. 1, *Wilkinson v. Bowser*, 199 W.Va. 92, 483 S.E.2d 92 (1996) and ruled "[b]ased on all of the foregoing, the Courts finds that this matter was not 'fairly tried' as the State's comments in closing

argument were improper, constituted plain error, and denied the Defendant a fair trial.” (Id.).

### **III. SUMMARY OF ARGUMENT**

The Circuit Court of Berkeley County correctly granted the Respondent’s Motion for New Trial finding that the matter was not fairly tried as the State exceeded its stated purpose in introducing Rule 404(b) evidence, i.e., the Respondent’s motive to steal, by improperly and repeatedly commenting upon the bad character or financial mismanagement of the Respondent in both the cross-examination of the Respondent and in its closing argument. The Circuit Court correctly found that the trial turned into a “side show” of the Respondent’s financial condition rather than simply providing a motive for the alleged crimes. The Circuit Court correctly found that the Respondent did neither invite the error nor “open the door” to allow the introduction of his bad character or financial misgivings and that despite the lack of a specific objection by the Respondent during the State’s closing, the error was not harmless but plain, affecting the Respondent’s substantial right to a fair trial, and seriously affecting the fairness, integrity and public reputation of the judicial proceedings.

### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

If this Honorable Court were to accept this case, Rule 19 argument is appropriate.

### **V. ARGUMENT**

- A. THE CIRCUIT COURT DID NOT EXCEED ITS LEGITIMATE POWER OR DEPRIVE THE STATE OF A VALID CONVICTION BY GRANTING A NEW TRIAL WHEN THE DEFENDANT FAILED TO SPECIFICALLY OBJECT TO THE ALLEGED ERROR DURING THE STATE’S CLOSING BUT HAD MADE A CONTINUING OBJECTION AT THE BEGINNING OF THE TRIAL TO ALL RELATED IMPROPER EVIDENCE; ALTERNATIVELY ANY POSSIBLE ERROR WAS PLAIN.**

#### **Standard of Review**

The general standard for issuance of the writ of prohibition is set forth in W.Va. Code §53-1-1 (1923) which states that “[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.”

In Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953) the Court has held that “[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari.”

In *State ex rel. Caton v. Sanders*, 215 W.Va. 755, 601 S.E.2d 75 (2004) the Court noted: “It is well established that “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.” Citing W.Va. Code §53-1-1 and Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977).

In *State ex rel Forbes v. Canady*, 197 W.Va. 37, 475 S.E.2d 37 (1996) this Court noted:

If a trial court improperly interferes with a State's right to prosecute, the court, in effect, exceeds its jurisdiction. In *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992) we stated in Syllabus Point 5 as follows:

The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be properly presented.

In Syllabus Point 4 of *State ex rel Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996)

the Court established the standard for considering whether to issue a writ of prohibition in the context of a trial court exceeding its jurisdiction as follows:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

In Syllabus Point 1 of *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979) the Court stated:

[i]n determining whether to grant a writ to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

In reviewing decisions to suppress evidence, the Court applies a *de novo* standard of review to the legal conclusions made by the Circuit Court. *State v. Honaker*, 193 W.Va. 51, 56, 454 S.E.2d 96, 101 (1994).

### **The Circuit Court's Ruling Does Not Exceed Its Legitimate Power**

The Circuit Court is entrusted with providing all litigants with a fair trial pursuant to the

Constitution of the United States and the State of West Virginia, the Rules of Evidence and the statutory and case law of this State. The Circuit Court's Order Granting the Defendant's Motion for New Trial addresses the issue raised by the Respondent that his case was not fairly tried. The Order contains factual and legal analysis on each issue raised by the litigants and is well reasoned. Additionally, the Circuit Court personally presided over the trial of this matter and witnessed first-hand the errors complained of by the Respondent, not relying simply upon a cold record.

