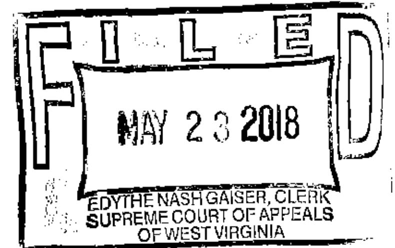
NO. 18-0161

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CHARLESTON

State of West Virginia,
Plaintiff Below, Respondent

vs. **No. 18-0161**

Nickolas Lee Velez,
Defendant Below, Petitioner

On Petition for Appeal
From the Circuit Court of
Monongalia County, West Virginia
Case No. 17-F-186

BRIEF OF PETITIONER, AND ASSIGNMENTS OF ERROR

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BRIEF OF PETITIONER, AND ASSIGNMENTS OF ERROR

I. Statement of the Case.

Defendant Below, Petitioner, Nickolas Lee Velez,[1] was indicted by the May 2017 Grand Jury in Monongalia County, West Virginia, on two (2) Counts. Petitioner was indicted jointly with Gordon W. Swiger and John Russell Skidmore. Specifically, Count One of the Indictment charged Petitioner, and his co-defendants, with Robbery in the First Degree and Count Two of the Indictment charged Petitioner, and his co-defendants, with Conspiracy.[2]

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[1] Hereinafter "Petitioner."

[2] Please see Volume I, VELEZ001-002.

After reviewing the State's initial discovery response, Petitioner believed that essentially all of the evidence which the State had gathered as part of their investigation in this matter was obtained unlawfully and should be suppressed by the Circuit Court. As such, on June 21, 2017, Petitioner filed a Motion to Suppress.[3] Thereafter, the Circuit Court conducted four (4) days of evidentiary hearings regarding Petitioner's Motion to Suppress. Specifically, the Court heard testimony, and numerous exhibits were admitted into evidence, on June 27, 2017, August 7, 2017, August 8, 2017, and August 24, 2017.[4] Additionally, on September 18, 2017, the Circuit Court heard further arguments from counsel regarding the issues presented in Petitioner's Motion to Suppress and the evidence presented during the evidentiary hearings.[5] Below is a summary of the evidence.

On March 5, 2017, at approximately 7:25 p.m., an armed robbery took place in Morgantown, Monongalia County, West Virginia. At approximately 9:32 p.m., the victim, Brett McIntyre, contacted MECCA 911 regarding the incident.[6] The incident took place at or near 221 Willey Street, where Mr. McIntyre resided, within the corporate limits of the City of Morgantown.[7] Officers from the Morgantown Police Department arrived at the scene shortly after the 911 call. The victim informed the Morgantown Police Department that a jar of

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[3] See Defendant's Motion to Suppress, Volume I, VELEZ003-005.

[4] The transcripts from said hearings are contained in Volumes II, III, and IV of the Appendix. As this Court will readily recognize from the transcripts, co-defendant Skidmore filed a similar motion to suppress and co-defendant Swiger ultimately joined in the motions to suppress filed by Petitioner and co-defendant Skidmore. As such, counsel for the State, counsel for Petitioner, and counsel for Petitioner's co-defendants all participated in the hearings held by the Circuit Court. Please note that the undersigned counsel was out of town on June 27, 2017, and, as such, J. Brandon Shumaker, Esquire, an attorney associated with the undersigned's firm, was counsel for Petitioner at said June 27th hearing. The undersigned was personally present as counsel for Petitioner at all other hearings and proceedings pertinent to this appeal.

[5] The transcript from the September 18, 2017, hearing is contained in Volume V of the Appendix.

[6] Volume I, VELEZ092 and Volume I, VELEZ057.

[7] Volume I, VELEZ091.

marijuana was taken by the suspects.[8] At approximately 9:40 p.m. MECCA 911 issued a "be on the lookout" or "BOLO" over all frequencies, which indicated that all units should be on the lookout for "suspects in a burglary, occurred 221 Willey Street...all units be on the lookout for three males, wearing masks, wearing black sweatshirts, one male armed with a rifle, involved in a burglary, 221 Willey Street, unknown direction of travel, occurred about 5 minutes ago, end of BOLO, 21:40."[9] 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.

Thereafter, officers on scene began reviewing video footage which was captured by various cameras near 221 Willey Street. During said review, Morgantown Police Officer Dean Cantis viewed video footage from the building to the west of the building where the incident occurred.[10] As a result of his review, Officer Cantis identified a vehicle which had entered the municipal parking lot adjacent to 221 Willey Street. 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 matching 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. 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 determine the possible make and model of the vehicle.[11]

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[8] Volume II, Pgs. 58-59.
[9] Volume I, VELEZ092 and Volume VI, CD4, initial BOLO.
[10] Volume III, Pgs. 12-13.
[11] Volume IV, Pgs. 14-33.

After conducting said Google search, Officer Cantis contacted MECCA 911 and indicated that "possibly a white four-door Audi" was involved in the incident.[12] Officer Cantis further indicated to MECCA that he was "unsure of the model, possibly an Audi A4."[13] MECCA 911 then sent out an updated BOLO which stated that "all units be on the lookout for possible suspect vehicle, white Audi A4 model, end of update broadcast, 22:21."[14] As such, at 10:21 p.m., on March 5, 2017, MECCA 911 had informed officers who heard the initial BOLO, and the updated BOLO, that three (3) suspects had been involved in an alleged burglary at 221 Willey Street, that they were wearing masks and black sweatshirts, that one (1) of the suspects may have been armed with a rifle, and that the suspects were traveling in a four-door white Audi, possibly an A4 model, with an unknown direction of travel.

Importantly, a review of footage from Granville Police Officer Aaron Huyett's dash-cam, which was produced after the last day of the evidentiary hearing, appears to show Officer Huyett exit his police cruiser prior to the initial BOLO.[15] This is further supported by the fact that Officer Huyett only referred to one BOLO transmission during his testimony.[16] As such, Petitioner submits that Officer Huyett likely only heard the updated BOLO, which simply identified a possible make and model of a suspect vehicle.

Ultimately, based solely on the information provided by MECCA 911, Officer Huyett stopped a white Audi A4, being operated by co-defendant John Skidmore near Mile Marker

[12] Volume VI, CD4, Morgantown Police Department radio traffic "from initial dispatch to 23:59" at 7:05 of the recording. Officer Cantis is identified as Unit 652 on said recording.
[13] Id., at 7:19.
[14] Volume VI, CD4, updated BOLO on municipality frequency.
[15] Volume VI, CDS5, 6 & 7.
[16] Volume II, Pgs. 33-34.

