IN THE SUPREME COURT OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,
PLAINTIFF BELOW, RESPONDENT,

v.

DOCKET NO. 22-705
(22-F-75)

JULIE BROWNING,
DEFENDANT BELOW, PETITIONER.

PETITIONER'S BRIEF

Counsel for Petitioner, J.B.

Mark Plants (WV Bar #9760)
Counsel of Record
Plants Law Firm
320 2nd Avenue
South Charleston, WV 25303
Tel: 304-744-9148
mplants@plantslaw.com

CERTIFICATION PAGE

I, Mark Plants, hereby certify that the facts alleged in Petitioner's Brief are accurate to the best of counsel's ability.

Mark S. Plants WVSB#9760
320 2nd Avenue, So. Charleston, West Virginia 25303
mplants@plantslaw.com

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NOW COMES YOUR PETITIONER, Julie Browning, by and through counsel, and hereby submits this *Petitioner's Brief*.

ASSIGNMENTS OF ERROR

I. The trial Court erroneously ruled evidence of past bad acts was intrinsic evidence. The evidence of other acts was not *inextricably intertwined* or even rationally related to the charged conduct causing the victim's death. The Court failed to make requisite findings as set forth in *State v. McGinnis*. As a result, highly prejudicial testimony of multiple past bad acts was attributed to Petitioner without sufficient evidence connecting her to the acts. Consequently, she was denied a fair trial.

II. The trial court unconstitutionally limited Petitioner's right to cross examine a codefendant/fact witness by prohibiting any questions that had already been answered on direct examination by that witness.

STATEMENT OF THE CASE

On the morning of December 26, 2018, eight (8) year old R.B. collapsed in the shower after suffering flu-like symptoms. *Vol. II, Appx. Pg. 1589-98, 400:9, 468:12-24.* She had a cough for several days. *Vol. II, Appx. Pg. 1579:17, 1586:16.* Petitioner Julie Browning, her step-mother, and Marty Browning, her father, were both at work at the time. *Vol. II, Appx. Pg. 1595-1597*. Sherrie Titchenell, her live-in step-aunt, was home and immediately called 911 and reported the child was having a seizure. *Id*. EMS arrived and transported R.B. to Plateau Medical Center in Oak Hill, W. Va. *Vol. II*, *Appx. Pg. 398:14-400:9, 368:12-24*. All the experts agreed, R.B. died of sepsis due to untreated pneumonia. *Vol. II, App. Pg. 1449:6-1451:7*. According to the chief medical examiner, there was no evidence of physical abuse or trauma other than pneumonia. *Vol. II, Appx. Pg. 1455:14- 1467:9; 781:13-782:14.*

A Fayette County Grand Jury returned a two (2) count indictment against Marty Browning, Julie Browning, and Sherie Titchenell. Count one (1) alleged "death of a child by

parent, custodian, or guardian by child abuse" which occurred between August 28, 2014 and December 26, 2018. *Vol. I*, *Appx. Pg. 40-1*. It alleges that the defendants intentionally, maliciously inflicted pain and/or impairment of physical condition causing the death of R.B. in violation of W. Va. 61-8D-2a(a), which carries a 15-to-life sentence in prison. *Id*. Notably, this count alleges child abuse over a four (4) year period which *caused* the child's death on December 26, 2018.

Count two (2) alleged "child neglect resulting in death" which occurred between August 28, 2014 and December 26, 2018. It alleged the defendants committed medical neglect causing the death of R.B. in violation of W. Va. Code 61-8D-4a, which carries a 3-to-15-year prison sentence. *Id*. Notably, this count alleges neglect over a 4-year period *causing* pneumonia and ultimately death on December 26, 2018. Its undisputed that R.B.'s death was caused by untreated pneumonia, not previous child abuse. *Vol. II, Appx. Pg. 1455:14- 1467:9; 781:13-782:14; 1449:6-1451:7*.

