IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 21-0249

STATE OF WEST VIRGINIA,
PLAINTIFF BELOW, **RESPONDENT**

v. Appeal from Wyoming County
Circuit Court Civil Action No. 15-F-56

OSCAR ROSS COMBS, SR.,
DEFENDANT BELOW, **PETITIONER**

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by instructing the jury, "The criminal history of the defendant shows evidence of misconduct of motive, personal gain, proof of a deliberate manner, proven malice and pre-meditation," where the Court admitted evidence that the defendant had been convicted of murder and armed robbery in a prior case. Appendix @ 1224.

   A) The instruction told the jury that prior bad act evidence "shows" evidence as to elements of the crime charged in this trial – the EXACT OPPOSITE of the limiting instruction required under 404(b) case law with respect to collateral crime evidence.

   B) The "limiting" instruction was erroneous under State v. McGinnis, 455 S.E.2d 516, 193 W.Va. 147 (1994), and State v. McFarland, 721 S.E.2d 62, 228 W.Va. 492 (2011), because it listed multiple uses for the collateral crime evidence instead of a specific use, and because it improperly instructed that the evidence showed malice and premeditation.

2. The trial court erred by admitting collateral crime evidence of defendant's prior conviction for murder where evidence of that conviction did not serve the 404(b) specific purpose for which it was allegedly offered during the McGinnis hearing, that of "*modus operandi*," where the collateral offense was extremely dissimilar to the offense on trial.

A) The trial court failed to appreciate how dissimilar the collateral crime and the charge on trial were, substituting for that analysis the reasoning ". . . that depravity of respect for human life is of such a nature that the court has no alternative but to grant the motion [to admit]." Appendix @ 296. The two cases were so different that no 404(b) use for the evidence was legitimate.

B) The trial court completely failed to make a Rule 403 analysis as part of the McGinnis analysis. Even assuming the other murder conviction was somehow relevant the specific purpose offered, that of *modus operandi*, its prejudicial effect greatly outweighed any scant probative value it could have had on *modus operandi*. The record is absolutely silent as to the trial court's 403 analysis because there was no analysis.

C) A read of the transcript from the moment of introduction of Defendant's "Bo Butler" murder and armed robbery conviction demonstrates that the improper admission of the collateral crime evidence created a trial within a trial.

3. The trial court erred by not granting a mistrial AND by not giving any limiting instruction where the prosecution offered evidence that Defendant had refused a polygraph examination.

A) The polygraph evidence was part of a recorded statement of the Defendant which the prosecution and defense had agreed to redact to remove the polygraph evidence. The prosecution did not obtain the redaction in time to provide it to

defense before the morning it was offered into evidence. The Court did not want to allow the defense to listen to the audio to be sure of the redactions. The prosecution stated that the State would "bear the risk" in case improper evidence was admitted, and the defense specifically did not waive objections. The Court allowed the audio and did not grant a mistrial or give a curative instruction.

4. The cumulative effect of errors 1 through 3 rendered the trial unfair to defendant. Error 1 instructed that Defendant's criminal history showed elements of this offense, Error 2 admitted the evidence of a completely-unrelated collateral crime, and Error 3 left the implication that arises naturally from a polygraph refusal, which is of something to hide.

5. The Court erred by admitting almost every piece of physical evidence and all of the testing, reports, and expert opinions arising therefrom because the prosecution could not establish the chain of custody because the evidence custodian was not at trial, having been deployed in military service at the time of trial.

6. The Court erred by not granting the Defendant's motion to dismiss for violation of speedy trial rights where at least three full terms of court had expired, not counting the term of indictment, without trial and without charge to the defendant, and further that defendant's motion for speedy trial was not honored once the same was filed, and then on remand, the Court violated the holding in State v. Underwood, which held that if the record does not contain continuance orders chargeable to the defendant, the Circuit Court cannot in

essence enter or find such continuances chargeable to the defendant in retrospect. See, 330 W.Va 166, 43 S.E. 2d, 474 (1947), More recently, the West Virginia Supreme Court rejected such a procedure in State v. Moore, 178 W.Va 99, 357 S.E.2d 780 (1987).

7. The Court erred in giving an instruction to the jury on first-degree murder and erred in not setting aside the verdict due to insufficiency of evidence to support the *mens rea* elements of first-degree murder.

II. STATEMENT OF THE CASE

1. Teresa Ford's lifestyle and disappearance

On May 13, 2013, Teresa Ford disappeared. Facts known about that day are that she bought and used cocaine with an ex-boyfriend, William Cottle; that she had angered a man in an illicit drug-related theft she committed to the extent that William Cottle sent messages trying to warn her to stay away from Lashmeet, WV (where that man lived); and that she was using a stolen cell phone in May of 2013. She was getting hundreds of Oxycontin pills per month by prescription, and she had by May 8th already spent all the welfare money on her EBT card for the entire month, largely at convenience stores. According to William Cottle, she often spent most of her money for drugs, and she frequently stole to get drugs.

2. Discovery of Teresa Ford's remains

On April 10, 2014, skeletal remains were found on property adjacent to a 29-acre plot which belonged to defendant's sister. Oscar Combs, Sr., had resided in a house at the other end of the 29-acre plot. Junior Combs had worked on cars there. Junior and his girlfriend's father-

in-law had dumped refuse and ashes from home demolitions near the location of the skeletal remains. The remains were found at the same location where approximately one dozen police and a backhoe operator had searched in November of 2013 without making any findings. Oscar Combs, Sr., had been incarcerated since November 13, 2013 and was never at the 29-acre plot between November of 2013 and April of 2014.

3. Cell phone messages and the sale of a van, signed title

Cell phone messages of May 11, 2013 showed that Teresa Ford asked Defendant to buy her van from her. William Cottle said Teresa was going to use the money for past-due rent. William Cottle and Teresa Ford went to the DMV and got a duplicate title so she could sell the van, which DMV records show she bought for $500. The title was signed by Teresa Ford as seller. The defendant openly drove the van in public for weeks without any effort to hide or disguise it. He bought a CV axle to repair the van, and although he did not register title in his name, he traded it in to a public used car dealer with an open title, not an unusual occurrence according to Robert Cole, owner of Autos 4 Less, where he traded it. Appendix @ 1187.

4. A mattress and DNA results

A November 2013 search of the 29-acre plot on Bud Mountain turned up a mattress inside the house with some blood on it. DNA from that blood was compared with a known DNA sample from Teresa Ford's sister, and results were reported by Kelly Beatty, MSFS, as being a 99.9999% likelihood that the mattress blood sample was the full sister of the known sample. Defendant had been dating the decedent. He recalled an instance in which Teresa Ford had cut

her leg on jagged metal and bled in that back room.

5. Dr. Owsley identified Teresa Ford's remains

Following the April 10, 2014 discovery of the skeletal remains, Dr. Douglas W. Owsley, a forensic anthropologist who works from the Smithsonian Institute, exhumed the remains and made comparison to dental records, concluding that the remains were Teresa Ford.

