IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 22-706

State of West Virginia,

Plaintiff-below, Respondent

v.

Richard Dane Small,

Defendant-below, Petitioner

PETITIONER'S BRIEF

Appeal from the Berkeley County Circuit Court
Case No. 20-F-212
The Honorable Michael Lorensen

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2. Whether Mr. Small's constitutional and procedural rights to due process were violated by the State's failure to provide him notice of the 404(b) evidence that it intended to introduce against Mr. Small's Co-Defendant, Mr. Mason?

3. Whether the prejudicial spillover effect of evidence offered against Mr. Mason regarding gang affiliation and drug trafficking unduly prejudiced Mr. Small's ability to have a fair trial where the proffered evidence was not admissible against Mr. Small, was extremely prejudicial and inflammatory, was minimally relevant, and was cumulative?

4. Whether the circuit court erred in failing to sever Mr. Small's and Mr. Mason's trials where the evidence presented against Mr. Mason had a prejudicial spillover effect on Mr. Small.

5. Whether the circuit court erred in failing to conduct an evidentiary hearing on the issue of Mr. Small's supposed waiver of *Miranda* and the circumstances surrounding his invocation to right of counsel?

6. Whether the circuit court erred in failing to suppress Mr. Small's statement to law enforcement where Mr. Small unequivocally invoked his right to counsel immediately following his *Miranda* warning?

7. Whether the State improperly commented on Mr. Small's invocation of his right to remain silent during closing argument of the mercy phase of the jury trial?

8. Whether the State improperly directed the jury regarding the law concerning the mercy phase of the jury trial?

STATEMENT OF CASE

This appeal is taken from Richard Small's conviction and sentence (along with his co-defendant Joseph Mason) for first degree murder and conspiracy to commit murder and sentence of life in prison without mercy.

On Saturday, June 28, 2014 at approximately 3:34 a.m., Taylor Hawkridge was fatally shot in the facial area while standing near her residence. App. 1641.

In October of 2017, a Berkeley County jury found Nasstashia Powell (VanCamp) guilty of second degree murder in the killing of Ms. Hawkridge in case number 2015-F-132. The Berkeley County Circuit Court sentenced Ms. Powell to forty-five (45) years in the penitentiary based upon the conviction and a recidivist enhancement. Following her conviction and sentence, Ms. Powell filed a motion for reduction of sentence wherein she agreed to meet with investigators and implicated both Joseph Mason and Richard Small in the murder of Ms. Hawkridge.

On October 21, 2020, a Berkeley County Grand Jury indicted Mr. Small and Mr. Mason both for one count of murder and one count of conspiracy to commit murder. App. 55.

Despite being indicted jointly, both Mr. Small and Mr. Mason had different case numbers for purposes of the West Virginia e-filing system-- Mr. Small was under case number 20-F-212, App. 1, while Mr. Mason was under case number 20-F-213. App. 28. In practical effect, this meant that if a motion, notice, or order was only filed in one of the defendant's cases, the other defendant and his counsel would not receive notice or service. Aware of this issue, counsel for Mr. Small filed a motion on September 17, 2021 to continue the trial and to consolidate the

co-defendants' cases, stating "Additionally, Defendant's [sic] would also jointly request that the two Defendants' cases be joined within the Court's e-filing system. Currently, the Defendants are not receiving the filings made by the other, which they are entitled to so long as the case remains joined." App. 95.

The basis for the State's case against Mr. Small (and Mr. Mason) was the statements and trial testimony of Nasstashia Powell, who after being indicted for murder, gave a statement to police in April of 2016 that implicated Mr. Small as the shooter for the first time. App. 674. Ms. Powell, through the course of litigation against her and even after her conviction, gave multiple evolving and changing statements to the police about the shooting. Ms. Powell's testimony, plus expert testimony regarding cell phone tower pinging of Ms. Powell's and Mr. Small's cell phones that purportedly put their location near the scene of the shooting and toolmark identification of the firearm that Ms. Powell alleged was used in the shooting formed the gravamen of the State's case against Mr. Small. The State's theory of the prosecution was that Ms. Powell, Mr. Mason, and Mr. Small agreed to and carried out the murder of Ms. Hawkridge at the behest of an unindicted co-conspirator, Armistead Craig, because they had learned that she was a confidential informant working for law enforcement.

Mr. Small's counsel did not call any witnesses, and Mr. Small did not testify at trial.

I. MOTION FOR SEVERANCE

On July 2, 2021, Mr. Mason filed a motion for a separate trial from Mr. Small. App. 61. The State filed a response objecting to severance. App. 63. A hearing on the issue of severance was conducted by Berkeley County Circuit Court Chief Judge Michael Lorensen on July 12, 2021. App. 66. Neither Mr. Small nor his counsel were present at the hearing. During the hearing, the court asked counsel for Mr. Mason whether there was any piece of evidence that

would be admissible against Mr. Small but not admissible against Mr. Mason, and counsel was unable to specify any piece of such evidence. App. 79-80. The court denied the motion to sever at that time but invited counsel to refile such a motion if any subsequent issue arose. App. 81, 84.

At the pre-trial hearing on March 16, 2022, Mr. Small's counsel again raised the issue of severance in the context of the State intending to introduce social media posts of Co-Defendant Mason that made reference to his involvement with the Crips gang. Counsel for Mr. Small stated, "So I'm concerned not only of what the social media posts of my client, but of the social media posts of his co-defendant's, unless this is severed, which obviously there is no desire by the State to do so." App. 282-83. The court ruled that it would not reopen the issue of severance.

> And that's, you know, that was a severance thing, and the train has left that station. You know, the motion for severance has been heard, based on what I had in front of me, it is denied, and we need the particularized prejudice and the specific item that you can't try your case with, and you know, we went through that thoroughly with Mr. Mason. I'm not doing that again.
>
> So, you know, he said he's not offering gang evidence against your guy.

App. 298.

II. 404(B) EVIDENCE

On January 20, 2021, Mr. Mason's counsel filed a motion *in limine* to preclude the State from introducing certain social media posts of Mr. Mason. App. 98. On that same date, the State filed its notice of intent to admit intrinsic evidence or 404(b) evidence. App. 101. Co-defendant's motion and the State's notice were only filed under Mr. Mason's case number--20-F-213, depriving Mr. Small notice of these filings.

On September 23, 2021, counsel for Mr. Small filed a motion to exclude social media posts that referenced Co-Defendant Mason's affiliation in the Crips gang. App. 110.

On September 27, 2021, with the agreement of the parties, the court continued the pre-trial and trial. App. 116. The trial was continued until February 1, 2022 and the pre-trial was rescheduled for January 21, 2022. *Id*. The court further ordered the State to clarify its notice of intrinsic and/or 404(b) evidence and to attach specific exhibits to the State's notice prior to the pretrial hearing. *Id*.

On January 10, 2022, counsel for Mr. Small filed a motion to continue the pre-trial scheduled for January 21, 2022 due to a scheduling conflict. App. 120. The court granted the motion and continued Mr. Small's pre-trial until January 24, 2022. App. 138. However, the court did not continue the pre-trial of Co-Defendant Mason.

On January 21, 2022, a pretrial hearing was held on the issue of the 404(b) evidence that had been proffered by the State. App. 139. Neither Mr. Small nor his counsel were present. App. 139.

At the hearing, the State called Sgt. Jonathan Bowman of the West Virginia State Police as a witness. App. 142. Sgt. Bowman testified regarding Mr. Mason's social media account, his nickname of Cracc, and Mr. Mason's affiliation with the Crips gang. App. 145. The State introduced exhibits 1A through 1J for the purpose of showing the social media posts that it intended to introduce at trial. App. 149. The court held that the social media posts were relevant and not unduly prejudicial. App. 173-74.

As to the 404(b) evidence, the State indicated that it intended to enter into evidence Defendant Mason's drug dealing, Mr. Mason's membership in the Crips gang, and Mr. Mason's animus toward informants. App. 176. The State argued, "I don't see how we can try this case

and tell the jury what and why everything happened without mentioning the fact that he is a Crip member." App. 178. Following argument from Co-Defendant Mason's counsel, the court found that the evidence was admissible under 404(b) for purposes of motive and identity. App. 195-96.

At the pre-trial hearing on March 16, 2022, counsel for Mr. Small addressed the issue of 404(b) evidence, first arguing that he did not have proper notice from the State.