At trial, there were three (3) separate and distinct past bad acts the trial Court ruled were admissible. *Infra*. The evidence of other bad acts included:

1. Previous bruises and a cigarette burn,
2. Broken femur,
3. Starvation, including drinking from a toilet.

Most of the state's case focused on past bad acts, not the circumstances leading up to R.B.'s death. *Infra*. Multiple expert witnesses testified that the broken femur was child abuse. *Id*. State witnesses testified that R.B. was starved and intentionally deprived of water, including that she drank from a toilet. *Id*. Six of the state's witnesses, including three (3) doctors, one (1) nurse, and two (2) fact witnesses testified regarding past abuse unrelated to the death. *Infra*. The trial

testimony was substantively the same testimony presented at the 404(b) hearing on February 8, 2022. At trial, the testimony concerning other acts included the following:

> **Michelle Staton, M.D**.- R.B.'s family physician, testified that she was not informed of the femur break in 2015, that it was unreasonable not to report it to a family physician, and that having learned of the incident- it would have been "impossible for [R.B.] to break her leg that way [as described by defendants]". *Vol. II, Appx. Pg. 519:1-520:1; 526:9-528:7*. Dr. Staton testified to R.B.'s loss of weight since 2014, she authenticated a chart of percentage weight loss over a 4-year period, and was "extremely, extremely" concerned with a precipitous drop in weight. *Id*. She did not testify who caused the broken femur or starved R.B.
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> **Brandon Workman, M.D**.- R.B.'s treating psychiatrist, testified that he was not informed of the femur break in 2015, that the defendants did not inform him of the incident, and that normally caretakers would "lead" with that type of information to help treatment. *Id. at 620:17-621:13.* He did not testify who caused the broken femur or starved R.B.
>
> **Kara Gillispie**- physician's assistant, Summersville Regional Medical Center, testified that she treated R.B. on September 2, 2015 for a broken femur. *Vol. II. Appx. Pg. 684:15-690:4.* It was reported by the defendants that R.B. threw a tantrum and kicked a wall, injuring her knee. Defendant Marty Browning was the only defendant present at the ER to report the cause of the broken femur. She testified that R.B. was diagnosed with a "buckle fracture" caused by bones crushing into each other. *Id.* She opined that the femur is the hardest, strongest bone in the body and that a fracture of this nature is child abuse until proven otherwise. *Id.* She added that the defendants' story was inconsistent with the injury; and in her opinion, the femur break was child abuse. *Id.* She did not testify who caused the injury.
>
> **Joan Philips, M.D.**-expert child abuse pediatrician, testified that in her expert opinion the "distal metaphyseal" femur break was child abuse, that this injury is "highly specific" of child abuse, and that this type of injury does not happen by accident. *Vol. II*, *Appx. Pg. 830:21-833:2.* She added that "we know from … literature and research that metaphyseal fractures…[are not caused] by kicking or impact …. So… given the explanation it was not plausible; this was fracture caused by child abuse." *Id*. She opined that studies have shown that a child with a lower leg fracture caused by non-accidental trauma is "more likely to actually die." She did not testify who caused the fracture. Regarding the allegation of starvation, Dr. Philips testified that based on her review of R.B.'s past medical records/weight charts her loss in weight was an "indication that she's being deprived of food." *Vol. II, Appx. Pg. 827:3-830:17*. She did not testify who caused the broken femur or who deprived R.B. of food.
>
> **Carrie Ciliberti**- R.B.'s teacher from Nicholas County, testified that R.B. suffered from a broken femur which is not common, that the parents' explanation did not fit the injury, and that she notified Child Protective Services of the incident. *Vol. II*, *Appx. Pgs*. *1088:9-1089:9*. She testified that she previously saw bruising that appeared to be a handprint and bruises/scabs on her legs. *Id. at 1099:4; 1104:3.* She added the bruises were small and the

scabs were round, possibly cigarette burns. *Id. at 1105:5*. She testified that R.B. was always hungry, that she was afraid of telling the teachers she was hungry, and that Defendant Sherrie Titchenell advised the school not to feed R.B. breakfast. *Id. at 1091:17; 1093:6*. She did not testify which, if any, of the defendants mistreated R.B.

