NO. 18-0139

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA,
Plaintiff Below,
Respondent,

vs. No. 18-0139

JOHN RUSSELL SKIDMORE,
Defendant Below,
Petitioner.

On Petition for Appeal
from the Circuit Court of
Monongalia County, West Virginia
Case No. 17-F-184

PETITIONER'S BRIEF

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This appeal follows the Circuit Court's denial of Petitioner John Russell Skidmore's motion to suppress, his entry of a conditional plea under Rule 11(a)(2), and the imposition of sentence committing him to the custody of the Commissioner of the Division of Corrections for incarceration at the Anthony Center for Youthful Offenders for a period of six (6) months, up to two (2) years.

I. ASSIGNMENTS OF ERROR

In ruling upon Petitioner's motion to suppress:

1. The Circuit Court erred when it found that the extraterritorial *Terry*[1] investigative stop of Petitioner's vehicle by the Town of Granville police officer, more than two (2) miles beyond his jurisdiction, was "performed in concert with officers who were within their territorial jurisdiction;"

2. The Circuit Court erred when it concluded that articulable reasonable suspicion existed to conduct the extraterritorial *Terry* investigative stop of Petitioner's vehicle by the police officer "based on the BOLOs and his observations;"

3. The Circuit Court erred when it concluded that "reasonable grounds" existed for the extraterritorial *Terry* investigative stop of Petitioner's vehicle, his subsequent roadside warrantless arrest, and the roadside plain-view search of his vehicle;

4. The Circuit Court erred when it concluded that the "holdings of *Gutske* and *Horn* are not applicable under the set of facts of this case;"

5. The Circuit Court erred when it concluded "that the Statement of Rights form used by the Morgantown Police Department is a clear, understandable, comprehensive, accurate, effective, and informative tool for achieving the objective of apprising individuals of their rights when being questioned by law enforcement personnel," as mandated by the holding in *Miranda*;

6. The Circuit Court erred when it found "[t]he time period between when Petitioner was taken into custody, transported to the police station, and when he made his statement was not a delay in order to obtain a confession" and that "[n]ormal police/judicial

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[1] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968).

procedure was followed in this case in processing Defendant Skidmore," in compliance with the prompt presentment rule; and,

7. The Circuit Court erred when it failed to apply the totality of the circumstances standard in determining the voluntariness of Petitioner's confession in light of undisputed evidence of delay in appearing before a judicial officer, Petitioner's intoxication, and the promises made by Detective Trejo prior to the commencement of the custodial interrogation resulting in Petitioner's confession.

II. STATEMENT OF THE CASE

The relevant procedural history establishes that Petitioner was indicted by the May 2017 Monongalia County Grand Jury. The two-count indictment charged that, on March 5, 2017, Petitioner and two others committed robbery in the first degree and conspiracy. (A.R. 1-2).[2] Upon receiving the State's discovery and conducting pretrial investigation, it was determined that serious constitutional and procedural issues existed in this case. Accordingly, on June 21, 2017, Petitioner timely filed his motion to suppress and related pretrial motions. (A.R. 3-4). Thereafter, four evidentiary hearings were held on the motions to suppress filed by Petitioner and his Co-Defendants. On September 18, 2017, the Circuit Court heard argument of counsel following briefing of the issues presented. (A.R. 238-269).

Importantly, on September 25, 2017, counsel were informed that the Circuit Court intended to deny the motions to suppress. The next day, on September 26, Petitioner entered into the *Conditional Plea Agreement*, presented his *Conditional Plea of Guilty* to the Circuit Court at the Rule 11(a)(2) plea hearing. (A.R. 270-274). The *Plea Order* was entered on November 7, 2017. (A.R. 275-279). The Circuit Court entered its *Order Denying Defendant's Motion to*

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[2] Petitioner's Co-Defendants are Gordon W. Swiger and Nikolas Lee Velez, and they have filed Petitions for Appeal in this Court, and their case numbers are: No. 18-0160; and No. 18-0161, respectively.

Suppress Evidence on December 15, 2017. (A.R. 280-295). On January 23, 2018, Petitioner was sentenced, pursuant to the *Conditional Plea Agreement*, to a period of incarceration at the Anthony Center for a period of six (6) months to two (2) years. (A.R. 296-299). The *Sentencing Order* was entered on January 26, 2018. (A.R. 296-299). To date, Petitioner remains confined to the Anthony Center.

The relevant factual information developed in this case reveals that the armed robbery incident giving rise to the filing of the indictment occurred on March 5, 2017, at approximately 7:25 p.m. (1925 hours). (A.R. 316). The location of the alleged crime was a student apartment building located at 221 Willey Street, Morgantown, Monongalia County, West Virginia. This specific location is within the corporate municipal boundaries of the City of Morgantown and within the statutory jurisdiction of the Morgantown Police Department, as authorized by *West Virginia Code* § 8-14-3.