151.5, on Interstate 79 Southbound, at approximately 10:45 p.m.[17] Sgt. Slagle from the Granville City Police Department assisted in the stop.[18] There were four (4) individuals in the subject vehicle at that time, namely, the driver John Skidmore, and three (3) passengers; Nickolas Velez, Gordon Swiger and Anthony Jimenez.[19] It is undisputed that Interstate 79 is not within the corporate limits of the Town of Granville or within the corporate limits of the City of Morgantown. Officer Huyett further admitted that he did not even try to effectuate a stop within Granville's jurisdiction.[20] Importantly, Officer Huyett did not personally witness the subject vehicle commit any traffic violations, nor did Officer Huyett witness any crimes being committed by any of the occupants in the subject vehicle. Although officers from the Monongalia County Sheriff's Department arrive much later at the scene of the stop, as detailed below, the State explicitly conceded that at the time the subject vehicle was stopped, there were no officers from the Monongalia County Sheriff's Department present at the scene.[21] In fact, the State specified that "Officer Huyett was solely responsible for [the] stop[.]"[22]

Furthermore, the State agreed with Petitioner and characterized the stop as "extra-jurisdictional, investigative stop."[23] Never once did the State even attempt to argue that the stop was conducted by officers with jurisdiction at the scene. As such, the subject vehicle was stopped by Granville Police Officer Huyett outside of the corporate jurisdiction of the Town of Granville based solely upon information conveyed to Officer Huyett by MECCA 911 via BOLO.

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[17] Said vehicle is hereinafter, at times, referred to as the "subject vehicle."
[18] Volume II, Pg. 29, lines 5-11.
[19] Volume II, Pgs. 22-25 and 63.
[20] Volume II, Pg. 26.
[21] Volume V, Pg. 19.
[22] Volume V, Pg. 16.
[23] Volume I, VELEZ042.

Immediately after stopping the subject vehicle, Officer Huyett conducted a felony traffic stop.[24] It is undisputed that at the time of the stop of the subject vehicle, neither Officer Huyett, nor any other law enforcement officer, had an arrest warrant for any of the occupants of the vehicle.[25] Additionally, neither Officer Huyett, nor any other police officer, had a search warrant to search the subject vehicle at the scene of the stop outside of the corporate limits of the Town of Granville.[26] In fact, the State argued that at the time the subject vehicle was stopped, the officers did not have probable cause to make an arrest.[27] The State further conceded that the stop was an investigative detention along the lines of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).[28]

After the stop, Officer Huyett ordered each of the four (4) occupants in the vehicle, one (1) by one (1), to get out of the vehicle, and walk backwards towards his police cruiser. At that point, each individual was handcuffed, and placed into police cruisers.[29] Officer Huyett testified that Petitioner obeyed all of his commands at the scene of the stop, that Petitioner was calm, and that within 45 seconds to a minute, Petitioner had been placed into a police cruiser.[30] Officer Huyett confirmed that Petitioner did not say anything directly to him at the scene.[31] Officer Huyett further confirmed that once the subject vehicle was stopped, that all four (4) occupants were being detained and were not free to go.[32] Thereafter, each of the four (4) suspects was

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[24] Volume II, Pg. 15.
[25] Volume II, Pg. 32.
[26] Id.
[27] Volume V, Pgs. 21-22
[28] Volume V, Pg. 17.
[29] See Volume VI, CD4 and Volume II, Pgs. 32-35.
[30] Volume II, Pgs. 45-46.
[31] Volume II, Pg. 47.
[32] Volume II, Pgs. 37-38.

transported to the Morgantown Police Department, in separate police cruisers.[33] As such, within minutes of the stop, all four (4) occupants of the vehicle were being detained, the scene was completely secure, and no exigent circumstances existed.[34]

Ultimately, Gordon Swiger, John Skidmore, Petitioner Nickolas Velez, and Anthony Jimenez, were transported back to the Morgantown Police Department for questioning. Representatives from the Morgantown Police Department first interviewed Gordon Swiger. Mr. Swiger's interview began at 0017 hours, or 12:17 a.m. on March 6, 2017.[35] Mr. Swiger did not provide any substantive information during his interview.[36] Despite not obtaining any substantive information from Mr. Swiger, the Morgantown Police Department informed Mr. Swiger that he was being arrested at the end of his interview.[37] As such, the Morgantown Police Department very clearly believed that probable cause existed to arrest individuals they believed were involved in the incident prior to interviewing Mr. Jimenez, Mr. Skidmore or Petitioner.

The police then proceeded to interview Mr. Jimenez at 0059 hours on March 6, 2017.[38] It is undisputed that Mr. Jimenez provided no incriminating statement and that he had no information regarding the incident which had taken place on March 5, 2017. As such, Mr. Jimenez was not charged with having committed any crimes.[39]

Contemporaneously, other officers with the Morgantown Police Department were preparing a search warrant regarding the subject vehicle. Specifically, Morgantown Police

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[33]Volume II, Pgs. 38-39.
[34] Volume I, VI, CD1, 5, 6 & 7.
[35] Volume I, VELEZ126.
[36] Volume III, Pg. 64.
[37] Volume III, Pg. 65 and Volume VI, CD3.
[38] Volume II, Pg. 69, line 23.
[39] Volume II, Pgs. 63-64.

Officer Robert Meador prepared the Affidavit and Complaint for Search Warrant.[40] The suspects reported to the Morgantown Police Department at approximately 11:00 p.m. on March 5, 2017.[41] Officer Meador began preparing the search warrant documents (i.e. the Affidavit and Complaint for Search Warrant) within a few minutes of the suspects arriving at the police station.[42] Officer Meador estimated that it took twenty (20) minutes to prepare the search warrant documents.[43] Thereafter, Monongalia County Magistrate James Nabors signed the search warrant at approximately 1:30 a.m. on March 6, 2017.[44] Accordingly, as of 1:30 a.m., a Magistrate was clearly available who could arraign the suspects on the charges at issue in this case.

Despite the availability of a Magistrate, and after determining that probable cause existed to arrest Gordon Swiger almost an hour earlier, representatives of the Morgantown Police Department proceeded to interview Mr. Skidmore at 0139 hours.[45] During his interview, Mr. Skidmore confessed to committing the robbery at issue in this case and further indicated that co-Defendants Gordon Swiger and Nickolas Velez were involved in the same.[46] At the conclusion of his interview, the police informed Mr. Skidmore that he was being arrested.[47]

Finally, representatives from the Morgantown Police Department interviewed Petitioner, Nickolas Velez, at 0227 hours on March 6, 2017.[48] Importantly, Detective Trejo readily admitted that that the purpose of speaking with Petitioner was to get him to confess and admit his

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[40] Volume I, VELEZ101-103.
[41] Volume III, Pg. 40, lines 8-11.
[42] Volume III, Pg. 48, lines 12-18.
[43] Volume III, Pg. 40, lines 15-17.
[44] Volume III, Pg. 14, lines 13-22.
[45] Volume I, VELEZ098 and Volume II, Pg. 69, line 24.
[46] See Volume VI, CD8.
[47] See Volume VI, CD8.
[48] Volume I, VELEZ099 and Volume II, Pg. 69, line 24.

involvement in the robbery.[49] During Petitioner's interview, he admitted to being involved in the robbery at issue in this case. At the conclusion of Petitioner's interview, the police informed Petitioner that he was being arrested.[50]