B.M.- R.B.'s older half-sister, testified at trial, for the first time, regarding the broken femur and starvation. However, she did not testify at the 404(b) hearing. *Vol. II*, *Appx. Pg. 82:11-14*. Her testimony was proffered through therapy notes of her therapist, Dreama Short. *Id*. At trial was the first time the court and the defendants heard details of the broken femur from B.M. *Id*. Regarding the broken femur, she stated R.B. was crying and co-defendant Sherrie Titchenell took her into a bedroom. She heard a "pop sound" and Sherrie came back out of the bedroom, but R.B. did not. *Vol. II*, *Appx. Pg. 1178:3-21*. The next day R.B. could not stand or walk on her own. *Id.* She testified that Defendant Sherrie Titchenell would strike her on multiple occasions. *Id. at 1175:18-24*. She stated that R.B. was denied food and water for days, sometimes as a form of punishment. *Id. at 1191:1-11*; *1192:7-15*. She specifically recalled an instance that R.B. drank water from the toilet. *Id. at 1195:10-23.*

On February 8, 2022, the trial court conducted a pretrial hearing regarding Petitioner's *Motion In Limine*. *Vol. II, Appx. Pgs. 99-107, See, Vol. I, Appx. Pgs. 42-7.* The trial Court relied on *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996), and ruled the past bad acts were intrinsic to the charged conduct. *Id*. Upon information and belief, there was not an order drafted reflecting the court's denial of Petitioner's *Motion In Limine* from the February 8, 2022 hearing. The trial court did not conduct a 404(b) analysis and failed to make findings required by *State v. McGinnis*, 193 W.Va. 147, 159, 455 S.E.2d 516, 528 (1994). *Id*.

On June 10, 2022, Defendant Sherrie Titchenell testified regarding the facts and circumstances of R.B.'s death and other acts. *Vol. II*, *Appx. Pgs. 1645-75*. Petitioner's counsel was prohibited from freely cross-examining Mrs. Titchenell because the Court limited cross examination of the codefendants. *Vol. II, Appx R. 1623-4*. The Court allowed defense counsel to ask only questions that "had not already been answered" on direct. *Id*. The Court stated:

> THE COURT: You know, I think I have to give other defense counsel an opportunity to ask this woman some

questions before you cross examine.

So, you finished?

MR. PLANTS: I am, Your Honor.

THE COURT: All right, you want to make sure we get all the exhibits.

All right, Mr. Dove, you may inquire, and ask any questions that have not already been answered, okay.

All right, go ahead.

Id. The Court allowed the prosecutor to cross examine witnesses as to all aspects of the case. *Vol. II, App. Pgs. 1661:23- 1662:3.* The Court also prohibited defense counsel from objecting during the prosecutor's cross examination if counsel did not call that witness on direct. *See, Vol. II, Appx. Pgs.. 1656:14-1657:2.*

SUMMARY OF THE ARGUMENT

Other bad act evidence was not intrinsic

The trial Court erroneously ruled evidence of past bad acts was intrinsic evidence. The evidence of other acts was not *inextricably intertwined* or even rationally related to the charged conduct causing the victim's death. Other act evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are both part of a *single criminal episode* or the other acts were *necessary preliminaries* to the crime charged or necessary to a *full presentation* of the state's case. Here, the other acts occurred several years prior to the R.B.'s death. Undisputedly, she died from pneumonia unrelated to the past bad acts. The autopsy revealed no evidence of injuries or physical trauma other than pneumonia. The evidence of other acts was not

necessary for a full presentation of the state's case or to explain the context of the charged conduct. The context and circumstances leading up to R.B.'s death from pneumonia were practically undisputed. The only issue in dispute was the defendants' intent, i.e., whether the death was an accident or not. The *other act* evidence is classic 404(b) evidence which should have been offered to prove *intent* and/or *absence of mistake*, not intrinsic evidence.

By incorrectly ruling the other acts as intrinsic, the Court failed to make requisite findings as set forth by Syl. Pt. 2, *State v. McGinnis*, 455 S.E.2d 516 (1994). There are three (3) separate and distinct past bad acts that required a judicial analysis:

4. Previous bruises and a cigarette burn,
5. Broken femur,
6. Starvation, including drinking from a toilet.

Most of the state's case focused on past bad acts, not the circumstances leading up to R.B.'s death. Multiple expert witnesses testified that the broken femur was child abuse. State witnesses testified that R.B. was starved and intentionally deprived of water, including that she drank from a toilet. The trial court failed to find by a preponderance of the evidence that the Petitioner committed these acts; that the acts were relevant; and failed to apply the Rule 403 balancing test as required by *McGinnis*. As a result, the jury heard unfairly prejudicial evidence attributed to the Petitioner without a judicial determination that she committed the other acts.[1]

