IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Feb 03 2023
03:45AM EST
Transaction ID 69065134

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

V.

Docket No.: 22-710
(Fayette Co. Circuit Court Case No.: 20-F-74)

MARTY L. BROWNING,
Defendant Below, Petitioner

PETITIONER'S BRIEF

Steven K. Mancini
Counsel for Petitioner,
Marty L. Browning
State Bar ID#: 5921
P.O. Box 5514
Beckley, WV 25801
304- 327-6840
Fax: 304-324-8782
stevekm101@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NOTICE

Petitioner's co-defendants below were Julie D. Browning (Fayette Co. Circuit Ct. Case No.: 20-F-75) and Sherie M. Titchenell (Fayette Co. Case No.: 20-F-76).

Ms. Titchenell's appeal in this Court is docketed as #22-719, and Ms. Browning's appeal to this Court is docketed as # 22-705.

Portions of *Petitioner's Brief* have incorporated portions of the brief filed in #22-719.. This has been by permission of the attorney therein.

Now comes Petitioner, appealing his conviction at jury trial below, and moving this Court to reverse said conviction and remand for a new trial, or to dismiss, as deemed meet by the Court.

I.: Statement of the Case

Petitioner was indicted by the May, 2020, term of the Fayette County grand jury in a two-count indictment, charging child abuse causing death and child neglect resulting in death. *Appendix,* Vol. I, p. 1-2.

Co-defendants Julie Browning (Petitioner's wife) and Sherie Titchenell (Julie Browning's sister) were similarly charged.

The child who had passed away was R.B., Petitioner's eight-year-old daughter, and unrelated to Petitioner's co-defendants.

Both counts in the indictment alleged an offense time period from August 28, 2014, until December 26, 2018.

Several pre-trial hearings were convened, and the trial was re-scheduled several times.

At the February 8, 2022, pre-trial hearing, the trial court ruled that the various allegations of abuse and neglect in this case, occurring both in Nicholas County and Fayette County, and during the entire four year and four month time frame in the indictment, were all "intrinsic" evidence, and not "404(b)" evidence per *West Virginia Rules of Evidence* Rule 404(b).

The trial court's order from the February 8, 2022, hearing did not address the court's ruling

upon this issue. *App.,* Vol. I, p. 27-28. The prosecuting attorney had volunteered, and was directed by the court, to prepare an order encompassing the court's ruling (*App.,* Vol. I, p. 248), but said order does not seem to have been prepared. However, the transcript of said hearing appears at *App.,* Vol. I. p. 137-256. See, especially, *Ibid.,* p. 239.

At pre-trial hearing June 3, 2022, Petitioner's *Motion to Dismiss with Prejudice* based on Petitioner's allegation that the "three-term rule" protecting the right to a speedy trial had been violated, was denied by the trial Court. *App.,* Vol. I, p. 280, 301-311.

Jury trial was convened below June 6, 2022, and proceeded through June 13, 2022. Evidence was presented by the State, including testimony that Petitioner and his co-defendants had been abusive of R.B., and testimony that they had been negligent in failing to take R.B. to the hospital when she was sick in December, 2018. Co-defendants Titchenell and Julie Browning presented evidence and testified. Petitioner offered no evidence and did not testify.

At trial, Petitioner and his co-defendants were prohibited by the trial court from examining or cross-examining any witness called by another co-defendant, other than direct examination of the co-defendants themselves. That is, if the attorney for one of the three co-defendants called a witness, the attorneys for the other two co-defendants were prohibited from examining or cross-examining that witness. *App.,* Vol. V, p. 238-240, 252-253. As to examination by Petitioner and co-defendants of the co-defendants themselves, only direct examination was permitted, not cross examination. *App.,* Vol. VI, p. 295-296.

Petitioner and his co-defendants were all acquitted of Count One, child abuse causing death. All three were convicted of Count Two, child neglect resulting in death.

Petitioner filed *Defendant's Motion for New Trial and Motion to Dismiss,* which was not addressed by the trial court. *App.,* Vol. I, p. 297-300.

Petitioner and both co-defendants were sentenced by the trial court on August 12, 2022, to indeterminate prison terms of not less than three, nor more that fifteen, years.

It is from this conviction that Petitioner now appeals.