The initial report of the alleged crime was made by telephone by Brett M. McIntyre to MECCA 911 at 2132 hours, nearly two hours after the incident, as documented on the police report. (A.R. 300, 316, 335). The first police officers to arrive at the scene were Morgantown Police Department Patrolmen Frantz (647) and Palmer (666);[3] and the time documented for their arrival was 2135 hours. (A.R. 300). Based upon information provided by Morgantown Police Department Patrolman Rhodes (613), an initial BOLO (Be On The Lookout) was transmitted by MECCA at 2140 hours that included information about the nature of the crime reported (armed robbery), its location (221 Willey Street), the description of the perpetrators (three white males wearing masks and black sweatshirts), and the description of the weapon used (one male armed with a rifle). There was no known direction of travel by these

[3] Police officer unit numbers or identifiers are included for reference when evaluating the record of MECCA radio transmissions and documentations in this case.

three perpetrators as they left the scene. (A.R. 300, 335). Importantly, no identifying vehicle information was provided in the initial BOLO, and no information was given that a vehicle was used in the commission of the crime. (A.R. 300, 335).

Thereafter, Morgantown Police Department Patrolman Cantis (652) arrived at the scene at 2138 hours. (A.R. 300). He waited until the owner of the adjacent building, located at 211 Willey Street, came to review the security videos in an attempt to continue the investigation. (A.R. 170-173). Officer Cantis testified that he reviewed the security video and determined that a white vehicle had entered the municipal parking lot adjacent to 221 Willey Street. (A.R. 170). However, Officer Cantis admitted that he could not see where the vehicle was parked, could not see the identity of any of the occupants, could not tell whether any individuals meeting the description of the perpetrators either exited or entered the vehicle, and could not see the vehicle's direction of travel upon leaving the parking lot, after it was seen moving in the lot for a brief period of time. (A.R. 170-177). Importantly, Officer Cantis also admitted that he could not identify any license plate number on the vehicle and that he could not initially identify the make and model of the vehicle but, instead, had to rely upon a subsequent Google internet search to do so. (A.R. 174-175). Officer Cantis then stated that he was the Morgantown Police Department officer who provided the vehicle information (make and model only) to MECCA, resulting in the second BOLO being transmitted at 2140 hours. (A.R. 180-185).

The record reveals that the second BOLO transmitted by MECCA at 2140 hours included the description of the vehicle to be an all-white, four-door sedan, make Audi A4. (A.R. 335). No further information was provided to MECCA, such as the direction of travel of the suspects' vehicle, its model year, or any license plate number known or observed. (A.R. 158-200, 338, 340). At some time between 2240 and 2242 hours, Granville Patrolman Huyett (313)

observed a white, four door Audi A4 sedan pass his parked cruiser on Dents Run Road in the Town of Granville, and he began to follow the Audi in his cruiser. Also at 2240 hours, Morgantown Police Department Patrolman Meador (642) requested that MECCA run West Virginia license plate number 9XL 635. (A.R. 335). MECCA responded at 2241 hours and stated the vehicle was a 2007 white Audi A4 registered to John Skidmore, of Clarksburg, West Virginia. (A.R. 335). At 2242 hours, Patrolman Huyett (313) also requested a check on license plate number 9XL 635 through MECCA 911. (A.R. 335). At the same time, MECCA records show that the dispatcher then asked Officer Meador (642) if he "had reason to know this vehicle," to which he responded, "Negative—I was just running it because I stopped the vehicle a couple days ago." (A.R. 335). Officer Meador (642) then asked which (Granville) unit had run the license plate number, to which MECCA responded, "313," which was known to be Patrolman Huyett's unit number. (A.R. 331-334, 335).

A careful review of Patrolman Huyett's (313) dash cam videos reveals that, at the time of the first BOLO transmitted at 2140 hours, he may not have been in his police cruiser and, therefore, would not have heard, *via* BOLO, the location of the alleged crime or the description and number of the perpetrators and what they were wearing and whether they had weapons. (A.R. 331-332). Moreover, a careful review of the MECCA audio CD (A.R. 335-336) reveals that Officer Meador (642), who was actively monitoring and communicating with MECCA and other police officers concerning this matter, directed MECCA to re-transmit the description of the perpetrators to Patrolman Huyett (313) after he had run the license plate of Petitioner's vehicle while he was following it. Therefore, the only reasonable conclusion to reach from this series of transmissions, from the review of dash cam video clips, and from Patrolman Huyett's report (A.R. 304) is that Patrolman Huyett relied solely upon the limited information transmitted

via the second BOLO, which was the minimal description of the color, make, and model of the vehicle and nothing more.