Cross examination was unconstitutionally limited

Petitioner's counsel was prohibited from freely cross-examining codefendant/fact witness Sherrie Titchenell because the Court severely limited cross examination of the codefendants. The Court allowed defense counsel to ask *only* questions that "had not already

[1] Petitioner would have filed a motion for separate trials if the Court determined a codefendant committed the acts.

been answered" on direct. Petitioner's counsel was not afforded the opportunity to engage in hostile cross examination of Mrs. Titchenell. As such, counsel could not adequately flush out potential inconsistencies of her testimony. Importantly, R.B. was left in Mrs. Titchenell's custody, care, and control the morning of R.B.'s death. The other defendants were at work and had not seen R.B. since the day before. Mrs. Titchenell was responsible for calling 911, set the narrative of the scene that morning in the house, and was the last person to see R.B. alive.

Where there is more than one defendant or defense attorney, it may be proper to prevent one defense attorney from repeating a question already asked by another defense attorney. *U.S. v. Caudle*, 606 F.2d 451 (4th Cir. 1979). However, a defendant's right to cross-examine the witnesses on the subject matter of their direct testimony, cannot be denied merely because the witness has already asked the same or similar questions. *Id*. The fact that the questions had been previously asked and answered is a reason to permit cross-examination, not a reason to deny it. *Id. at 456*.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The West Virginia Supreme Court is aware of the standard and the entire factual record is available for the Court's review. Therefore, oral argument is not likely to aid the Court in resolving this matter.

STANDARD OF REVIEW

Regarding the admission of evidence, the action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion. Syllabus Point 10, *State v. Huffman*, 141 W.Va. 55, 57, 87 S.E.2d 541, 544 (1955), overruled on other grounds by *State ex rel. R.L. v.*

Bedell, 192 W.Va. 435, 452 S.E.2d 893 (1994), *Syl. Pt. 2*, *State v. Harris*, 230 W.Va. 717, 742 S.E.2d 133 (2013). Further, "'[a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.' Syllabus Point 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998)." Syl. Pt. 3, *Harris*, 230 W.Va. at 717, 742 S.E.2d at 134. However, the Court's review of evidence admitted pursuant to Rule 404(b) of the West Virginia Rules of Evidence involves the following additional analysis:

> The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

State v. LaRock, 196 W.Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996). We also note that "[t]his Court reviews disputed evidence in the light most favorable to its proponent, [in this case, the State,] maximizing its probative value and minimizing its prejudicial effects. *Id.* at 312, 470 S.E.2d at 631; *see also State v. McGinnis*, 193 W.Va. 147, 159, 455 S.E.2d 516, 528 (1994). Where the issue on appeal concerns procedural or constitutional commands and is clearly a question of law or involving an interpretation of a statute, the Court applies a de novo standard of review. *State v. Boyce*, 230 W.Va. 725, 742 S.E.2d 413 (W. Va. 2013).

APPLICABLE LAW: RULE 404(b)

Evidence relating to a crime that a defendant is accused of committing, other than that charged in the indictment for which he is on trial, is not generally admissible to prove the offense for which the accused is on trial. *State v. Hudson*, 128 W.Va. 655, 37 S.E.2d 553 (1946); *State v.*

Caudill, 170 W.Va. 74, 289 S.E.2d 748 (W. Va. 1982). Rule 404(b) of the West Virginia Rules of Evidence provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The purpose of Rule 404(b) is 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 and to prevent the inference that because s/he had engaged in or may have engaged in other crimes previously he was more likely to commit the crime for which he was being charged. *State v. Simmons*, 175 W.Va. 656, 657; 337 S.E.2d 314, 315 (1985), citing *State v. Harris*, 166 W.Va. 72; 272 S.E.2d 471 (1980). The West Virginia Supreme Court takes seriously claims of unfair prejudice. *State v. LaRock*, 196 W.Va. 294, 310-11, 470 S.E.2d 613, 629-30. (1996). The Court recognizes the prejudice inherent in admitting evidence of other crimes and demands that a defendant be tried for what he or she did, not for who he or she is. *Id*. Thus, guilt or innocence of an accused must be established by evidence relevant to the particular offense being tried, not by showing a defendant was engaged in other acts of wrongdoing. *Id*.