6. No evidence of cause of death whatsoever

One major unknown is cause of death. There was no evidence from the remains as to cause of death. The skull was intact, and Dr. Owsley agreed that Teresa Ford had not been shot in the head, the significance of which is discussed below. There is no known cause of death. Could have been an injury, an illness, an overdose, or any number of things. Admittedly, the shallow grave implies an effort by someone either to hide her body or to plant her body there to be found.

7. No direct evidence of who killed Teresa Ford, if anyone did

While the prosecution's biggest problem with the case was cause of death, there really was no direct evidence that Defendant even killed her – or if he did, why. There wasn't even any evidence that she was killed. There was evidence that her body was disposed of in a shallow grave and whatever reasonable implications might arise from that, but there was nothing direct as to the nature of her death, and certainly not of the identity of anyone who might have harmed her.

8. ZERO evidence of premeditation, planning, lying in wait, or poison – or even intent

There was absolutely no evidence of intent. The prosecution could not supply an answer to the question, "Why was Teresa Ford dead?" If Defendant killed her, why? They had dated. She sold him a van. There was no reason.

9. Defendant had previously been convicted of a very different murder

Defendant had been convicted of a different murder previously. He and his son were both charged with murder and armed robbery of a man named Bo Butler. Defendant was tried and convicted in Mercer County for those crimes. According to the evidence which led to conviction in Mercer County, the Bo Butler murder took place with an accomplice, beside a main highway, in an execution-style shot to the back of the head, with pre-planning, to steal his payday, and his body was dumped (not buried) over a hillside, and the defendant and his son hid Mr. Butler's truck – even repainting it with rollers to avoid its detection until they could get rid of it in pieces at salvage yards. Nothing about the Bo Butler murder was similar to the case on trial. There is a chart in this brief demonstrating all the differences.

10. Then came the error: first, collateral crime evidence

The prosecution gave notice of intent to use that conviction, pursuant to Rule 404(b), to show *modus operandi*, but that made little sense because there was absolutely nothing about the two alleged crimes which was so similar as to establish Defendant's identity by the signature method in which crimes were committed. The argument within this brief sets forth a chart demonstrating just how different the two events were.

The defense objected to the admission of that collateral crime evidence. The Court erroneously admitted it, without even paying lip service to a 403 prejudice analysis, and the Court compounded the error by delivering an erroneous instruction right before the admission of the Bo Butler murder evidence which instructed the jury that evidence of defendant's criminal history showed planning, malice and premeditation, all elements of the offense of murder in the first degree, and clearly an improper use of 404(b) evidence. Appendix @ 1224.

The defense objected at the McGinnis hearing, at the opening of the trial, and when the evidence was offered, all to no avail.

11. The Court's improper instruction

The Court's instruction concerning the use of 404(b) evidence said the following:

> "Ladies and gentlemen of the jury, I'm going to give you what is called a limited [sic] instruction. The State of West Virginia will be introducing 404(b) evidence (conviction of crimes in Mercer County, WV) against the Defendant Oscar Ross Combs, Sr. This evidence will not be used by the State to prove that the Defendant Oscar Ross Combs, Sr. is guilty of 1st degree Murder for which he is on trial for here in Wyoming County and that this evidence cannot be used to show conformity to character evidence.
>
> This evidence can only be considered as being relevant on a noncharacter (sic) theory and that uncharged misconduct evidence 'be admissible for other purposes, such as proof of motive and intent,' The criminal history of the defendant shows evidence of misconduct of motive, personal gain, proof of a deliberate manner, proven malice and pre-meditation."

Appendix at 3347.

The Court entered the instruction as Court Exhibit 1. It was drafted by the State and was given over the objection of Defendant, who objected to the admission of the evidence of the prior murder and robbery conviction. The prosecutor claimed the authority for the language of the instruction was State v. McGinnis, 193 W.Va. 147 (1994), but the instruction given in this trial (quoted above) is NOT the instruction required by McGinnis at all. Not even close.

12. The polygraph examination

The prosecutor played an audio file to the jury of a statement taken and recorded from the defendant. The original recording had been provided in discovery. That recording included reference to a polygraph examination. The defendant, in the recording, told the officer that he was supposed to take a polygraph and had gone to take the polygraph exam but left without taking it. The defense met before trial with the prosecution, and they agreed to redact the reference to the polygraph and defendant's refusal to take the polygraph. The prosecutor did not obtain a redaction until the night before the State intended to play the recording to the jury. At trial, the Court did not allow the defense, who had not been given a copy of the redacted version of the statement, to listen to ensure that redactions were proper. The defense warned on the record that the audio recording could contain inadmissible evidence that could bring the trial to a screeching halt. The prosecuting attorney said that he would take the risk rather than wait for the defense to hear the recording. The Court accepted that. At 1:08 of the recording (see Appendix 3350), the defendant is heard to say that he was going to meet an officer to take a polygraph but got there and refused to take the polygraph. The defense moved for a mistrial. The Court denied the request and did not give a curative instruction. So, the jury heard that Defendant had a

polygraph scheduled and refused to take the polygraph exam.

13. The missing link: no chain of evidence

The trooper who was responsible for the evidence locker, and whose testimony was necessary to establish the chain of evidence to nearly all evidence and especially all DNA evidence, was not at trial. He was deployed in military service. The prosecution did not make arrangements to preserve his testimony by deposition or in any other way. He was available during many of the terms of court that passed without a trial.

14. Violation of speedy trial

The defendant was indicted on May 4, 2015, which was the May 2015 term. The prosecution moved to continue the trial to accommodate its scheduling and witness schedules from time to time, but without written motion.

A total of five (5) terms passed without entry of documents or orders reflecting a continuance chargeable to the defense, and with only one motion from the defense (App. Vol. II, at 31-34).

Term	**Defendant Attend A Hearing Regarding Continuance?**	**Was there an Order entered chargeable to Defendant?**
May 2015	No	Term of Indictment and Does Not Count for this calculation
October 2015	No	No
February 2016	Motion filed by Defendant due to State's late disclosure of witnesses	Order entered but does not charge the continuance either way
May 2016	No	No
February 2017	No	No

May 2017	Trial Commenced	Trial Commenced in September 2017 at the tail end of the term

Thus, there are four terms of Court which passed from the end of the May 2015 term (the term of indictment) until the start of the May 2017 term. Three of those terms passed without a defense motion to continue, and the one term in which the defendant moved to continue was due to a late disclosure of a new witness list from the State (Id.).

III. SUMMARY OF ARGUMENT

The Court gave an improper 404(b) instruction during the trial, immediately before the Circuit Clerk of Mercer County read a criminal judgment into the record. The instruction told the jury that "the criminal history of the defendant shows evidence of misconduct of motive, personal gain, proof of a deliberate manner, proven malice and pre-meditation." Appendix @ 1224. In essence, the trial court instructed the jury that deliberate action, malice, and pre-meditation were proven by the defendant's criminal history and then allowed a witness to read defendant's judgment order into the record, which revealed a conviction for first-degree murder and armed robbery and the sentence, which was life without mercy and 80 years, consecutive.