A review of Patrolman Huyett's testimony, his report, and his dash cam video footage reveals that he did not observe Petitioner's vehicle violating any traffic law or otherwise observe him or the occupants committing any misdemeanor or felony offense. (A.R. 11-44, 304, 331-332). The dash cam video from Patrolman Huyett's cruiser confirms there was no factual or legal basis to effectuate a traffic stop of Petitioner's vehicle other than the BOLO previously transmitted by MECCA. (A.R. 331-332). As the radio communication continued, at 2242 hours, Sergeant Slagle (330) communicated directly with Patrolman Huyett (313) that he could get a county or state police unit "headed that way." (A.R. 333-334). At that time, Patrolman Huyett (313) radioed that he was already on I-79 South and continuing to follow Petitioner's vehicle. (A.R. 331-334). After following the vehicle for a short distance, and based solely on the information contained in the BOLOs, Patrolman Huyett activated his emergency lights and performed a traffic stop of Petitioner's vehicle at the mile marker 151.5 on I-79 South, at approximately 2245. (A.R. 331-332). Detective Trejo (622) also testified that the stop made by Patrolman Huyett at mile post 151.5 was approximately four or five miles outside the municipal limits of the City of Morgantown. (A.R. 30).

Patrolman Huyett testified during the hearing he knew at the time he entered I-79 South and at the time of the stop of Petitioner's vehicle that he was approximately two to two and one-half miles outside his jurisdiction as a police officer employed by the Town of Granville, West Virginia. (A.R. 15). When Sergeant Slagle (330) radioed MECCA and Patrolman Huyett (313) that he could get another police agency with broader authority beyond the Town of Granville's jurisdiction "headed that way," it was clearly known and understood by

these police officers that the stop of Petitioner's vehicle would be outside their lawful jurisdiction. At that time and place, Patrolman Huyett and Sergeant Slagle must be deemed to have been acting as private citizens effectuating an arrest. Otherwise, it would be a clear violation of the color of office doctrine to allow them to conduct the extraterritorial stop to investigate based upon the BOLOs transmitted. In this regard, it is critical to understand that the State agreed with the Court's question posed during the September 18, 2017 hearing that "what you're looking at this as [sic] is more along the lines of a Terry v. Ohio stop?" (A.R. 255).

From the testimony provided by Patrolman Huyett and the telling representations made by counsel for the State during argument on September 18, 2017, it is clearly established that:

> [MR. NOEL]: Now, the timeline continues. The Granville Police Department stop -- the Huyett stop. I don't think we should call it the Slagle stop, because, in fairness, I don't believe that Slagle was involved in the initial stop. **I think that Huyett was solely responsible for that stop, and that stop occurred at 10:45 P.M.** I believe it's fair to say that. Now, Sergeant Slagle arrived shortly after Officer Huyett made the stop, and I don't believe that Officer Huyett attempted to get the suspects out of the vehicle until Sergeant Slagle was on scene. (Emphasis added.)

(A.R. 254).

Likewise, contrary to the Circuit Court's finding used to deny the suppression motions, the following representation made by counsel for the State during argument acknowledges the absence of any police officer with territorial jurisdiction at the time and place of the stop of Petitioner's vehicle:

> [MR. NOEL]: Now, the Court had asked about whether or not there was a Mon County Sheriff's deputy on scene. I believe that if the Court had reviewed the video from -- the dash cam video from the Huyett unit, I think that you've seen that there are at least two Mon County Sheriff's Department units present, although I think **the State would concede that at the time the vehicle was**

stopped no Sheriff's Department units were present. (Emphasis added.)

(A.R. 257).

During argument, the State further acknowledged the essential facts and concerns upon which Petitioner relies in this case:

> [MR. NOEL]: Now, I would point out, and I think it's important to note that Sergeant Slagle radioed for any available county unit immediately -- I believe immediately upon Officer Huyett calling him for backup. So the State's position is that the ---- that Officer Huyett took an interest in this vehicle based on the two MPD BOLOs while he was in Granville city limits. **He did not -- indeed, he did not attempt to stop the vehicle until approximately two and a half miles had elapsed once the vehicle was on I-79 southbound and he had backup through Sergeant Slagle.** Unfortunately, I don't believe that the record is clear as to when the Mon County Sheriff's Department units arrived, although it's clear that they arrived at some point. (Emphasis added.)
>
> [THE COURT]: I would imagine -- I'm going to give Mr. Benninger and Mr. Slagle [sic] an opportunity to say something else. They're probably going to say that Huyett should've waited until the deputies got there and let them make a stop.
>
> [MR. NOEL]: If, in fact, we lived in a perfect world, perhaps I might ask him to do that in the future, but we don't live in a perfect world. I think that it is unfair to suggest to Officer Huyett, under the circumstances, that he should, given what was alleged within the BOLO, given what he knew at the time that he was following a white Audi A4 driving from the vicinity of Morgantown, which was the location of the alleged crime, containing multiple occupants, wearing dark clothing -- all this is consistent with the BOLO, and some or all of them alleged to be armed. I think it's unfair to ask Officer Huyett to act any differently than he did.
>
> Now, if the law suggests otherwise, then perhaps we need to look at things differently in the future but I would agree that in a perfect world he would have waited for a state unit or a Sheriff's Department unit to actually make the stop.