Rule 404(b) begins by restating the exclusionary principle of Rule 404(a) that evidence of crimes, wrongs, or acts is inadmissible to prove that a person acted in conformity therewith on a particular occasion. The second sentence of Rule 404(b), however, expressly permits the introduction of specific acts in the nature of crimes, wrongs, or acts to prove purposes other than character, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Thus, Rule 404(b) permits the introduction of specific crimes, wrongs, or acts for "other purposes" when character is not, at least overtly, a link in the

logical chain of proof. *State v. McGinnis*, 193 W.Va. 147, 153–154; 455 S.E.2d 516, 522–523 (1994).

When offering evidence under Rule 404(b), the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. 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). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction. Syl. pt. 1, *State v. McGinnis*, supra.

Intrinsic Evidence Exception to 404(b) Analysis

Pursuant to *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996), evidence of "other bad acts" is admissible *without analysis under 404(b)* when the trial court determines that the evidence is intrinsic to the crimes charged in the indictment. *LaRock* involved the death of an infant from a skull fracture. *Id*. The child's father intentionally slammed the infant on the floor multiple times. *Id*. At autopsy, in addition to the skull fracture, the medical examiner noted several healing bruises from abuse in the recent past inflicted by the defendant. *Id*. The evidence of past abuse was deemed "intrinsic" evidence to explain the context of the previous bruising on the child's body. *Id*. Unlike the case sub judice, the other acts were close in time/proximity to the charged conduct, undisputedly caused by a single defendant, and necessary to explain the full context of the state's physical evidence related to the cause of death.

In determining whether the admissibility of evidence of "other bad acts" is governed by Rule 404(b), the Court first must determine if the evidence is "intrinsic" or "extrinsic." *Id.*, *See*

United States v. Williams, 900 F.2d 823, 825 (5th Cir.1990): "'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged**.**". If the proffer fits in to the "intrinsic" category, evidence of other crimes should not be suppressed when those facts come in as res gestae-as part and parcel of the proof charged in the indictment. *Id*., *See United States v. Masters*, 622 F.2d 83, 86 (4th Cir.1980) (stating evidence is admissible when it provides the context of the crime, "is necessary to a 'full presentation' of the case, or is . . . appropriate in order 'to complete the story of the crime on trial by proving its immediate context or the "res gestae"'").

Three Step Analysis of 404(b) Evidence

Where an offer of evidence is made under Rule 404(b) the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an in-camera hearing as stated in *State v. Dolin*, 176 W.Va. 688; 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel:

(1) the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b).

(2) If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence;

(3) The court must conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Syl. pt. 2, *McGinnis*.

Safeguard is Necessary to Prevent Prosecutorial Abuse and Overreaching

In *Mcginnis*, Judge Cleckley noted the importance of circuit courts' gatekeeping function. He provides that we cannot escape the fact that Rule 404(b) determinations are among the most frequently appealed of all evidentiary rulings, and the erroneous admission of evidence of other acts is one of the largest causes of reversal of criminal convictions. *State v. McGinnis*, 455 S.E.2d 516, 193 W.Va. 147 (W. Va. 1994).

It is equally inescapable that where a trial court erroneously admits Rule 404(b) evidence, prejudicial error is likely to result. *Id.*; *citing See Government of Virgin Islands v. Toto*, 529 F.2d 278, 283 (3rd Cir.1976) (Rule 404(b) evidence was wrongfully admitted and "[a] drop of ink cannot be removed from a glass of milk"); *United States v. Sanders*, 964 F.2d 295, 299 (4th Cir.1992) (Rule 404(b) evidence wrongly admitted "obviously has the capacity to tip the balance" in the jury's deliberations); *State v. Dolin*, 176 W.Va. 688, 692, 347 S.E.2d 208, 212-13 (1986) ("the admission of collateral crime evidence is highly prejudicial"), overruled on other grounds, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990); *State v. Simmons*, 175 W.Va. 656, 658, 337 S.E.2d 314, 316 (1985) ("[t]he improper admission of evidence relating to collateral crimes has generally been held to constitute reversible error").

