

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Appeal No. 22-706

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State of West Virginia,

Plaintiff-below, Respondent

v.

Richard Dane Small,

Defendant-below, Petitioner

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PETITIONER'S REPLY BRIEF

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Appeal from the Berkeley County Circuit Court

Case No. 20-F-212

The Honorable Michael Lorensen

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## **REPLY ARGUMENT**

### **I. CORRECTION OF RESPONDENT'S STATEMENT OF THE CASE**

First, Petitioner must correct the Respondent's Statement of the Case. Respondent writes that "the State offered evidence of Petitioner's 'hatred of informants,' asserting that '[i]n tune with this Crip gang affiliation, the evidence shows that the Defendant exhibits both rage and disgust toward informants and believes that they should die.'" Respondent's Brief 6. The State offered evidence of Petitioner's Co-Defendant's 'hatred of informants.' The State entered evidence to show that Joseph Mason was associated with the Crips. The State did not enter any gang affiliation evidence regarding Petitioner. This correction is important because Petitioner has argued and continues to argue that he was improperly prejudiced by spillover evidence of his co-defendant's gang affiliation.

### **II. 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 CRITICAL EVIDENTIARY HEARINGS AND BY THE INTRODUCTION OF UNDULY PREJUDICIAL EVIDENCE**

In Respondent's Brief, Respondent concedes that both Mr. Small and his counsel were absent during two trial proceedings-- a hearing where the court took evidence and argument on the State's notice of intent to introduce gang affiliation evidence against Mr. Small's co-defendant and a hearing in which the court ruled on the co-defendant's motion to sever. Based upon this acknowledgment by Respondent, the only issues therefore are whether these hearings were critical stages and whether Mr. Small's and his counsel's absences were harmless beyond a reasonable doubt.

First, Respondent admits that Mr. Small and his counsel were absent at the hearing where the court heard evidence and argument related to the State's notice of intent to introduce the

co-defendant's gang affiliation. Further, Respondent concedes that Mr. Small's counsel tried to argue that Mr. Mason's gang affiliation should be excluded from trial at a subsequent hearing, and the circuit court refused to allow Mr. Small's counsel to make any such argument, finding that he had already ruled on the issue at the 404(b)/intrinsic evidence hearing (at which Mr. Small and his counsel were not present) and that Mr. Small's counsel was precluded from arguing about Mr. Mason's case. *See* Respondent's Brief 10.

Respondent tries to argue that Mr. Small could have litigated this issue at a hearing subsequent to the 404(b) hearing from which he was absent. But, as admitted by Respondent, Mr. Small tried to argue this issue, and the circuit court shut him down, finding that it was already decided and inappropriate.

Respondent attempts to argue that Mr. Small was not entitled to notice of 404(b) evidence relating to his co-defendant. However, Mr. Small would aver that notice is even more important because such evidence is inadmissible against Mr. Small and highly prejudicial in its spillover effect. Essentially, by introducing the gang affiliation evidence against Mr. Small's co-defendant and co-conspirator, the State was able to prejudice Mr. Small by association.

Respondent's argument that Mr. Small's co-defendant's gang affiliation evidence was not relevant to Mr. Small has the opposite effect than Respondent intends. If the gang affiliation evidence is not relevant and if the gang affiliation evidence is extremely prejudicial, then it should have been excluded under Rules 401 and 403 of the West Virginia Rules of Evidence. According to the *McGinnis* standard, the court must first do an analysis under Rule 404(b) and determine by a "preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts.... [T]he 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.” Syl. Pt. 2, *McGinnis*, 193 W.Va. 147, 455 S.E.2d 516. Even if the evidence is 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. Therefore, the lack of relevancy of the evidence is a critical factor in favor of Petitioner’s argument-- that had Petitioner and his counsel been present, they could have argued that the balancing test in *McGinnis* had not been met.