The Court erred terribly in admitting the collateral crime evidence of a prior murder conviction and armed robbery conviction. The circumstances were not remotely similar except they were both murder cases and each victim had a vehicle (no surprise in the modern world). The prosecution failed in its notice to specify a specific use for which the collateral crime evidence would be offered. The prosecution, when pressed for a reason at the 404(b) hearing, stated it was for *modus operandi*, which makes no sense because the circumstances were so dissimilar. The Court failed to make the analysis prescribed in McGinnis and completely failed

to conduct the 403 prejudice analysis. The Court's eventual instructions did not limit the use of the evidence to *modus operandi* and did not limit to a specific purpose. The collateral crime evidence was not relevant to any 404(b) use, and the evidence was completely dissimilar to the case on trial. Much as in McFarland, the prosecution put the cart in front of the horse using the Bo Butler murder evidence to fill in gaps in its case at trial rather than as support for evidence at trial.

The three-term rule issue was once remanded, but the Circuit Court, by Judge Warren R. McGraw, simply made a conclusory ruling upholding it's own pretrial ruling despite the record being devoid of orders showing defense chargeable continuances.

IV. STATEMENT AS TO ARGUMENT

Appellant asserts that the issues presented herein are well settled under current law but that the issues presented are also of fundamental public importance in as much as the three-term rule derives from the Constitutionally protected right to a speedy trial, and the admission of evidence (and the manner of that admission) of a collateral crime is also of fundamental public importance. Accordingly, although Appellant believes that many of the issues raised are Rule 19 argument issues where misapplication of settled law are concerned and the decisional process would be aided by argument, the Appellant also believes that a Rule 20 argument is appropriate because certain of these issues are of fundamental public importance.

V. ARGUMENT

1. The Trial Court improperly admitted collateral crime evidence, and where there should have been a limiting instruction indicating that the evidence of a collateral crime is

not to be considered as proof of the defendant's guilt in the case on trial, State v. McGinnis, 455 S.E.2d 516, 193 W.Va. 147 (1994), instead instructed that the defendant's criminal history was proof of malice and pre-meditation, elements of the crime charged.

"The specific and precise purpose for which the evidence is offered must be clearly shown from the record and that purpose alone must be told to the jury in the trial court's instruction." *Id.* Syl, Pt. 1 (in part).

The Court instead instructed that the evidence of the prior murder conviction was admissible for "other purposes, such as proof of motive and intent" (Court Exhibit, App @ 3347), and "That the criminal history of the defendant shows evidence of misconduct of motive, personal gain, proof of a deliberate manner, proven malice and pre-meditation."*Id.*

Clearly, this instruction does not define a "specific and precise purpose" as required by McGinnis. In fact, it is hard to decipher what purpose the Court was directing the jury to consider, and the prosecution identified its purpose at the 404(b) hearing as *modus operandi* (a form of identification evidence), which purpose does not even appear in the instruction, nor does it appear in the general charge.

The last sentence of Court Ex. 1, the limiting instruction seems to direct that a person's criminal history is relevant to prove malice and pre-meditation. This is clearly wrong. In State v. McFarland, the Supreme Court noted " . . the purpose of Rule 404(b) is to 'to prevent the conviction of a defendant for one crime by use of evidence tending to show that he engaged in other legally unconnected criminal acts . . " 721 S.E.2d 62, 71, 228 W.Va 492 (2011)(quoting State v. Simmons, 337 S.E.2d 314, 315, 175 W.Va. 565, 657 (1985).

The Court instructed the jury that Defendant's criminal history showed proof of elements of this crime, and that instruction was immediately followed by testimony from Julie Ball, the

Mercer County Circuit Clerk, who read the judgment order of Defendant's conviction into evidence as follows:

> "It is ordered that Oscar Ross Combs, Sr. be taken from the bar of this court to the penitentiary of this state and therein confined for the remainder of his natural life without possibility of parole as provided by law for the offense of Murder in the First Degree as the state in Count I of this indictment herein hath alleged and by the jury hath found; that he be further confined for the determinate term of 80 years as provided by law for the first offense ah . . . or ah . . . I'm sorry - - provided by law for the offense of Robbery, First Degree as the state in Count II of its Indictment herein hath alleged and by a jury hath found; and for the indeterminate term of not less than one nor more than 5 years as provided by law for the offense of Conspiracy as the state in Count III of its Indictment herein hath alleged and by the jury hath found; that these three sentences run consecutively with one another; that the defendant be given credit for 450 days on said sentence for which he has served in jail; and that he be otherwise dealt with in accordance with the rules and regulations of that institution and the laws of the State of West Virginia.
>
> It is further ordered that the defendant pay all Court costs in this matter.
>
> Thereupon the Court advised the defendant of his right to appeal said conviction and appoints E. Ward Morgan and Colin Cline as counsel for appeal purposes, and that the court reporter prepare transcripts of the court proceedings. And the defendant is remanded to the Southern Region [sic] Jail."

Appendix at 1227-28.

First, the reading of that order did not introduce any evidence serving any specific purpose named either by the State or the trial court for 404(b) evidence. That order was

completely irrelevant and terribly prejudicial. To that point in the trial, the jury did not know that Defendant had been previously convicted of murder and was serving a life sentence without parole. The sentence was not even arguably relevant. The defense had vehemently objected and had been granted a continuing objection to all collateral crime evidence by this point.

The Court told the jury that criminal history showed proof of premeditation and malice and then allowed a witness to read that murder conviction. The instruction was simply wrong and prejudicial, and it allowed the jury to conclude premeditation in this case based on the defendant's criminal history – said it word for word!

2. Collateral crime evidence of a prior, but wholly dissimilar, murder conviction was improperly admitted, did not remotely serve the Rule 404(b) purpose the prosecution specified, was unfairly prejudicial, and was admitted without any meaningful analysis by the trial court.

The prosecution gave notice of its intent to introduce Defendant's conviction for the first-degree murder of Bo Butler, a crime for which he had been convicted in Mercer County. The Court held a hearing which was a McGinnis hearing in name only on August 4, 2017 (Appendix @ 240). The prosecution specified that the Butler murder conviction was offered to assist the state in proving *modus operandi*, which is a 404(b) exception designed to aid in the identification of an offender. There is absolutely nothing similar between the Butler crime and the case on trial. There was absolutely no effort at trial to prove that the defendant killed Teresa Ford through any *modus operandi* evidence. The ONLY effect of the evidence was to let the jury know that the person on trial was already a convicted murderer, and that was a huge effect!

The admission of the Butler murder conviction was a very big deal in this trial. This

West Virginia Supreme Court knows that it is ". . . inescapable that where a trial court erroneously admits 404(b) evidence, prejudicial error is likely to result." State v. McGinnis, 455 S.E.2d 516, 522, 193 W.Va. 147, 153 (1994).

