IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON, WEST VIRGINIA

NO. 22-674

STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

Appeal from a final order
of the Circuit Court of
Berkeley County (20-F-213)

JOSEPH WAYNE MASON

Defendant Below, Petitioner.

PETITIONER'S BRIEF

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3) The lower court erred by permitting improper hearsay testimony under the guise of a "prior consistent statement."

4) The lower court erred by failing to sever the Petitioner's trial from that of his co-defendant.

5) The effects of these errors are cumulative, and they combined to deny the Petitioner a fundamentally fair trial.

STATEMENT OF THE CASE

On July 28, 2014, Taylor Hawkridge was found senselessly murdered in Berkeley County, West Virginia. Appendix Record ("A.R.") at 22. The murder occurred between 3:35 and 3:36 a.m. *Id.* at 1145. She was shot twice in her driveway after returning home and witnesses reported seeing a black vehicle with round taillights in the area at the time of her killing. *Id.* at 1122-23. The police began their investigation after getting reports that Ms. Hawkridge was in a verbal altercation at Vixen's Gentlemen's club, which was her place of employment. *Id.* at 1125; 1127. She had allegedly gotten into this altercation with Nasstashia Van Camp Powell (sometimes "Nas") because Ms. Hawkridge was having relations with her boyfriend, Petitioner Joseph Mason.[1] *Id.* at 1131.

The police interviewed Ms. Powell and noted that she arrived at the police station driving a black Dodge Charger, consistent with the vehicle observed driving away from the

[1]The police also determined that Ms. Hawkridge was working as a confidential informant due to her arrest for dealing drugs but did not pursue this avenue at the time. *Id.* at 90.

murder scene. *Id*. at 1131. The police obtained a search warrant for the phone and determined that she was the "girlfriend" of Petitioner Joseph Mason. *Id.* at 1136.

In September 2014, the police got what could only be called incredibly good luck as someone, possibly Ms. Powell, posted from her Facebook account:

> Joey's my baby daddy. No, I didn't kill Taylor. Yes, Tiara Brown showed me where she lived at on that Tuesday. Taylor was a snitch. No one wants to talk about that, how she got caught up and decided to roll on people. Guess people want to keep that a secret to weight (sic) out the fact she's a good person. She's everyone's sister, everyone's friend. Well, I guess y'all snitching too. Yes, I found out where she lived for Joey. No, I didn't go there. When did I – no, I didn't know he was going to kill her. So, yes, Joey had something to do with it. Yes, it was my car. No, I wasn't there. And yes, I was at the club. New Nassy. I've living for me and my babies.

Id. at 1148-49. Ms. Powell denied posting this to her account. *Id.* at 1150. Based upon this post, the police received a search warrant for the black Dodge Charger but did not find anything. *Id.* at 1150-51. The police were eventually able to talk to Tiara Brown who told them that she had shown Ms. Powell where Taylor Hawkridge lived. *Id.* at 1151. In addition, the police determined that Ms. Powell's cell phone travelled to and from the murder scene at the appropriate times. *Id.* at 1152. Based upon this and Ms. Powell's inconsistent statements, she was indicted for the murder of Taylor Hawkridge in 2016. *Id.* at 1151-52.

After she was indicted, Ms. Powell approached the police with a different story. She first said that a Mr. Richard Small was the shooter. *Id.* at 1154-55. She stated that the Petitioner Mr. Mason send her a text message while at Vixen's to pick up Mr. Small. *Id.* at 1155. In November 2016, she gave more information about Mr. Mason, *id.* at 1156, and said that during the night of the murder she, Mr. Mason, and Mr. Small were all in contact with one another. *Id.* at 1159.

Ms. Powell proceeded to trial where she was convicted of second degree murder and due to a two-time recidivist enhancement received a determinate sentence of forty-five (45)

years in prison. *Id.* at 1161. During the trial the State proceeded on the theory that Ms. Powell murdered Ms. Hawkridge because of her jealousy of Ms. Hawkridge's relationship with her boyfriend Mr. Mason. *Id.* at 1240.

After her conviction, Ms. Powell was not done changing her narrative. *Id.* at 1162. She approached the police and implicated herself, Mr. Small, Mr. Mason, and now a Mr. Armistead Craig. *Id.* This was in exchange for a Rule 35 recommendation that she receive a thirty (30) year sentence instead of forty-five (45). *Id.* This marked the seventh and final time that she had told a different story for the police. *Id.* at 1231.

In addition, Ms. Powell led the police to where the murder weapon was found in March 2019 in a rusted condition alongside the road near the murder scene. *Id*. at 1213.

The State plowed ahead and at the October 2020 term of the Berkeley County Grand Jury indicted Mr. Mason and Mr. Small for the murder of Taylor Hawkridge. *Id*. at 22. Mr. Craig to date has never been charged. Mr. Mason filed a motion for a separate trial, *id.* at 24, which was denied by the circuit court. *Id.* at 29.