The Circuit Court's findings of fact and rulings of law obviously do not constitute "substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts . . . ," but instead evidence the Court's fulfilling its Constitutional and statutory duty to provide each litigant a fair trial. See: *Hinkle supra*.

The Circuit Court's analysis and ruling cannot be characterized by any neutral and detached observer as flagrantly depriving the State of a valid conviction. In fact, the Court has surmised that the Respondent's conviction was not valid given the conduct of the State. See: *Forbes and Lewis supra*.

It is patently clear that the Circuit Court's Order Granting the Respondent a New Trial is not clearly erroneous as a matter of law, does not contain oft repeated error or manifests a persistent disregard for either procedural or substantive law. To the contrary, the Order is based entirely upon the well settled law of this State, is not erroneous in any regard and shows adherence to both the procedural and substantive law. See: *Hoover supra*.

### **Respondent's Objection was Preserved**

The Petitioner contends that the Respondent failed to object to the improper remarks made

during closing argument and has thus waived his objection thereto and that the Circuit Court has flagrantly ignored the same. The Petitioner argues that the Respondent's objection to the introduction of evidence of his financial condition made at pretrial, at trial and acknowledged by the Circuit Court at trial as continuing in nature is insufficient preserve the objection to its improper use of character.

The Respondent's original and continuing objection on the record to this line of evidence and its progeny was amply sufficient to preserve the issue for the Circuit Court to consider in deciding his Motion for New Trial. In the Respondent's original Motion in Limine to Restrict the State's Use of Rule 404(b) Evidence, filed in response to the State's Notice of its Intent to Use Rule 404(b) Evidence a week prior to trial, he argued "[t]he danger inherent in the presentation of such evidence is that the jury will conclude the Defendant is a financially irresponsible individual and thus convict him based upon his financial standing rather than upon the merits of the case." This exact argument became prophetic when the State said in its closing, ***"[b]ut let's assume that he was being honest about that [his stated reason for walking away from his mortgage] don't you think that gives a little bit of insight about his character?"***

This is precisely the harm that the Circuit Court feared would occur when this line of evidence was allowed to be pursued:

"The Court, nevertheless, noted its reservations in allowing the subject evidence as it was afraid the trial would turn into a proceeding resting primarily upon the Defendant's financial problems rather than upon his guilt or innocence. In retrospect, the Court believes that it may have committed error by even allowing the evidence in as direct evidence, because the case turned into a sideshow on the Defendant's debts and the reasons for the debts. The Court questions how far down this road the State should be allowed to go in using the defendant's debts to try to prove that he or she had a motive for a crime. Are we going to start looking at credit reports to show that a person accused of committing a theft had a motive for the theft?"

Also, the Respondent points out that none of the cases cited by the Petitioner regarding the failure to object to comments made in closing argument involve a continuing objection made by the defense to the use of such or similar evidence.

Accordingly, the Respondent's continuing objection to the admission of the 404(b) evidence was broad enough to encompass the improper comments concerning the Respondent's character made by the State in closing.

### **No Cautionary Instruction Would Have Cured the Taint**

Given the sacred prohibition in our jurisprudence that evidence of a person's character can not be presented to show that he acted in conformity therewith in committing the crime charged, the State's improper comments were so egregious that even if an objection had been then renewed, the damage or "taint" to the Respondent had already occurred and could not have been corrected by any corrective measures the Court might employ. The Circuit Court acknowledged this argument in its Order granting a new trial. Therefore, even if a specific objection was then again renewed, so that the Court could admonish the jury to disregard the same, the same would have been wholly ineffective given the volume of financial evidence brought against the Respondent in conjunction with the improper comments made about his character in relation thereto. Simply, by that point, the harm was already complete and could not be undone.

Quite glaringly, the State does not contend in its brief that its comments about the Respondent's character were proper. Conversely, the State seeks to justify the use of its improper comments because the Respondent didn't specifically lodge an objection during the middle of its closing argument. The State also justifies its use of the improper comments because the Respondent

brought it up first and “opened the door.”