II.: Assignments of Error

a.: First Assignment of Error

Petitioner states that the trial Court erred, at a pre-trial hearing February 8, 2022, in ruling that allegations of abuse and neglect of the child by Petitioner and his co-defendants in this matter, some having allegedly occurred in Nicholas County, West Virginia, some years ago, were all intrinsic to the crimes charged, rather than evidence of other acts pursuant to *WVRE* 404(b).

b.: Second Assignment of Error

Petitioner states that the trial court erred by prohibiting at trial direct examination or cross examination by counsel for Petitioner, or counsel for either co-defendant, of witnesses called by counsel for a different co-defendant. While making an exception by allowing *direct* examination by each defense counsel of the co-defendants themselves, the trial court compounded its error by prohibiting *cross* examination of the co-defendants by counsel of the each of the other co-defendants.

c.: Third Assignment of Error

Petitioner assigns as error the denial by the trial court, prior to trial, of Petitioner's motion to dismiss the indictment for the reason that three terms of court had passed after the return of an indictment against Petitioner prior to the commencement of the trial June 6, 2022.

D.: Fourth Assignment of Error

The circuit court erred when it permitted the hearsay testimony of R.B. and of Petitioner's co-defendants to be heard by the jury over a Confrontation Clause objection by counsel, and when prior order of the circuit court had ruled such hearsay inadmissible.

III.: Summary of Argument

a.: Intrinsic Evidence versus 404(b) Evidence

Counts One and Two of the indictment, in that they allege child abuse causing death and child neglect resulting in death over a fifty-two month period, basically charge Petitioner with killing his daughter over said fifty-two month period.

The evidence produced by the State at trial, and referenced at the February 8, 2022, pre-trial hearing, involve various allegations: that R.B.'s femur had been broken as an act of abuse, while she lived with Petitioner and his co-defendants in Nicholas County three years before R.B.'s death, although a specific perpetrator was not named; that R.B. had been improperly disciplined and not permitted interaction with family and friends to the same extent as the other children in the household; insufficient nourishment and water; physical abuse; and failing to

secure medical treatment for R.B.

Some of these acts were alleged to have occurred in Nicholas County, where Petitioner and his family had lived prior to moving to Fayette County.

At the February 8. 2022, pre-trial hearing, the trial court ruled that all of these allegations could be offered into evidence by the State at trial as intrinsic to the offenses charged.

Petitioner at said hearing argued that there was no evidence that any or all said "prior bad acts," even taken together, could have caused or resulted in R.B.'s death, with the exception of failure to seek medical attention during R.B.'s bout with pneumonia during her final illness. *App.,* Vol. I, p. 240-243. Also see *App.,* Vol. VI, p. 158-159.

Petitioner further argued that, therefore, evidence of said prior acts could only be introduced, if at all, as "404(b) evidence."

Petitioner additionally argued that the Nicholas County prior acts were not intrinsic to the Fayette County charges, and therefore would have to be charged, if at all, in Nicholas County. *App.,* Vol. I, p. 240.

During trial, the court revisited the issue, opining that the prior acts were coming into evidence as 404(b) evidence, rather than as intrinsic evidence. When reminded by the prosecuting attorney of its pre-trial ruling, the trial court then stated that the acts could only be charged in Fayette County if they had occurred in Fayette County. *App.,* Vol. II, p. 227-228. Nevertheless, the trial court then proceeded to permit the evidence of all the allegations, both in Nicholas County and in Fayette County, to be admitted at trial.

No *WVRE* 404(b) analysis or *WVRE* Rule 403 balancing test was conducted by the

trial court, neither prior to nor during trial. Even upon admission of the prior bad acts as intrinsic evidence, a Rule 403 balancing test should have been conducted.

b.: No Opportunity to Directly Examine or Cross Examine Defense Witnesses

During trial, the court announced that, upon the calling of witnesses by counsel for one of the three co-defendants, the attorneys for the other two co-defendants would not be permitted to conduct direct examination or cross examination of those witnesses. *App.,* Vol. V, p. 238-240. Rather, the attorney who had called said witness could, upon completion of his inquiry, confer with the other two co-defendants' attorneys to see if any further questions needed to be asked. *Ibid.,* p. 239. Petitioner objected to the court's ruling. *App.,* Vol. V, p. 252-253; *App.,* Vol. VI, p. 219.

Later, the court permitted direct examination, but not cross examination, of the co-defendants themselves. *App.,* Vol. VI, p. 295-296.

The trial court's prohibition of direct or cross examination by the other two co-defendants' attorneys was error, and prejudicial to Petitioner, especially as regards the denial of the right to cross examination of the co-defendants because the three co-defendants were not completely non-adversarial one to the other. See, for example, Julie Browning's testimony about not having conferred with Petitioner about taking R.B. to the hospital. *App.,* Vol. VI, p. 305-306.

If permitted to cross examine Ms. Browning, Petitioner would have inquired, "Isn't it accurate that you were home with R.B. during her final illness, while your husband, Marty Browning, was at work and not in a position to observe any symptoms displayed by R.B. at the time? Wouldn't Mr. Browning then have relied on how you described any symptoms that R.B.

may have been displaying in deciding whether to take R.B. to the hospital?"