After the conclusion of said evidentiary hearings, and presentation of the evidence outlined above, the Circuit Court permitted Petitioner, Petitioner's co-defendants, and the State, to submit additional briefings regarding Petitioner's Motion to Suppress. Petitioner filed a Memorandum in Support of Motion to Suppress on September 1, 2017.[51] In said Memorandum Petitioner presented numerous arguments. First, Petitioner argued that Granville Police unlawfully stopped the subject vehicle outside of the corporate jurisdiction of the Town of Granville.[52] Second, Petitioner argued that Granville Police did not have reasonable suspicion to stop the subject vehicle.[53] Third, Petitioner argued that his statement to the Morgantown Police Department on March 6, 2017, must be suppressed because a) Petitioner's rights under the prompt presentment rule were violated; b) Petitioner was incapable of waiving his constitutional rights due to intoxication[54]; and c) the Waiver of Rights Form utilized by the Morgantown Police Department is unconstitutional.[55]

Thereafter, the State filed a "Response in Opposition to the Defendants' Various Motions to Suppress" on September 10, 2017.[56] Importantly, the State's Response, once again, makes

[49] Volume II, Pgs. 115-117.
[50] See Volume VI, CD2.
[51] See Volume I, VELEZ009-033.
[52] Volume I, VELEZ018-023
[53] Volume I, VELEZ024-026.
[54] Petitioner has since abandoned this argument. As such, Petitioner is not asserting, in this appeal, that he was incapable of waiving his constitutional rights due to intoxication.
[55] Volume I, VELEZ026-032.
[56] See Volume I, VELEZ034-046. As this Court will readily recognize, the State filed one (1) response which addressed the issues presented in Petitioner's Motion to Suppress, and Petitioner's subsequent memorandum, and

clear that Officer Huyett conducted the initial stop and that Sgt. Slagle, also of the Granville police department, was the only other officer present when Officer Huyett ordered the suspects out of the subject vehicle.[57] In fact, the State's response readily concedes that the stop at issue was an "extra-jurisdictional, investigative stop."[58] At no point in the State's Response does the State even attempt to argue that the stop was conducted by officers from the Monongalia County Sheriff's Department, or any other officers, with jurisdiction over the scene where the stop occurred.[59] Subsequently, Petitioner filed a Reply to the State's Response to Defendants' Various Motions to Suppress on September 13, 2017.[60]

On September 18, 2017, after all briefing regarding Petitioner's Motion to Suppress had been completed, the Circuit Court heard argument from counsel for the parties. Importantly, at this hearing, the State again conceded "that at the time the vehicle was stopped no Sheriff's Department units were present."[61] The State also argued that at the time the subject vehicle was stopped, the officers did not have probable cause to make an arrest.[62] As such, the State argued that officers, acting as private citizens outside of their jurisdiction, have authority to make an investigative stop pursuant to Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Once again, at no point did the State even attempt to argue that the stop took place when jurisdictional officers were present. Petitioner submits that the reason the State did not make

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which addressed the similar motions and memorandum filed Petitioner's co-defendants.

[57] Volume I, VELEZ036-037.

[58] Volume I, VELEZ042.

[59] Importantly, the State's concession that the stop was an extra-jurisdictional, investigative stop, is directly at odds with the Circuit Court's attempt to describe the stop at a joint stop made by Granville police officers and officers from the Monongalia County Sheriff's Department. Petitioner submits that the Circuit Court has misconstrued the facts

[60] See Volume I, VELEZ047-055.

[61] Volume V, Pg. 19, lines 8-10.

[62] Volume V, Pgs. 21-22

such an argument is because any logical interpretation of the facts leads the same conclusion: the subject vehicle was stopped by an officer, acting as a private citizen outside of his jurisdiction, without probable cause, to conduct an investigation.

On or about September 25, 2017, in proceedings which, unfortunately, do not appear to have been a part of the official record in this matter, the Circuit Court informed the parties that Petitioner's Motion to Suppress, and the similar motions filed by Petitioner's co-defendants were being denied in their entirety. As a result of the Circuit Court informing Petitioner that his Motion to Suppress was being denied, Petitioner reached a Conditional Plea Agreement with the State. Specifically, on September 26, 2017, the Circuit Court accepted a proposed "Conditional Plea Agreement" which was entered into by the State and Petitioner. Pursuant to the terms of the Conditional Plea Agreement, Petitioner entered a conditional guilty plea to the felony offense of Burglary, a lesser-related offense as to that charged in Count One of the Indictment, and to the felony offense of Conspiracy, as charged in Count Two of the Indictment.[63] The Plea Order specifically provides that the plea entered into by Petitioner was "conditional" in nature, pursuant to West Virginia Criminal Procedure Rule 11(a)(2), and that Petitioner reserved the right to seek appellate review of the Circuit Court's "forthcoming Order Denying the Defendant's 'Motion to Suppress[.]'"[64]

Thereafter, almost three (3) months later, on December 15, 2017, the Circuit Court finally entered an Order Denying Defendant's Motion to Suppress Evidence.[65] In the Order, the Circuit

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[63] See Plea Order, Volume I, VELEZ073-077.
[64] Volume I, VELEZ075.
[65] Volume I, VELEZ056-072. At times, the Circuit Court's Order Denying Defendant's Motion to Suppress Evidence is referred to herein simply as the "Order."

Court found that the stop of the subject "vehicle outside of the jurisdiction of the Town of Granville was not illegal."[66] This incorrect finding was, in large part, based upon the Circuit Court's erroneous conclusion that the investigatory stop was performed in presence of Monongalia County Sheriff deputies,[67] despite the fact that the State readily conceded, on multiple occasions, that no Monongalia County Sheriff deputies were present when the subject vehicle was stopped, and the State itself characterized the stop as a "extra-jurisdictional, investigative stop." The Circuit Court also found that Petitioner did not have standing the challenge the validity of the search of the subject vehicle, despite the fact that Petitioner was not arguing that the search, in and of itself, was unlawful.[68] The Circuit Court further found that Petitioner's statement to the Morgantown Police Department was admissible. More specifically, the Circuit Court found that the Statement of Rights form utilized by the Morgantown Police Department was valid, that Petitioner was not intoxicated to the point that his statement was involuntary, and that Petitioner's rights under the prompt presentment rule were not violated.[69]

Thereafter, on January 22, 2018, the Circuit Court held a Sentencing Hearing. At said hearing, and as set forth in the Sentencing Order which was entered on January 23, 2018, the Circuit Court ultimately sentenced Petitioner to one (1) to fifteen (15) years in the West Virginia State Penitentiary for the felony offense of Burglary, and to one (1) to five (5) years in the West Virginia State Penitentiary for the felony offense of Conspiracy, to be served consecutively.[70] The Circuit Court further Ordered that Petitioner's underlying sentence be suspended, and that he

[66] Volume I, VELEZ063.
[67] Volume I, VELEZ064.
[68] Volume I, VELEZ065-066.
[69] Volume I, VELEZ066-071.
[70] Volume I, VELEZ079.

be committed to the custody of the Commissioner of the Division of Corrections for placement at the Anthony Correctional Center for Youthful Offenders, pursuant to W. Va. Code § 25-4-6. As such, as of the date of the filing of this Brief, Petitioner is a resident of the Anthony Correctional Center.

Petitioner submits that the Circuit Court erred in denying his Motion to Suppress. As set forth below, Petitioner submits that the Circuit Court erred in finding that the stop of the subject vehicle outside of the jurisdiction of the Town of Granville was legal. Petitioner further submits that the Circuit Court erred in finding that Petitioner's statement to the Morgantown Police Department was admissible. Accordingly, Petitioner filed this appeal with this Court as he believes the Circuit Court's Order Denying Defendant's Motion to Suppress Evidence constitutes reversible error which should be overturned by this Court.