While Respondent tries to argue that Petitioner has no information that would be relevant to the circuit court’s decision regarding “whether the acts occurred and that the defendant committed the acts,” Respondent’s Brief 22, Petitioner suggests that this argument is myopic on the part of Respondent. Petitioner not only had information, he had a separate and distinct interest and perspective in arguing that the lack of relevancy and the prejudicial effect should have resulted in the exclusion of the evidence. First, the State alleged that Petitioner and his co-defendant were involved in a conspiracy to commit murder. However, the State had no evidence that Petitioner was a member of the Crips gang. Had Petitioner been a part of the Crips gang, perhaps there would be some relevancy as to the evidence of the co-defendant’s gang affiliation. Instead, however, Mr. Mason’s gang affiliation had nothing to do with this case. It was not argued that Mr. Mason and Mr. Small were in a gang and that the killing was a gang-related murder. Had Mr. Small been present at the hearing, or had he been allowed to bring up this issue at a later date, he could have argued regarding the lack of relevancy of the co-defendant’s gang affiliation. However, he was precluded from doing so.

Second, had Mr. Small been present at the Rule 404(b) hearing, he could have argued that the introduction of the gang affiliation evidence was unduly prejudicial and should have been

precluded under a Rule 401 and 403 balancing test. Or alternatively, Mr. Small could have argued that his case should have been severed from Mr. Mason's case based upon the prejudicial spillover effect of the gang affiliation evidence. Mr. Small's absence and the circuit court's refusal to allow Mr. Small to litigate this issue at subsequent hearings prevented him from being able to make these compelling arguments in his favor.

Furthermore, the court only said that the State "had a reasonable argument" that the evidence of gang affiliation was intrinsic, but rested its holding on the admissibility of the evidence on a finding that the State had satisfied the *McGinnis* test to introduce the evidence as 404(b) evidence. The court held, "I am satisfied that the State has elicited sufficient evidence and has identified a valid purpose under 404(b). As they have stated their theory of the case... there's a reasonable argument it's intrinsic. And I'll likewise fall back to the extent that it may not be." App. 196. "I find that... the essential requirements of McGinnis and 404(b) have been met." App. 197. However, a holding that the evidence of Mr. Mason's gang affiliation was intrinsic does not obviate the need for Mr. Small and his counsel to be present at the Rule 404(b)/intrinsic evidence hearing nor does it obviate the need for a relevancy/prejudice balancing test.

In terms of Petitioner's argument that his constitutional rights were violated based upon his and his counsel's absence from the pre-trial hearing on January 21, 2022, Petitioner suggests that the Respondent's argument that a Rule 404(b) hearing is not a critical phase is misplaced. Assuming *arguendo* that a 404(b)/intrinsic evidence hearing is merely an "argument upon a technical question of law not depending upon facts within the personal knowledge of the defendant," the fact that Petitioner's attorney, not only Petitioner, was absent obviates this argument. Assuming it is a hearing on a technical question of law, it is a violation of Petitioner's

right to counsel not to even have his counsel present. The only way that Petitioner could offer any argument on a technical question of law would be through his counsel. Thus, his counsel's absence resulted in a constitutional violation.

Nonetheless, Petitioner suggests that the 404(b)/intrinsic evidence hearing meets the standard of criticalness set out in *State v. Boyd* as it involved both substantial matters of law and testimony of witnesses. *State v. Boyd*, 160 W.Va. 234, 246 , 233 S.E.2d 710, 729 (1977) ("Pre-trial hearings involving substantial matters of law or the testimony of witnesses would be deemed critical."). Petitioner avers that he had a right to be personally present at this hearing, but even if this court was to find that it was a hearing on a technical issue of law, his counsel's absence would be a constitutional violation.

Moreover, Petitioner and his counsel were not only absent from the 404(b)/intrinsic evidence hearing, they were also absent from a separate hearing on the issue of severance of the co-defendants. And similar to the 404(b)/intrinsic evidence issue, when Respondent's counsel attempted to litigate the severance issue at a later hearing, the circuit court said "too late." Respondent argues that the circuit court did not err in failing to address Petitioner's counsel's oral motion to sever the case from his co-defendant at a later hearing. However, like with the 404(b)/intrinsic evidence hearing, neither Petitioner nor his counsel were present at the hearing where his co-defendant moved for severance. And again like the 404(b)/intrinsic evidence absence, when Petitioner's counsel attempted to raise the issue of severance, the court found that it had already been litigated and decided. Petitioner suggest that the court's litigation of the issue of severance without the presence of Petitioner and his counsel and the court's refusal to allow Petitioner to re-litigate the issue, clearly violated Petitioner's constitutional rights to counsel and to be present at every critical stage of the proceeding.