The right of an accused to cross-examination is fundamental. This right is not limited to only confronting state witnesses, but extends to witnesses of any party who are, or may be, postured adversarially to the accused.

Ms. Browning and Petitioner would be adversarial to each other during such questioning. Further, it is almost inconceivable that her attorney, upon request by Petitioner's counsel to make such inquiry, would not balk at, and decline, asking his own client such incriminating questions.

c.: Denial of Speedy-Trial Right

Petitioner was indicted in this matter by the May, 2020, term of the Fayette County grand jury. Not including the term in which Petitioner was indicted, five full terms of court passed prior to the commencement of trial, not including the May, 2022, term in which trial convened.

Continuation of the trial date to successive terms of court for reasons not constituting exceptions to the "three-term rule" totaled four.

Therefore, Petitioner's motion to dismiss based upon failure to provide a speedy trial should have been granted by the trial court at the June 3, 2022, pre-trial hearing.

d.: Improper Admission of Hearsay

At pre-trial hearing May 24, 2021, the trial court ruled that "[t]he State of West Virginia may not present statements made by the Defendant's co-defendants in their case-in-chief." *App.,* Vol. I, p. 320.

The trial court's reasoning was that, since the three co-defendants were joined for trial, and

in that each co-defendant might not testify at trial, cross examination of a particular co-defendant by counsel for the other co-defendants would not be possible. *App.,* Vol. I, p. 319-321.

Yet, at trial, the court permitted, over Petitioner and co-defendants' objection, testimony by one of R.B.'s teachers (a mandatory reporter) as to statements made by R.B. to her. *App.,* Vol. V, p. 84.

The trial court also permitted, over Petitioner's objection, hearsay of the co-defendants, and of R.B., as testified to by B.M. *App.,* Vol. V, p. 178-180, 197-198.

IV.: Statement Regarding Oral Argument and Decision

Oral argument is necessary, pursuant to the criteria of Rule 18(a) of the *West Virginia Rules of Appellate Procedure*, because (a) Appellant has not waived oral argument; (b) this appeal is not frivolous; (c) the dispositive issues have not been authoritatively decided per the specifics of how the issues present in this case, especially as regards Petitioner's first and second assignments of error; and (d) it appears that the decisional process would be significantly aided by oral argument, given the fairly complex specifics of how the issues present in this case.

This case should be set for Rule 20 argument because (a) this case, at least as to Petitioner's second assignment of error, involves an issue substantially of first impression; (b) Petitioner's first and second assignments of error involve issues of fundamental public importance; to wit, the admission , as intrinsic evidence, of evidence that should have been admitted, if at all, as 404(b) evidence, and whether acts allegedly committed in one county can be prosecuted in another county; and (c) the prohibition by the trial court of defense counsel's direct examination of all witnesses called by another co-defendant's counsel, other than the co-

defendants themselves, and the prohibition by the trial court of cross examination of all witnesses, including those adversarial adversarial to Petitioner, are of constitutional importance.

V.: Argument

> "[I]n reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review."
> *State v. Vance,* 207 W. Va. 640, 535 S.E.2d 484 (W. Va. 2000), quoting *Tennant v. Marion Health Care Foundation*, *Inc*., 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995)

> "'Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.'"
> Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995), quoted in Syl. Pt. 2, *State v. Boyce*, 230 W.Va. 725, 742 S.E.2d 413 (2013)

Here, Petitioner's first assignment of error is clearly a question of law: that the trial court erred in its admission of certain evidence against Petitioner and co-defendants as intrinsic evidence rather than *WVRE* 404(b) evidence. Therefore, a *de novo* standard of review should be applied. Also, since the admission of evidence as intrinsic implicates jurisdiction of the court, there exists a constitutional dimension to this issue.

Also, the trial court's failure to conduct any 404(b) analysis was an abuse of discretion, in that a failure to exercise any discretion constitutes an abuse of discretion. *Green v. Ford Motor Credit Co.,* Sup. Ct. No.: 14-0816 (W. Va. 2015), *citing Banker v. Banker*, 196 W.Va. 535, 548, 474 S.E.2d 465, 478 (1996).

Petitioner's second assignment of error is also a question of law: that the trial court erred in

denying Petitioner certain direct examination and all cross examination of witnesses called by a different co-defendant's counsel, when some such witnesses were adversarial in posture to Petitioner. Therefore, a *de novo* standard of review should be applied. Also, a denial of the right to confront adverse witnesses is a denial of due process, which is a constitutional issue.

Petitioner's third assignment of error - denial of a speedy trial - involves an interpretation of a statute, *West Virginia Code* 62-3-21. Therefore, a *de novo* standard of review should be applied.