(A.R. 257-258).

After Sergeant Slagle arrived at the scene of the vehicle stop, Petitioner and the other suspects were removed from his vehicle, handcuffed, interrogated at the roadside as to weapons located in the vehicle, taken into custody, placed into cruisers, and transported by Monongalia County Sheriff deputies back to the Morgantown Police Department, where they were held until each of them were subject to additional custodial interrogation. (A.R. 18-19). After three hours of delay since being handcuffed at roadside, at approximately 0139 hours, Petitioner was brought to the interrogation room and was provided and signed the Morgantown Police Department *Statement of Rights Form*, and his custodial interrogation commenced. (A.R. 305, 306).

The testimony of Morgantown Police Officer Meador, elicited by the State during the August 7, 2017 hearing, reveals that, prior to Detective Trejo commencing Petitioner's custodial interrogation, he deemed probable cause existed. He stated so in the affidavit supporting the application for the search warrant, which was "signed off on" by Magistrate Neighbors at approximately 1:30 a.m. on March 6, 2017. (A.R. 57-60, 342). This timing and sequence of events was confirmed by counsel for the State during argument presented to the Court on September 18, 2017. (A.R. 256-257).

Also prior to commencing Petitioner's custodial interrogation at the Morgantown Police Department, Detective Trejo "advised him that it would be better for him to tell the truth." The following questions and answers reveal clear evidence that significant promises of leniency were then made to Petitioner:

> Q. The – what – and, again, I'm not going to play it because it's going to be in the record. What specifically do you recall promising John Skidmore during this statement that you would do for his benefit as a result of him giving a voluntary statement.

A. I promised that I would advise the prosecutor that he was 100% cooperative and honest.

Q. Didn't that appear to be meaningful to him, John Skidmore?

A. I believe so. I also explained to him that I had a bunch of respect for somebody to come in and do what he did, tell the truth.

(A.R. 33). Lastly, the record cited below is replete with undisputed evidence of Petitioner's marijuana use and intoxication prior to his custodial interrogation and confession. (A.R. 126-127).

III. SUMMARY OF ARGUMENT

Petitioner asserts, in summary, that:

The Circuit Court's finding that the stop of Petitioner's vehicle on I-79 was performed in concert with law enforcement personnel vested with territorial jurisdiction is clearly erroneous and has no support or basis in the record and is contrary to the representations made by the State at the September 18, 2017 hearing;

The Circuit Court's conclusion that there was an articulable reasonable suspicion and reasonable grounds for the extraterritorial *Terry* investigative stop of Petitioner's vehicle based upon the two BOLOs and Patrolman Huyett's observations of the vehicle and its occupants is not supported by the record. Specifically, the two BOLOs, under the totality of the circumstances, lacked sufficient information to establish an objective, reasonable suspicion, justifying the investigatory stop of Petitioner's vehicle.

The State admits, in its memorandum of law filed below, that the holding in *Horn* applies but ignores the constitutional implication that the stop was investigative in nature and cannot be performed by a private citizen under the "color of office" doctrine.

The prompt presentment rule was violated in this case because of the three-hour delay following Petitioner's detention at roadside and his custodial interrogation is not excusable and was intended to facilitate the extraction of a confession from him.

The Statement of Rights Form signed by Petitioner prior to his custodial interrogation failed to advise him of his absolute right to have counsel present with him as he was being questioned by Detective Trejo as required by *Miranda.*

Lastly, Petitioner's confession, waiver of his *Miranda* rights, and his voluntary statement and subsequent confession were not voluntary because of his intoxication and the meaningful promise made to him that the investigating officer would advise the prosecutor that he was one hundred percent cooperative and honest.

IV. STANDARD OF REVIEW

The applicable standard of review regarding the denial of a motion to suppress evidence is stated in *State v. Lilly*, 194 W.Va. 595, 461 S.E.2d 101 (1995):

> By employing a two-tier standard, we first review a circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. Second, we review de novo questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action. Under the clearly erroneous standard, a circuit court's decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made.