> Mr. Riddell: Here's the procedural issue: There was no 404(b) notice filed in my case.
> The Court: It it goes to conspiracy or murder, it doesn't matter….
> Mr. Riddell: My procedural issue for the record is that I think it is incumbent upon the State whenever there is a piece of evidence that involves some kind of potential prior bad act, to file a notice and have a hearing where they-- where they make a showing that it is an actual permitted use under Rule 404(b). That has not happened here. So on that basis, I moved for the exclusion of all such evidence.

App. 288-89.

The State argued that the court had already ruled upon the admissibility of the 404(b) evidence, including gang affiliation evidence against Mr. Mason, and that it did not intend to directly introduce any gang affiliation (Mr. Small was purportedly involved with the Bloods gang) evidence or evidence of Mr. Small's prior convictions directly against Mr. Small. App. 297.

Counsel for Mr. Small indicated that he was still concerned about the prejudice for his client of the gang affiliation evidence coming in for Mr. Mason. However, the court ruled that Mr. Small's counsel was foreclosed from arguing about Mr. Mason's evidence.

> Mr. Riddell: I'm concerned, Your Honor, about the fact that--
> The Court: You won't take yes for an answer?
> Mr. Riddell: No, I'm concerned about Mr. Mason's apparent--
> The Court: Well, you know what, you can't complain about the strength of a case against a co-defendant. It is part of his-- it explains the moniker he gives himself. I mean, you can't-- well, I have ruled on that, and you're not going to argue about Mr. Mason's case. You're going to argue about Mr. Small's case.
> Mr. Riddell: Right.

> The Court: And the fact that if he has got a moniker that he uses on Facebook, or what other social media might be out there, I mean, that's simply proof of identification. And that's what we're talking about.
>
> And that's, you know, that was a severance thing, and the train has left that station. You know, the motion for severance has been heard, based on what I had in front of me, it is denied, and we need the particularized prejudice and the specific item that you can't try your case with, and you know, we went through that thoroughly with Mr. Mason. I'm not doing that again.
>
> So, you know, he said he's not offering gang evidence against your guy.

App. 297-98.

Counsel for Mr. Mason then raised the issue that there may be prejudice to his client not to be able to elicit evidence of Mr. Small's purported gang affiliation because Mr. Small's and Mr. Mason's affiliation with rival gangs would be circumstantial evidence that Mr. Small and Mr. Mason did not conspire together. The court deferred ruling on that issue until it became an issue at trial and the further colloquy on the gang affiliation devolved into discussion of the gangs' respective colors and what the defendants would be wearing at trial.[1]

> Mr. Sutton: Your Honor, one of the issues that could come up in this case, and probably why the State does not want to introduce whether or not he's a member of the Bloods, my client is a member of the Crips, is those two individuals do not generally get along… And so it could be prejudicial against my client for that information not to be able to be disclosed.
> The Court: Do I need to regulate the color of-- I don't know if they are coming with open collared shirts, or wearing ties as opposed to-- red ties could give away certain loyalties. I understand that the gangs associates themselves with certain colors?
> Mr. Sutton: That's correct, Your Honor.
> The Court: So, that might be-- well, never mind. Neutral colors, I guess. It is like when I went to judicial college, the establishment we were staying in, they were having an event that week, and they said no gang colors. So we'll have to assure ourselves of

[1] Counsel for co-Defendant Mason elicited testimony at trial that Armistead Craig, an unindicted co-conspirator, was a member of the Bloods gang but did not elicit any testimony regarding Mr. Small's supposed Bloods affiliation. App. 562, 827.

> neutral color attire when we come to court, because you guys are going to be in street clothes. Because your custodial status is none of the jury's business.
> Mr. Riddell: It is all right if I wear blue, Your Honor? It is my lucky suit.
> The Court: No one-- unless someone is putting you in a gang, no, you can wear whatever you like.

App. 298-300.

During direct examination of the State's first witness, Investigator Brian Bean, the State elicited testimony that the "loc" portion of the name "craccloc," which was a moniker used by Mr. Mason, was a term for "Love of Crips." App. 551-553. Counsel for Mr. Small objected to this testimony on grounds Investigator Bean did not have any expert knowledge regarding gang affiliation, but the objection was overruled by the court. App. 552. Investigator Bean further described the Crips gang and that though they were originally an African American gang, the gang had expanded into other ethnic areas (since Mr. Mason is a Caucasian). App. 553.

During the State's examination of Dave Boober, further testimony was elicited regarding the co-Defendant's drug dealing and gang affiliation through admission of certain cell phone records. App. 609-618. Counsel for Mr. Small objected to admission of these records, arguing that they were not relevant, unduly prejudicial, and improper 404(b) evidence. App. 609-10. The State referenced that the 404(b) notice was filed in the co-Defendant's case, but not under Mr. Small's case, and counsel for Mr. Small argued the prejudicial effect of joint trial as well as his lack of notice of the 404(b) evidence because he was not present at the 404(b) hearing and never received notice of the evidence from the State. App. 611. The court ruled that it would allow the introduction of such evidence. App. 612. The court held,

> …I appreciate the fact that they are jointly indicted. It is not going to be a totally symmetrical case against both accused…. And for the purposes of… there was a 404(b) notice. This is relevant to identification, if not motive. And so I was letting it in as to Mr. Mason, and it doesn't bear directly on your client. It may inferentially and circumnavigate it, get to your client, but I'm going to stick with my pretrial ruling. And I'll note your exception.

App. 612.

During the testimony of Sgt. Bowman, the State again elicited testimony regarding the significance of "LOC" over the objection of Mr. Small's counsel. App. 660. Sgt. Bowman further testified regarding the theme of gang affiliation throughout the co-Defendant's Instagram posts. App. 704-05.

The State also elicited from Sgt. Bowman testimony regarding a picture on Mr. Small's Instagram profile that contained Mr. Small's son and a pile of cash. App. 706. Counsel for Mr. Small objected to the testimony and the exhibit being admitted, arguing that it was not relevant, it was prejudicial, and he had not received proper notice, but the court overruled the objection. App. 709-12.

The State also introduced a social media post that both Mr. Small and Mr. Mason interacted with discussing "rats." App. 717-18. Counsel for Mr. Small objected, but the court allowed its admission. App. 718.

Counsel for Mr. Small also objected to another exhibit that purported to show an interaction between Mr. Small and Mr. Mason's Craccloc social media profile, arguing that the State failed to properly disclose it. App. 720.

> Mr. Riddell: So, I think you got two potential disclosure issues here. One is that I didn't recollect seeing this in discovery. Now after we called up to the sidebar, I just spoke with Mr. Kinser. He's telling me he disclosed it. I'm inclined to believe him, frankly, but… this was also not disclosed to us when we had that 404(b) discussion about the social media posts, this was not disclosed as one of those… I think we have a disclosure issue here…
> Mr. Kinser: Disclosure. As you can see on the post itself, it is page 342 of-- we provided all the social media records, so it should be there. I will say this, the actual post itself, the front is not particularly relevant, and I don't care to get rid of it. But I needed to establish that it was a post from one defendant, and a comment comes from the other defendant. It is to show the conspiracy, and he puts out that phone number just shortly before the murder of June 24. So four days prior to the murder….

> The Court: All right. Your objection was disclosure. It has been disclosed, I mean, do you want me to go through the discovery? I'll do that during the lunch hour.
> Mr. Riddell: No, I believe he sent it.
> The Court: Well, then we don't have a disclosure problem.
> Mr. Riddell: I'm raising it as --
> The Court: It is communication between the defendants. It is not 404(b) to show that people who conspire are communicating with each other. I mean--
> Mr. Riddell: If he is going to remove this section of 2, then, it removes the 404(b) consideration. But I just wanted to point out for the record that he's already introduced evidence that--
> The Court: All right. So here's the way it works, I ask for your objection. You gave me your objection. I heard the State's. I ruled. Now it is over. So now we go back and we resume the trial. So, you know, here's what-- and I'm just trying to add some orderliness to this because we can go round Robin. And just as the house rule is, you make your objection, I hear from the State, if I need to. If I can understand it in context and rule based upon the objection, and what I have heard from the stand, I'll make a ruling, just to kind of keep things moving along. The way this trial stays within one week is that you do not start arguing with me after I have made my ruling, Mr. Riddell. See--
> Mr. Riddell: Yes, sir.
> The Court: I want you to understand this, because apparently this is not the way you operate. In my court once I ruled, argument-- your objection is saved, we move on. All right? So I want us to get along. I want us to get the whole case put to a jury in a reasonable fashion. That's not going to happen if every point is argued, reargued, and reargued again. You argue it once, I make a ruling, the thing is done. I have either screwed it up or I haven't. So you can go sit down now, and if there's another question to which an objection would be appropriate, you can make it at that time. Bench conference over.