II. Summary of Argument.

Petitioner contends that the Circuit Court's Order Denying Defendant's Motion to Suppress contains numerous incorrect factual and legal findings which must be overturned by this Court.

First, Petitioner contends that the Circuit Court erred in finding that the subject vehicle was stopped in the presence of jurisdictional officers from the Monongalia County Sheriff's Department. Petitioner submits that the record is clear that the subject vehicle was stopped solely by Officer Huyett from the Town of Granville acting outside of his jurisdiction. Petitioner further submits that the State, on multiple occasions, admitted that the subject vehicle was stopped solely by Officer Huyett that the State readily admitted that the stop at issue was an "extra-jurisdictional, investigative stop." In fact, the State never, in any prior hearings, responses,

supplemental briefs, or other filings in this matter, ever even so much as attempted to argue that the subject vehicle was stopped in the presence of jurisdictional officers. Petitioner further submits that the Circuit Court's erroneous finding that jurisdictional officers were present when the subject vehicle was stopped lead to the Circuit Court's incorrect ruling that this Court's prior holdings in State ex rel. State v. Gustke, 205 W. Va. 72, 516 S.E.2d 283 (1999) and State v. Horn, 232 W. Va. 32, 750 S.E.2d 248, 252–53 (2013) were inapplicable to the facts of this case. As such, Petitioner contends that the Circuit Court's finding that the subject vehicle was stopped in the presence of jurisdictional officers from the Monongalia County Sheriff's Department was made without any basis whatsoever and constitutes error.

Petitioner further contends that Granville Police unlawfully stopped the subject vehicle outside of the corporate limits of the Town of Granville on March 5, 2017. As set forth below, a law enforcement officer acting outside of his territorial jurisdiction may make an arrest under the same circumstances in which a private citizen would be authorized to make an arrest. However, pursuant to the "under color of office" doctrine a law enforcement officer cannot use his official position to gather evidence that a private citizen would be unable to gather.[71] Petitioner submits that Granville Police Officer Huyett could not have objectively developed any reasonable grounds to believe that the occupants of the subject vehicle had committed a felony. Officer Huyett did not witness the suspects commit any violations of West Virginia law. Furthermore, Officer Huyett was completely unaware of the underlying facts, and he did not possess facts which would permit an ordinary citizen to stop the subject vehicle. Ultimately, the

[71] See State ex rel. State v. Gustke, 205 W. Va. 72, 74, 516 S.E.2d 283, 285 (1999) and State v. Horn, 232 W. Va. 32, 750 S.E.2d 248, 252–53 (2013), which are cited and explained below.

subject vehicle was stopped out of the corporate limits of the Town of Granville based solely upon limited information provided by MECCA 911. Moreover, the stop of the subject vehicle was clearly conducted so that the police could gather information, in direct violation of the "under color of office" doctrine. Accordingly, as set forth herein, the stop of the subject vehicle was unlawful and any "fruits" of the unlawful stop must be suppressed as "fruits" of the unlawful stop and assertion of authority.

Petitioner further contends that Granville Police did not have an articulable reasonable suspicion to stop the subject vehicle on March 5, 2017. Specifically, Petitioner contends that Officer Huyett did not possess an articulable reasonable suspicion that the vehicle was subject to seizure or a person in the vehicle had committed, was committing, or was about to commit a crime. Prior to the stop, the police could not identify the suspects or the specific vehicle involved in the alleged crime. Furthermore, Officer Huyett did not witness the suspects commit any violations of West Virginia law which would have given him reason to stop the subject vehicle and he was, by his own admission, completely unaware of the underlying facts. As such, the stop was based solely upon limited information Officer Huyett received from MECCA 911 via a BOLO. Ultimately, Officer Huyett stopped the subject vehicle simply because it was a white Audi A4. Accordingly, Petitioner submits that the stop of the subject vehicle was unlawful, as Granville Police did not have an articulable reasonable suspicion to stop the subject vehicle, and, as such, that all evidence obtained as a result of said unlawful stop must be suppressed as fruits of the poisonous tree.

Alternatively, if, somehow, this Court determines that the stop of the subject vehicle on March 5, 2017, was lawful, Petitioner submits that the statement he gave to the Morgantown

Police Department must still be suppressed. More specifically, two (2) separate and distinct reasons exist which each mandate that Petitioner's statement to the Morgantown Police Department be suppressed. In this regard, Petitioner submits that his rights under the prompt presentment rule were violated and that the Waiver of Rights form utilized by the Morgantown Police Department is invalid and unconstitutional.

More specifically, at the time Petitioner was interrogated, the police, admittedly, had probable cause to arrest Petitioner, a Magistrate was available to arraign him, and the primary purpose of interrogating Petitioner was to attempt to obtain a confession. As such, the Morgantown Police Department's interrogation of Petitioner on March 6, 2017, was a violation of his rights under the prompt presentment rule contained in W.Va. Code § 62-1-5 and Rule 5(a) of the West Virginia Rules of Criminal Procedure. Second, the Waiver of Rights Form utilized by the Morgantown Police Department does not comport with the mandates of Miranda v. Arizona, 384 U.S. 436, 479 (1966) thereby rendering the Waiver of Rights Form invalid. As such, Petitioner's statement to the Morgantown Police Department be suppressed.

Accordingly, Petitioner requests that this Court overturn the Circuit Court's Order Denying Defendant's Motion to Suppress, and that this Court rule that the stop of the subject vehicle was unlawful, and that all evidence obtained as a result of said unlawful stop must be suppressed. Alternatively, if this Court determines that the stop of the subject vehicle on March 5, 2017, was lawful, Petitioner submits that the statement he gave to the Morgantown Police Department must still be suppressed as Petitioner's rights under the prompt presentment rule were violated and the Waiver of Rights form utilized by the Morgantown Police Department is invalid and unconstitutional.

III. Standard of Review.

This Court has defined the standard of review regarding the denial of a motion to suppress evidence on numerous occasions. In State v. Lilly, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995), this Court described the two-tier standard for reviewing a circuit court's denial of a motion to suppress evidence:

> 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 law5; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made.

State v. Lilly, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995)

This Court further elaborated on the applicable standard of review regarding a circuit court's denial of a motion to suppress evidence in State v. Lacy, 196 W. Va. 104, 107, 468 S.E.2d 719, 722 (1996):

> 1. 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.

Syl. Pt. 1, State v. Lacy, 196 W. Va. 104, 107, 468 S.E.2d 719, 722 (1996).

IV. Assignments of Error and Argument.

A. Petitioner Was Under "Arrest" Shortly After The Subject Vehicle Was Stopped.

First, it is important to note that Petitioner was under arrest shortly after the stop of the subject vehicle when he was handcuffed by Officer Huyett.[72] 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), this Court defined "arrest" 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.