The reasoning behind serious concern about evidence of other crimes and the proper step-by-step analysis for collateral crime evidence is set forth in three cases. State v. Dolin, 347 S.E.2d 208, 176 W.Va. 688 (1986), State v. McGinnis, 455 S.E.2d 516, 193 W.Va. 147 (1994), and State v. McFarland, 721 S.E.2d 62, 228 W.Va. 492 (2011).

Even before Dolin, McGinnis and McFarland, our jurisprudence recognized that for collateral crime evidence to be relevant and admissible, the " . . . other offense [must be] similar and near in point of time to [have] some logical connection with, and tend to establish commission of the specific offense charged . . ." State v. Hudson, 37 S.E.2d 553, 128 W.Va. 553 (1946). Nothing about our jurisprudence has changed the requirement that collateral crime evidence be logically connected to the charge at trial.

THE DOLIN COURT DISCUSSED THE PROBLEM WITH COLLATERAL CRIME EVIDENCE:

In Dolin, the Supreme Court supplied a discussion of the reasoning behind the general rule that collateral crime evidence is inadmissible, with exceptions, and it is for that reason we include reference to Dolin herein. In short, Dolin reminded that the rationale behind the general rule of exclusion

". . . is that when one is placed on trial for the commission of a particular offense, he is to be convicted, if at all, on evidence of the specific charge against him. The purpose of the rule excluding evidence in a criminal prosecution of collateral offenses is to prevent a conviction for

one crime by the use of evidence tending to show that the accused engaged in other legally unconnected criminal acts . . . "

Dolin 347 S.E.2d at 212, 176 W.Va. at 692 (quoting State v. Harris, 272 S.E.2d 471, 474, 166 W.Va. 72, 76 (1980). Further, Dolin reminded us:

". . . that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged, unless such other offenses are an element of or are legally connected with the offense for which the accused is on trial."

Dolin, 347 S.E.2d at 212, 176 W.Va. at 692 (quoting State v. Thomas, 203 S.E.2d 445, 157 W.Va. 640 (1974)). The Dolin court concluded this primer on significance of collateral crime evidence saying, "Another reason underlying this rule is that the admission of collateral crime evidence is highly prejudicial and can result in a jury convicting a defendant based on his past misdeeds other than on the facts of the present offense with which he is charged." Id at 213 (W.Va. at 692).

There was no evidence at the trial as to how Teresa Ford died. We do know that her skull was intact and so there was not a gunshot to her head. There was no direct evidence that the defendant even killed her; rather, that implication arose, if at all, from the circumstantial evidence of her blood on a mattress in the house and her skeletal remains in a shallow grave on the neighboring property. There was no evidence at all of premeditation or plan. Nonetheless, the trial court instructed on first-degree murder, and the jury returned that verdict.

THE McGINNIS COURT SET THE PROCESS FOR 404(b) ANALYSIS:

The decisions of Dolin, Thomas, and Harris explained the reasons for concern about

collateral crime evidence. Then, in 1994, the McGinnis decision set the rules and the analysis for such evidence that still guide us today.

In Summary, the step-by-step analysis to test the admissibility of collateral crime evidence under Rule 404(b) is:

1. **State must prove the act occurred and the defendant committed it by a preponderance, to the trial court's satisfaction.**

2. **Prosecution must state a specific purpose within those listed in Rule 404(b) for which the evidence is offered in proof.**

3. **The trial court must determine whether the collateral crime evidence actually serves that specific purpose.**

4. **If so, the trial court must conduct a Rule 403 analysis to weigh whether the evidence is more prejudicial than probative.**

McGinnis requires that the trial court determine whether the collateral crime occurred and whether the defendant committed it by a preponderance of the evidence. Due to his conviction for the Butler murder, the appellant concedes these points.

SPECIFIC PURPOSE: Next, McGinnis requires that the prosecution state the specific purpose for which the Bo Butler murder evidence was admissible. "It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b)." McGinnis at 523. In our case, the prosecution's stated purpose was "*modus operandi.*"

"The mere fact that the prosecutor identifies another purpose (aside from propensity) under Rule 404(b) does not guarantee its admissibility. The trial court must determine whether the evidence is relevant . . ." in our case, to prove

an element of the charged offense by use of *modus operandi* argument. See, McGinnis at 524. The *modus operandi* 404(b) use is to prove identity of an offender by demonstrating great similarities between an act known to have been committed by the person on trial and the act for

which that person is on trial. See, State v. Dolin, 347 S.E.2d at 218 (explaining *modus operandi* use).

Now, there was absolutely nothing about the Bo Butler murder which could possibly have served as proof that the defendant was guilty in the case on trial through *modus operandi* evidence, There is nothing which would mark the acts as being so similar as to merit admission for such use here. (See table on next page).

	THERE ARE NO SIMILARITIES AT ALL	
CIRCUMSTANCE	CASE ON TRIAL (as alleged)	BO BUTLER MURDER
Was the crime allegedly alone or with an accomplice?	Alone	With accomplice
Was defendant the person who allegedly killed the victim?	Yes	No. The alleged accomplice shot the victim.
Location of the crime	At home, in bedroom	Along the side of a main roadway miles away
Victim's Vehicle	Defendant says he bought it, and he later traded it in at a used car dealer.	Abandoned near scene of murder
Body "disposal"	Buried in shallow grave	Thrown over a hill without burial
Manner of death	Unknown, but forensics prove it was not a gunshot to head	Execution-style gunshot to back of head with pistol.
Gender of the decedent	Female	Male
Motive	Unknown	To take decedent's paycheck of several thousand dollars.
Close in time? No	Decedent missing as of May 13, 2013	Decedent shot on April 4, 2011

Relationship to Decedent	Personal intimate	Acquaintance through work activities

McGinnis cautions that relevancy for the stated use is " . . .necessary to prevent prosecutorial abuse and overreaching," and continues stating, "The trial court must understand that it alone stands as the trial barrier between legitimate use of Rule 404(b) evidence and its abuse." McGinnis at 524. The trial court in our case did not analyze whether the use was legitimately for the stated *modus operandi* purpose, substituting for that analysis the inexplicable reasoning ". . . that depravity of respect for human life is of such a nature that the court has no alternative but to grant the motion [to admit]." App at 296.

TWO ALABAMA CASES ARE ILLUSTRATIVE ON THE POINT OF CONNECTEDNESS AND SIMILARITY VERSUS DISSIMILAR AND UNCONNECTEDNESS:

The Alabama Supreme Court, applying very similar analysis pursuant to 404(b) for the admission of collateral crime evidence as do we, decided two cases, three years apart, which are illustrative of the difference between when collateral crimes are similar enough to the current offense for admission to the record and when they are not.