App. 721-23.

In closing argument, the State drew the jury's attention to the co-defendant's posts about gang affiliation, stating "This is Crip life. This is Craccloc141." App. 1219.

III. MR. SMALL'S STATEMENTS TO POLICE

On September 14, 2016, Cpl. Bowman interviewed Mr. Small at the Chesapeake Detention Facility in Baltimore, Maryland, where Mr. Small was serving a sentence on a previous conviction for human trafficking. App. 1673-74.

Cpl. Bowman and Sgt. See interviewed Mr. Small for a second time at the Chesapeake Detention Facility on June 26, 2018. App. 1693-95.

Neither the September 14, 2016 nor the June 26, 2018 statement were recorded. App. 680.

In Sgt. Bowman's police report he indicates,

> Sgt. Bowman advised SMALL of his Miranda Rights, in which he read from a Miranda Rights card, and SMALL advised he thinks he needs to talk to a lawyer. SMALL never explicitly requested his lawyer or told Sgt. Bowman to stop talking. Later SMALL asked Sgt. Bowman if he needed a lawyer. Sgt. Bowman advised it was up to him when he wished to hire a lawyer.

App. 1693.

On September 23, 2021, counsel for Mr. Small filed a motion to suppress Mr. Small's statement, arguing that his statements were compelled in violation of his Fifth and Sixth Amendment rights. App. 113.

At the pre-trial hearing on March 16, 2022, counsel for Mr. Small argued that Mr. Small had invoked his right to counsel on more than one occasion, and that the officer continued with the interview. App. 263. No testimony was taken from the officers that elicited the statement from Mr. Small. App. 264-65. The court ruled that the invocation to the right to counsel, as contained in the police report, was equivocal because Mr. Small said "I think I need a lawyer" rather than "I want a lawyer." App. 267-68.

At trial, the State introduced Mr. Small's statements through the testimony of Sgt. Bowman. App. 727. Sgt. Bowman testified that even though Mr. Small never made an admission to participating in the shooting, he made several to what Sgt. Bowman were contradictory statements involving his location on the night of the shooting, his relationship with Mr. Mason, and his cell number. App. 728-31.

V. MERCY PHASE

The State filed a motion to bifurcate the guilty and mercy phases of the trial for the charge of first degree murder. App. 86. Neither defendant objected to bifurcation, and the court granted the motion. App. 116.

During closing argument at the mercy phase, the State drew attention to the jury that they had not heard any statements of remorse from Mr. Small and Mr. Mason. App. 1359. The State also instructed the jury to look at two factors in deciding the issue of mercy-- "When we consider whether or not mercy should attach to a sentence, when we make this argument to a jury, we generally look to two factors. We look to the defendant's criminal history. We look to the heinous nature of the crime". App. 1357.

The jury returned verdicts of no mercy for both Mr. Mason and Mr. Small.

SUMMARY OF THE ARGUMENT

As the first assignment of error, Mr. Small argues that his constitutional rights were violated where both he and his counsel were absent from critical stages of the criminal proceeding-- a hearing on the severance of Mr. Small and Mr. Mason and a later evidentiary hearing on the admissibility of 404(b) evidence against Mr. Mason. These hearings were critical stages of the criminal proceeding because they involved substantial issues of law and evidentiary issues that required witness testimony and the introduction of evidence. Moreover, the fundamental fairness of the proceedings was called into question by Mr. Small's and his counsel's absence at the hearing because they were unable to present defenses to the evidence and were foreclosed from re-litigating the issues at a later time.

Mr. Small further argues that besides not being able to participate in the 404(b) hearing, he did not receive proper notice of the State's intention to introduce 404(b) evidence related to the co-Defendant. Mr. Small argues that the failure of the State to provide him notice of the

proffered 404(b) evidence violated his due process rights and his right to disclosure under the West Virginia Rules of Evidence.

Mr. Small next argues that the 404(b) evidence of gang affiliation and drug trafficking admitted against Mr. Mason unduly prejudiced Mr. Small's ability to have a fair trial. Mr. Small argues that the evidence of Mr. Mason's affiliation in an infamous street gang severely inflamed the passions of the jury, which was drawn from a largely Caucasion and rural area. Mr. Small further argues that this evidence was only minimally relevant and was cumulative.

Mr. Small further argues that the circuit court erred in failing to grant a severance of the trials of Mr. Small and Mr. Mason based upon the prejudicial spillover effects of the 404(b) evidence of gang affiliation and drug trafficking of Mr. Mason. Mr. Small argues that the circuit court foreclosed him from offering argument on the requirement of a severance due to having litigated the issue already with Mr. Mason.

Mr. Small argues that the circuit court erred in failing to suppress his statement taken by Sgt. Bowman and Sgt. See of the West Virginia State Police while he was in custody in a penal setting. Mr. Small avers that the circuit court failed to hold the State to its burden of proof of a preponderance of the evidence that his *Miranda* waiver was voluntarily and intelligently made. Mr. Small further argues that the State failed to provide the necessary evidentiary hearing to determine the circumstances of the interrogation to determine whether Mr. Small's invocation of his right to counsel was unequivocal. Finally, Mr. Small argues that under West Virginia law, which sets a higher standard than federal law regarding interpretation of the invocation of right to counsel, Mr. Small's statement of "I think I need an attorney" was unequivocal, rendering his statements obtained upon subsequent questioning to be inadmissible.

As the final assignment of error, Mr. Small argues that the State's closing argument at the mercy phase of the trial violated his rights by improperly commenting upon Mr. Small's decision to remain silent and lack of remorse and directing the jury to consider certain factors in deciding whether or not to grant mercy.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Mr. Small suggests that oral argument is necessary pursuant to Rule 18(a). The parties have not waived oral argument, the appeal is not frivolous, and the Court would be aided by oral argument. This is a case that involves a first degree murder conviction and a sentence of life without mercy.

Mr. Small requests that this case should be set for a Rule 20 argument because it involves several issues of first impression in West Virginia, including the defining of critical stages of a criminal proceeding in a jointly indicted case with two co-defendants, and an issue that is often inconsistently applied by lower courts in attempting to determine the words that trigger an invocation of counsel for purposes of *Miranda*.

ARGUMENT

I. MR. SMALL'S DUE PROCESS RIGHTS AND RIGHT TO COUNSEL WERE VIOLATED BY THE STATE'S FAILURE TO NOTICE HIM ON CRITICAL EVIDENCE AND BY HIS AND HIS COUNSEL'S ABSENCE FROM A CRITICAL EVIDENTIARY HEARINGS

As the first assignment of error, Mr. Small avers that his constitutional rights under both the federal and the state constitutions to due process, right to counsel, and right to effective assistance of counsel were violated by the State's failure to notice him of 404(b) evidence of gang affiliation and drug trafficking that it intended to introduce against his co-Defendant Joseph Mason in their joint trial and by his and his counsel's absence from critical evidentiary hearings

where the admissibility of the 404(b) evidence was litigated and where the court denied a motion to sever the defendants.

A. Mr. Small's Constitutional Rights Were Violated by His and His Counsel's Absence from Critical Stages of the Criminal Prosecution

Neither Mr. Small nor his counsel were present during two pretrial hearings that involved substantial matters of law and testimony of witnesses-- the hearing on July 12, 2021 in which the court ruled upon a motion to sever the defendants and an evidentiary hearing on January 21, 2022, in which the court took evidence on other bad acts evidence that the State intended to introduce against Mr. Mason in the joint trial with Mr. Small. The record is clear that neither Mr. Small nor any attorney representing Mr. Small was present at either of these hearings. Apparently, Mr. Small and his attorney were absent from the July 12, 2021 hearing because of a pending motion to disqualify Mr. Small's attorney due to a potential conflict of interest. Mr. Small and his attorney were not present for the January 21, 2022, because Mr. Small's counsel filed a motion to continue the pre-trial hearing, which was granted for him but not for Mr. Mason.

"Due process of law as guaranteed by the State and Federal Constitutions requires that a party be accorded the right to be present in person or by counsel during all trial proceedings." Syl. Pt. 2, *State v. Byers*, 875 S.E.2d 306, 2022 WL 2128507 (W.Va. June 14, 2022). "A defendant has a due process right to be present at all critical stages of a criminal proceeding pursuant to Article III, Section 10 of the West Virginia Constitution and the Fifth Amendment of the United States Constitution." Syl. Pt. 3, *Byers*, 875 S.E.2d 306.