Id. at 106.

In *State v. Lacy*, 196 W.Va. 104, 107, 468 S.E.2d 719, 722 (1996), the Court further elaborated on the standard of review in suppression determinations:

> When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly

> fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

Id., Syl. Pt. 1.

The applicable standard of review regarding the determination of whether a particular confession is voluntary is set forth in *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994):

> [W]e hold that this Court is constitutionally obligated to give plenary, independent, and de novo review to the ultimate question of whether a particular confession is voluntary and whether the trial court applied the correct legal standard in making its determination.

Id. at 56. *See also*, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975). This Court also stated that a trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence and that deference would be given to the factual findings made by the lower court relating thereto; however, the ultimate determination of voluntariness is a legal question requiring independent determination. *See also*, *Farley* at 55-56.

V. ARGUMENT

A. Petitioner was under arrest from the time he was handcuffed by Patrolman Huyett immediately after his vehicle was stopped on I-79.

Under West Virginia law, the word "arrest" has a specific defined meaning within the context of criminal and constitutional law and the protections they provide. In *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987), the Court defined "arrest" in Syl. Pt. 1 and stated as follows:

> 1. An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest.

Id.

The *Muegge* decision also stands for the proposition that all federal and state constitutional protections apply to those arrested by private citizens and police officers. A careful review of the dash cam video from Patrolman Huyett's (313) cruiser clearly shows that, at the time of the stop of Petitioner's vehicle, he was thereafter handcuffed and detained by the police officers, while they were acting outside their jurisdiction. (A. R. 331-332) Petitioner was taken into custody and transported to the Morgantown Police Department for custodial interrogation which, after three hours, resulted in the obtaining of his confession by illegal and unlawful means. Therefore, for all purposes relating to the motion to suppress, this Court should hold that Petitioner was under arrest from the time he was handcuffed by Patrolman Huyett and taken into custody through the time of his initial appearance before the Magistrate on March 6, 2017. *See*, *State v. Mays*, 172 W. Va. 486, 307 S.E.2d 655 (1983).

B. The stop of Petitioner's vehicle outside the corporate jurisdiction of the Town of Granville was illegal and constituted a violation of Petitioner's Fourth Amendment and Article 3, Section 6 rights guaranteed by the United States and West Virginia Constitutions.

In West Virginia, a law enforcement officer acting outside of his territorial jurisdiction has limitations on his power to stop, search, and arrest a person and to stop and search his vehicle. In this regard, the Court, in *State ex rel. Gutske*, 205 W.Va. 72, 516 S.E.2d 283 (1999), said, in Syl. Pt. 2:

> 2. A law enforcement officer acting outside of his or her territorial jurisdiction has the same authority to arrest as does a private citizen and may make an extra-territorial arrest in those circumstances under which a private citizen would be authorized to make an arrest.

The undisputed facts in this case developed during the evidentiary hearings held in this case reveal that both Patrolman Huyett and Sergeant Slagle were municipal police officers employed by the Town of Granville, West Virginia. Petitioner's vehicle was first observed as it passed by Patrolman Huyett's cruiser which was stationary, observing traffic on Dents Run Road. After following Petitioner's vehicle for a couple miles, Patrolman Huyett engaged his cruiser's lights and effectuated a traffic stop approximately two to two and a half miles outside the Town of Granville's corporate jurisdiction. Therefore, the rule articulated in *Gutske*, together with "under color of office" doctrine, places a significant "limitation on the power of police to conduct investigations and to gather evidence outside their jurisdiction." *Id.* at 292.

More recently, in the case of *State v. Horn*, 232 W.Va. 32, 750 S.E.2d 248 (2013), this Court reaffirmed the *Gutske* rule and held, pursuant to Syl. Pt. 14, that:

> Under the common law a private citizen is authorized to arrest another person who the private citizen believes has committed a felony.

The Court in *Horn* also held, in Syl. Pt. 15, that:

> A police officer acting beyond his or her territorial jurisdiction retains powers of a private citizen to make an arrest when a felony has been committed and the officer has reasonable grounds to believe the person arrested has committed a crime.