In In re Baker, the Alabama Supreme Court overturned a first-degree robbery conviction because of the improper and prejudicial admission of collateral crime evidence. There, the trial admitted evidence of the defendant's prior robbery. The offenses were a month apart, the person who was armed was different in each (accomplice in one, defendant in the other), different weapons were used, and the gender of the victims was different. 780 So.2d 677 (Ala Sup 2000).

In Ex Parte Guthrie, the same Alabama Supreme Court upheld a capital murder

conviction where the collateral crime evidence was similar enough to the present offense. There, both crimes were small town convenience stores robberies, only eight hours apart, with a clerk shot in the chest, behind the counter, with a shotgun, only currency – not coins - was taken from the register, both victim's wallets were taken, and in both getaways the suspects escaped in a stolen and distinctive Ford Mustang. The same accomplice was with the defendant in both instances. 689 So.2d 951 (Ala Sup 1997).

Clearly, In re Baker is more similar to our case. In fact, our case has even more differences between the Bo Butler murder and the case on trial that did the offenses in Baker.

RULE 403 PREJUDICE VS. PROBATIVE VALUE MUST BE ON THE RECORD:

Even had the trial court in this case served its function as "the trial barrier between legitimate use of Rule 404(b) evidence and its abuse," McGinnis at 524, and somehow reached the conclusion that the Bo Butler murder evidence was probative of legitimate proof of the identity of the killer in the instant case via a *modus operandi* showing, the trial court abjectly failed again at the third step of the McGinnis analysis.

"Third, if the evidence is relevant under Rule 401, the evidence is nevertheless subject to the strictures limiting admissibility under Rule 403 . . . to be admissible, the probative value of such evidence must outweigh risks that its admission will create substantial danger of unfair prejudice. **The balancing necessary under Rule 403 must affirmatively appear on the record.**" McGinnis. at 525. (Emphasis supplied).

There is no record of the balancing test because the trial court conducted no such balancing test. Instead, the trial court ruled the irrelevant evidence admissible on the grounds ". . . that depravity of respect for human life is of such a nature that the court has no alternative

but to grant the motion [to admit]." Appendix at 296. This is clearly not the standard.

The Court made no balancing of the prejudicial effect of a prior murder conviction, the prior life sentence without parole, the prior 80 years run consecutively with it, or any other potential prejudice. This case came without a cause of death!! There was no evidence how the lady died. There was no evidence of premeditation or planning or poison or lying in wait. These two had dated and were still seeing each other.

An example of the trial court's inattention to the prejudice arising from extraneous bad act evidence occurred earlier in the trial when the defendant's daughter was testifying that the road to the property was gated (she had already established this).The prosecutor himself introduced extraneous bad act evidence, prejudicial to the defendant, and the trial court failed, on objection, to appreciate the prejudice whatsoever. The testimony proceeded as follows:

Q: Just a couple of small questions, Ms. Jackson. You mentioned about that locked gate. When did that locked gate get up there?

A: I mean there was always a locked gate over there.

Q: Always when you grew up.

A: Yes.

Q; And you said, I think, sometime in 2012 all your stuff was set out by that gate.

A: Yes, it was locked.

Q: Who did that?

A: My father had set our stuff out. So we couldn't get in. We was suppose [sic] to go in and get it, but it was set out at the end of the driveway, and we could not go get our stuff. There was boxes, so we just got what was there.

Appendix @ 609.

Defense objected and asked for a curative instruction. Appendix @ 610. "I need to object to the last question and answer and ask that a curative instruction be given by the court . . . this is a bad act that was just alluded to by the prosecutor and it was not identified as a prior bad act. We had an [sic - I said "no"] opportunity to view it as a 404-B [sic] and I'd like the Court to make a determination that it has no probative value, that it is just prejudicial . . . There is a lot of prejudice involved in just the way it was presented, that this man is sitting [sic] his daughter's stuff out at the end of the driveway . . ."

The Court simply stated, "Well your objection will be noted and overruled."

Throughout the proceedings, from the so-called McGinnis hearing through instances such as the one noted above and through the admission of the judgment order verbatim, the testimony of the Bo Butler investigator, and the Bo Butler testimony from Junior Combs, the trial court conducted no 403 prejudicial impact analysis.

THE MCFARLAND CASE IS INSTRUCTIVE: In McFarland, the defendant was on trial for second-degree sexual assault. He was a social guest at the home of the alleged victim. They drank alcohol, smoked marijuana, and did cocaine. The next day, the victim, without memory as to what happened, awoke to vaginal pain and found her pants on inside out and her underwear on wrong. Defendant's semen was found on the victim's pants. The prosecution gave notice of intent to use evidence of prior sex crimes committed by the defendant, and the trial court admitted the evidence. State v. McFarland, 721 S.E.2d 62, 228 W.Va. 492 (2011).

The evidence of the prior sex crimes was that the defendant had twice committed acts in which he had penetrated his victims with a foreign object while masturbating on them against

their will. The State offered the evidence to show that the manner in which the instant offense occurred was the same as the defendant's prior crimes. This was *modus operandi* use as analyzed by the McFarland court. *Id.* at 73. The Supreme Court held this was improper because absent the evidence of prior crimes, there was no evidence at trial sufficient to show the manner in which the defendant sexually assaulted his victim in the instant case. In other words, the evidence of the prior crimes would have allowed the jury to infer how the instant offense happened, but "...only as a result of the prior bad acts." *Id.* In the case *sub judice*, the situation is even worse. In our case, the Bo Butler evidence sheds light on absolutely nothing aside from the fact that the defendant was already a convicted murderer.

In McFarland, the Supreme Court reversed. The Court found the improperly admitted evidence prejudiced defendant partly because "....the prior bad acts played such a prominent role at Petitioner's trial ..." *Id.* at 73.

The Bo Butler murder evidence played a very prominent role in the trial of Oscar Ross Combs. An entire day of testimony was committed to it. The Circuit Clerk of Mercer County testified, reading the judgment order in its entirety. Trooper Corporal Reed testified to his investigation of the Bo Butler murder. Junior Combs took the stand and testified to his version(s) of the Bo Butler murder, ultimately claiming that his father, Oscar Ross Combs, Sr., held a gun to his back making him shoot Bo Butler in the head; and despite that obvious distress, Junior entered a first-degree murder plea. Junior had previously denied being the shooter and had previously asserted that his father distracted Bo Butler while Junior snuck up on him from behind. In any event, the testimony was extensive and resulted essentially in a trial within a trial in which this defendant was forced to attempt to defend himself against charges for which he had already been convicted in another court. Defense counsel had to address issues that defense

counsel should never have had to address had the improperly-admitted collateral crime evidence been excluded, and the defendant had to testify extensively about the Bo Butler conviction and trial when he should not have to have addressed it at all in this trial. Defendant's counsel made a record as follows, "Just note for the record as it's preserved that the introduction of that evidence considerably changes our strategy." Appendix at 1244.