> Preliminary hearings, pretrial hearings involving substantial matters of law or testimony of witnesses, matters surrounding a continuance, and all matters starting with commencement of actual trial are critical stages of criminal proceedings in which presence of defendant is essential, but entry of routine orders involving clerical or administrative matters and consultations between defense counsel, prosecutor, and court

> prior to actual trial are not critical stages of proceedings wherein presence of defendant is required.

State v. Boyd, 160 W.Va. 234, 246, 233 S.E.2d 710, 719 (1977).

More generally, a criminal defendant has a constitutional right to be "present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *United States v. Riddle*, 249 F.3d 529, 534 (6th Cir. 2001) (quoting *Faretta v. California*, 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). "This right is derived from the Due Process Clause of the Fifth and Fourteenth Amendments, as well as from the Sixth Amendment's Confrontation Clause." *United States v. Shepherd*, 284 F.3d 965, 968 n. 1 (8th Cir. 2002). A criminal defendant's presence is only required at "critical stages" of the proceedings-- i.e., only "to the extent that a fair and just hearing would be thwarted by [the defendant's] absence." *Snyder v. Massachusetts*, 291 U.S. 97, 108, 54 S.Ct. 330, 78 L.Ed. 674 (1934); *see also United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985)).

As an initial matter, Mr. Small avers that both hearings where he and his counsel were absent were critical stages of the criminal proceeding of the joint trial of him and Mr. Mason. Generally, under the *Boyd* standard, a pre-trial hearing on a motion to sever defendants in a joint indictment involves substantial matters of law. While an argument may be made that there would be no violation if Mr. Small was not present but his lawyer was present because this is only a matter of law, Mr. Small's lawyer was also not present. Both Mr. Small's and his counsel's absence frustrated the fairness of the proceedings.

Furthermore, under the *Boyd* standard, a pre-trial hearing on the admissibility of other bad acts evidence, also known as a *McGinnis* hearing in West Virginia, involves both substantial matters of law and witness testimony and is a critical stage of the criminal proceeding. An evidentiary *McGinnis* hearing requires both the presence of Mr. Small and his counsel because it

involves a mixed question of fact and law and Mr. Small's presence would necessarily assist his counsel in litigating the issue. However, neither Mr. Small nor his counsel were present at this critical stage of the proceedings. Again, Mr. Small's and his counsel's absence frustrated the fairness of the proceedings.

Jurisprudence from other courts confirm that both of these types of hearings are critical stages of a criminal proceeding. In *State v. Curry*, the Utah Court of Appeal held,

> The suppression hearing constituted a critical stage of the proceeding because it was Defendant's opportunity to contest the admissibility of the evidence upon which the City's entire case against him was based. The record indicates that Defendant's attorney did not appear at the suppression hearing due to a serious illness. As a result, Defendant was effectively denied an opportunity at the hearing to cross-examine the City's witnesses and to put on evidence of his own version of the facts leading up to the search of his home, which ultimately resulted in his arrest. Defendant's motion to suppress set out a version of the facts patently different than that proffered by the prosecution, and Defendant's counsel specifically requested an evidentiary hearing. These facts indicate that Defendant and his attorney viewed the hearing as a valuable opportunity to present Defendant's case, which deserved full consideration by the trial court, aided by the skill and experience of Defendant's attorney.
>
> Taken together, these facts persuade us that the trial court denied Defendant his right to counsel at a critical stage of his criminal proceeding. As such, the City cannot establish that the trial court's error was harmless because we presume prejudice under these circumstances.

State v. Curry, 147 P.3d 483, 485-86, 2006 UT App 390 (Utah 2006).

In *Hanson v. Passer*, the Eighth Circuit Court of Appeals found that a Minnesota pretrial omnibus hearing where "the parties examined two witnesses and presented several pretrial motions including a motion to suppress and a motion to determine the admissibility of Rule 404(b)–type evidence of other offenses" was a critical stage. *Hanson v. Passer*, 13 F.3d 275, 278 (8th Cir. 1994). "At oral argument before this court, the county attorney conceded that the omnibus hearing was a critical stage in the prosecution, and we agree. A competent attorney could have provided Hanson with meaningful assistance." *Id*.

The Connecticut Court of Appeals found that a hearing that concerned a number of substantive motions was critical and the defendant's absence was unconstitutional.

> We next turn to the hearing on February 1, 2013. At the start of this hearing, the defendant's attorney reiterated his request that the defendant be present. This hearing concerned a number of substantive motions, including the defendant's motion to suppress a statement that he had made to Nardelli, the state's motion to admit evidence of uncharged misconduct, and cross motions by the state to permit Tremblay's testimony and by the defendant's attorney to preclude Tremblay from testifying because of late discovery. In assessing whether this hearing was critical to the defendant's defense, we assess the potential impact of these pieces of evidence on the defendant's case on the basis of the defendant's attorney's statements at the February 1, 2013 hearing, and the statements in the motions regarding the anticipated evidence.
>
> The importance of the evidence discussed at this hearing demonstrates that it was a critical stage of the case. The content of Nardelli's anticipated testimony was not discussed at the hearing or in the motion to suppress, but the suppression of statements made by the defendant is often an important consideration. More importantly, the admission of the defendant's uncharged misconduct, consisting of violence and threats of violence directed against L.B., potentially would have a significant effect on the jury's view of him. Finally, Tremblay's testimony regarding prior abuse by the defendant directed against her could provide strong corroboration for the state's case. This hearing was critical to the defendant's defense.

State v. Ralph B., 162 Conn.App. 583, 599-601, 131 A.3d 1253, 1263-64 (Conn.App. 2016).

A number of other courts have also found that suppression hearings and 404(b) hearings are critical stages of a criminal proceeding. *See*, *e.g.*, *Robinson v. Com.*, 445 Mass. 280, 286, 837 N.E.2d 241, 247 (Mass. 2005) ("We are satisfied that, because the suppression hearing in this case would have required the taking of evidence and also involved the admissibility of substantial evidence that could determine the outcome of the case, the defendant was entitled, under rule 18(a), to be present."); *State v. Grace,* 204 Vt. 68 165 A.3d 122 (VT 2016) ("Defendant had right under Confrontation Clause to be present at suppression hearing in driving under the influence prosecution."); *State v. Allenbaugh*, 151 N.E.3d 50 (Ohio App. 2020)

(holding that a *Daubert* hearing is a critical stage requiring the presence of a defendant); *State v. Ogburne*, 235 N.J.Super. 113, 561 A.2d 667 (N.J.Super 1989) (finding that an evidentiary rape shield hearing is a critical stage); *People v. Hoey*, 145 A.D.3d 118, 41 N.Y.S.3d 477 (2016) (finding "that defendant's absence at hearing at trial relating to admissibility of evidence of uncharged crimes and bad acts deprived him of his right to be present at all material stages of trial.").

While Respondent may attempt to argue that neither of the hearings in this case were critical stages of the criminal proceeding because they involved the co-defendant, Mr. Small responds that this made his and his counsel's presence even more critical at these proceedings. First, Mr. Small and Mr. Mason were indicted as co-defendants and co-conspirators in the same indictment with the same charges-- first degree murder and conspiracy to commit murder. The State intended and did in fact try both defendants jointly. As such, any evidentiary issues related to Mr. Mason directly affect Mr. Small as well.

Moreover, while Mr. Mason and his counsel were able to make legal arguments regarding severance of Mr. Mason and Mr. Small, were able to cross-examine Sgt. Bowman, and were able to litigate the proffered 404(b) evidence, Mr. Small's co-defendant's litigation of these issues does not excuse Mr. Small's and his attorney's absence. Mr. Small and his attorney had defenses as to the admissibility of the 404(b) evidence as well as arguments regarding severance that were wholly separate and apart from Mr. Mason's defenses and arguments. Mr. Small had a compelling argument to make regarding the spillover effect of the admission of evidence of Mr. Mason's gang affiliation and drug trafficking. While such evidence may have been admissible as 404(b) evidence against Mr. Mason, it was unduly prejudicial as to Mr. Small and should have required either severance of the defendants and/or preclusion of introduction of such evidence in

a joint trial. However, Mr. Small and his counsel never got the opportunity to present such an argument.