Syl. Pt. 1, 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 review of the dash-cam video from Officer Huyett's cruiser clearly shows that, mere moments after the stop of the subject vehicle, Petitioner was handcuffed and detained by the police officers, while they were acting outside of their jurisdiction. Petitioner was taken into custody and transported to the Morgantown Police Department for custodial interrogation which resulted in the obtaining of his confession by illegal and unlawful means. Therefore, for all purposes relating to this appeal, Petitioner was under arrest from the time he was handcuffed by Officer Huyett and taken into custody through the time of his initial appearance before the Magistrate upon the arrest warrant issued in Monongalia County, West Virginia.

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[72] Volume VI, CD1, 5, 6, & 7.

B. Granville Police Unlawfully Stopped The Vehicle In Which Nickolas Lee Velez Was Traveling on March 5, 2017 Outside Of The Corporate Limits Of The Town Of Granville.

As set forth above, the facts of this case very clearly lead to one (1) conclusion: the subject vehicle was stopped by Granville Police Officer Huyett outside of the corporate limits of the Town of Granville. As noted above, the subject vehicle was stopped solely in the presence of Officer Huyett, outside of his jurisdiction. There is no evidence which even so much as suggests that jurisdictional officers were present when the subject vehicle was stopped. Furthermore, the State admitted that the subject stop at issue was an "extra-jurisdictional, investigative stop." [73] As such, contrary to the Circuit Court's finding, the stop at issue was most certainly an extra-jurisdictional stop conducted by Granville police officers outside of the corporate limits of the town of Granville and this Court's prior holdings in State ex rel. State v. Gustke, 205 W. Va. 72, 74, 516 S.E.2d 283, 285 (1999) and State v. Horn, 232 W. Va. 32, 750 S.E.2d 248, 252–53 (2013) are very clearly applicable to this case.[74]

Furthermore, this Court's holdings in Gustke and Horn are still applicable to this case even though officers from the Monongalia County Sheriff's Department arrived at the scene after the subject vehicle was stopped. If a vehicle is stopped unlawfully by officers acting as private citizens outside of their jurisdiction, the unlawful stop does not somehow become lawful if jurisdictional officers arrive at the scene at a later time, after the vehicle was stopped. As discussed below, a private citizen has the authority to conduct a citizen's arrest, under limited

[73] Volume I, VELEZ042.

[74] See Volume I, VELEZ065, wherein the Circuit Court rules that "[t]he holdings in Gustke and Horn are not applicable to under the set of facts in this case.

circumstances set forth in Gustke and Horn. However, a private citizen cannot detain people and investigate a potential crime. It is undisputed that all pertinent acts related to the stop were performed by Granville police officers acting as private citizens outside of their jurisdiction. If the initial stop performed by officers acting outside of their jurisdiction is unlawful, then the fact that jurisdictional officers arrived at the scene after the stop took place would not negate the unlawfulness of the initial stop. Therefore, this Court's holdings in Gustke and Horn are very clearly applicable to this case.

This Court has outlined the limited circumstances when a law enforcement officer acting outside of his territorial jurisdiction may make an extraterritorial arrest:

> 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 extraterritorial arrest under those circumstances in which a private citizen would be authorized to make an arrest.
>
> 3. Under the common law, a private citizen is authorized to arrest another who commits a misdemeanor in his or her presence when that misdemeanor constitutes a breach of the peace.

Syl. Pts. 2-3, Gustke, 205 W. Va. 72, 74, 516 S.E.2d 283, 285.

Importantly, the officer in Gustke actually observed the suspect operate his vehicle in an erratic manner. Therefore, the officer in Gustke had reason to believe that the suspect was driving under the influence of alcohol or controlled substances based upon his own personal observations. Id. 205 W. Va. 72, 80, 516 S.E.2d 283, 291. As such, Gustke is clearly distinguishable from the facts of this case, as Officer Huyett did not personally witness any of the suspects commit any alleged violations of the law, including traffic violations, prior to stopping the subject vehicle. Therefore, the Circuit Court's finding that the officers in this case

had as strong a factual basis to act as the officers did in Gustke is completely incorrect.[75]

Additionally, the Gustke Court explained how the "under color of office" doctrine prevents a law enforcement officer from using his official position to gather evidence that a private citizen would be unable to gather. Specifically, the Gustke Court explained:

> The "under color of office" doctrine prohibits a law enforcement officer from using the indicia of his or her official position *to collect evidence that a private citizen would be unable gather.* This doctrine was discussed at length in *State v. Phoenix,* 428 So.2d 262 (Fla.Dist.Ct.App.1982), one of the cases cited by Mr. Braverman. The *Phoenix* court explained that this
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> doctrine is more accurately understood if it is viewed as a limitation on the power of police to conduct investigations and to gather evidence outside their jurisdiction.
>
> Pursuant to the "under color of office" doctrine, police officers acting outside their jurisdiction but not in fresh pursuit may not utilize *the power of their office* to gather evidence or ferret out criminal activity not otherwise observable.... The purpose of this doctrine is to prevent officers from improperly asserting official authority to gather evidence not otherwise obtainable. Thus, when officers unlawfully assert official authority, either expressly or implicitly, in order to gain access to evidence, that evidence must be suppressed....
>
> An arrest based on evidence obtained by the unlawful assertion of official authority is likewise illegal; and any "fruits" of that arrest must be suppressed as "fruits" of the unlawful assertion of authority. Because of this result, the language of the case law indicates that the "under color of office" doctrine limits the power to arrest. But this doctrine does not prevent officers from making an otherwise valid citizen's arrest just because they happen to be in uniform or otherwise clothed with the indicia of their position when making the arrest. When officers outside their jurisdiction have sufficient grounds to make a valid citizen's arrest, the law should not require them to discard the indicia of their position before chasing and arresting a fleeing felon. Any suggestion that officers could not make a valid citizen's arrest merely because they happened to be in uniform or happened to be in a police car at the time they inadvertently witnessed a felony outside their jurisdiction would be ridiculous.
> 428 So.2d at 266 (citations omitted) (footnote omitted).

State ex rel. State v. Gustke, 205 W. Va. 72, 81–82, 516 S.E.2d 283, 292–93 (1999).[76]

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[75] Volume I, VELEZ065.

[76] Gustke makes clear that any fruits from an unlawful citizen's arrest or investigation must be suppressed. Petitioner argues that the stop of the subject vehicle by Officer Huyett acting as a private citizen outside of his

After Gustke, this Court extended the right to make a citizen's arrest with regards to felonies in 2013 in State v. Horn, 232 W. Va. 32, 750 S.E.2d 248, 252–53. Specifically, the Horn Court held:

> 15. A police officer acting beyond his or her territorial jurisdiction retains power as 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 the crime.

Syl. Pt. 15, State v. Horn, 232 W. Va. 32, 750 S.E.2d 248, 253.

Importantly, Petitioner submits that, despite the language in Horn, probable cause is required to make a citizen's arrest. This Court has long held that an officer must have probable cause to make a warrantless arrest. See e.g. Syl. Pt. 1, State v. Plantz, (155) W.Va. (24) (180 S.E.2d 614); Syl. Pt. 3, State v. Duvernoy, 156 W.Va. 578, 195 S.E.2d 631 (1973); Syl. Pt. 7, State v. Craft, 165 W. Va. 741, 742, 272 S.E.2d 46, 48 (1980). While this Court has not specifically ruled upon the issue, common sense dictates that the same standard would apply to an ordinary citizen making a citizen's arrest, and to a police officer, acting as a private citizen and making an arrest outside of his jurisdiction. To hold otherwise would permit citizens, and police officers acting as private citizens outside of their jurisdiction, to make warrantless arrests which would be unlawful had they been made by police officers acting within their jurisdiction.