The defense had to get into questioning about the Bo Butler murder and had to challenge Junior Combs as to his differing statements throughout the Bo Butler case, his plea agreement, his testimony in that proceeding, and his various versions of that story. The defendant himself had to answer questions about a murder for which he had already been convicted, which he should not have had to do. The Bo Butler murder case provided the jury with premeditation, planning, deliberateness of manner – just as the Court had instructed the defendant's criminal history showed.

The Circuit Court abused discretion with respect to all the collateral crime evidence, failing first to make a finding as to a specific purpose for which the evidence was offered, second in failing to appreciate the vast differences between the Bo Butler facts and the trial at hand, third in failing to give an appropriate limiting instruction and instead giving a completely improper instruction directing that the defendant's criminal history was proof of elements necessary to convict in this case, fourth in failing to conduct any prejudice analysis (which must be on the record), and fifth in applying its own standard of reasoning, rather than the step-by-step analysis of McGinnis and McFarland, applying instead its announced standard and reason for admitting the collateral crime evidence, ". . . that depravity of respect for human life is of such a nature that the court has no alternative but to grant the motion [to admit]. " Appendix @ 296. That is just not a 404(b) analysis.

3. The trial court erred by not granting a mistrial AND by not giving any limiting instruction where the prosecution offered evidence that Defendant had refused a polygraph examination.

The prosecution offered an audio recording of Defendant's statement given November 13, 2013. That recorded statement contained references to inadmissible evidence which the parties agreed to redact. The prosecution did not obtain a redacted version of the recording until 9:00 PM the night before they intended to play the audio to the jury and did not deliver the recording to the defense prior to the following morning. Appendix @ 667. The Court inquired as to whether anyone had listened to the recording following the alleged redaction. The following exchange occurred:

> THE COURT: Has nobody listened to it since that was done?
>
> MR. LUPARDUS: No. He got it at 9:00 o'clock last night. We haven't heard it since then.
>
> MR. COCHRANE: So we're in good shape. We just wanted to put it on the record, that's all.
>
> THE COURT: Well maybe the defense is entitled to know that it has been redacted appropriately and properly.
>
> MR. LUPARDUS: We don't wish to waive any objection if something pops up that shouldn't be on there.
>
> THE COURT: Why I'm certain not.
>
> MR. LUPARDUS: So, if the Court feels more comfortable with us listening to it before it is played, then to allow something unthwarted [sic – I said "untoward"] to

happen when it is play –

THE COURT: How long is this disc?

MR. COCHRANE: An hour and 30 minutes. So, I'd rather just play it. In view of their objection already, it's noted on record. I think we can play it.

THE COURT: Well we can do it that way.

MR. COCHRANE: It's a risk, but I'll take it.

MR. LUPARDUS: If the state is willing to take the risk ah . . . that there is something on it that might stop this trial in it's [sic] tracks, he must feel pretty confident about editing.

MR. COCHRANE: I do.

THE COURT: Well we will deal with that issue if we get to it. So you're ready to present it?

App. @ 667-68.

At this point, the defense is more than willing to listen to the recording before it is played, but the prosecution resists that. The Court has determined to play the recording even though the defense hasn't listened to it to verify redactions. The defense warned that certain materials in the unedited version could result in a mistrial, which the defense counsel characterized as stopping the trial in its tracks. The State, in response, openly and clearly accepts that risk. The defense openly and clearly states no waiver of any objection or error in the recorded statement.

The recorded statement is then played and contains inadmissible evidence that the defendant was scheduled to undergo a polygraph examination, went to the police department for the polygraph examination, and left refusing to take the polygraph examination. This occurs on the recorded statement at 1:08 approximately. Although 68 minutes into the recorded audio, the

jury was refreshed when hearing it because the Court took a break one hour into the audio, and so the jury was fresh off of a break only eight minutes into listening the recording when they heard the following from the defendant answering an interrogator's questions:

"Then I met Mr. Anderson down Mullens PD. Supposed to went to Princeton to do a polygraph test, and that guy down there got hateful with me and I walked out the door."

Whereupon, defense counsel asked for an *in camera* conference and stated as follows:

> "Judge . . . when we started this morning, we mentioned that the defense did not have a chance to listen to this edited tape yet . . . I specifically made clear that I didn't want to waive any objections if there were any problems with it and the state said, 'There's always risk in life all of the time. We'll take the risk and get on ahead with it in case a problem comes.' Well not edited out that was just played to the jury was the following sentence from Mr. Combs: 'I was suppose [sic] to went to Princeton to do a polygraph test and that guy down there got hateful with me and I walked out the door.' . . . I think we have to miss try [sic] this case based on the case law in West Virginia. I guess that was the risk taken in playing the tape without taking the hour-and-a-half for us to listen to it. That wasn't our choice, [sic] we were willing to do it. We didn't want to waive the objections or anything to it. The state wanted to proceed to play it instead of giving us that opportunity . . ."

Appendix @ 671-73.

The prosecutor replied, "Your Honor, 'lie detector' was said on the record, but it didn't say what the lie detector was in this case. We did take the chance to play it and I don't think it is prejudicial."

The defense replied, "I think our jurisprudence in West Virginia says otherwise. What the

jury heard is he said he went to Princeton to take a polygraph, that alone is inadmissible, and that he didn't take it. The gentleman got hateful with him, he said. He didn't take it, that also is inadmissible. . ."

The Court then offered, "It hasn't been offered as evidence against him."

The defense replied, "I don't think that's the law. It doesn't matter whether it's offered as evidence against him or not . . . as a matter of fact, it has been offered as evidence against him. That's what the recording is that we were playing to the jury, it's the state's evidence. And in evidence now is that he was suppose [sic] to go to Princeton to take a polygraph and refused once he got there."

The Court then made its ruling as follows: "Well I'm going to overrule because I think that is a small, minuscule [sic] part of that tape that the parties have determined to be submitted to the jury for listening, and I'm going to overrule it."

The defense clarified, "Well we never . . . agreed that that [sic – I said "to that"] part being submitted to the jury. We didn't get an opportunity to hear the edited version of the tape, as I've made pretty clear, and I think everybody knows that."

The Court then supplants West Virginia's jurisprudence with regard to the implications arising from the mention of a polygraph or of a defendant's polygraph refusal with contrary reasoning, stating, "Well all it says is that he was willing to take it without fear apparently and somebody caused him not to . . . I think it could be construed in his favor, as well as against him . . ."

The defense replied, "I have difficulty in understanding how the refusal to complete a polygraph could possibly be in his favor . . . it's clear we're not just objecting and asking for a curative. We're asking for a mistrial."

The Court ultimately denied the motion for a mistrial and gave no curative, and the jury was permitted to consider the evidence it had just heard, that the defendant was supposed to take a polygraph and ultimately refused to do so.