In the instant case, a review of the evidence presented from the testimony of Patrolman Huyett during the June 27, 2017 suppression hearing and his report (A. R. 304) establishes that it was only the second BOLO which provided the basis for the stop of Petitioner's vehicle. Implicitly, this means that Patrolman Huyett did not observe or perceive that Petitioner committed a misdemeanor traffic offense at any time which would otherwise give a basis for the development of any articulable reasonable suspicion justifying a stop of his

vehicle, in the absence of the BOLO. Nor does his testimony or any of the facts known as developed during the suppression hearings show that there is any factual or legal basis upon which Patrolman Huyett could have objectively developed, in his mind any "reasonable grounds to believe" that the operator and occupants of Petitioner's vehicle had committed a felony crime, as required by the holding in *Horn, supra.*

The State would suggest otherwise, however. In arguing against the undisputed set of facts established in the instant case, the State would argue that the BOLOs transmitted by MECCA 911 provided sufficient facts to establish the two-prong test set forth in the *Horn* decision. The first being that a felony crime had been committed and that the BOLOs provided Patrolman Huyett with reasonable grounds to believe that the operator and occupants of Petitioner's vehicle had committed the crime.

Petitioner asserts in response the instant case is factually on point with the leading BOLO/traffic stop case from the State of Georgia in *Allen v. State*, 325 Ga. App. 156, 751 S.E.2d 915 (2013), which held that, under all the facts and circumstances of the case (totality of the circumstances) there was insufficient evidence transmitted by a BOLO to support the traffic stop of the Defendant in *Allen*. In applying the same reasoning, upon almost identical facts, this Court should consider *Allen* as controlling authority in the instant case and hold that the State has failed to meet its burden under the *Horn* test. Likewise, the State has failed to meet its burden of proving that Patrolman Huyett possessed reasonable, articulable suspicion to stop Petitioner's vehicle under the holding in *State v Stuart*, 192 W.Va. 428 (1994), as well. The facts recited above support and prove this conclusion.

While the operative facts in this case are not now in dispute, the conflict in reasoning among Petitioner, the State, and the Court is palpable. First, Petitioner contends that

because the stop of his vehicle by Patrolman Huyett was obviously beyond the jurisdiction of the Town of Granville and without any aid or assistance from the Monongalia County Sheriff's office, the rule of law set forth in *Gutske* and *Horn* apply. The State and the Court take divergent views, whereby the Court concluded that the holdings of *Gutske* and *Horn* do not apply to this case but yet makes the conclusion that "reasonable grounds" exist for the extraterritorial stop by Patrolman Huyett. The State, however, argues *Horn* is controlling yet concedes that the stop of Petitioner's vehicle was investigative in nature and authorized by *Terry* and should be evaluated under the reasonable suspicion standard it requires.

Moreover, Petitioner urges a focused analysis as previously suggested during the September 18, 2017 argument that the extraterritorial stop of Petitioner's vehicle by Patrolman Huyett without aid or assistance of any law enforcement with jurisdiction authority falls under the holdings of *Gutske* and *Horn* and is limited by the "color of office" doctrine. Since the stop was concededly without probable cause and for purpose of investigation, the application of the "color of office" doctrine is required. Thus, Petitioner requests that this Court apply the reasoning in *Gutske* and *Horn* and the Texas Court of Appeals in *Garner v. State*, 779 S.W.2d 498 (TX 1989), and "hold a private citizen must have probable cause to believe a crime is being committed in order to justify an arrest or detention, and a private citizen does not have the authority to make a *Terry* stop." *Id.* at 501.

The conclusion to be reached here is self-authenticating—that Officer Huyett, with assistance of Sergeant Slagle, another Granville police officer, acting outside their territorial jurisdiction, were private citizens who effectuated a *Terry* stop in order to further investigate based upon the BOLOs transmitted by MECCA, resulting in a constitutionally infirm and illegal stop of Petitioner's vehicle. Because the record is demonstrative in establishing that all evidence

utilized by the State to charge Petitioner directly and proximately resulted from this illegal extraterritorial stop, same must be suppressed under the fruits of the poisonous tree doctrine, required by the holding in *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407 (1963).

C. Petitioner's confession obtained during his custodial interrogation at the Morgantown Police Department in violation of the prompt presentment rule must be suppressed.

Under Rule 5, *West Virginia Rules of Criminal Procedure*, and *West Virginia Code* § 62-1-5, an officer making an arrest (or detaining a person or depriving him of his liberty)[4] must, without unnecessary delay, take the person before a magistrate of the county where an arrest is made. *West Virginia Code* § 62-1-5(a)(1) reads in relevant part:

> An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence or as otherwise authorized by law, shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made.

Rule 5(a) of the *West Virginia Rules of Criminal Procedure* also states that:

> An officer making an arrest under a warrant issued under a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made.

The Court, in *State v. DeWeese*, 213 W.Va. 339, 582 S.E.2d 786 (2003), a case with near identical facts to those presented here, where the prompt presentment rule was found to have been violated, held that the prompt presentment rule was not nullified merely because the police read *Miranda* warnings to a suspect who was under arrest. As noted above, Petitioner was under arrest from the time he was handcuffed along I-79 following the stop of his vehicle through his custodial interrogation at the Morgantown Police Department.