Mr. Small and his attorney's absence from these proceedings frustrated the fairness of the proceedings in a way that is blatantly apparent from the record. When Mr. Small's attorney attempted to raise the issue of a severance based upon the spillover prejudice of the 404(b) evidence admissible against Mr. Mason and when Mr. Small's attorney attempted to re-litigate the admissibility of the 404(b) evidence against Mr. Mason, the circuit court held that it was not going to re-litigate these issues that were previously litigated with Mr. Mason and his counsel. The circuit court ruled that it would not allow Mr. Small's counsel to re-litigate the evidence that it had already found admissible as to Mr. Mason and that it would not re-litigate the issue of severance of the defendants, which the court had already litigated in regard to Mr. Mason. App. 297-98. At trial, when Mr. Small's counsel again tried to object to the spillover prejudice of the 404(b) evidence entered against Mr. Mason, the circuit court excoriated Mr. Small's counsel for repeatedly trying to litigate an issue that the trial court had already decided. App. 612, 721-23. As such, Mr. Small's and his counsel's absence from these critical proceedings clearly frustrated the fairness of the proceedings as the court would not allow Mr. Small's counsel to re-litigate these issues in regard to his client even though Mr. Small and his counsel were absent when these issues were originally litigated.

Thus, Mr. Small suggests that the two hearings from which he and his counsel were absent were unequivocally critical stages of the criminal proceeding and that their absence affected Mr. Small's fundamental constitutional rights to due process and assistance of counsel.

Furthermore, Mr. Small's counsel's absence during these hearings violated Mr. Small's Sixth Amendment right to assistance of counsel under the United States Supreme Court

precedence of *United States v. Cronic*, 466 U.S. 648, 659-62, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), which found a per se presumption of prejudice to a defendant when counsel is absent during a critical stage of criminal proceedings. The Supreme Court found that the absence of counsel at a critical stage of trial is a structural error requiring an automatic reversal of a conviction without any further showing of prejudice. *Cronic*, 466 U.S. at 658–61, 104 S.Ct. at 2049-51. While there was clearly prejudice in this case due to Mr. Small's counsel being foreclosed from litigating these issues because he was not present when they were originally litigated, such a showing in this case is not required. Mr. Small's counsel's absence at these two critical hearings was structural error requiring automatic reversal.

B. Mr. Small's Right to Due Process and Notice Under the Rules of Evidence Was Violated When the State Failed to Properly Notice Mr. Small of the 404(b) Evidence of Gang Affiliation and Drug Trafficking of his Co-Defendant

Furthemore, Mr. Small avers that his due process right to notice was violated by the State's failure to disclose to Mr. Small its notice of 404(b) evidence that the State intended to introduce against Mr. Mason.

Pursuant to Rule 404(b) of the West Virginia Rules of Evidence, any party seeking the admission of a crime, wrong, or other act must provide notice of the evidence and its intended use prior to trial. W. Va. R. Evid. 404(b).

In West Virginia, the main case regarding the introduction of Rule 404(b) evidence is *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994). The *McGinnis* Court laid out the predicates that must be established prior to introduction of Rule 404(b) evidence by the State. These predicates follow the two main standards for due process– notice and a hearing. As to notice, the *McGinnis* Court held,

> When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, 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, *McGinnis*, 193 W.Va. 147, 455 S.E.2d 516.

As to the hearing requirement of due process, the *McGinnis* Court held,

> Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, 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*, 347 S.E.2d 208 (W. Va. 1986). After hearing the evidence and arguments of counsel, 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). 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 and 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*, 193 W.Va. 147, 455 S.E.2d 516.

"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." *McGinnis*, 193 W.Va. at 154, 455 S.E.2d at 523. "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." *McGinnis*, 193 W.Va. at 155, 455 S.E.2d at 524.

"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.'" *McGinnis*, 193 W.Va. at 163, 455 S.E.2d at 532 (citing *State v. Thomas*, 157 W.Va. 640, 651, 203 S.E.2d 445, 456 (1974); *State v. Messer*, 166 W.Va. 806, 277 S.E.2d 634 (1981); *State v. Spicer*, 162 W.Va. 127, 245 S.E.2d 922 (1978); and *State v. Stollings*, 158 W.Va. 585, 212 S.E.2d 745 (1975)). "[T]he indiscriminate receipt of such [other crimes] evidence in volume and scope can predispose the minds of the jurors to believe the accused guilty of the specific crime by showing him guilty or charged with other crimes." *McGinnis*, 193 W.Va. at 164, 455 S.E.2d at 533 (quoting *Thomas*, 157 W.Va. at 651, 203 S.E.2d at 456).

While this Court has held that previous threats made against a murdered victim may be admissible 404(b) evidence, threats made against another person should not be admissible. *See State v. Ladd*, 210 W.Va. 413, 557 S.E.2d 820 (2001) ("Evidence of the defendant's desire or plan to kill her stepfather was irrelevant to motive, intent, preparation, plan, identity of the killer, absence of mistake, or accident in the murder of her husband.").

Moreover, in most cases, a trial court should require advance disclosure of 404(b) evidence, rather than an ad-hoc disclosure as the witness testifies. *See State v. Headley*, 168 W.Va. 138, 282 S.E.2d 872 (1981).

> [I]n such cases the trial court should demand advance disclosure by the prosecution of any collateral crimes and offenses which the State expects to present at trial. The court can then determine if their probative value is outweighed by the risk that [their] admission will create substantial danger of undue prejudice to the defendant.
>
> In this case the trial court did not get such an advance disclosure. Instead, the court simply cautioned the prosecution to restrict its questions about collateral crimes and offenses to events which occurred shortly before the day of the murder. While the court's actions were commendable as far as they went, we conclude that the better course would have been to solicit advance disclosure and then conduct the balancing test set out in *Nicholson*. Since the trial court made no conclusion concerning the danger of undue

> prejudice to which we would feel obliged to defer, we are free to make the determination ourselves.

Headley, 168 W.Va. at 140-41, 282 S.E.2d at 874-75.

In the instant case, while argued above that the hearing requirement under *McGinnis* was violated when both Mr. Small and his counsel were absent from the *McGinnis* hearing, the notice requirement of *McGinnis* was also violated.

Due to the nature of the West Virginia e-filing system and how Mr. Mason's and Mr. Small's cases were delineated in the system, the notice and amended notice of the proffered 404(b) evidence filed by the State was only filed under Mr. Mason's case number, which resulted in Mr. Small failing to get notice of this proffered evidence. Mr. Small's counsel was aware of this issue and filed a motion to consolidate Mr. Small's and Mr. Mason's cases for e-filing purposes to avoid this issue, but no relief was granted by the court. Mr. Small's counsel raised the issue of lack of notice of the 404(b) evidence on multiple occasions-- both at the pre-trial hearing on March 16, 2022 and during the trial, but the circuit court never granted Mr. Small any relief based upon the lack of notice-- instead ruling that Mr. Small's counsel was foreclosed from arguing about Mr. Mason's evidence because the issue had already been litigated.

Thus, separate and apart from Mr. Small's and his counsel's exclusion from the 404(b) hearing, Mr. Small argues that the lack of notice of the 404(b) evidence standing alone was a violation of his due process rights and his procedural right under Rule 404(b) of the West Virginia Rules of Evidence, requiring reversal of the conviction and remand for a new trial.

II. THE 404(B) EVIDENCE ENTERED AGAINST MR. MASON WAS NOT RELEVANT, WAS UNDULY PREJUDICIAL FOR MR. SMALL, AND WAS CUMULATIVE

Mr. Small next argues that the admission of the 404(b) evidence against Mr. Mason in their joint trial was unduly prejudicial for Mr. Small, was not relevant, and was cumulative. Mr.

Small suggests that the evidence of gang affiliation and drug trafficking was not relevant to any issue in the case-- whether Mr. Small and Mr. Mason conspired to commit the murder of Taylor Hawkridge-- and was highly prejudicial.

First, evidence of affiliation with a largely urban and African American street gang is extremely prejudicial, particularly in a predominantly Caucasian and rural county in West Virginia. In Berkeley County, West Virginia, affiliation with the Bloods or the Crips is akin to affiliation with Al-Qaeda or Isis. The jury's passions would be inflamed by learning about the affiliation of the defendants with these street gangs. Moreover, the implication for Mr. Small based upon Mr. Mason being identified as a Crip member is that Mr. Small-- who is accused of conspiring with Mr. Mason-- is also a Crip member.

Cases from other jurisdictions recognize that gang affiliation evidence may be highly inflammatory but may be introduced if there is relevance to a material issue in the case and it is not more prejudicial than probative and not cumulative. "Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative." *People v. Avitia*, 127 Cal.App.4th 185, 192, 24 Cal.Rptr.3d 887, 892 (2005). "However, gang evidence is inadmissible if introduced only to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." *Id*. at 193. "Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, trial courts should carefully scrutinize such evidence before admitting it." *Id*.