Of course the State invited the error by seeking to introduce a barrage of evidence against the Respondent regarding his financial condition in its attempt to establish a motive to steal. How could the Respondent not be expected to attempt to rehabilitate himself by at least explaining to the jury why and under what circumstances such sums of debt were incurred? With those explanations, the State improperly injected the Defendant’s character into the trial, which was the obvious objection made by the Respondent to begin with.

### **The Door Had Not Been Opened**

The Circuit Court found that the Respondent’s attempts to rehabilitate himself by explaining how and why he got into such a financial situation in the first place was not the type of evidence referenced in Rule 404(a)(2)(A), which would allow the State to then bring his character into issue, i.e., such did not constitute a pertinent trait of the Respondent. Thus the Court found that the Respondent did not place his character in issue and open the door to allow the State to make the comments it did in closing.

A somewhat similar situation occurred in *State v. Richards*, 190 W.Va. 299, 438 S.E.2d 331 (1993). Richard’s attorney in his opening to the jury said his client was a peaceful, law abiding citizen. The State then sought a side-bar arguing to the court that the door had been opened to allow admission of the Defendant’s prior criminal record. The trial court agreed and the evidence of the defendant’s convictions was allowed. The Defendant was the first witness to testify in his case-in-chief and during cross-examination the State elicited his admission to the prior convictions. Later, the defendant’s niece testified that the defendant was fair and honest and was trying to live a Christian life and stay out of trouble. The Defendant was convicted and on appeal argued that his

criminal record should not have been allowed to be introduced. The Court reasoned (1) that the Defendant's counsel's open statement remarks were not evidence and did not open the door and (2) regarding the remarks made by the Defendant's niece after admission of his prior criminal record:

Although these remarks were of the sort which normally sets the stage for the introduction of character evidence against a defendant, in the present case they were made only after the State had introduced evidence of the collateral crimes committed by the defendant. In effect, the evidence of collateral crimes was introduced before the defendant introduced evidence relating to his character, and under these circumstances, the Court cannot conclude that they laid the foundation for the introduction of collateral-crimes evidence.

*Id.*, W.Va. at 303, S.E.2d at 335.

Clearly the Respondent's explanations of why he was in such dire financial straits was of the same rehabilitative nature as was seen in Richards above and did not constitute character evidence. They were only testified to after the collateral bad act evidence had been presented.

### **The Error Was Plain**

The Circuit Court concluded alternatively that even if a renewed objection were required during the State's closing, that the improper comments by the State constituted plain error. The Circuit Court went through the plain error analysis set forth in Syl. Pt. 7 of *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 144 (1995), and found: (1) obvious error in that the prior bad character or misconduct of the Defendant was used not only to prove motive, but clearly to insinuate that he [defendant] acted in conformity with that bad character by committing the instant offense. In fact, the whole tenor of the trial became one of an attack upon the Defendant's mismanagement of his financial affairs

Syl. Pt. 2 of *State v. Hatala*, 176 W.Va. 435, 345 S.E.2d 310 (1986) states:

The plain error doctrine of West Virginia Rule of Criminal Procedure 52(b), whereby

the court may take notice of plain errors or defects affecting substantial rights although they were not brought to the attention of the court, is to be used sparingly and only in those circumstances in which a miscarriage of justice would otherwise result.

The Circuit Court characterized the State's use of the Respondent's financial problems along with its improper closing comments as a "side show." Obviously, the Circuit Court invoked the plain error doctrine to correct a miscarriage of justice resulting in the Respondent not receiving a fair trial.

### **The Circuit Court Concluded it Committed Error**

It is also important to note, that the Circuit Court found that it had committed error in the first instance in allowing the subject 404(b) evidence to be used by the State at trial: "[i]n retrospect, the Court believes that it may have committed error by even allowing the evidence in as direct evidence, because the case turned into a sideshow on the Defendant's debts and the reasons for the debts."