Also,

> [O]stensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed de novo.
> Syl. Pt. 1, in part, *State ex rel. Cooper v.* Caperton, 196 W.Va. 208, 470 S.E.2d 162 (1996).

Also, the right to a speedy trial is a constitutional issue, at least in that it is a due-process issue.

However, even if the review for Petitioner's third assignment of error is deemed to be under an abuse-of-discretion standard, Petitioner asserts that the trial court's denial of Petitioner's *Motion to Dismiss,* based on the three-term rule, was reversible error.

Petitioner's fourth assignment of error - the improper admission of hearsay - clearly involves constitutional issues, including the Confrontation Clause of the Sixth Amendment, the right to cross examine adverse witnesses, and the right to counsel per the Sixth Amendment and the due-process clause of the Fourteenth Amendment. Therefore, a *de novo* standard of review should apply.

a.: Intrinsic Evidence versus 404(b) Evidence

At a pre-trial hearing February 8, 2022, the state offered evidence of allegedly abusive or neglectful acts by Petitioner and his co-defendants. *App.,* Vol. I, p. 216-236. The state offered such either as intrinsic evidence or as *WVRE* 404(b) evidence, claiming, however, that the evidence was intrinsic to the offenses charged in the indictment. *Ibid.,* p. 222.

The position of Petitioner and the co-defendants was that such evidence was possibly 404(b) evidence, but clearly not intrinsic to the offenses charged, because of their remoteness in time to the death of the child; that there was no causality between these prior acts and R.B.'s death; and because some of the alleged acts had occurred in Nicholas County. *Ibid.,* p. 235-243.

Concerning the state's desire to have Drema Short, counselor for R.B.'s stepsister B.M. in preparation for B.M.'s testimony at the abuse-and-neglect case concomitant to the instant criminal case, testify as to B.M.'s statements to Ms. Short, the trial court ruled that such "prior bad acts" were not 404(b) evidence. *Ibid.,* p. 226. This is not to say that the court employed any balancing or *McGinnis* test; rather, the court simply stated that the evidence did not "fit in that pigeonhole." *Loc. cit*. Later in the hearing, the court simply ruled all the prior bad acts as intrinsic evidence. *Ibid.,* p. 239.

During trial, the court revisited the issue, recalling that the prior acts were coming into evidence as 404(b) evidence, rather than as intrinsic evidence. When the prosecuting attorney reminded the trial court of its pre-trial ruling, the court then stated that the acts could only be charged in Fayette County if they had occurred in Fayette County. Nevertheless, the trial court then proceeded to admit evidence of all the Nicholas County allegations, as well as all the Fayette

County allegations during trial as intrinsic.

> THE COURT: . . . [I]t appears that the charges - - the actual charges in the indictment regard offenses that occurred in Fayette County, West Virginia. I think if I'm relec - - recalling correctly that this information on the Nicholas County connection with these folks was submitted as 404b evidence, as I recall. Is that - - what was the basis on which it came in?
>
> MR. PARSONS: Your Honor, I think you're final opinion was that it was intrinsic evidence not 404b.
>
> THE COURT: Intrinsic evidence.
>
> MR. PARSONS: Res gestae.
>
> THE COURT: Res gestae. Well, you know, it would appear to me that the abuse and neglect - - in order for this court to have jurisdiction has to occur in Fayette County, West Virginia.
> *App.,* Vol. II, p. 227-228

See *State v. McGinnis*, 455 S.E.2d 516, 532-533, 193 W.Va. 147, 163-164 (W. Va. 1994).

> We can find nothing in the record that indicates that the trial court did the required balancing under Rule 403. At the conclusion of the pretrial hearing, the trial court stated that it had been thinking about the admissibility of the Rule 404(b) evidence for some time. Specifically, noting that it wanted to make sure that the defendant would be convicted of murder and not of the evidence of other acts and that he hoped that the State would not dwell on the Rule 404(b) evidence, the trial judge stated that he would be more concerned about admitting the evidence if it involved prior crimes of violence. As stated earlier, when admitting evidence under Rule 404(b), the record must clearly reveal the analysis the trial court used to comply with the mandates of Rule 403. Arnoldt v. Ashland Oil, Inc., 186 W.Va. at 408, 412 S.E.2d at 809 ("[t]he record of this case indicates that the trial judge failed to conduct the balancing inquiry required by West Virginia Rule of Evidence 403. Accordingly, we find that the trial court's failure to exclude evidence of Ashland's unrelated past acts constitutes reversible error").
>
> A plethora of West Virginia cases have held that when the prosecution seeks to admit cumulative evidence under Rule 404(b), it runs the risk of running afoul of our rule prohibiting "shotgunning." State v. Thomas, 157 W.Va. at 656, 203 S.E.2d at 456. See also State v. Messer, 166 W.Va. 806, 277 S.E.2d