> [T]his testimony is prejudicial evidence as trial counsel argued. In today's society, members of gangs are not regarded as model citizens. There is an inherent connotation that a gang member is involved in criminal activity. The fact that the defendant was a gang member could have, and probably did, create an image of a bad person in the eyes of the jury. While a defendant's gang membership may be probative under certain conditions, whether this defendant was a member of a gang was not relevant to any of the

> essential elements of this armed robbery. Thus, it was error for the trial court to allow the testimony.

State v. Barnes, 685 So.2d 1148 (La.App. 1996).

In the instant case, there was no careful scrutiny by the circuit court before allowing the admission of the gang affiliation evidence. While the State argued that admission of evidence concerning Mr. Mason's affiliation with the Crips was necessary to establish identity of the social media postings under the screen name "Craccloc," there was no need for the State to elicit testimony concerning the etymology of "Craccloc" from the Crips gang and evidence regarding the Crips to establish that Mr. Mason was the owner of that social media name. The State had already subpoenaed the records for Joseph Mason from Instagram, revealing that Mr. Mason was the owner of the "Craccloc" screen name. Moreover, Mr. Mason had posted multiple pictures of himself and other identifying information under that Instagram screen name. As such, Mr. Mason's purported membership in the Crips was not relevant to establishing identity. Identity was a red herring-- the evidence of the gang affiliation was presented because it was highly inflammatory both to Mr. Mason and Mr. Small.

Furthermore, gang affiliation of Mr. Mason was also not relevant on the issue of motive regarding the murder of Ms. Hawkridge. There was no evidence in this case presented by the State that the slaying of the victim was gang-related. In fact, the theory of prosecution was that the slaying was done because the victim was acting as an informant and had either made buys or tried to make buys from Armistead Craig and/or Mr. Mason. The State's theory was that Armistead Craig had paid Mr. Mason and Mr. Small to commit the murder. According to evidence at trial, Armistead Craig was not a member of Mr. Mason's supposed gang-- the Crips-- but instead a member of a rival gang-- the Bloods.

Based upon the State's theory of prosecution and evidence presented at trial, gang affiliation had no relevancy to the murder or the conspiracy. Mr. Small suggests that the 404(b) evidence of gang affiliation was not relevant to any element of the offense or material issue in the case. Instead it served to draw attention to the bad character of the co-Defendant, impugn the character of Mr. Small by association, and inflame the passions of the jury. As such, it should have been excluded.

Furthermore, the severe prejudicial effect of the evidence of gang affiliation evidence significantly outweighed any potential minimal relevancy. As stated above, the introduction of evidence that Mr. Mason belonged to a violent and infamous street gang-- the Crips-- and the spillover prejudicial effect for Mr. Mason was severe in a court where the jury pool was drawn from a predominantly White and rural area.

Finally, Mr. Small suggests that the introduction of the 404(b) evidence of gang affiliation was also cumulative. The State "shotgunned" this evidence into trial, asking not just a single witness, but asking multiple witnesses about Mr. Mason's gang affiliation. This is not the case of just a single reference to gang affiliation for a limited purpose, but admission and argument about gang affiliation many times by the State.

III. THE CIRCUIT COURT ERRED IN FAILING TO SEVER THE TRIALS OF MR. SMALL AND MR. MASON

Mr. Small suggests that the introduction of the 404(b) evidence of gang affiliation of Mr. Mason, if admissible as to Mr. Mason, required a severance of the trials of Mr. Small and Mr. Mason because of the unfair impact of prejudice from spillover. .

The United States Supreme Court has held,

> We believe that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury

> from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice.

Zafiro v. United States, 506 U.S. 534, 539, 113 S.Ct. 933, 938 (1993) (quoting *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)).

> Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in *Richardson v. Marsh*, less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.

Zafiro, 506 U.S. at 539, 113 S.Ct. at 938.

Mr. Small suggests that the spillover effect of evidence of co-Defendant's gang membership was prejudicial to his case, particularly where any evidence of gang affiliation was not admissible against Mr. Small if Mr. Small was tried separately. The State's focus on the co-Defendant's gang membership, introduction of highly inflammatory social media posts of the co-Defendant related to gang affiliation and activity, and argument regarding co-Defendant's gang affiliation seriously prejudiced Mr. Small.

Furthermore, as presented above, Mr. Small and his counsel were improperly excluded from the hearings involving the motion to sever and the 404(b) evidence against Mr. Mason. As such, Mr. Small was not given an opportunity to object and/or move for relief based upon introduction of the evidence against Mr. Mason. And when Mr. Small tried to litigate the issue of severance at a later date, the circuit court ruled that the issue had been foreclosed when he had denied Mr. Mason's motion to sever.

Under the circumstances of this case, a severance of the trials of Mr. Small and Mr. Mason was necessary to avoid undue prejudice as a result of the spillover effect of the introduction of the gang affiliation evidence. Mr. Small was foreclosed from making this argument by the circuit court and this argument was not raised by Mr. Mason's counsel (because the prejudice was directed at Mr. Small, not Mr. Mason).

Finally, no limiting instruction was offered to attempt to ensure that the jury would not consider the 404(b) evidence of gang affiliation of Mr. Mason against Mr. Small. As such, there was no effort to militate against the unfair prejudice. Mr. Small suggests that the unduly prejudicial nature of the 404(b) gang affiliation evidence, the lack of his participation in the 404(b) hearing, and the failure to sever or at least instruct the jury on the issue requires that a new trial be granted for Defendant.

IV. THE COURT ERRED IN FAILING TO SUPPRESS MR. SMALL'S STATEMENT TO LAW ENFORCEMENT

As the next assignment of error, Mr. Small avers that the circuit court erred in failing to grant his motion to suppress his statement provided to Sgt. Bowman and Sgt. See on June 16, 2018.

"The burden is on the State to prove by a preponderance of the evidence that extrajudicial inculpatory statements were made voluntarily before the statements can be admitted into evidence against one charged with or suspected of the commission of a crime." *State v. Bradshaw*, 193 W.Va. 519, 527, 457 S.E.2d 456, 464 (1995) (quoting *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972)). "Absent a knowing and intelligent waiver of the Fifth Amendment right against self-incrimination, a statement made by a suspect during in-custody interrogation is inadmissible." *Bradshaw*, 193 W.Va. at 527, 457 S.E.2d at 464 (citing *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 1628 (1966)).

Likewise, the State bears the burden of proving a knowing and intelligent waiver of *Miranda* by a preponderance of the evidence. *Bradshaw*, 193 W.Va. at 527 n.3, 457 S.E.2d at 464 n.3 ("Although the standard for proving a Miranda waiver was labeled in that decision as a "heavy burden," the Supreme Court in *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), made clear there is no difference between the burden of proof in Miranda and that in the "voluntariness" context. Both are governed by the preponderance standard."). Furthermore, once a suspect invokes his right to counsel, "the State's burden to show a subsequent waiver in the face of defendant's acknowledged assertion of his right becomes exceedingly heavy. This burden is much more onerous than in the case where the initial issue is whether, after receiving his *Miranda* warning, the defendant voluntarily and intelligently waived his right." *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982) (quoting *State v. Clawson*, 165 W.Va. 588, 600, 270 S.E.2d 659, 667-68 (1980), overruled on other grounds).

In *Miranda*, the Supreme Court held that, in order to protect a defendant's right against compelled self-incrimination under the Fifth Amendment, before police initiate custodial interrogation, they must advise a defendant that, in addition to other rights, he has the right to remain silent and the right to counsel." *Bradshaw*, 193 W.Va. at 528, 457 S.E.2d at 465 (quoting *Miranda*, 384 U.S. at 467–72, 86 S.Ct. at 1624–27, 16 L.Ed.2d at 719–22). "The right to counsel established in Miranda was one of a 'series of recommended "procedural safeguards" ... [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.'" *Bradshaw*, 193 W.Va. at 528, 457 S.E.2d at 465 (quoting *Davis v. United States*, 512 U.S. 452, 457, 114 S.Ct. 2350, 2354, 129 L.Ed.2d 362, 370 (1994)).

"The Supreme Court added another layer to that protection in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and its progeny, by holding that once a defendant invokes his right to an attorney under Miranda, the defendant must reinitiate contact in order for the authorities to resume interrogation." *Bradshaw*, 193 W.Va. at 528, 457 S.E.2d at 465. In *Edwards*, the Supreme Court held,

> [A]dditional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversation with the police.

Edwards v. Arizona, 451 U.S. at 484–85, 101 S.Ct. at 1884–85, 68 L.Ed.2d at 386.

> The United States Supreme Court in *Davis v. United States*, 512 U.S. at 458, 114 S.Ct. at 2355, 129 L.Ed.2d at 371, after reviewing the various approaches… set[] a "threshold" requirement of clarity:
>
> "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' ... But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning."