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[4] The reasoning articulated in *State v. Mays*, 172 W. Va. 486, 307 S.E. 2d 655, (1983) and *State v. Mason*, 162 W. Va. 197, 249 S.E. 2d 793, (1978) applies to this case.

The Court in *DeWeese* said, "the sole purpose for the prompt presentment rule 'is to bring a detached judicial officer into the process once an arrest has been made to furnish meaningful protection for a defendant's constitutional rights.'" *Id.* at 345, 582 S.E.2d at 792. Officer Trejo (622) candidly admitted during his testimony during the June 27, 2017 suppression hearing that the purpose of delay in taking Petitioner and the others to the Morgantown Police Department was to obtain statements or confessions from them. (A.R. 38). *See, State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982); *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984); and *State v. Newcomb*, 223 W.Va. 843, 679 S.E.2d 675 (2009). This is a fact of considerable moment in this case and controls the application of the prompt presentment rule.

The period of delay in this case, to-wit: the time when Petitioner was handcuffed at 2243 hours on March 5, 2017, until 0139 hours the following morning is a period of three hours, during which time period, there was probable cause to arrest Petitioner. Therefore, Petitioner's confession obtained as a direct and proximate result of the violation of the prompt presentment rule set forth in West Virginia's statute and judicial rule requires the suppression of same.

D. The *Morgantown Police Department's Statement of Rights Form* fails to give the constitutionally required *Miranda* warning that an individual held for custodial interrogation must be informed that he has the right to consult with a lawyer and to have the lawyer present with him during interrogation, as required by the Fifth Amendment to the United States Constitution and as specifically stated in the seminal *Miranda* decision.

The United States Supreme Court, in 1966, stated emphatically in *Miranda v. Arizona*, 384 U.S. 436 (1966), that the Fifth Amendment privilege to be free from self-incrimination is "fundamental to our system of constitutional rule" and that an adequate "warning at the time of the interrogation is indispensable." *Id.* at 470. The Court in *Miranda* specifically held:

> Accordingly, **we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during the interrogation under the system for protecting the privilege we delineate today**. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, **this warning is an absolute prerequisite to interrogation**. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand instead. Only through such a warning is there ascertainable assurance that the accused was aware of this right. (Emphasis added.)

Id. at 471-472.

Our Supreme Court, in *State v. Guthrie*, 205 W.Va. 326, 518 S.E.2d 83 (1999), reaffirmed the rule of law set forth in the *Miranda* decision and stated, in Syl. Pt. 8:

> 8. The special safeguards outlined in *Miranda* are not required where suspect is simply taken into custody, but rather only where a suspect in custody is subject to interrogation. To the extent that language in *State v. Preece*, 181 W.Va. 633, 383 S.E.2d 815 (1989), and its progeny, may be read to hold differently such language is expressly overruled.

Id. at 330. Accordingly, the undisputed facts developed during the evidentiary hearings held on Petitioner's Motion to Suppress reveal that at the time of stopping his vehicle, Patrolman Huyett placed him in handcuffs and interrogated him at roadside, along I-79, as to whether he possessed any firearms and whether same were in his vehicle. (A.R. 331-332). Thereafter, during his custodial interrogation conducted at the Morgantown Police Department beginning at approximately 0139 hours on March 6, 2017, Petitioner confessed all relevant facts and incriminated himself and was advised he was going to be arrested. (A.R. 306-307).

Importantly, the *Statement of Rights Form,* (A.R. 305) utilized by Detective Trejo (622) fails to comply with the requirements of *Miranda* and *Guthrie, supra*, and specifically did not advise Petitioner that he had the absolute right to have an attorney present with him at the time he was being interrogated while in custody of the Morgantown Police Department.

Paragraph 3 of the *Statement of Rights Form* reads as follows:

> 3. _____ You have the right to consult an attorney before any statement or answering any questions. You **may** have him present while being questioned. (Emphasis added.)

(A.R. 305). This advisement does not clearly and unequivocally inform Petitioner that had the **right** to have an attorney present, only that he **may** do so. The *Statement of Rights Form* does not comport with the strict mandates of and give the constitutionally adequate warning demanded by the holdings in *Miranda* and *Guthrie*; therefore, Petitioner's entire confession was illegally obtained, in violation of Petitioner's Fifth Amendment and Article 3, Section 5 rights afforded him under the United States and the West Virginia Constitutions, and must be suppressed in its entirety.

E. Petitioner's waiver of his constitutional rights guaranteed by *Miranda* and subsequent confession were not voluntary.