634 (1981); State v. Spicer, supra; State v. Stollings, 158 W.Va. 585, 212 S.E.2d 745 (1975), overruled on other grounds, State v. McAboy, 160 W.Va. 497, 236 S.E.2d 431 (1977), overruled, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983). In Thomas, this Court stated:

'A prudent prosecutor limits himself to what is needed to prove the charge in the indictment. In the process of proving the charge, other offenses may sometimes come to light incidentally, but when the prosecution devotes excessive trial time to this type of "background" material, it runs the risk of trespassing into the impermissible area and jeopardizing any resulting conviction'
United States v. Mastrototaro, 455 F.2d 802, 804 (4th Cir.1972).
157 W.Va. at 656, 203 S.E.2d at 456.

We hold, as we did in Messer, that "[i]n the instant case, ... the prosecution was permitted to do the very thing we condemned in State v. Thomas ...; that is, the State engaged in 'shotgunning' or the excessive employment of other crime evidence to convict the defendant." 166 W.Va. at 809, 277 S.E.2d at 636. We would be hesitant to reverse this conviction if the trial court admitted only evidence of one of the examples discussed above. The cumulative admission of the evidence under Rule 404(b), however, presents us with the likelihood that the jury convicted the defendant because of his character and not because of the evidence surrounding the murder. In this circumstantial evidence case, these errors cannot be regarded as harmless. 22 See State v. Walker, 188 W.Va. 661, 668, 425 S.E.2d 616, 623 (1992) ("[w]hen the circumstantial nature of the evidence requires the jury to construct a chain of logical inferences in order to find guilt, strict adherence to the rules of evidence becomes crucially important"). As we said in Thomas, "the indiscriminate receipt of such 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.... The excessive zeal of the prosecutor in introducing evidence of collateral crimes can and has affected the accused's right to a fair trial." 157 W.Va. at 656-57, 203 S.E.2d at 456.
State v. McGinnis, 455 S.E.2d 516, 532-533, 193 W.Va. 147, 163-164

Petitioner by counsel stated at the February 8, 2022, hearing:

"What the State, I believe, is trying to do is to paint such an emotional over breath [*sic*] of this whole case that the jury will just hate the clients." *App.,* Vol. I, p. 242-243.

The trial court ruled that all of the "prior bad acts" offered by the state were intrinsic

evidence and not 404(b) evidence. *Ibid.,* p. 239.

In *State v. LaRock* (1), 196 W.Va. 294, 470 S.E.2d 613 (1996), this Court set out the standards of review of a trial court's admission of evidence pursuant to Rule 404(b). In Petitioner's case, however, the trial court employed no analysis or discretion as to admissibility pursuant to Rule 404(b) and Rule 403. Rather, the court simply ruled that the proffered evidence was intrinsic.

The state at said hearing relied on *State v. Dennis,* 607 S.E.2d 437, 216 W.Va. 331 (W. Va. 2004) in support of its argument that the proffered evidence of "prior bad acts" was intrinsic to the offenses alleged in the instant indictment. *App.,* Vol. I, p. 232.

The trial court relied on *La Rock, supra,* in determining the prior bad acts to be intrinsic.

Yet, this Court in *LaRock* reviewed and upheld the trial court's analysis in determining that the defendant's prior bad acts were admissible under Rule 404(b). The trial court here, in Petitioner's case, did not undergo a 403/404(b) analysis.

A failure to exercise any discretion constitutes an abuse of discretion. *Green v. Ford Motor Credit Co.,* S.Ct. No.: Sup. No.: Ct.14-0816 (W. Va. 2015), *citing Banker v. Banker*, 196 W.Va. 535, 548, 474 S.E.2d 465, 478 (1996).

This Court in *LaRock* did address admissibility of intrinsic evidence in Footnote 29, citing *United State v. Williams,* 900 F.2d 823, 825 (5th Cir.1990) and *United State v. Masters,* 622 F.2d 83, 86 (4th Cir.1980).

---

(1) *LaRock* appears to be the case the trial refers to as the "Springdale" case. *Ibid.,* p. 234.

Applying the analysis in *Williams* and *Masters,* however, only reinforces Petitioner's claim that the alleged prior bad acts were not admissible as intrinsic evidence in his trial. In that Petitioner was acquitted of Count One, the inquiry is simply reduced to whether the alleged prior bad acts were part of a "single criminal episode" or were "necessary preliminaries of the crime charged" in relation to the offense of neglect of the child by failing to take her to the hospital. *LaRock,* FN 29, *citing* and *quoting Williams,* at 825. While the language of Count Two is broad, the evidence at trial as to Count Two is virtually exclusively upon that specific issue - neglect by not seeking medical attention.