Nor is Petitioner's and his counsel's absence from a 404(b) hearing and the severance hearing harmless beyond a reasonable doubt. Respondent attempts to argue that the evidence presented at trial related to Petitioner's guilt was overwhelming. Respondent's Brief 25. Petitioner disputes this characterization of the State's case against him. Petitioner's conviction was substantially based on the testimony of a known liar-- Nasstashia Van Camp. Not only was Ms. Van Camp a documented liar as seen in her multiple conflicting statements provided to law enforcement officers, she was also seeking to lessen her life sentence as the result of her conviction for the murder of Ms. Hawkrige. Ms. Van Camp's testimony was the rusty, corroded lynchpin holding the State's case together. As such, the introduction of the highly prejudicial gang affiliation evidence cannot be said to be harmless beyond a reasonable doubt.

Based upon the spillover prejudicial effect of the introduction of gang affiliation evidence against the co-defendant, where the State agreed not to introduce any gang affiliation evidence against Petitioner, Petitioner suggests that the error to preclude Petitioner and his counsel from participating in the severance hearing cannot be said to be harmless beyond a reasonable doubt. Petitioner had a colorable argument for severance from his co-defendant based upon the nature of the evidence allowed to be admitted against his co-defendant, which was inadmissible against Petitioner. Contrary to Respondent's assertion, the case against both defendants was inextricably intertwined at every level. The State alleged that Petitioner and co-defendant were co-conspirators and thus left with the jury the implication that Petitioner was a Crip member like his co-defendant. Petitioner's absence at the severance hearing, which prevented him from presenting any argument about spillover prejudice and which argument was not forwarded by co-defendant's counsel, cannot be said to be harmless beyond a reasonable doubt.



Respondent further argues that Petitioner's argument that he was prejudiced by the drug trafficking and gang affiliation evidence against his co-defendant was inadequately briefed. Respondent's Brief at 26. Petitioner disputes this contention. This sub-argument flows directly from Petitioner's argument regarding the 404(b)/intrinsic evidence offered by the State against his co-defendant, cites relevant and persuasive (though not mandatory) case law and lays out a convincing argument. Petitioner avers that he was prejudiced by the introduction of 404(b)/intrinsic evidence of gang affiliation and drug trafficking against his co-defendant. Petitioner was painted as guilty by association with a notorious street gang to a largely rural and white jury. Petitioner avers that he is entitled to relief.

To summarize why this serious error on the part of the circuit court requires vacating Mr. Small's convictions and sentence and remand for a new trial, Mr. Small was jointly charged with Mr. Mason with the most serious offense under West Virginia law-- first degree murder. At two critical stages of the case-- a hearing on the severance of the co-defendants and a hearing on the admissibility of 404(b)/intrinsic evidence-- neither Mr. Small nor his counsel were present. Mr. Small's counsel attempted to litigate both the 404(b) and severance issues at a later date, but the circuit court ruled that both issues had already been decided. As a result, highly prejudicial evidence, which was inadmissible against Mr. Small, of Mr. Mason's affiliation with a notorious street gang was introduced before a largely white and rural jury. The introduction of this evidence, without any limiting instruction as to its use, caused undue spillover prejudice to Mr. Small's case. As such, the error of the absence of Mr. Small and his counsel at critical stages of the case as well as the introduction of this highly prejudicial spillover evidence cannot be said to be harmless beyond a reasonable doubt. As such, this Court must vacate Mr. Small's conviction and remand for a new trial.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, Shawn R. McDermott, do hereby certify that I have filed the Petitioner's Reply Brief using the File&Serve express e-filing system which will electronically serve the Attorney General's Office on this 24th day of February, 2023.

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