The evidence in this case was starkly different from that at Ms. Powell's trial. The State first introduced evidence that Taylor Hawkridge was working as a confidential informant and had purchased drugs from Armistead Craig in that capacity. *Id.* at 90; 1023. Mr. Craig communicated with Ms. Hawkridge after the controlled buy and "told her to be careful because the police may have observed the transaction." *Id.* at 1024.

The State's case was made largely through the testimony of Ms. Powell. In her narrative, she testified that she had previously met Mr. Small through Mr. Mason. *Id.* at 1329. On the evening preceding the early morning murder, Mr. Mason allegedly came to her house sometime after midnight. *Id.* at 1333. He asked her to go to Vixen's Gentlemen's Club. *Id.* at

1334. She did as instructed and although Mr. Mason was at the club, he neither sat nor spoke with her. *Id.* at 1335. After a short time, Mr. Mason allegedly texted her and instructed her to drive to Hagerstown to pick up Mr. Small at the Clarion Hotel. *Id.* at 1135-36.

Ms. Powell did so and when she picked up Mr. Small she noticed that he had a silver handgun. *Id.* at 1336. The two arrived at Taylor Hawkridge's residence, waited for her to get home, and Mr. Small got out of the car and shot her twice. *Id.* at 1338-39. Mr. Small returned to the car and Ms. Powell drove off, with Mr. Small disassembling the gun and throwing it out the window on the way. *Id.* at 1340.

Ms. Powell and Mr. Small returned to Hagerstown where they spent what was left of the night at Ms. Powell's cousin's home. *Id.* at 1339. The next day (or more precisely later the same day) she testified that Mr. Mason came to her cousin's home. *Id.* at 1341. She alleged that Mr. Mason and she had "a conversation" about the shooting. *Id.* After this conversation, Ms. Powell drove Mr. Mason to an undefined Sheetz store to meet Armistead Craig. *Id.* at 1342. Mr. Craig and another person were at Sheetz and Ms. Powell and Mr. Mason followed them to a Weis grocery store parking lot. *Id.* at 1343.

In the grocery store parking lot Ms. Powell testified that Mr. Mason went into the back seat of Mr. Craig's car where she observed him hand Mr. Mason a brown paper bag. *Id.* at 1344. She later determined that in the brown paper bag was ten thousand dollars ($10,000) as Mr. Mason purportedly counted it in her presence. *Id.*

Mr. Mason then purportedly put seven thousand dollars ($7000) back in the bag and took three thousand dollars ($3000) out for himself. *Id.* at 1345. The two returned to the cousin's house where Mr. Mason gave the bag containing seven thousand dollars ($7000) to Mr. Small. *Id.* Mr. Small then left with a woman named Bree. *Id.* at 1346.

The State further provided evidence that Mr. Mason sold drugs and was a member of the Crips gang. *Id.* at 1326-27; *see* Argument, Section II, *infra*. The State alleged that Mr. Mason's Instagram handle was Craccloc141. *Id.* at 1327. Critically, the State made much of the fact that a photograph had allegedly previously been posted to this Instagram account containing a picture of the same make and model firearm that was recovered near the murder scene. *Id.* at 1141; *see* Argument, Section I, *infra*. It made much of the fact that Mr. Mason allegedly did not like "snitches" or "rats." *Id.* at 1197-98.

The State further admitted evidence that Ms. Powell contacted Mr. Mason's phone at 3:40 a.m., approximately five minutes after the murder. *Id.* at 1146. Mr. Small's phone was in the same area as Ms. Powell's phone at the time of the murder. *Id.* at 1225.

In addition, the State called witness Tiffany Linton to purportedly provide a prior consistent statement in which Ms. Powell had told her about a few months after the murders that Mr. Mason was involved. *Id.* at 1442; see Argument Section III, *infra*. It also, in relevant part, provided testimony from "Bree" who observed Mr. Small's child holding the supposed ill gotten money. *Id*. at 1476. This was the entirety of the State's evidence against Mr. Mason.

After a jury trial, Mr. Mason and Mr. Small were convicted of first degree murder. *Id.* at 449. After a mercy phase, both men were denied mercy and without relief from this Court will spend the remainder of their lives in prison. *Id.* at 526.

Mr. Mason humbly comes to this Court seeking the relief discussed below.

SUMMARY OF ARGUMENT

Mr. Mason was convicted, not because of powerful evidence against him, but because he is a person who does not look good to the eyes of an average West Virginia jury. He is a Crips gang member, drug dealer, and hates rats and snitches. He impregnates women he is not

married to and visits adult nude dancing clubs. He uses profanity and racial slurs on social media.

He was convicted, not because of what he did, but because of who he is. This is fundamentally unfair in our system. Joseph Mason deserved a trial on the merits of what he allegedly did and without the improper admission of collateral evidence, the State had nothing but bought and paid for testimony and there was much reasonable doubt.

The lower court allowed a gun picture that was not authenticated properly, admitted the above mentioned collateral bad act evidence, allowed improper bolstering testimony, and forced him to stand trial alongside an even more unsavory character. All of this combined to deny him a fair trial.