Similarly, the requirement per *Masters* that evidence is admissible as intrinsic evidence if it is "necessary for a 'full presentation' of the case, or is . . . appropriate in order to complete the story of the crime on trial by providing its immediate context or the 'res gestae' " also is not satisfied in the instant case. Evidence of prior bad acts years earlier (some of which involving an unnamed perpetrator), some in a different county, and wholly unrelated factually to failure to seek medical attention, is not intrinsic evidence. The evidence of the other acts and the evidence of the crime charged were not "inextricably intertwined." *LaRock,* FN 29, *citing* and *quoting Masters,* at 86.

Dennis can easily be distinguished from the instant case. There, the evidence admitted as intrinsic was of prior bad acts occurring the month prior to the occurrence of the offenses charged, and wholly related to the offenses charged: the prior acts and the offenses charged both involved recent domestic violence, lies, and threats, and were part of a "single criminal episode." *Williams,* at 825.

In the instant case, the prior bad acts were of many months and even years prior, some occurring in a different county; at least one not even resulting in a named perpetrator; and in no way causally connected to medical neglect resulting in the child's death.

Also, the prosecutor here, at the February 8, 2022, pre-trial hearing, seems to have failed to perceive the difference between jurisdiction and venue (*App.,* Vol. I, 231-234), and also, in his argument, presupposes the evidence of the prior acts as intrinsic. *Ibid..,* p. 232. "And so, if it's admissible for evidence to come intrinsically from another state, we argue certainly [inaudible] from a neighboring County. So, we rely heavily on State v. Dennis." *Loc. cit.*

As for the specific allegations of prior bad acts, there were the following:

(i) an observation by the emergency-room personnel of a possible burn mark on R.B. This could not have been intrinsic evidence because there was no evidence as to when the mark had occurred (*App.,* Vol III, p. 95), nor any evidence as to the identity of the perpetrator, if any, of such mark. *Ibid.,* p. 77.

(ii) observation by the emergency-room doctor of marks on the body that could be attributed to self-pinching, and for which there was no evidence as to the identity of a perpetrator. *App.,* Vol. III, p. 96-98, 108-110, 118.; also see *App.,* Vol. V, p. 215 (B.M. testimony), p. 246-247 (Jaber testimony), 262. Therefore, these marks can not be intrinsic evidence. Also, R.B. suffered from a "self-mutilating disorder." *App.,* Vol. IV, p. 54-55; also see *App.,* Vol. III, p. 229. The child's pediatrician testified as to the marks being referenced as self-inflicted, and that she had not discerned abuse, and that, as a mandatory reporter, had not seen anything warranting a report to Child Protective Services. *App.,* Vol. III, p. 161. The child's psychiatrist

did not suspect abuse upon observing the marks on her body. *Ibid.,* p. 266.

(iii) failure to follow through with medical referrals made by R.B.'s pediatrician - specifically to a dermatologist and psychiatrist. *App.,* Vol. III, p. 134-137. Since R.B. died from sepsis resulting from pneumonia (*App.,* Vol. IV, p. 46-54, 61-62, 85, 94, 285), her skin condition and psychiatric issues did not cause her death. *Ibid.,* 276-278. Therefore, not following through with referrals could only be 404(b) evidence, and not intrinsic evidence.

The child's pneumonia would have developed over a period of days, not years. *Ibid.,* p. 95-96.

(iv) a broken femur suspicious of abuse. *App.,* Vol. III, p. 133, 140-141; *App.,* Vol. IV, p. 11-40. This could not be intrinsic evidence because (a) it had occurred thirty-nine months prior to the child's death (*Ibid.,* p. 197-198); (b) was not the cause of death (*App.,* Vol. IV, p. 46-54, 61-62, 85, 94, 285); (c) had occurred when the family lived in Nicholas County (*App.,* Vol. V, p. 79, 85-86, 121; *App.,* Vol. VI, p. 289) ; and (d) no perpetrator was alleged. *App.,* Vol. V, p. 121.

The adults in the home delayed medical treatment for R.B.'s broken femur. *App.,* Vol. V, p. 176. This allegation could have been 404(b) evidence, but, for the reasons just stated, was not intrinsic evidence.

(v) contusions on R.B.'s body. However, these were not from trauma, but rather a result of the sepsis. *App.,* Vol. IV, 106-107, 122, 288. There was no trauma contributing to the child's death. *Ibid.,* p. 78-79, 117. Nevertheless, there was testimony at trial by a gym teacher of bruises that appeared to be a hand print on the child, with no perpetrator named. *App.,* Vol. V, p. 92-96,

98-100, 120. B.M. also testified as to observing bruises on R.B.. *Ibid.,* 214.