This safeguard is necessary to prevent prosecutorial abuse and overreaching. The trial court must understand that it alone stands as the trial barrier between legitimate use of Rule 404(b) evidence and its abuse. *Id.* "Adversarial incentives predictably generate pretextual purposes that courts reject, and [the prosecution] must be ready to show that the probative force of the evidence on the specific point for which it is offered is sufficient to offset the danger of

illegitimate use by the trier of fact as mere propensity evidence." *State v. McGinnis*, 455 S.E.2d 516, 193 W.Va. 147 (W. Va. 1994).

A plethora of West Virginia cases have held that when the prosecution seeks to admit cumulative evidence under Rule 404(b), it runs the risk of running afoul of our rule prohibiting "shotgunning." *State v. Thomas*, 157 W.Va. at 656, 203 S.E.2d at 456; *See also State v. Messer*, 166 W.Va. 806, 277 S.E.2d 634 (1981); *State v. Spicer*, supra; *State v. Stollings*, 158 W.Va. 585, 212 S.E.2d 745 (1975), overruled on other grounds, *State v. McAboy*, 160 W.Va. 497, 236 S.E.2d 431 (1977), overruled, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

In *Thomas*, the Court stated that a prudent prosecutor limits himself to what is needed to prove the charge in the indictment. In the process of proving the charge, other offenses may sometimes come to light incidentally, but when the prosecution devotes excessive trial time to this type of "background" material, it runs the risk of trespassing into the impermissible area and jeopardizing any resulting conviction.' *State v. McGinnis*, 455 S.E.2d 516, 193 W.Va. 147 (W. Va. 1994); *United States v. Mastrototaro*, 455 F.2d 802, 804 (4th Cir.1972).

ARGUMENT: EVIDENCE OF OTHER ACTS WAS 404(B), NOT INTRINSIC

I. The trial Court erroneously ruled evidence of past bad acts was intrinsic evidence. The evidence of other acts was not *inextricably intertwined* or even rationally related to the charged conduct causing the victim's death. The Court failed to make requisite findings as set forth by *State v. McGinnis*. As a result, highly prejudicial testimony of multiple past bad acts was attributed to Petitioner without sufficient evidence connecting her to the acts. Consequently, she was denied a fair trial.

The trial Court erroneously ruled evidence of past bad acts was intrinsic evidence. The evidence of other acts was not *inextricably intertwined* or even rationally related to the charged conduct causing the victim's death. Other act evidence is 'intrinsic' when the evidence of the

other act and the evidence of the crime charged are both part of a *single criminal episode* or the other acts were *necessary preliminaries* to the crime charged or necessary to a *full presentation* of the state's case. Here, the past bad acts occurred several years prior to the R.B.'s death. Undisputedly, she died from pneumonia, not from past abuse. The autopsy revealed no other evidence of injuries or physical trauma. Clearly, the evidence of other acts was not necessary for a full presentation of the state's case. The context and circumstances leading up to R.B.'s death from pneumonia were clear and practically undisputed. The only issue in dispute regarding R.B.'s death was the defendants' intent, i.e., whether or not it was an accident. The *other act* evidence is classic 404(b) evidence offered to prove intent and/or absence of mistake.

Pursuant to *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996), evidence of "other bad acts" is admissible *without analysis under 404(b)* when the trial court determines that the evidence is intrinsic to the crimes charged in the indictment. *LaRock* involved the death of an infant from a skull fracture. *Id*. The child's father intentionally slammed the infant on the floor multiple times. *Id*. At autopsy, in addition to the skull fracture, the medical examiner noted several healing bruises from abuse in the recent past inflicted by the defendant. *Id*. The evidence of past abuse was deemed "intrinsic" evidence to explain the context of the previous bruising on the child's body. *Id*. Unlike the case sub judice, the other acts were close in time/proximity to the charged conduct, undisputedly caused by a single defendant, and necessary to explain the full context of the state's physical evidence related to the cause of death.