Anyone in this State, whether rich or poor, or even someone of a character that an average citizen might find distasteful like Mr. Mason deserves a whole lot better than the treatment he was given in Berkeley County which, without aid from this Court, will cost him the rest of this life.

The Court should reverse and remand the matter to give him a new, and this time a fair, trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that argument under Rule 19 would be appropriate as this case involves both a case "involving assignments of error in the application of settled law" and "an unsustainable exercise of discretion where the law governing that discretion is settled." W.Va. R. of App. Pro. 19. The admission of the social media posts was clear error regarding settled law, and the 404 (b)/res gestae evidence that was introduced regarding drugs, gangs, and snitches was an abuse of discretion.

As such, he believes a memorandum decision would not be appropriate except insofar as the admission of the gun picture was such clear error that this case may be reversed in a memorandum decision.

ARGUMENT

Standard of Review

This Court reviews questions of law under a *de novo* standard. *See, e.g., State v. Lilly*, 461 S.E.2d 101 (W.Va. 1995). A lower court's ruling on the authenticity of evidence is reviewed by an abuse of discretion standard. *State v. Boyd*, Syl. Pt. 12, 796 S.E.2d 207 (W.Va. 2017). The admission of the prior bad act evidence, the motion for separate trials, and the admission of the so called "prior consistent statement" is also reviewed for an abuse of discretion. *State v. Huffman*, 87 S.E.2d 541 (W.Va. 1955).

I. The lower court erred by allowing into evidence a social media post without sufficient authentication.

"Under Rule 901(a) of the West Virginia Rules of Evidence, social media text messages may be authenticated innumerous ways including, for example, by a witness who was a party to sending or receiving the text messages, or through circumstantial evidence showing distinctive characteristics that link *the sender to the text messages*." *State v. Benny W.*, Syl. Pt. 2, 837 S.E.2d 679 (W.Va. 2019) (emphasis added).

In *Benny W.*, this Court cited with approval:

> The need for authentication arises in this context because an electronic communication, such as a Facebook message, an e-mail or a cell phone text message, could be generated by someone other than the named sender. This is true even with respect to accounts requiring a unique user name and password, given that account holders frequently remain logged into their accounts while leaving their computers and cell phones unattended. Additionally, passwords and website security are subject to compromise by hackers. Consequently, **proving only that a message came from a particular account, without**

<u>further authenticating evidence, has been held to be inadequate proof of authorship.</u>

Id. at 684 (emphasis added) (internal citation omitted). In this matter, the alleged picture of a .45 caliber pistol on what was purportedly Mr. Mason's Instagram account was critical to the State even seeking an indictment against Mr. Mason instead of not pursuing any case as with Mr. Craig. A.R. at 1225; 1322. The picture can be found at Appendix Record page 64.

Upon receiving the picture in discovery, the Petitioner moved for its exclusion because, in relevant part, "[i]t is unknown when this particular screenshot was taken, who took the screenshot, or on what electronic device the screenshot was captured. Further, it is unknown when the original photograph was taken, who took the original photograph, who posted this photograph to Instagram, or when the photograph was posted to Instagram." *Id.* at 32. The Petitioner continued, "[t]here is no proof that the Defendant was the actual person that took the original photo, was in possession of the original photo, posted the photo on Instagram, or drafted the caption." *Id.* at 33.

The State responded below by making much of the fact that the *Instagram account* was Mr. Mason's. *Id.* at 40-42. ("[t]here are a number of characteristics of the Instagram post that make it clear that it was properly attributed to the Instagram account of Joseph Mason.") It cited *Benny W.* (miscited as Barney W.) for the proposition. *Id.* at 41. It concluded:

> The Defendant argues that even if the State can prove the account belonged to the Defendant Mason, the State cannot prove who posted the picture. The State counters that there is a clear inference that someone who opens a social media account and frequently posts on that account is the actual person doing the posting. Nevertheless, if the Defendant wishes to purse the claim that someone else posted the photograph to his account, then that is a question of fact to be determined by the jury and is not an issue of admissibility.

Id. at 42. The State simply botched the argument. *Benny W.* says the *exact opposite* of what the State argued. *Benny W.*, 837 S.E.2d at 684. The lower court allowed the evidence "[u]pon the testimony of Sgt. Bowman and the arguments of counsel" at a hearing held on February 21, 2022 (sic). A.R. at 82.

The hearing was held on January 21, 2022, at which Sgt. Bowman testified. *Id.* at 625. Sgt. Bowman testified that he learned that Mr. Mason had an Instagram account (although he did not recall how) named "Craccloc141" which had a picture of Mr. Mason. *Id.* at 632. He testified that he personally "viewed those photos." *Id.* He further said that "we had printouts of those photos." *Id.* at 634. When asked if Ms. Powell was familiar with "[Mr. Mason]'s Instagram account, he replied:

> A. Yes.
>
> Q. Referring to the Instagram picture in dispute in this hearing, the picture of the gun, was she familiar with that particular post?
>
> A. She had mentioned it during her statement, yes.
>
> Q. Yes. And did she say that gun was similar or the same as the gun that was used in the murder of Taylor Hawkridge?
>
> A. She believed it was the one that was used.
>
> Q. She believed it was the gun?
>
> A. Yes.