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jurisdiction, was unlawful. Petitioner asserts that because he was unlawfully stopped and detained, that all evidence which was gathered as a result of said unlawful stop and detention must be suppressed as fruit of the poisonous tree. Petitioner's argument does not stem from the legality of the subsequent search of the subject vehicle, in and of itself. As such, the Circuit Court's finding that Petitioner does not have standing to challenge the subsequent search of the subject vehicle is immaterial. Volume I, VELEZ065-066. More specifically, the Circuit Court's finding that Petitioner "lacked standing" to challenge the validity of the search of the subject vehicle has no bearing on Petitioner's argument that all evidence which was gathered as a result of said unlawful detention must be suppressed as fruit of the poisonous tree. In other words, even assuming Petitioner does not have standing to challenge the legality of the subsequent search of the subject vehicle, in and of itself, all evidence gathered by the police, including the evidence gathered as a result of the search of the vehicle which took place hours after the unlawful stop, detention and arrest, must still be suppressed as fruits from the unlawful stop, detention and arrest.

As such, a citizen, or a police officer acting as a private citizen outside of his jurisdiction, can only make a "citizen's arrest" when probable cause exists.

Next, the Circuit Court's finding that the officers in this case had as strong a factual basis to act as the officers did in Horn is completely incorrect.[77] Even a cursory review of Horn makes clear that the circumstances present in Horn are vastly different from the circumstances present in this case. In Horn, the West Virginia police were investigating a murder which took place in McDowell County, West Virginia. During their investigation, officers learned that Mr. Horn had been with the decedent earlier that evening, so officers went to question Mr. Horn at a nearby house. Id., 232 W. Va. 32, 37–38, 750 S.E.2d 248, 253–54. The West Virginia officers saw that Mr. Horn had dried blood in his ear and blood on his waistband and on his boots. Additionally, officers observed blood on the steering wheel of Mr. Horn's vehicle. Id. Importantly, when Mr. Horn was asked about the blood in his ear, he immediately attempted to wipe it away. Mr. Horn was also scuffing the top of his boots with the heel of the opposite foot, leading the officers to believe he was trying to destroy the evidence of blood on the boots. The West Virginia officers handcuffed Mr. Horn and placed him in the police cruiser. Id. The West Virginia officers mistakenly believed that they were in the State of West Virginia during the time they interacted with Mr. Horn, when, in fact, they were in the State of Virginia. Id. The circuit court ultimately did not suppress the evidence from Mr. Horn's arrest, "theorizing that the officers had a good faith belief that they were located within the State of West Virginia, and, upon learning differently, the lower court reasoned that the officers executed a citizen's arrest to prevent the destruction of evidence until the Virginia authorities arrived and arrested Mr. Horn." Id. 232 W.

[77] Volume I, VELEZ065.

Va. 32, 45, 750 S.E.2d 248, 261. This Court ultimately upheld the circuit court's ruling. Id.

In this case, unlike in Horn, there is absolutely no question that Granville Police Officers Huyett and Slagle knew that the subject vehicle was stopped outside of the corporate limits of the town of Granville. Furthermore, there is nothing in the record which even so much as suggests that the suspects were attempting to destroy evidence. Similarly, there is nothing in the record which could lead to a conclusion that exigent circumstances existed at the time of the stop. Finally, and perhaps most importantly, the record is clear and Officer Huyett could not have objectively developed any reasonable grounds to believe that the occupants of the subject vehicle had committed a felony, as required by this Court's holding in Horn.

Officer Huyett admittedly did not witness the suspects commit any violations of West Virginia law which would have given him reason to stop the subject vehicle, and he stopped the subject vehicle out of his jurisdiction based solely upon the limited information provided to him by MECCA 911. A review of Officer Huyett's dash-cam footage makes clear that he was completely unaware of the underlying facts, and that he did not possess facts which would permit an ordinary citizen to stop the subject vehicle. For example, approximately ten (10) minutes after stopping the subject vehicle, Officer Huyett even asks another officer "So what's the deal with them?"[78] Furthermore, Officer Huyett can be heard telling one of the suspects over ten (10) minutes after the stop that "It's not my stop man, whatever y'all did you did in Morgantown, it's their stop."[79] Additionally, almost twenty (20) minutes after the stop, Officer Huyett tells one of the suspects "Ain't my show man, it's whatever the hell y'all did in Morgantown."[80] As such, it

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[78] Volume VI, CD1, at 13:30.
[79] Volume VI, CD1, at 15:20.
[80] Volume VI, CD1, at 22:40.

is clear that Officer Huyett stopped the subject vehicle without even the slightest understanding of the underlying factual circumstances. No citizen armed with the limited information possessed by Officer Huyett at the time of the stop would have been permitted to make a citizen's arrest. Accordingly, the limited, specific, holding in Horn is inapplicable to the facts of this case.

Moreover, the stop of the subject vehicle was clearly conducted so that the police could gather information. As noted previously, the "under color of office" doctrine prohibits a law enforcement officer from using the indicia of his or her official position to collect evidence that a private citizen would be unable gather. Officer Huyett activated his overhead lights and stopped the subject vehicle so that the police could investigate this matter and collect evidence. No private citizen could stop a vehicle in this manner or for that purpose.

Accordingly, the stop of the subject vehicle was unlawful. To hold otherwise would mean that a municipal police officer's jurisdiction is unlimited, thereby rendering corporate limits, and police jurisdiction, completely meaningless. As set forth above, "all evidence obtained by the unlawful assertion of official authority is likewise illegal; and any 'fruits' of that arrest must be suppressed as 'fruits' of the unlawful assertion of authority." State ex rel. State v. Gustke, 205 W. Va. 72, 82, 516 S.E.2d 283, 293. As such, all evidence obtained as a result of, and/or after, the unlawful stop of the subject vehicle took place, must be suppressed.

C. Granville Police Did Not Have Reasonable Suspicion To Stop The Subject Vehicle.

It is black letter law that police officers must have an articulable reasonable suspicion before stopping a vehicle to investigate. Specifically, this Court has held:

> 1. Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime. To the extent *State v. Meadows,* 170 W.Va.

> 191, 292 S.E.2d 50 (1982), holds otherwise, it is overruled.
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> 2. When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police.

Syl. Pts. 1-2, State v. Stuart, 192 W. Va. 428, 429, 452 S.E.2d 886, 887 (1994).

This Court has not specifically addressed the facts and circumstances present in this case, however, the Court of Appeals in Georgia addressed an extremely similar set of circumstances in Allen v. State, 325 Ga. App. 156, 751 S.E.2d 915 (2013). In Allen, the officer who stopped the vehicle testified that he

> was given a lookout from a previous case, and basically the BOLO was a silver or dark colored Dodge Charger, and in a certain area of Flat Shoals in unincorporated Fulton County. And while on patrol, [he] noticed the vehicle matching that description, and [he] followed it and attempted to pull it over, and it pulled into a parking lot for a business there, and [he] conducted [his] traffic stop there.