Child Protective Services in Nicholas County had not substantiated any allegations of abuse or neglect of the child. *App.,* Vol. IV, p. 110; *App.,* Vol. V, p. 297-312.

(vi) R.B. was suspected of coming from an abusive home and was reported to have not wanted to return home at the end of the school day in 2015 and 2016, two to three years before her death. *App.,* Vol. V, p. 86, 87. R.B. was alleged to have been underfed at home. *Ibid.,* p. 90-91.

(vii) This same gym teacher testified that in first grade (2016-2017), she observed bruises and scabbing on R.B.'s leg and suspected child abuse approximately two years before the child's death. *Ibid.,* p. 100-102, 111-112. Said teacher made three reports of suspected abuse, the reports and alleged abuse all occurring in Nicholas county. *Ibid.,* p. 119-120.

(viii) The family's Nicholas County home was full of tension. *Ibid.,* p. 170. The family moved from Nicholas County to Fayette County in 2018. *Ibid.,* p. 226-227. Per B.M., R.B.'s stepsister, co-defendant Sherie Titchenell was "mean" to B.M. and R.B. and physically abusive. *Ibid.,* p. 171-173.

(ix) Breakfast was not provided to the children by the adults in the home. *Ibid.,* p. 182.

(x) R.B. was not present with the other children when they were home-schooled, implying that her education was being neglected. *Ibid.,* p. 186, 190.

(xi) R.B. was made to sleep on a mattress on the floor. *Ibid.,* p. 187.

(xii) R.B. was treated differently (impliedly negatively) by the adults in the home relative to the other children. *Loc. cit.*

(xiii) R.B. was "always 'in trouble,'" even when having done nothing to deserve to be in trouble, and punished without cause. *Ibid.,* p. 187-189.

(xiv) R.B. was denied food and water by the co-defendants in the home, including as punishment. *Ibid.,* p. 188-189, 191.

(xv) R.B. drank from the toilet, implying that she was not provided sufficient liquid by the co-defendants (although there was a sink adjacent to the toilet). *Ibid.,* p. 192, 213.

The trial court erred in ruling that all of these prior bad acts offered by the state were intrinsic evidence and not 404(b) evidence. *Ibid.,* p. 239.

> Where the prosecution improperly introduces evidence of other criminal acts as part of the res gestae or same transaction beyond that reasonably required to accomplish the purpose for which it is offered, and makes remarks concerning such other crime evidence in argument for the purpose of inflaming the jury, the conviction will be reversed on the ground that the defendant was denied the fundamental right to a fair trial.
> Syl. Pt. 3, *State v.* Spicer*,* 245 S.E.2d 922, 162 W.Va. 127 (W. Va. 1978)

b.: No Opportunity to Directly Examine or Cross Examine Defense Witnesses

During trial, at the commencement of the defendants' cases, the trial court announced that the attorney for only one of the co-defendants would be permitted direct examination of each defense witness. *App.,* Vol. V, p. 238-240. Also, see *Ibid.,* p. 252-253, where Petitioner informed the court that he wanted the opportunity for direct and cross examination of a witness called by co-defendant Julie Browning. The trial court there denied Petitioner the ability to directly examine or cross examine witnesses called by a co-defendant's attorney.

> THE COURT: . . . You're going to turn this into the same situation you did with cross examination of defense [*sic*] witnesses, you know, and I'm not going to do that.

Ibid., p. 253.

Petitioner raised the issue again by "object[ing] to our inability to conduct individual direct examination." *App.,* Vol. VI, p. 19. The trial court overruled Petitioner's objection, again denying Petitioner the opportunity of direct examination of witnesses called by a co-defendant's attorney. *Loc. cit.*

When the first co-defendant, Julie Browning, was called as a witness on direct examination by her attorney, however, the trial court changed its ruling:

> THE COURT: You know, I think I have to give other defense counsel an opportunity to ask this woman some questions before you [the prosecutor] cross examine.
> *App.,* Vol. VI, p. 295.

Yet, the court here was merely providing an opportunity for the counsel for the other co-defendants for *direct* examination, not the opportunity to *cross* examine the co-defendants.

Especially note in this regard the following:

> THE COURT . . . All right, Mr. Dove, you may inquire, and ask any questions *that have not already been answered,* okay.
> All right, go ahead.
> *Ibid.,* p. 296. (Emphasis added.)