Id. at 637-38. The officer confirmed that the picture at issue was not found during the search of Mr. Mason's Instagram account but was "consistent with what Ms. Powell told [him] that that (sic) had been deleted." *Id.* at 641. On cross examination, Sgt. Bowman admitted that he did not know who took a screenshot of the photograph. *Id*. at 643. He admitted that the exhibit was not an actual screenshot, but a photograph of a printout of the screenshot. *Id.*

Q. So someone took a picture of somebody's phone with that picture on it?

A. I didn't know if they took a photo of the phone, but there's numbers down there, appears—maybe we printed it out and took a photo of it?

Q. Even when you look at the bottom of this, you can see like – it is a sheet of paper. So the document that we received **is actually a picture of a sheet of paper that was a picture of the screenshot.** Is that correct?

A. A picture of the paper, that's what it appears, **yes**.

Q. Yes. Okay. And do you know who provided these screenshots?

A. **I cannot recall who actually printed those off at that time.**

Id. at 644 (emphasis added).

Q. And you mentioned that Ms. Powell had said – or Nas – Ms. Van Camp –I guess she goes by several references to her name – that she at one point said something – mentioned something to you that she believed that a post of a gun was the same gun that was used?

A. Yes.

Q. Now did you do that interview with her?

A. Yes.

Q. Eventually we did. I believe in the --- it was almost the last interview we had with her.

Id. at 644-45. The State then argued that the picture had been authenticated and was admissible at trial:

As to authentication, I noted a case – I incorrectly cited the State v. Barty –- it is State versus Barney. State versus Barney says there' a number of ways to authenticate witness testimony on social media evidence. Circumstantial evidence, distinctive characteristics met the standard among them. And that's not even exclusive. You can have other circumstantial evidence that shows that this is in fact not authentic piece of data.

We know that defendant went by Cracc. He identifies himself as a Crip. So his user name is Cracc, lover of Crips 141. His picture is his profile picture. His picture – he's got selfies throughout. And some of those were introduced into court. He's got selfies throughout these Instagram photos.

> We have a witness who will say that she is aware of Joey Mason's Instagram accounts, Ms. Powell. That this was his Instagram account. That she did see the picture of the gun. And that she – it was from his account that she is familiar with.

Id. at 646-47. Aside from whiffing again on the *Benny W.* case name, the State again misapplied the relevant test. Mr. Mason pointed this out below:

> The big factor, though, I think is authentication. The State in their response relies on State v. Barney to admit the photo. And I think the State believes that just because they can basically show that this post was on a social medial account, that that item can be attributed to the alleged owner of the account. And that's not at all what Barney says. Barney actually says that only proving that the message came from a particular account without further authentication – authenticating evidence has been held to be inadequate proof of authorship.

Id. at 651. Mr. Mason's argument below was indisputably correct.[2] However, the lower court nonetheless erroneously allowed the photograph:

> Well, what we have is – what I am satisfied for the purposes of considering the admissibility of the evidence – is that the name of the account tracks a nickname and/or alias that Mr. Mason is known by and goes by. The Instagram account has his photograph. And within it has selfies that depict him, both singly and with others.
>
> Ms. Powell, by circumstance, appears to be a person with knowledge of Mr. Mason and his social media account accounts. She is able to identify the gun, the location of the gun, as it was – in a location appeared to be consistent with the location of the murder.
> …
>
> It is a photograph of a firearm that was associated by independent scientific evidence with the commission of a crime. If it just happened to be there, or of no particular moment, of if it is something that he republished not knowing its source or meaning, and, you know, it is a circumstance, which I think the jury should consider…

Id. at 659-660-61.

[2] Aside from yet again calling the case "Barney."

Respectfully, the lower court could not have gotten it more wrong. It is meaningless under the *Benny W.* test whether the Instagram account is shown to be Mr. Mason's account. It must be shown to be Mr. Mason's post. *Benny W.*, 837 S.E.2d at 684. Thus, the fact that there was evidence that this particular *accoun*t belonged to Mr. Mason as evidenced by other photographs of him, selfies, etc. is not important at all. That is because nothing introduced by the State below showed that the *picture itself* was taken by Mr. Mason. Nothing at all.

In addition, although the Rules of Evidence are arguably inapplicable at evidentiary hearings, Ms. Powell's last vague statement that she knows Mr. Mason's account should not be given a bit of credibility as it was her seventh version of events. A.R. at 1231. However, even at trial when given the opportunity, Ms. Powell said absolutely nothing about the photograph. *Id.* at 1324-1433.

`Further, the fact that Ms. Powell led the police to the location of the gun is not surprising in the least as she was convicted of murdering Ms. Hawkridge and would therefore know where she threw the gun. This does nothing to link the gun to the Instagram post.