Allen v. State, 325 Ga. App. 156, 157, 751 S.E.2d 915, 916 (2013).

In Allen, as in this case, the "only specific piece of information was the make and model of the car[.]" Id. "The other information was so general as to be essentially useless." Id. Importantly, as in this case, "[t]he only facts known about the occupants were their race and gender; not even the number of occupants was known. No particular street or direction of travel was communicated, and the vehicle was said to have been associated with a crime" that occurred much earlier than the stop. Id. As such, the Allen Court ultimately held that "[u]nder these circumstances, the BOLO was too generalized to justify the stop." Id. The facts of this case mandate the same ruling.

In this matter, Officer Huyett did not possess an articulable reasonable suspicion that the vehicle was subject to seizure or a person in the vehicle had committed, was committing, or

was about to commit a crime. Prior to the stop, the police could not identify the suspects or the specific vehicle involved in the alleged crime.[81] Officer Huyett stopped the subject vehicle based solely upon limited information he received from MECCA 911 via a BOLO.

Furthermore, Officer Huyett was, by his own admission, completely unaware of the underlying facts. For example, approximately ten (10) minutes after stopping the subject vehicle, Officer Huyett even asks another officer "So what's the deal with them?"[82] Furthermore, Officer Huyett can be heard telling one of the suspects over ten minutes after the stop that "It's not my stop man, whatever y'all did you did in Morgantown, it's their stop."[83] Additionally, almost twenty (20) minutes after the stop, Officer Huyett tells one of the suspects "Ain't my show man, it's whatever the hell y'all did in Morgantown."[84] As such, it is clear that Officer Huyett stopped the subject vehicle without even the slightest understanding of the underlying factual circumstances.

Officer Huyett admittedly did not witness the suspects commit any violations of West Virginia law which would have given him reason to stop the subject vehicle. Ultimately, Officer Huyett stopped the subject vehicle simply because it was a white Audi A4.[85] As set forth in Allen, this limited information does not amount to an articulable reasonable suspicion to stop the subject vehicle. To find that Officer Huyett had an articulable reasonable suspicion to stop the subject vehicle would be tantamount to finding that Officer Huyett could, based on the limited

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[81] Volume IV, Pgs. 32-33. Importantly, Officer Cantis readily admitted he was unable to identify the license plate number or State of registration from the video footage regarding the alleged crime. In fact, as noted above, all he was able to discern was that the vehicle was "possibly an Audi A4."
[82] Volume VI, CD1, at 13:30.
[83] Volume VI, CD1, at 15:20.
[84] Volume VI, CD1, at 22:40.
[85] Volume II, Pgs. 33-34.

information he possessed at the time, stop all four-door white Audi sedans which he encountered on March 5, 2017. Clearly, such is not the law in this State.

Accordingly, Officer Huyett's stop of the subject vehicle was unlawful and all evidence obtained as a result of said unlawful stop must be suppressed as fruits of the poisonous tree. *See, e.g.* State v. DeWeese, 213 W. Va. 339, 582 S.E.2d 786 (2003), State v. Newcomb, 223 W. Va. 843, 679 S.E.2d 675 (2009) and Miller v. Chenoweth, 229 W. Va. 114, 117, 727 S.E.2d 658, 661 (2012).

D. Petitioner's Statement to the Morgantown Police Department On March 6, 2017 Must Be Suppressed.

As set forth above, Petitioner was interrogated by the Morgantown Police Department on March 6, 2017. It is black letter law that the State must prove that confessions or statements of an accused were voluntary before any such confessions or statements may be admitted into evidence in a criminal case. Syl. Pt. 5, State v. Starr, 158 W.Va. 905, 216 S.E.2d 242 (1975). In the event that the Court determines that the stop of the subject vehicle on March 5, 2017, was somehow lawful, Petitioner submits that the statement he gave to the Morgantown Police Department must still be suppressed. More specifically, two (2) separate and distinct reasons exist which each mandate that Petitioner's statement to the Morgantown Police Department be suppressed.

First, at the time Petitioner was interrogated, the police, admittedly, had probable cause to arrest Petitioner, a Magistrate was available to arraign him, and the officer conducting the interrogation readily admitted that the primary purpose of interrogating Petitioner was to attempt to obtain a confession. As such, the Morgantown Police Department's interrogation of Petitioner on March 6, 2017, was a violation of his rights under the prompt presentment rule contained in

W. Va. Code § 62-1-5 and Rule 5(a) of the West Virginia Rules of Criminal Procedure. Second, the Waiver of Rights Form utilized by the Morgantown Police Department does not comport with the mandates of Miranda v. Arizona, 384 U.S. 436, 479 (1966) thereby rendering the Waiver of Rights Form invalid. Accordingly, Petitioner's statement to the Morgantown Police Department be suppressed.

1. Petitioner's Rights under the Prompt Presentment Rule Were Violated.

For decades, this Court has held that "[t]he provision of W. Va. Code § 62-1-5 (1965) stating that '(a)n officer making an arrest upon a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence, shall take the arrested person without unnecessary delay before a justice of the county in which the arrest is made,' is hereafter mandatory." Syl. Pt. 1, State v. Mason, 162 W. Va. 297, 297, 249 S.E.2d 793, 794 (1978). Said provision, along with Rule 5(a) of the West Virginia Rules of Criminal Procedure, constitute West Virginia's prompt presentment rule. This Court has specifically stated when the prompt presentment rule is triggered:

> Our prompt presentment rule contained in W. Va. Code § 62–1–5, and Rule 5(a) of the West Virginia Rules of Criminal Procedure, is triggered when an accused is placed under arrest. Furthermore, once a defendant is in police custody with sufficient probable cause to warrant an arrest, the prompt presentment rule is also triggered.

Syl. Pt. 2, State v. Humphrey, 177 W. Va. 264, 265, 351 S.E.2d 613, 614 (1986)

This Court has further held that "[t]he delay in taking the defendant to a magistrate may be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant." Syl. Pt. 6, State v. Persinger, 169 W. Va. 121, 122, 286 S.E.2d 261, 263 (1982). This Court has further stated that "[o]ur state prompt presentment rule has been interpreted to proscribe delays in presentment, the sole purpose of which is

to obtain a confession[.]" State v. Guthrie, 173 W. Va. 290, 293, 315 S.E.2d 397, 401 (1984). "The rationale that justifies refusing to admit a confession under circumstances where a defendant was questioned by police officers at the police station rather than taken to a neutral magistrate for an explanation of his rights, the charges against him, and mechanisms for acquiring bail, is that a confession elicited under those circumstances is inherently unreliable or suspect." Id. Ultimately, "[w]hen a statement is obtained from an accused in violation of the prompt presentment rule, neither the statement nor matters learned directly from the statement may be introduced against the accused at trial." Syl. Pt. 1, State v. DeWeese, 213 W. Va. 339, 341, 582 S.E.2d 786, 788 (2003)

As stated above, the police ultimately interviewed all four (4) of the occupants in the subject vehicle. First, the police began interviewing Mr. Swiger at 0017 hours, or 12:17 a.m. on March 6, 2017.[86] Despite not obtaining any substantive information from Mr. Swiger, the Morgantown Police Department informed Mr. Swiger that he was being arrested at the end of his interview.[87] As such, the Morgantown Police Department very clearly believed that probable cause existed to arrest individuals they believed were involved in the robbery prior to interviewing Mr. Jimenez, Mr. Skidmore, or Petitioner.