"Polygraph test results are not admissible in evidence in a criminal trial in this state." State v. Frazier, Syl. Pt. 2, 252 S.E.2d. 39, 162 W.Va. 602 (1979). Furthermore, in a case which arose in the very same courtroom as our case, "reference to an offer or refusal by a defendant to take a polygraph test is inadmissible in criminal trials to the same extent that polygraph results are inadmissible." State v. Chambers, Syl. Pt. 2, 459 S.E.2d. 112, 194 W.Va. 1 (1995). The Supreme Court has analyzed the implications which arise from evidence when a defendant has been offered a polygraph examination and refuses. The Supreme Court, in Chambers, stated, "Testimony that a defendant was offered a polygraph test, or that he refused one, interjects into the case inferences which bear directly on his guilt or innocence; either he failed the test – as the State presumably would not pursue charges against an innocent – or he refused to submit to testing in fear that his guilt would be shown. That which may not be accomplished directly by evidence of polygraph test results, may not be accomplished indirectly by references to whether a defendant sought, declined, or was offered a polygraph test." 459 S.E.2d. @ 114, quoting People v. Eickhoff, 471 N.E.2d 1066, 1069, 129 Ill. App. 3d. 99 (1984). In the Chambers case which arose in the same Wyoming County courtroom as Appellant's trial was held, the admission of evidence that Ms. Chambers had refused a polygraph exam resulted in a reversal even where no objection was made by her defense counsel and where the trial judge in Chambers had even given a curative instruction.

In our case, an objection was made, and no curative instruction was even given. Furthermore, this occurred in evidence offered by the State which was supposed to have been

redacted, which the defense was not permitted to review, and by reason of which the prosecution agreed to "take the risk." Fundamental trial fairness dictated in that panoply of circumstance that the defendant be given a new trial free from the implications arising from this referenced polygraph evidence.

4. The Court erred by not granting the Defendant's motion to dismiss for violation of speedy trial rights where at least three full terms of court had expired, not counting the term of indictment, without trial and without charge to the defendant, and further that Defendant's motion for speedy trial was not honored once the same was filed.

There are at least three terms of court which passed between the term of indictment and the term of trial without any order charging continuance to the defendant. In fact, there are at least three such terms with no order showing the continuance at all. (App Vol II, Docket Sheet 31-34)

In West Virginia, the defendant's speedy trial rights, within the meaning of United States Const., amend. VI and W.Va. Const. Art. III, § 14, are protected by Code §62-3-21, See, State ex rel. Shorter v. Hey, 294 S.E.2d 51, 170 W.Va. 249 (W.Va., 1981), which states: "Every person charged by presentment or indictment with a felony or misdemeanor and, remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of court, after the presentment is made or the indictment is found against him without a trial, unless the failure to try him was caused by his insanity; mor by the witnesses for the state being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his

escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict; and every person charged with a misdemeanor before a justice of the peace, city police judge, or any other inferior tribunal, and who has therein been found guilty and has appealed his conviction of guilt and sentence to a court of record, shall be forever discharged from further prosecution for the offense set forth in the warrant against him if after his having appealed such conviction and sentence, there be three regular terms of such court without a trial, unless the failure to try him was for one of the causes hereinabove set forth relating to proceedings on indictment."

The term at which the indictment is returned is not to be counted in favor of the discharge of the defendant. *Syl. Pt. 1*, State ex. rel Smith v. DeBerry, 146 W.Va. 534, 120 S.E.2d 504 (1961).

Prior to the trial beginning, defense counsel Evans argued Defendant's motion for dismissal for violation of speedy trial rights. Defense argued that if it had been three terms passed without continuance chargeable to the defendant, then dismissal was appropriate. Appendix @ 340-41. The prosecutor argued that although there were continuances, they were all for good cause, a couple were due to the Court being involved in other proceedings, and the State believed that the trial was commencing in what would amount to the third term and was therefore timely. Appendix @ 340-41. The Court held that the law is "pretty clear on that issue," but then continued, stating, "The customary procedure in this court has always been to try to provide an immediate trial unless requests were made by defendants to delay the trial and I have no reason to doubt this case is any different on that issue." The defense noted that there had been State motions to continue and encouraged the Court to review the docket sheet. The Court responded, "Well, the motion will be denied." Appendix @ 342.

Wyoming County Circuit Court consists of three terms annually. They are known as the May term, the October term, and the February term. They run roughly May through the end of September, October through close to the end of January, and February to May. A review of the docket sheet and orders in this matter reveals the following with respect to the defendant's motion for speedy trial.

Oscar Ross Combs, Sr., was indicted in the **May 2015** term of court. No trial was held that term; however, the first term of court does not count in the calculation relating to speedy trial rights.

The **October 2015** term of court passed without trial. The record is silent as to good cause or any chargeability to the defendant.

The **February 2016** term of court was continued by the defense, and so that term does not count with regard to the speedy trial calculations.

The **May 2016** term of court came, and the matter was continued on the State's motion, which makes the second term of court in which there is no chargeability of delay to the defendant.

The **October 2016** term of court came. Trial was noticed for November 14, 2016, but that trial did not occur. There is no order reflecting the cause nor reflecting chargeability to the defendant. Notably, this is the term of court during which the defendant filed a *pro se* motion seeking a speedy trial, which is of record in Appendix @ 212.

The **February 2017** term of court came and went without trial and without order or reference in the record as to the cause of said passage of the term, making the fourth term that trial was not conducted in this matter without charge to the defense.

The **May 2016** term of court resulted in a trial during the last weeks of the term. The jury

returned a guilty verdict for first-degree murder, but sentencing was scheduled later.

The **October 2017** term passed without a sentencing hearing not chargeable to the defendant, and sentencing was finally held in the **February 2018** term.

THE CIRCUIT COURT ON REMAND SIMPLY IS INCORRECT AND MERELY KICKED THE CAN BACK TO THIS COURT:

There is no precedent, statutory or otherwise, for the Circuit Court's February 24, 2021 order following remand and from which this petition is taken. That order failed to address the law at all. Instead it was a conclusory order which completely failed to analyze the actual state of law on this important constitutional issue. The state of our law is as follows:

In State v. Carrico, the West Virginia Supreme Court notes that the three-term rule applies more strictly than the one-term rule. Furthermore, the Supreme Court stated "...the three-term rule operates no matter whether the Defendant asks for a trial." State v. Carrico, 189 W.Va. 40, 44, 427 S.E.2d 474, 478 (1993). Therefore, the Circuit Court finds that the Defendant has no obligation to seek or ask for a trial in each term, but rather, the duty is on the State to bring the Defendant to trial within three terms. The defense sought continuance only of the February 2016 term.

The State, although admitting it sought at least two of the continuances due to witness scheduling and the State's failure to produce necessary witnesses at a 4040(b) hearing, still argues that the other continuances should be charged to the defendant even though there are no orders in the file supporting this. The circuit court adopted that argument; however, the court simply ignored our law in State v. Underwood, 130 W.Va. 166, 43 S.E.2d 61 (1947), wherein the State claimed that continuances had been agreed to by the Defendant but that through

inadvertence, no order had been entered reflecting the agreement. In Underwood, the State advocated entering orders *nunc pro tunc* to "correct" the three-term rule violation which appeared in the record. The Supreme Court rejected such a procedure, and that position was reiterated by the West Virginia Supreme Court in State v. Moore, 178 W.Va. 99, 357 S.E.2d 780 (1987), in which the Moore court found State v. Underwood to be analogous to its situation in which the State in the Moore case was arguing that the State had, through counsel, agreed to continuance when there was nothing of record to indicate the same.