Finally, although the method of authentication is not at issue because the State has failed to authenticate the picture in any event, the idea that in a criminal trial a party can vouch for the authenticity of a document because an officer remembers viewing it eight years prior, has someone (we don't know who) take a picture of it with a phone, print out that picture, and then take a picture of that piece of paper for use as evidence is worthy of the mad hatter. *Id.* at 644-45. At least Petitioner thinks that is what was submitted. It is not clear from the testimony at all.

The State may complain that the Petitioner can cite no case that this is improper, but it is respectfully such an absurd submission that it is doubtful that any other party has tried to admit evidence in this fashion in any common law court in history.

This Court should reverse on this Instagram picture issue alone as it associated a picture of a gun similar to the murder weapon with the Petitioner and was a powerful yet improper piece of evidence against him which caused him great prejudice.

II. *The lower court erred by permitting the discussion of res gestae and/or 404 (b) evidence related to the Petitioner's gang and drug affiliations and his dislike of police informants.*

"In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to prove evidence which is relevant and legally connected with the charge for which the accused is being tried." *State v. Thomas*, Syl. Pt. 16, 203 S.E.2d 445 (W.Va. 1974).

This Court recognizes, and the Petitioner agrees, that at times unfortunately criminal defendants must be exposed to testimony related to prior acts which are embarrassing or potentially prejudicial. W.Va. R. of Evid. 404 (b) (allowing bad act testimony "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."). Some of these other acts are so "inexorably intertwined," "necessary preliminaries to the crime charged," or needed to "portray[] to the jurors the complete story" of the event that it would not be fair to the State nor to the jury to attempt to edit them or leave the items out. *State v. McKinley*, 764 S.E.2d 303, 315-16 (W.Va. 2014) (known as intrinsic or *res gestae* evidence).

If the evidence is of the 404(b) or extrinsic type, a defendant is entitled to the well-known protections of the three-part pretrial test. *State v. McGinnis*, 455 S.E.2d 516 (W.Va.

1994). If the evidence is intrinsic, the defendant is not so protected. *McKinley*, 764 S.E.2d at 315.

Not surprisingly then, there is a tactical benefit to the State to craft its narrative of the crime to sweep in as many unpleasant facts about the defendant on trial as possible to make each of those facts intrinsic. This was clearly done in this case.

Prior to trial, the State filed a "State's Amended Notice of Intent to Admit Intrinsic Evidence or 404(B) Evidence." A.R. at 44. It first wished to admit evidence that Mr. Mason "was…a drug dealer in the area." *Id.* at 45. This was necessary, it said, because Taylor Hawkridge had become a drug informant for the police. *Id.* "The State will prosecute this case under the theory that the Defendant Joseph Mason became aware that Ms. Hawkridge was an informant and decided to kill her, in part, out of fear that Ms. Hawkridge was informing on him Without the jury being made aware that Defendant Mason was, at the relevant time, dealing drugs in the community, they would (sic) be able to properly understand the Defendant's motive in this case." *Id.* The State argued that the evidence was admissible for motive as well under 404(b). *Id.*

Next, the State asked for permission to introduce Mr. Mason's gang affiliation. *Id.* at 36. It stated, "The culture of the Crips gang creates an environment that deplores any cooperation with law enforcement for any reason. This is **integral** to the State's presentation of the evidence and is intrinsic to the case." *Id.* at 47 (emphasis added). It further argued that under 404 (b) it would be admissible as "probative of the motive for the killing of Taylor Hawkridge. Additionally it is relevant to the identity of the Defendant, as he frequently self identifies through his gang affiliation." *Id.*

Third, the State wanted to introduce evidence of Mr. Mason's alleged "Hatred of Informants." *Id.* at 48. "The State intends to introduce evidence that the Defendant, Joseph Mason, has very particular views towards informants and individuals who otherwise cooperate with law enforcement officers. In tune with his Crip gang affiliation, the evidence shows that the Defendant exhibits both rage and disgust towards informants and believes that they should die." *Id.*

The State argued that the evidence was "to explain to the jury why Defendant Mason would wish to kill a government informant, the State must be able to show the jury that the Defendant held unbridled contempt for anyone who assisted the government in the investigation or prosecution of crime." *Id.* The State argued that this was intrinsic or in the alternative, it was admissible under 404 (b) as "probative of the Defendant's motive to kill Taylor Hawkridge." *Id.*

The lower court found that all three items were intrinsic to the State's case or in the alternative 404 (b) evidence. *Id.* at 682-83.

> As they have stated their theory of the case, I'm satisfied that it –there's a reasonable argument that it's intrinsic. And I'll likewise fall back to the extent that it may not be.
>
> So the ---and some of it does venture a bit off the path. Covering the child with the blue bandana really would appear to have more to do with his world view – his commitment to the organization and his level of fidelity to the organization.
>
> And I believe that is part of the State's case, and should be part of the State's case, and should be permitted to be a part of the State's case to establish his involvement and role and motivation. As well as the associated social media accounts that –from which these flow. Because it is all wrapped together, it is really hard to parse out.
>
> I don't know how – the government has the duty to explain to some juror who is sitting there wondering, What's with all the double Cs and 3s for the Bs, and all those sorts of things? So, I think it is helpful for their understanding of the

> context of what the State is asking them to understand, and if they are so inclined to believe.