As stated above, Monongalia County Magistrate James Nabors signed the search warrant, authorizing the police to search the subject vehicle at approximately 1:30 a.m. on March 6, 2017.[88] The Circuit Court attempts to circumvent Petitioner's rights under the prompt presentment rule by noting that Magistrate Nabors met with officers in the Cheat Lake area, as

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[86] Volume I, VELEZ126.
[87] Volume III, Pg. 65 and the video statement of Gordon Swiger, Volume VI, CD3.
[88] Volume III, Pg. 14.

opposed to the Monongalia County Justice Center.[89] The Circuit Court further makes the blanket finding, which was not supported in any way by the testimony or evidence presented, that "[n]ormal police/judicial procedure was followed in this case in processing Defendant Velez. Magistrates are not called during off hours to come to the Magistrate Court to do arraignments or issue arrest warrants."[90] The Circuit Court's finding in this regard is incorrect for multiple reasons.

First, as evidenced by the Circuit Court's failure to cite to any portion of the underlying record, absolutely no evidence was presented regarding the "normal police procedure" regarding arraignment. Contrary to the Circuit Court's baseless finding, the undersigned is personally aware of numerous occasions in which a Magistrate in Monongalia County has arraigned a defendant at the Monongalia County Justice Center on nights and weekends outside of normal business hours. Unfortunately, the underlying record was not developed in this regard as the State never even attempted to argue that the fact that Magistrate Nabors met police at Cheat Lake meant that he was "unavailable" to arraign Petitioner at the Monongalia County Justice Center. Instead, almost four (4) months after the last day of evidentiary hearings in this matter, the Circuit Court unilaterally found that Magistrate Nabors was "unavailable" to arraign Petitioner despite the fact that no evidence is in the record which supports such a finding.

Second, and perhaps more importantly, the Circuit Court's finding means that police can avoid presenting an accused person promptly to a Magistrate, even if the Magistrate is available to meet with police and sign a search warrant at the exact same instant, by simply meeting that

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[89] Volume I, Pg. 70.
[90] Id.

Magistrate outside of the physical confines of the courthouse. The Circuit Court's ruling means that a Magistrate is available to the police at all hours of the day, to aid the police in investigating a suspect, but a criminal suspect only has prompt presentment rights, and the right to be presented to a Magistrate, during normal business hours. This cannot be the law in the State of West Virginia. As such, contrary to the Circuit Court's ruling, as of 1:30 a.m., a Magistrate was clearly available who could arraign Petitioner on the charges at issue in this case.

Despite the availability of a Magistrate, and after determining that probable cause existed to arrest Gordon Swiger almost an hour earlier, representatives of the Morgantown Police Department proceeded to interview Mr. Skidmore at 0139 hours on March 6, 2017.[91] During his interview Mr. Skidmore confessed to committing the robbery at issue in this case and further indicated that co-Defendants Gordon Swiger and Nickolas Velez were involved in the same.[92] At the conclusion of his interview, the police informed Mr. Skidmore that he was being arrested.[93]

Accordingly, prior to interviewing Petitioner at 0227 hours on March 6, 2017, the police had already determined that probable cause existed to arrest both Mr. Swiger and Mr. Skidmore, and the police had already obtained a statement, implicating Petitioner, from Mr. Skidmore. In fact, Detective Trejo admitted that that the purpose of speaking with Petitioner was to get him to confess and admit his involvement in the alleged robbery.[94] It is important to note that the police's purpose need not be to "coerce" a confession. In other words, the police do not have a "coerce" a confession to constitute a violation of the prompt presentment rule. All that is

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[91] Volume I, VELEZ098 and Volume II, Pg. 69, line 24.
[92] Volume VI, CD8.
[93] Volume VI, CD8.
[94] Volume II, Pgs. 115-117.

necessary is that the purpose of the delay in presentment of Petitioner to a magistrate was to obtain a confession.

As such, and contrary to the Circuit Court's findings, the objective of the interrogation of Petitioner was most certainly to attempt to obtain a confession. Therefore, probable cause existed to arrest Petitioner, and a Magistrate was available to arraign Petitioner on the charges at issue in this case, before the police even stepped in to the interview room with Petitioner. Accordingly, given all the above, it is clear that Petitioner's rights under the prompt presentment rule were violated and that the only remedy for such violation is to suppress the statement which Petitioner gave to the Morgantown Police Department on March 6, 2017.

2. The Waiver Of Rights Form Utilized By The Morgantown Police Department Is Invalid And Unconstitutional.

This Court has made clear that the United States Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436, 479 (1966), which is derived from one's rights under the Fifth Amendment of the United States Constitution, requires four specific procedural safeguards that must be given to a person in custody prior to questioning by the police:

> [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

State v. Livermon, No. 15-0087, 2016 WL 6805005, at *3–4 (W. Va. Nov. 17, 2016) quoting Miranda v. Arizona, 384 U.S. 436, 479 (1966).

Miranda is clear and unequivocal and mandates that a person in custody be informed that he has the "right" to the presence of an attorney. In this case, the Statement of Rights Form utilized by the Morgantown Police Department fails to comply with the mandates set forth in Miranda. Specifically, the Statement of Rights Form fails to inform one of his "right" to have an

attorney present and instead simply states that you "may" have an attorney present while being questioned.[95] Mr. Velez submits that this distinction is not semantics but is a violation of his constitutional rights. The word "may" is not the equivalent of possessing a "right." As such, Mr. Velez submits that the Statement of Rights Form utilized by the Morgantown Police Department does not comport with Miranda and, as such, that Mr. Velez was not properly Mirandized and his statement must be suppressed.

V. Request for Oral Argument

Petitioner requests that he be permitted to present Oral Argument. Given the nature and severity of the issues presented in this appeal, Petitioner requests argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

VI. Conclusion

WHEREFORE, Petitioner requests that this Court overturn the Circuit Court's Order Denying Defendant's Motion to Suppress, and that this Court rule that the stop of the subject vehicle was unlawful, and that all evidence obtained as a result of said unlawful stop must be suppressed. Alternatively, if this Court determines that the stop of the subject vehicle on March 5, 2017, was lawful, Petitioner submits that the statement he gave to the Morgantown Police Department must still be suppressed as Petitioner's rights under the prompt presentment rule were violated and the Waiver of Rights form utilized by the Morgantown Police Department is invalid and unconstitutional.

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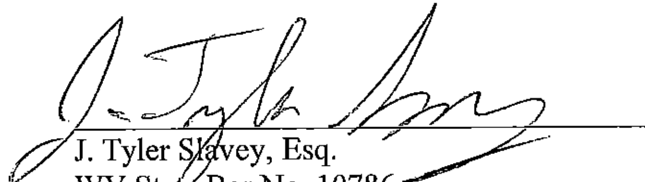
[95] Volume VI, CD2.

RESPECTFULLY SUBMITTED,
PETITIONER, BY COUNSEL.



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