This fact has been totally overlooked by the State in its arguments for the granting of the writ and render the State's arguments moot. The trial court has *sua sponte* found that it committed error affecting the substantial rights of the Respondent and has taken curative measures to rectify the miscarriage of justice by granting him a new trial. How can any other tribunal, not present at the trial, conclude otherwise?

- B. THE CIRCUIT COURT DID NOT EXCEED ITS LEGITIMATE POWER OR DEPRIVE THE STATE OF A VALID CONVICTION BY GRANTING A NEW TRIAL ON THE GROUNDS THAT THE STATE IMPROPERLY ATTACKED THE DEFENDANT'S CHARACTER, AS THE DEFENDANT'S REBUTTAL OF THE REASONS FOR HIS FINANCIAL PROBLEMS DID NOT AMOUNT TO PLACING HIS CHARACTER IN ISSUE OR INVITE ERROR.**

The Respondent adopts and incorporates herein by reference all law and arguments set forth

and contained in his preceding argument in Section A above as the issues are inextricably intertwined and cannot be isolated in review.

**C. THE CIRCUIT COURT DID NOT EXCEED ITS LEGITIMATE POWER OR DEPRIVE THE STATE OF A VALID CONVICTION BY GRANTING A NEW TRIAL AS THE ALLEGED ERROR WAS PLAIN.**

The Respondent adopts and incorporates herein by reference all law and arguments set forth and contained in his preceding argument in Section A above as the issues are inextricably intertwined and cannot be isolated in review.

In addition the Respondent notes that the Circuit Court set forth the following in its Order Granting the Defendant's Motion for New Trial:

“[T]he Court cannot say beyond a reasonable doubt that the Defendant would have been convicted if such comments had not been made. On this point the Court notes that the statements about debts and the judgments against the Defendant were not introduced as direct evidence in a prior trial of this matter involving two counts against the Defendant. In that trial, the jury acquitted the Defendant of one count and hung on the instant count. So it does appear that these statements could have been prejudicial and very well made a difference in the jury's ruling.”

Obviously, the Circuit Court did not deem the improper closing arguments and the introduction of 404(b) evidence in the Respondent's second trial to be harmless and the Court's rational therefore is concise and reasonable under the facts of the case.

**VI. CONCLUSION**

The Circuit Court of Berkeley County did not exceed its legitimate powers in granting the Respondent's Motion for New Trial as the State made improper comments during cross-examination and in closing argument which denied the Respondent of a fair trial. The Circuit Court admitted that it committed error by allowing the State to present the subject 404(b) evidence in the first instance. The Respondent's continuing objection to the admission of the particular Rule 404(b) evidence

presented by the State, drawing into question the Respondent's character through his financial mismanagement, preserved his objection to the State's improper closing argument comments without a contemporaneous and renewed objection. Even if an objection was required by the Respondent, his failure to do so was not fatal to the Circuit Court's granting of a new trial as the error was plain. The State was not justified in making comments about the Respondent's character as the Respondent, had not as a matter of law, placed into issue any pertinent character trait opening the door for the State's use of such evidence.

According, the State has failed to demonstrate any reason why this Honorable Court should issue a writ of prohibition against the Circuit Court of Berkeley County ruling in this matter.

Accordingly, the Respondent, Dennis E. Streets, respectfully prays that this Honorable Court deny the Writ of Prohibition sought by the State of West Virginia and for such other and further relief as the Court may deem just, necessary and proper.

Respectfully submitted,

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By Counsel

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## CERTIFICATE OF SERVICE

I, B. Craig Manford, hereby certify that on this 15<sup>th</sup> day of January, 2016, true and accurate copies of the foregoing **Respondent's Brief** were personally hand-delivered to the Office of the Prosecuting Attorney for Berkeley County, West Virginia, Christopher Quasebarth, Chief Deputy Prosecuting Attorney and Timothy D. Helman, Esq., Assistant Prosecuting Attorney, at 380 W. South Street, Suite 1100, Martinsburg, West Virginia 25401.

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