Id. This rationale is plainly wrong and an abuse of discretion. It may perhaps be a proper holding in a case where the State *actually introduced evidence* that the motive was hatred of informants or revenge for snitching, but in this case, it did no such thing. In the actual case, and not a hypothetical one, the State's proposed and sole motive for the killing was ten thousand dollars ($10,000) handed to Mr. Mason by Mr. Craig in a brown paper bag. *Id.* at 1344. One can search the record in vain for any mention or evidence that Mr. Mason knew Ms. Hawkridge was a confidential informant, that he had ever sold her drugs, or that his Crips affiliation had anything at all to do *with the killing*. Intrinsic evidence should at least be intrinsic to the State's actual case and not a pretend one.

The argument that the jury needed to know Mr. Mason's gang affiliation to explain his Instagram handle is respectfully silly. The Court can take judicial notice that pseudonyms are prevalent on social media and all over the internet. For example, Counsel's email is listed on the cover page of this brief as "wvlawyer13@gmail.com." It cannot be seriously argued that the Court is simply unable to associate this email address with Petitioner's counsel because it is unaware of the significance of the number "13" appended to the user name. The Court, like a jury without the prejudicial information, assumes that Counsel picked that number for a personal or other irrelevant reason. It could be his child's birthday, the year of a loved grandfather's birth, a hex against the unlucky number 13, or (correctly) the year he graduated law school. The answer to that question is completely irrelevant to the association of Counsel's email to him.

In fairness, it is difficult to parse the irrelevancy of the other bad act evidence because the State used it to such an extreme extent. *McGinnis,* 455 S.E.2d at 528-531 (colloquially

known as “shotgunning”). If there was a piece of evidence related to gangs, drugs, hatred of informants, or really anything that made Mr. Mason look bad to the good citizens of Berkeley County, the State used it.

For example, in the disputed Instagram picture, the State introduced the purported statement of Mr. Mason below the picture which claimed, “Extendo if a pussy wanna try me!!! Crip Life.” A.R. at 111. Sgt. Bowman testified that “extendo” was gang slang for the “longer magazine [than] that’s standard for the firearm.” *Id.* at 1143-44. This despite a magazine never being recovered from the crime scene or anywhere else. *Id.* at 1220.

Surely, though, it was unnecessary for a proper story for the State to introduce Exhibit 24 which showed Mr. Mason covered in body tattoos for the limited purpose of showing his stomach tattoo which read “A Man’s Ruin Lies in His Tongue” for the limited purpose of possibility getting the jury to believe through a tenuous connection that this statement would lead to the murder of an informant—again a motive the State never argued. *Id.* at 127. Clearly this was done for the prejudicial effect.

Further to show that this was Mr. Mason’s Instagram account, it was over the top unnecessary to publish the account name with the picture which included the tagline “Eight Trays M8V3N_bacxwest. Fucx niggas been winning, now it’s My Turn!!! Fucc The Feds. Free the real 1’s, fuc the rats….” for the very limited purpose, according to the lower court, that Mr. Mason did not like informants. *Id.* at 129.

To prove that Mr. Mason and Mr. Small knew each other, a fact not in dispute, the State introduced a picture of several intoxicated people, including Mr. Mason and Mr. Small, with a girl in the background giving the camera the middle finger. *Id.* at 134.

The examples are replete. Throughout the trial, the jury was informed that Mr. Mason had a prior criminal record, *id.* at 1152-3, that he had at least two illegitimate children, that he was a Crips member covered in tattoos, that he was a drug dealer, he was a regular at a local nude dancing club, and that he associated with Mr. Small, a pimp and sex trafficker. *Id*. at 1806. And again, none of this had to do with the State's presentation of the evidence that Mr. Mason received money from Mr. Craig to pay Mr. Small to kill Taylor Hawkridge. Indeed, Sgt. Bowman agreed that it was "somewhat shocking" that a Bloods member like Mr. Craig would "be associating" with a member of the Crips like Mr. Mason. *Id.* at 1308. It was so shocking because it was not intrinsic to the State's case at all nor relevant in any way.

The introduction of this evidence was devastating to Mr. Mason because the State's case was otherwise incredibly weak. Ms. Powell testified that Mr. Mason came to her house and asked her to go to Vixen's Gentlemen's Club on the night of the murder. Both she and Mr. Mason entered but did not talk and he texted her to go pick up Mr. Small. The story is nonsensical because, if true, Mr. Mason could have simply texted her at the outset to go pick up Mr. Small, but instead created this complex scheme of driving to the club simply so that they would be seen together in public on the night before a murder that they planned. The reason for this fabrication by Ms. Powell is that they *were* seen at Vixen's Gentlemen's Club and her tale had to account for that.

Further, the idea that Armistead Craig parked his car at Weis grocery store in a "front to front" manner with Ms. Powell's car, all so that she could get a good look at the alleged money exchange is unbelievable. But it had to be that way in her story for her to get her fifteen (15) year sentence reduction.