The state's theory was that R.B.'s death was not an accident, but intentional abuse and/or intentional neglect inflicted by the defendants. The state was attempting to prove that the defendants knew R.B. was deathly ill and intentionally denied her medical treatment. Put simply, the state was proving "lack of mistake or accident." Conversely, the Petitioner relied on the

"Tylenol" defense. That, just as a Children's Tylenol bottle advises, its reasonable for parents to observe a feverish child for 2 or 3 days before seeing a doctor. The defense's case was that they were unaware R.B. was gravely ill and her death was accidental.

All misconduct occurring before the last week of R.B.'s death should have been offered to prove lack of accident or mistake. This is classic 404(b) evidence- any other position is pretextual. This evidence would likely be admissible to prove intent had the *State v. McGinnis* analysis been applied. A fair trial required judicial determination of which, if any, defendant(s) committed the bad acts. Unlike *Larock*, this case involved 3 defendants, not a single bad actor that undisputedly committed substantiated abuse by an eye witness. Moreover, all the pathologists agree that there was no evidence of physical trauma other than pneumonia. Here, the evidence of past pad acts was not necessary to explain the context of the charged conduct.

The state devoted most of its case in chief to "background" material involving past crimes/bad acts. The jury heard of horrific past acts that were unconnected to R.B.'s death. Moreover, the state included a 4-year span of alleged misconduct in the indictment to circumvent the need for a 404(b) hearing and bolster its pretextual intrinsic argument. The state indicted a 4-year period and subsequently argue that such misconduct was "charged" conduct. All the pathologists agree, R.B. did not die of a broken femur, bruises, starvation, or a cigarette burn. This is an end run around Rule 404(b).

There were three (3) separate past bad acts at issue: previous bruises and a cigarette burn, a broken femur, starvation, including drinking from a toilet. Six state witnesses testified that R.B. suffered previous bruises, a cigarette burn, and a broken femur which occurred in September 2015. Multiple expert witnesses testified that a broken femur was child abuse. There was testimony that the defendants starved R.B. and intentionally deprived her of water, including that

she drank from the toilet. The trial court failed to find by a preponderance of the evidence that Petitioner committed the bad acts, that the bad acts were relevant, and failed to conduct the balancing test under Rule 403. Here, the past bad acts were horrendously prejudicial.

Where a trial court erroneously admits Rule 404(b) evidence, prejudicial error is likely to result. When Rule 404(b) evidence is wrongfully admitted, "[a] drop of ink cannot be removed from a glass of milk"). *United States v. Sanders*, 964 F.2d 295, 299 (4th Cir.1992) (Rule 404(b) evidence wrongly admitted "obviously has the capacity to tip the balance" in the jury's deliberations); *State v. Dolin*, 176 W.Va. 688, 692, 347 S.E.2d 208, 212-13 (1986) ("the admission of collateral crime evidence is highly prejudicial"), overruled on other grounds, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990); *State v. Simmons*, 175 W.Va. 656, 658, 337 S.E.2d 314, 316 (1985) ("[t]he improper admission of evidence relating to collateral crimes has generally been held to constitute reversible error").This safeguard is necessary to prevent prosecutorial abuse and overreaching. The trial court must understand that it alone stands as the trial barrier between legitimate use of Rule 404(b) evidence and its abuse. *Id*.

Here, the jury heard very prejudicial acts attributed to Julie Browning. However, there is no testimony that she physically abused R.B. in the past or burned her with a cigarette. There is no evidence she broke R.B.'s femur or was even present when it happened. There is no evidence she starved R.B. or deprived her of water. Petitioner is entitled to a determination, by a preponderance of the evidence, that she committed these acts before a jury considers the misconduct. Most importantly, she is entitled for judicial determination if such relevancy is substantially outweighed by unfair prejudice. If 404(b) evidence was admissible against a codefendant but not Petitioner, a motion for separate trials would have been filed.

Prosecutors should not be allowed to "shotgun" bad acts evidence to prejudice defendants and to divert jurors' attention from the evidence surrounding the charged crime. This is a classic example of a zealous prosecutor piling on the bad acts evidence. Cumulative evidence of these acts have the capacity to tip the balance in jury deliberations. A fair trial requires judicial scrutiny of such prejudicial testimony and for a trial Court to perform its gatekeeping function.