Bradshaw, 193 W.Va. at 529, 457 S.E.2d at 466.

> Ultimately, the *Bradshaw* Court found that they did
>
> not believe the "clear and unequivocal request for counsel" rule of Edwards was met by the defendant and any Miranda-triggered request for counsel would only, at the very best, be an ambiguous request under the circumstances. While we have substantial doubts whether a reasonable officer would believe the defendant was or had any intention of invoking his right to have counsel present, we believe the police made adequate efforts under both *Davis* and *Hoey* to clarify the attorney dilemma. Simply stated, there can be no violation of the rights protected by *Miranda*/*Edwards* where, when facing an ambiguous request for counsel, the police remind the defendant of his Miranda rights and specifically his right to have counsel present.

Bradshaw, 193 W.Va. at 531-32, 457 S.E.2d at 468-69.

However, there is a case in West Virginia that is exactly on point with the present case and Mr. Small's invocation of his right to counsel. In *State v. Green*, the West Virginia Supreme Court stated the general rule

> concerning interrogation after a suspect has expressed a desire to be represented by counsel: "Once a suspect in custody has expressed his clear, unequivocal desire to be represented by counsel, the police must deal with him as if he is thus represented. Thereafter, it is improper for the police to initiate any communication with the suspect other than through his legal representative, even for the limited purpose of seeking to persuade him to reconsider his decision on the presence of counsel."

172 W.Va. 727, 729 310 S.E.2d 488, 490 (1983) (quoting Syl. Pt. 1, *State v. McNeal*, 162 W.Va. 550, 251 S.E.2d 484 (1978)).

In *Green*, the defendant had told officers after they read him his Miranda rights that "I think I should contact my attorney."

> The appellant's statement concerning his desire to speak to his attorney was made at both a logical and a critical juncture in the interrogation process. He had just finished reading a form which contained language referring to the waiver of certain constitutional rights, including the right to counsel. He was contemplating the effect of his signature on those constitutional rights, as well as on his subsequent questioning. At this crucial point, the appellant said, in effect, "I think I should contact my attorney." Despite contentions by the State to the contrary, we find nothing ambiguous in this request, particularly given the context within which it was made.

Green, 172 W.Va. at 729-30, 310 S.E.2d at 491. Despite that unambiguous request for counsel, an admission was coaxed from the defendant and the *Green* Court ruled that the statement was inadmissible based upon the denial of counsel, reversed Green's conviction, and remanded for a new trial. *Green*, 172 W.Va. at 30, 310 S.E.2d at 491.

In the instant case, the trial court failed to impose the burden on the State to prove that Mr. Small's *Miranda* waiver was made knowingly and intelligently. After hearing briefly from counsel for Mr. Small and the State, the court asked the State, "Is this something we need to put

evidence on, do you think?." App. 264. The State responded, "No, I believe that… essentially the dispute here is… whether there was an equivocal or unequivocal---" App. 264-65. The court then cited several federal cases where it was determined that the phrase, "I think I need a lawyer," is not unequivocal and denied the motion. App. 267-68.

This procedure was insufficient as a matter of law to determine the admissibility of Mr. Small's statement. The State had the burden to put forward evidence to prove that Mr. Small's waiver of his *Miranda* rights and right to counsel was intelligently and voluntarily made. Moreover, the State has an even heavier burden of proving an invocation to right of counsel was rescinded. No evidence on either the initial *Miranda* waiver or the subsequent invocation of right to counsel was submitted by the State. Sgt. Bowman was not called as a witness. Sgt. See was not called as a witness. No audio or video recording of the interrogation existed, so none was submitted into evidence. Nor was even the police report submitted into evidence. No evidence was presented whatsoever regarding the circumstances of the interrogation.

As is made clear by the *Green* Court, the circumstances of the interrogation are equally as important in putting the words of the invocation of right to counsel into context. Without requiring the State to produce any evidence, the circuit court was completely unaware of the circumstances surrounding the interrogation. And because the circuit court failed to provide a venue for the taking of such evidence, there is no record before this Court as to the circumstances of the interrogation besides the recitation of the statement, "I think I need a lawyer." The lack of any evidence surrounding the circumstances of the interrogation, the supposed waiver, and the invocation of the right to counsel renders the circuit court's decision regarding the admissibility of the statement erroneous and an abuse of discretion. In the instant case, an evidentiary hearing on the waiver, the circumstances of the interrogation, and the invocation of the right to counsel

was required. The failure to provide such an evidentiary hearing is reversible error, and this Court should remand this case for an evidentiary hearing consistent with what is required.

Moreover, Mr. Small argues that his statement that "I think I need a lawyer" was a clear and unequivocal invocation of his right to counsel. Federal precedent provides a floor but not a ceiling in terms of constitutional protection. While the court in denying the motion cited a number of federal cases where "I think I need a lawyer" was held to be insufficiently unequivocal, in West Virginia, this Court has held in *Green* that the phrase "I think I need a lawyer" is unequivocal and unambiguous. Like the defendant in *Green*, Mr. Small asserted this phrase immediately after being read his *Miranda* rights. App. 1693. There is no indication in Sgt. Bowman's police report that Sgt. Bowman tried to get Mr. Small to clarify this invocation of counsel. Nor is there any indication in Sgt. Bowman's police report of how the interrogation moved to the point of questioning after Mr. Small said that he thought he needed a lawyer.

The statement "I think I need a lawyer" made immediately after being read Miranda rights is a clear, unequivocal, and unambiguous invocation of right to counsel. Interrogation of Mr. Small should have stopped at that moment but did not.

Finally, in determining whether this statement was an unequivocal invocation of right to counsel, the standard is not one of statutory interpretation and resorting to the possible definitions and ambiguity of the term "think." There is no need to discuss the colloquial phrase, "I think so," or Descartes' *Cogito, ergo sum*. The standard is whether " a reasonable officer in light of the circumstances would have understood… that the suspect might be invoking the right to counsel[.]" *Bradshaw*, 193 W.Va. at 529, 457 S.E.2d at 466. Under the circumstances where a suspect in detention states immediately after a reading of *Miranda* that "I think I need an

attorney," no reasonable officer can understand those words as anything but an invocation of the right to counsel.

As such, Mr. Small suggests that even on the record as it exists, as scant as it is because there was no evidentiary hearing on the suppression motion, it is clear beyond peradventure that he invoked his right to counsel and that any statements derived from subsequent questioning should have been suppressed. As such, Mr. Small would request that this Court vacate his conviction and remand for a new trial.

V. ERRORS AT THE MERCY PHASE OF THE TRIAL REQUIRE THIS COURT GRANT A NEW TRIAL ON THE ISSUE OF MERCY

As the last assignment of error, Mr. Small argues that this Court should grant him a new mercy phase trial based upon errors that occurred during the mercy phase where the jury returned a verdict of "no mercy."

Mr. Small argues that the State improperly commented on his right to remain silent during the mercy phase of the trial, that the State improperly implied that there were factors that the jury should consider in the mercy phase.

A. The State's Improper Comment on Defendant Small's Right to Remain Silent

Mr. Small suggests that his constitutional right to remain silent and the State's prohibition on commenting on his invocation of this right remained in effect at the bifurcated mercy phase of his jury trial.

"Historically, this Court has scrupulously protected a defendant's right to remain silent. Also, we have consistently held that [f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." *State v. Murray*, 220 W.Va. 735, 739, 649 S.E.2d 509, 513 (2007) (citations omitted).

"In order to protect the right against self-incrimination, the West Virginia Legislature adopted W. Va. Code, 57-3-6 (1923),[2] which provides that the failure of the defendant to testify cannot be the subject of comment before the court or jury by anyone." *Murray*, 220 W.Va. at 739, 649 S.E.2d at 513. "It is prejudicial error in a criminal case for the prosecutor to make statements in final argument amounting to a comment on the failure of the defendant to testify." *Murray*, 220 W.Va. at 740, 649 S.E.2d at 514.

The Court has held that they "recognize that a certain latitude must be given to an attorney either for the defense or for the prosecution in final argument. We are aware that the intensity of the moment may be productive of language which is intemperate or overdrawn. However, this can never justify disregard for constitutional and statutory guarantees either directly or by inference or innuendo." *Murray*, 220 W.Va. at 740, 649 S.E.2d at 514.

"[T]he State should studiously avoid even the slightest hint as to the defendant's failure to testify." *Murray*, 220 W.Va. at 740, 649 S.E.2d at 514. "Remarks made by the State's attorney in closing argument which make specific reference to the defendant's failure to testify, constitute reversible error and defendant is entitled to a new trial." *Murray*, 220 W.Va. at 740, 649 S.E.2d at 514.