The cell records where Ms. Powell called Mr. Mason approximately five minutes after the murder, in an attempt to persuade the jury that it was a confirmatory call (i.e. "It had been done") is again simply a piece of evidence manufactured by Ms. Powell. If a person is planning a set up, then all he or she must do to implicate another in a crime is to call them. The call sheds no light on the ultimate issue.

Based upon the weakness of the State's case, tied to its shotgunning effort, Mr. Mason's conviction should be reversed, and he should receive a new trial.

III. *The lower court erred by permitting improper hearsay testimony under the guise of a "prior consistent statement."*

"A statement that meets the following conditions is not hearsay… The declarant testifies and is subject to cross examination about a prior statement, and the statement…is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying…." W.Va. R. of Evid. 801 (d) (1) (B).

"[A] prior consistent out-of-court statement of a witness who testified and can be cross examined about the statement, in order to be treated as non-hearsay under the provisions of said Rule, must have been made before the alleged fabrication, influence, or motive came into being." *State v. Quinn*, 490 S.E.2d 34, 45 (W.Va. 1997).

As clear from the rule, the prior statement must be consistent, and the applicability of the rule is a precondition of admissibility. The lower court failed to follow these rules in this case.

During Ms. Powell's testimony while she was weaving her seventh version of the tale, she claimed that she had told another person, Tiffany Linton, her story implicating Mr. Small and Mr. Mason prior to her arrest. A.R. at 1396-97. On cross examination, she claimed that

she never told Ms. Linton that: 1) she was supposed to shoot Ms. Hawkridge but froze up and therefore Mr. Small had to shoot, 2) that Ms. Hawkridge was killed because she had stolen money from Mr. Mason so she could take a trip to Las Vegas, and 3) that she met both Mr. Mason and Mr. Small at Vixen's Gentlemen's Club the night of the murder.

In purported response to this testimony, the State attempted to call Tiffany Linton, ostensibly to offer a prior consistent statement. *Id.* at 1433-34. Mr. Mason objected claiming that Ms. Linton's testimony "is not consistent whatsoever with [Ms. Powell's] testimony, or with any other statement, or grand jury testimony that Ms. Powell has ever given. Because she adamantly denied many of the items set forth in Ms. Linton's statement, so I don't see how it is consistent." *Id.* at 1434.

The lower court allowed the statement holding:

> Whether it is consistent or not, isn't that sort of the meat and grist of a cross-examination? I mean, obviously it would – it is like sending a boat out in the harbor with a big hole in the bottom. If you thought that was a consistent statement, you're going to flounder a bit.
>
> …
>
> And part of the give and take of trial, I would presume, is the details of whether an item is truly inconsistent or consistent or not?

Id. at 1435; 1436. This is error. The question of admissibility is one for the court to decide in the first instance and not leave it to jury determination. If the statement is not consistent, and it was not consistent, then the jury gets to hear improper and bolstering hearsay.

The State then called Tiffany Linton, incarcerated and ready to testify. *Id.* at 1439. The State had secured her as a helpful witness because it engaged in an informal agreement whereupon on Ms. Linton's arrest, she ran to the State with this story, and she was granted a personal recognizance bond at the request of the prosecutor. *Id.* at 1444-45.

Ms. Linton testified that Ms. Powell spoke with her after "[t]hey had just came and got her car to search her car. And worried about them, and finding stuff out about her and Taylor. Well, about her and Rich." *Id.* at 1440. She stated that Ms. Powell had told her:

> [T]he night of the murder, her Rich [Mr. Small] and Cracc [Mr. Mason] were at the club that Taylor worked at. That her and Rich were told to leave the club by Cracc, to go kill Taylor, because he thought that she was setting him up. Or she had stole from him. When they got to Taylor's townhouses, Nas couldn't pulled the trigger, so she had Rich do it.

Id. at 1442. Ms. Linton testified that Ms. Hawkridge and a friend went to Las Vegas with money stolen from Mr. Mason. *Id.* at 1464-5. Ms. Linton did not tell anyone this story until seven years after it allegedly happened and when she was arrested on an unrelated charge. *Id.* at 1465.

As noted, this statement is completely inconsistent with what Ms. Powell testified to at trial and should not have been admitted. In addition, the alleged statement was made after the police had searched Ms. Powell's car and when the motive for fabrication had already arisen. *Quinn*, 430 S.E.2d at 45.

The admission of this statement was erroneous and served to pile on more inferences of guilt to Mr. Mason.

IV. The lower court erred by failing to sever the Petitioner's trial from that of his co-defendant.

Our Legislature has provided a powerful statutory right to any criminal defendant to elect to be tried separately from his co-defendant. W.Va. Code §62-3-8; *State ex rel. Whitman v. Fox*, 236 S.E.2d 565, 572 (W.Va. 1977) ("[B]asic concepts of fairness dictate that every individual has a right to a separate trial at which the primary focus is upon his individual guilt or innocence.").