ARGUMENT: UNCONSTITUTIONAL LIMITING OF CROSS EXAMINATION

II. The trial court unconstitutionally limited Petitioner's right to cross examine a codefendant/fact witness by prohibiting any questions that had already been answered on direct examination by that witness.

The right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065 1068, 13 L.Ed.2d 923 (1965). A full cross-examination of a witness upon the subjects of his examination in chief is the right, not the mere privilege, of the party against whom he is called. *Alford v. United States*, 282 U.S. 687, 691, 51 S.Ct. 218, 75 L.Ed. 624 (1931).

Where there is more than one defendant or defense attorney, it may be proper to prevent one defense attorney from repeating a question already asked by another defense attorney. *U.S. v. Caudle*, 606 F.2d 451 (4th Cir. 1979). It is quite a different thing, however, to prevent the defense from asking a question on the grounds that it has already been asked. *Id*. "Repeating the same testimonial matter of the direct examination, by questioning the witness anew on cross-examination, is a process which often becomes desirable . . . in order to test the witness' capacity to recollect what he has just stated and to ascertain whether he falls easily into inconsistencies and thus betrays falsification." *Id*. The goals of cross-examination cannot be achieved "except by the direct and personal putting of questions." *Id*. A defendant's right to cross-examine the

witnesses on the subject matter of their direct testimony, cannot be denied merely because the witness has already asked the same or similar questions. *Id*. The questions involved having been asked for the first time on redirect examination, the fact that they had been asked and answered is a reason to permit cross-examination, not a reason to deny it. *Id. at 456*.

On June 10, 2022, Defendant Sherrie Titchenell testified regarding the circumstances of R.B.'s death and past acts. Petitioner's counsel was prohibited from freely cross-examining Mrs. Titchenell because the Court limited cross examination of the codefendants. *Appx R. 1623-4*. The Court allowed defense counsel to ask *only* questions that "had not already been answered" on direct. *Id*. Petitioner's counsel was not afforded the opportunity to engage in comprehensive cross examination of Mrs. Titchenell. As such, counsel could not adequately flush out potential inconsistencies of her testimony. Mrs. Titchenell was a critical witness. R.B. was left in her care, custody, and control the morning of R.B.'s death. The other defendants were at work and had not seen R.B. since the day before. Mrs. Titchenell was responsible for calling 911, set the timeline/narrative of scene, and was the last person to see R.B. alive.

CONCLUSION

The trial Court erroneously ruled evidence of past bad acts was intrinsic evidence. The evidence of other acts was not *inextricably intertwined* or even rationally related to the charged conduct causing the victim's death. The purpose of Rule 404(b) is to prevent the inference that because a defendant may have engaged in unconnected crimes/bad acts previously, she would be more likely to commit the crime for which she was charged.

Here, the jury heard cumulative evidence of past bad acts without such misconduct being judicially filtered. The trial Court erroneously ruled 404(b) evidence of past bad acts were

intrinsic and failed to make requisite findings as set forth by *State v. McGinnis* resulting in the admission of severely prejudicial evidence.

Based on the forgoing, Petitioner requests her conviction be overturned and this matter be remanded for a 404(b)-hearing consistent with *State v. McGinnis*. Likewise, the trial court unconstitutionally limited Petitioner's right to cross examine her codefendant. As such, Petitioner requests her conviction be overturned and a new trial.

By Counsel

s/Mark Plants
Mark Plants (WV Bar #9760)
320 2nd Avenue, South Charleston, WV 25303
Tel: 304-744-9148
mplants@plantslaw.com

IN THE SUPREME COURT OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
PLAINTIFF BELOW, RESPONDENT

v. **DOCKET NO. 22-705**

JULIE BROWNING,
DEFENDANT BELOW, PETITIONER.

CERTIFICATE OF SERVICE

I, Mark Plants, do hereby certify that on the 2nd day of February, 2023, I caused the foregoing **PETITIONER'S BRIEF** to be served upon the following by delivering to each a true copy thereof via electronic filing to:

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

Mark S. Plants WVSB#9760
Plants Law Offices
320 2nd Avenue
South Charleston, WV 25303
mplants@plantslaw.com
Counsel for Petitioner