In *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982), this Court held that the State failed to meet its burden establishing that Petitioner's confession was voluntarily made. The Court stated:

> Here, the interrogating officer's statement was explicit; if the defendant would cooperate, **the officer would give the accused a good recommendation to the probation officer**. This statement can only be viewed as calculated to foment a hope for leniency in the mind of the accused and under *Parsons* renders the confession inadmissible. (Emphasis added.)

Id. at 141.

Currently, this Court follows the guidance set forth in *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994), which states in pertinent part,

> Representations or promises made to a defendant by one in authority do not necessarily invalidate a subsequent confession. **In determining the voluntariness of a confession, the trial court**

> **must assess the totality of all the surrounding circumstances.** No one factor is determinative. To the extent that *State v. Parson*, 108 W.Va. 705, 152 S.E. 745 (1930), is inconsistent with this standard, it is overruled. (Emphasis added.)

Syl. Pt.7.

As noted above, during the June 27, 2017 hearing, Detective Trejo admitted that, prior to Petitioner making his confession, he "advised him that it would be better for him to tell the truth." He also made a significant promise to him which brings the instant case within the rule of law set forth in *Persinger*, *Farley*, and *State v. Burgess*, 174 W. Va. 784, 329 S.E.2d 856 (1985). Accordingly, the following questions and answers reveal clear evidence that significant promise of leniency and benefits were made to Petitioner if he gave a voluntary statement:

> Q. The – what – and, again, I'm not going to play it because it's going to be in the record. What specifically do you recall promising John Skidmore during this statement that you would do for his benefit as a result of him giving a voluntary statement.
> A. I promised that I would advise the prosecutor that he was 100% cooperative and honest.
>
> Q. Didn't that appear to be meaningful to him, John Skidmore?
>
> A. I believe so. I also explained to him that I had a bunch of respect for somebody to come in and do what he did, tell the truth.

(A.R. 33).

In addition, the testimony of Petitioner describing his use of marijuana prior to his traffic stop and arrest provides clear and undisputed evidence of intoxication and triggers the analysis required by the holding in *State v. Hall*, 174 W.Va. 599, 328 S.E.2d 206 (1985). Patrolman Huyett acknowledged finding marijuana in Petitioner's vehicle at the time of stopping it. (A.R. 19). Detective Trejo further admitted that he did not question Petitioner as to his use of marijuana prior to obtaining his *Miranda* waivers and obtaining of Petitioner's confession. (A.R. 110-111).

Furthermore, Petitioner testified, under oath, that he had consumed "multiple amounts of marijuana, enough to get high with." When asked if he was high at the time of the stop, Petitioner responded, "yes sir." When asked if he was high at the time that he gave his statement, Petitioner responded, "Yes." (A.R. 126-127). When asked if any police officer from the time of the stop through the conclusion of his interview had asked him if he had consumed any alcohol, drugs, or marijuana, Petitioner responded, "they did not." (A. R. 126-127). Thus, this Court should construe the undisputed testimony in favor of the Petitioner, absent any evidence to the contrary, and hold that his *Miranda* waiver and confession were not voluntary because of marijuana intoxication and the promises of leniency and benefits expressed by Detective Trejo to him. Likewise, a careful review of the circuit court's order denying Petitioner's motion to suppress reveals it did not apply the proper standard to its voluntariness determination by failing to assess the totality of all the surrounding circumstances as mandated by the holding in *Farley, supra.*

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

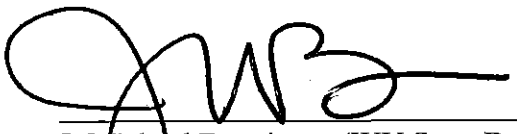
Petitioner requests that oral argument be permitted under Rule 20 because this appeal presents issues of first impression and of public importance concerning law enforcement procedures and the administration of the criminal justice system and implicates fundamental federal and state constitutional rights.

VII. CONCLUSION

Petitioner requests that this Court reverse the *Order Denying Defendant's Motion to Suppress Evidence*, entered by the circuit court on December 15, 2017, and file an opinion holding that the extraterritorial stop of Petitioner's vehicle on March 5, 2017, was in violation of his rights secured by the Fourth Amendment and Article 6 of the United States Constitution, and

Article 6, Section 3 of the West Virginia Constitution, and ruling that all evidence obtained by law enforcement subsequent thereto must be suppressed as fruits of the poisonous tree. In the alternative, should the stop of Petitioner's vehicle be declared lawful, then Petitioner requests that this Court rule that his confession be suppressed, as it was obtained in violation of his *Miranda* rights and obtained in violation of the prompt presentment rule and was involuntarily given.

Respectfully submitted this 29th day of May, 2018.



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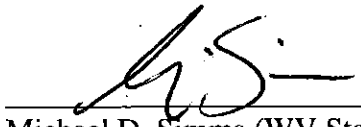

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