Nonetheless this Court has enacted W.Va. R. of Crim. Pro. 14 (b) which makes separate trials discretionary instead of mandatory. The Court has thus voided a statute under the guise of the provision of our Constitution which gives this Court power to "promulgate rules for all cases and proceedings, civil and criminal…which shall have the force and effect of law." W.Va. CONST. Art. VIII, §3.

With respect, this Court should revisit this precedent. The right of a separate trial is not a simple procedural rule such as a time limit for filing motions, the form of indictments, or the processes of arraignment. It is a powerful right recognized by the *Whitman* Court and it is why many defendants, including Mr. Mason, argue so forcefully for it and not so much for simple procedures. Mr. Mason argues that as the Legislature has bestowed upon him such a choice, the due process clauses of the State and Federal Constitutions should permit him the choice of a separate trial upon request.

However, Mr. Mason's argument is far more than this as he was actually prejudiced by the joinder of his trial with Mr. Small. "A defendant is not entitled to relief from prejudicial joinder pursuant to Rule 14 of the West Virginia Rules of Criminal Procedure when evidence of each of the crimes would be admissible in a separate trial for the other." *State v. Gibb*s, Syl. Pt. 4, 797 S.E.2d 623 (W.Va. 2017).

The lower court attempted to follow this dictate by asking if there would be evidence admissible against Mr. Small but not Mr. Mason. A.R. at 590-91. The State asserted to the lower court that there was no such evidence:

> So simply saying that: I don't feel like --- I don't feel like sitting next to this person. I feel like that case is stronger against him than it is against me – is not the kind of prejudice that they [this Court] is looking for. It is looking for substantial – pinpoint something that you look at and say, well, that's clearly going to be admissible against Mr. Small, should not be admissible against Mr. Mason. **And there is no such evidence.**

Id. at 588 (emphasis added). The State was wrong.

The State introduced statements made during police interrogations by Mr. Small. *Id.* at 1206. Mr. Small said that he knew Mr. Mason because it was a small town. *Id.* at 1207-08. When showed a picture of money, Mr. Small said that it was not his "M.O." to do a murder for hire. *Id.* at 1209. Mr. Small asked Sgt. Bowman during the interrogation if Sgt. Bowman thought it was murder for hire. Sgt. Bowman said that he did. *Id.* at 1210. Sgt. Bowman confronted Mr. Small with the proof that he had stayed at the Clarion hotel, and that his phone was pinging near the murder scene at the time of the murder, and Mr. Small "didn't…really [have] a response, other than the fact that he didn't deny it anymore." *Id*. at 1210-11.

Sgt. Bowman pointed out that "there was evidence mounting up on him as far as his case is concerned. And at that point, he was nodding his head." *Id.* at 1211. Although Mr. Small did not confess, "he would say he would like to help, but he couldn't. He took a deep breath one time where I felt something was going to come out, but it never did." *Id.*

All of these statements are admissible against Mr. Small as he is a party. W.Va. R. of Evid. 801 (d) (2). They are not admissible against Mr. Mason because they are hearsay with no exception, and they violate his Confrontation Clause rights as they are clearly testimonial being given to a police officer in a custodial and investigatory setting. *Crawford v. Washington,* 541 U.S. 36 (2004); *State v. Mechling,* 633 S.E.2d 311 (W.Va. 2006). At a separate trial for Mr. Mason, none of these statements would have been admissible had Mr. Small not testified—and he did not testify at this trial.

For these reasons, it was error for the lower court to force Mr. Mason into a joint trial with Mr. Small.

V. *The effects of these errors are cumulative, and they combined to deny the Petitioner a fundamentally fair trial.*

When the effect of cumulative errors prevents a defendant from receiving a fair trial, even if the errors taken individually would not merit reversal, this Court may nonetheless order a new trial. *State v. Smith*, 193 S.E.2d 550 (W.Va. 1972); *State v. Wilson*, 202 S.E.2d 828 (W.Va. 1974).

Mr. Mason maintains that each of his assignments of error merit reversal and a new trial. However, if some members of this Court do not share his opinion, he raises the cumulative error doctrine. He contends that taken in totality, and not individually parsing and knocking down each assignment, he presents a broad picture about the unfairness of his trial. He was hit with a picture that wasn't authenticated, was presented to the jury as a Crips gang member drug dealing thug, a witness was allowed to bolster her testimony through the improper use of a "prior consistent statement" that was not consistent and done after the motive to lie was present, he was forced to associate himself with a triggerman near the murder scene and who is also a pimp and human trafficker, and finally he was denied his Sixth Amendment confrontation clause rights.

All of these things have combined to make Mr. Mason's conviction and his stay in prison until the day he dies most terribly unjust and in contravention of controlling law. This Court should reverse.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse his conviction and sentence from the Circuit Court of Berkeley County and remand the matter to that court with instructions to grant him a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have caused a copy of this Petitioner's Brief to be served by the Supreme Court File and Serve Express system on this 26th day of January, 2023.

/s/ Jason T. Gain

_____

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