The record is the record. Accordingly, under West Virginia Code §62-3-21, the three-term rule, which implements an accused's constitutional right to speedy trial as contained in Article III, Section 14 of the West Virginia Constitution, the Court is constrained to conclude that there were three unexcused, expired terms between the first term of indictment and the eventual trial, which do count and are chargeable for calculation of the three-term rule. In accordance with the holdings in State v. Underwood, State v. Moore, State v. Carrico, Good v. Handlan, 176 W.Va. 145, 342 S.E.2d 111 (1986), and State ex. rel. Webb, 182 W.Va. 538, 390 S.E.2d 9 (1990). For that reason, the Appellant should prevail on appeal.

5. The cumulative effect of errors 1 through 3 rendered the trial unfair to defendant. Error 1 instructed that Defendant's criminal history showed elements of this offense, Error 2 admitted the evidence of a completely unrelated collateral crime, and Error 3 left the implication that arises naturally from a polygraph refusal, which is, as noted in our case law and precedent, an implication that the defendant is guilty or hiding his guilt.

"Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." Syl. Pt. 5, State v. Smith, 156 W.Va. 385, 193 S.E.2d 550 (1972).

All defendants are entitled to " . . . a fair trial as required by as required by the West Virginia and Federal Constitutions and laws of this State." *Id.* at 554.

The numerous errors which occurred in this trial include the improper admission of vast amounts of collateral crime evidence concerning the defendant's conviction in Mercer County of the murder of Bo Butler, armed robbery, and conspiracy, other 404(b) evidence as noted herein above, the admission of the defendant's opportunity to take a polygraph exam and ultimate refusal, as well as considerations in the faulty manner in which the State addressed the chain of almost all of its physical evidence through the absence of the evidence officer assigned to the case. The collateral crime evidence alone dominated the latter portions of this trial. The manner in which the conviction was introduced into the record was unbelievably prejudicial, as a jury which, to that point in the trial after six days of testimony, still had heard no evidence of premeditation, planning, manner of death, and was at that point merely given to guess as to the manner in which Teresa Ford met her end, was suddenly instructed that the defendant's criminal history they were about to hear was evidence of deliberateness of purpose, premeditation, planning, and malice. These are elements necessary for conviction of first-degree murder, and the jury was instructed they could find them based upon the defendant's criminal history.

Whereupon, the prosecution proceeded to have, over a continuing objection as to all collateral crime evidence, Julie Ball, the Mercer County Circuit Clerk, read the judgment of conviction and sentencing to the jury, who now were suddenly dealing with a defendant already

committed to the state penitentiary for life without mercy plus 80 years, consecutive, plus an indeterminate sentence for conspiracy. No paper record can reflect the nature in which the air went out of the room with the reading of that judgment order, but the remainder of the trial focused largely on the murder of Bo Butler, the investigation of that murder, the testimony of the co-defendant in that murder, and, of course, the verdict in that other murder case. There was, over the last two days of testimony, essentially a trial within a trial concerning the facts and allegations of the Butler case for which defendant was already convicted. That alone is enough to clearly call for a reversal of this conviction, and taken cumulatively with other error, it causes the overwhelming conclusion that the defendant was denied a fair trial. Any assertion that the collateral crime evidence wasn't extremely and unduly prejudicial or that it was limited in scope to some articulable and reasonable specific purpose is, quite frankly, laughable.

6. The Court erred in giving an instruction to the jury on first-degree murder and erred in not setting aside the verdict due to insufficiency of evidence to support the *mens rea* elements of first-degree murder.

There was no direct evidence as to even what happened to bring about Teresa Ford's death. First-degree murder requires proof of murder "by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing. . ." WV Code § 61-2-1. Further, second-degree murder would require a showing that the defendant did "feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the decedent." WV Code § 61-2-1. The State offered absolutely no cause of death. Though there was some blood evidence admitted, no witness offered a medical opinion or a lay opinion as to whether the amount of blood would

likely have resulted in death or even that the blood found was related to the event charged.

Additionally, there was absolutely no evidence as to the defendant's *mens rea*, no evidence of premeditation, lying in wait, poison, or any of the other mental states required to prove first-degree murder, nor was there any proof offered of any mental state required to prove second-degree murder.

The Court erroneously instructed the jury that the defendant's criminal history was evidence of those mental elements of the current offense, and that instruction unduly prejudiced the defendant, was improper, and would permit conviction of one offense based on the conviction of another unconnected, separate offense. The evidence of mental state was so insufficient that the State didn't even argue the mental elements of the offense in summation. The only manner in which the jury could conclude that the mental state required for first-degree murder conviction was proven was through application of the improper instruction concerning collateral crime evidence or through improper consideration and the prejudice caused by the improper evidence of collateral crime.

VI. CONCLUSION

This conviction has to at least be reversed and remanded for a new trial. The admission of defendant's prior murder conviction, in a case wholly unconnected to the case at trial, and the degree to which evidence was offered concerning that conviction, were overwhelmingly

prejudicial, never limited by any instruction to a specific purpose, and for goodness' sake the jury was instructed that the defendant's criminal history – just the history alone – was evidence showing malice, pre-meditation, deliberateness of manner, and planning – some elements of the offense on trial. The prosecution named one specific purpose at the hearing on 404(b) and then others at trial. There was no 403 prejudice balancing conducted and certainly none on record. Curative instruction was denied in another instance. There was evidence that defendant had a scheduled polygraph exam which he refused.

The appellant's right to a speedy trial was violated, and on that ground, the conviction should be reversed and the matter dismissed. The first remand resulted in an order from the underlying court which failed to help. There just are no orders in the file to show continuances charged to the defendant excepting one term. There aren't even any showing the other continuances that the State admitted it requested for witness scheduling and the State's 404(b) mistake.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 21-0249

STATE OF WEST VIRGINIA,
PLAINTIFF BELOW, **RESPONDENT**

v. Appeal from Wyoming County
Circuit Court Civil Action No. 15-F-56

OSCAR ROSS COMBS, SR., **PETITIONER**
DEFENDANT BELOW,

CERTIFICATE OF SERVICE

I, Timothy P. Lupardus, hereby certify that I have served the foregoing **PETITIONER'S BRIEF** upon the State of West Virginia by mailing a true copy thereof addressed as follows:

Julianne Wisman
Assistant Attorney General
Office of the Attorney General
Appellate Division
812 Quarrier Street, 6th Floor
Charleston, WV 25301

on this the 24th day of June 2021.

Timothy P. Lupardus (WVSB #6252)