"The general rule formulated for ascertaining whether a prosecutor's comment is an impermissible reference, direct or oblique, to the silence of the accused is whether the language used was manifestly intended to be, or was of such character that the jury would naturally and

[2] W. Va. Code § 57-3-6 provides, "In any trial or examination in or before any court or officer for a felony or misdemeanor, the accused shall, with his consent (but not otherwise) be a competent witness on such trial or examination; and if he so voluntarily becomes a witness he shall, as to all matters relevant to the issue, be deemed to have waived his privilege of not giving evidence against himself and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by anyone."

necessarily take it to be a reminder that the defendant did not testify." *Murray*, 220 W.Va. at 741, 649 S.E.2d at 515.

The Supreme Court of Appeals has considered this fundamental right in the context of prosecutorial comments on the defendant's alleged "lack of remorse" during or prior to trial.

In *Murray*, a majority of this Court invoked the "plain error" analysis to reverse a conviction based upon improper comments made by a prosecutor regarding a defendant's decision not to testify. *Id*. In *Murray*, the statements at issue were the prosecutor discussing defendant's "failure to accept... responsibility," the prosecutor's discussion of how to prove the case, and the prosecutor's slip of the tongue and correction, "if you believe the testimony– not the testimony, the statements of the Defendant." 220 W.Va. at 743, 649 S.E.2d at 517.

In *State v. Mills*, the reversible comment made by the prosecutor was,

> And there are cases in which—in other cases in which, as the detectives all said, and the police, no murderer is normal, because murder isn't normal. But there are cases in which the murderer himself calls 911. There are cases in which the murderer himself says, "I am so sorry; I am so sorry. I beg your forgiveness."
>
> Maybe those murderers—maybe those first degree murderers should get a second chance. But upon the proof in this case, upon the unspeakable cruelty of this murder and upon the state of mind of this defendant, we ask for your verdict of guilty to first degree murder and no parole; no second chances for Marvin Mills.

211 W.Va. 532, 541, 566 S.E.2d 891, 900 (2002).

In finding this comment to require reversal, the Court opined,

> We agree with the State that the prosecutor's initial comment that "there are cases in which the murderer himself calls 911" does not constitute error. A defendant's lack of concern for the victim at the crime scene may be used as evidence of the defendant's intent to kill.... The evidence at trial indicated that after shooting Mrs. Cabe, the defendant strolled across the street, smoked a cigarette, sat on a wall, and watched emergency vehicles arrive. This evidence indicates the defendant's lack of remorse at the crime scene.

> However, the prosecutor went on to state "[t]here are cases in which the murderer himself says, 'I am so sorry; I am sorry. I beg your forgiveness.' " During oral argument, the State argued that this comment must be read in context with the one before it so that it amounts simply to a reiteration of the defendant's lack of remorse at the crime scene. Unfortunately, the statement itself is not specifically limited to lack of remorse at the crime scene, and such a construction is not readily apparent. It is likely that one would naturally understand the comment to mean that the defendant has not asked for forgiveness for killing Mrs. Cabe at any time, including at trial. Of course, the only way in which the defendant could beg forgiveness at trial would be to take the stand and testify in his own behalf. Accordingly, we believe that the prosecutor's second statement amounts to a comment on the defendant's failure to testify.

Mills, 211 W.Va. at 546, 566 S.E.2d at 905.

In Mr. Small's trial, the State made the following remark during closing arguments of the mercy phase of the trial:

> You heard that from the defendant. But you know what you haven't heard today? Remorse. You haven't heard any remorse. This was a cold-blooded gang hit where Taylor had no chance. They are asking for a chance, but Taylor had no chance. The defendants showed Taylor no mercy when she was gunned down in front of her house. And so I ask that you show these defendants no mercy and return a verdict that does not attach mercy to their first degree murder convictions.

App. 1359.

In making this remark, the prosecutor was neither eliciting testimony from a witness concerning a Mirandized statement nor exploiting a line of questioning first brought up by defense counsel. Rather, she was inviting the jury to extend an inferred lack of remorse from Mr. Small's invocation of his right to remain silent. While the co-Defendant did offer a statement, Mr. Small did not, and the State did not seek to differentiate the co-Defendant from Mr. Small in making this statement.

Furthermore, it is no excuse that this occurred during the mercy rather than the guilty phase of the trial. As previously stated, the code provides protections against commentary on the silence of the accused "in any trial." W. Va. Code § 57-3-6. The plain and ordinary meaning of

the words in a statute are the best evidence of the legislature's intent in enacting the statute, and every word in a statute is presumed to have a specific purpose and meaning which must be given effect in applying the statute. *See Verizon v. Bd. of Review of Workforce*, 240 W.Va. 355, 360, 811 S.E.2d 885, 890 (2018). The mercy phase of a first-degree murder trial is just that: part of a trial. To suggest that defendants cease to enjoy such a fundamental right as the right against self incrimination merely because the trial court has, in its discretion, decided that the trial should be bifurcated is incompatible with the primary goal of bifurcation: promoting justice at the expense of judicial economy by "ensuring mercy decisions [are not based] on a partial or speculative presentation of the facts." *State v. LaRock*, 196 W.Va. 294, 314, 470 S.E.2d 613, 633 (1996).

B. The State's Improper Argument that Jury Should Consider Certain Factors

The Supreme Court of Appeals has held that "an instruction outlining factors which a jury should consider in determining whether to grant mercy in a first-degree murder case should not be given." *State v. Miller*, 178 W. Va. 618, 623, 363 S.E.2d 504, 509 (1987). The *Miller* Court reasoned that in making the mercy determination, the jury "is not controlled by any rule of law, nor could the court under any circumstances instruct them as to when they should, or should not, make such a recommendation. They may do so with or without reason…[i]t is a matter wholly within their discretion." *Miller*, 178 W. Va. at 621, 363 S.E.2d at 507.

When a prosecutor misstates the law to the jury during closing argument, that constitutes reversible error if the misstatement resulted in prejudice to the defendant. *See State v. Hatcher*, 211 W.Va. 738, 741-42, 568 S.E.2d 45, 48-49 (2002). In *Hatcher*, a prosecutor incorrectly based his closing argument in a first degree murder trial on an erroneous statement of the law concerning pre-meditation. *Id*. The circuit court overruled defense counsel's objection because while he agreed the prosecutor had misstated the law, this error would be cured by the jury

instruction, which correctly stated the law. *Id*. The Supreme Court reversed, holding that the fact that the law was correctly stated in a later jury instruction did not cure the error of allowing the prosecutor to base his entire closing argument on a misstatement of the law. *Id*. This prejudiced the defendant because "[t]he jury could well have relied on the prosecutor's repeated erroneous statements of the law…in deciding the issue of premeditation." *Id*. The defendant was therefore entitled to a new trial.

In the case at bar, the prosecutor instructed the jury on factors to consider when determining mercy when she made the following remark: "When we consider whether or not mercy should attach to a sentence, when we make this argument to a jury, we generally look to two factors. We look to the defendant's criminal history. We look to the heinous nature of the crime". App. 1357.

She proceeded to structure her entire closing argument around these twin factors, suggesting to the jury that they were the guidelines by which they would decide whether Mr. Small would ever be entitled to the possibility of parole. The jury could well have relied on the prosecutor's erroneous statement of the law in deciding the issue of mercy. And while the court's mercy instruction correctly informed the jury that "[t]heissue of mercy is committed to your discretion and I am not permitted to guide you further on what facts or reasons justify mercy," App. 1551, this at best would have confused the jury since it did not directly contradict the prosecutor's statements: perhaps, the jury was invited to speculate, the Judge can't tell us how to decide mercy, but the prosecutor sure did. And as the *Hatcher* Court held, a proper jury instruction does not cure uncorrected prejudicial misstatements of law by the prosecutor during closing arguments. *Hatcher*, 211 W.Va. at 742, 568 S.E.2d at 49.

The determination of whether a defendant should receive mercy is a crucially important phase of a bifurcated first degree murder trial. Mr. Small was prejudiced by the prosecutor's impermissible reference to non-existent factors for the jury to consider.

CONCLUSION

Based on the foregoing arguments, Mr. Small respectfully requests that this Honorable Court vacate his sentence and conviction and remand for a new trial on both guilt and mercy.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Shawn R. McDermott, do hereby certify that I have filed the Petitioner's Brief and Appendix using the File&Serve express e-filing system which will electronically serve the Berkeley County Prosecutor's Office and the Attorney General's Office on this 19th day of December, 2022.

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