> A defendant's right to cross-examine the witnesses on the subject matter of their direct testimony, cannot be denied merely because the prosecutor has already asked the same or similar questions. The questions involved having been asked for the first time on redirect examination, *the fact that they had been asked and answered is a reason to permit cross-examination*, *not a reason to deny it.*
> *U.S. v. Caudle*, 606 F.2d 451, 456-457 (4th Cir. 1979) (Emphasis added.)

The right to confront adverse witnesses is well established, per the Confrontation Clause of the Sixth Amendment of the *United States Constitution*. Syl. Pt. 2, *State v. Kennedy*, 735 S.E.2d

905, 229 W.Va. 756 (W. Va. 2012); Syl. Pt. 1, *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

"'Cross-examination is a right, because of its efficacy in securing more than could have been expected from a direct examination by a friendly examiner.' 3A Wigmore, Evidence § 944 (Chadbourn rev. 1970)." *Caudle*, at 456.

> " There are few subjects, perhaps, upon which (the Supreme) Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405, 85 S.Ct. 1065 1068, 13 L.Ed.2d 923 (1965). A full cross-examination of a witness upon the subjects of his examination in chief is the right, not the mere privilege, of the party against whom he is called. Lindsey v. United States, 77 U.S.App.D.C. 1, 2, 133 F.2d 368, 369 (D.C. Cir. 1942); Heard v. United States, 255 F. 829 (8 Cir. 1919). See, e. g., Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); Alford v. United States, 282 U.S. 687, 691, 51 S.Ct. 218, 75 L.Ed. 624 (1931); 2 Wright, Federal Practice and Procedure, Criminal § 416 (1969).
>
> It may not be an exaggeration to claim, as Wigmore does, that cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, Evidence § 1367 (Chadbourn rev. 1976). And, its efficacy in testing the accuracy and completeness of testimony is so well understood that the right of cross-examination is "one of the safeguards essential to a fair trial." Alford v. United States, supra, 282 U.S. at 692, 51 S.Ct. at 219. Evidence supplied through the lips of witnesses is subject not only to the possible infirmities of falsification or bias; it is also subject to the inaccuracies which inevitably flow from the fallibility of human powers of observation, memory, and description.
> *Caudle*, at 457.

This right applies as well to witnesses in an adversarial posture to a defendant even if they are not witnesses for the opposing party. Syl. Pts. 3-4, 9-10. *Kominar v. Health Mgmt. Associates of WV*, 648 S.E.2d 48, 220 W.Va. 542 (W. Va. 2007).

The required analysis to be undertaken by the trial court (Syl. Pts. 3-4. 9-10, *Kominar*) was wholly absent in this case. A failure to exercise discretion is an abuse of discretion. *Green v. Ford Motor Credit Co.,* 14-0816 (W. Va. 2015), p. 3, *citing Banker v. Banker*, 196 W.Va. 535, 548, 474 S.E.2d 465, 478 (1996).

> The right of cross-examination is an inviolate right, but it presupposes adversity between the party wishing to cross-examine and the party for whom the witness has been called to testify. The right, which is of fundamental importance in the discovery of truth in the trial of a case, is intended for the use of an "opponent" (1) for the purpose of the further examination of a witness proffered by the opposite side so as to bring to light qualifying or contradictory facts and circumstances not disclosed by the witness on direct examination and (2) for the further purpose of developing those facts which may diminish the personal trustworthiness or credit of the witness which may have remained undisclosed on direct examination. 5 Wigmore, Evidence (3 ed.) § 1368, From an examination of the authorities it appears that the right of cross-examination is an absolute right only in regard to adverse witnesses. The Ottawa, 3 Wall. 268, 70 U.S. 268, 18 L.Ed. 165 [(1865)]; Gurley v. St. Louis Transit Co., Mo.App., 259 S.W. 895 [(1924)]; Citizens Bank & Trust Co. v. Reid Motor Co., 216 N.C. 432, 5 S.E.2d 318 [(1939)]; Aluminum Industries, Inc. v. Egan, 61 Ohio App. 111, 22 N.E.2d 459 [(1938)]; Hall v. Crosby, 131 Me. 253, 160 A. 878 [(1932)]; Proceedings Nebraska State Bar Assn., 37 Neb. L.Rev. 149; Annotations, 38 A.L.R.2d 952, and 43 A.L.R.2d 1000; 58 Am.Jur., Witnesses, § 614.
> *Kominar*, 648 S.E.2d 48, 65.

Also, see FN 16, *Kominar.*

The interests of Petitioner here and his co-defendants are not identical. It is not a situation where the three defense attorneys all represented all three co-defendants. Since the co-defendants' defenses were not identical, there must necessarily exist prejudice if each of the co-defendants' attorneys was denied the opportunity to cross examine the witnesses called by one of the other two co-defendants' attorneys, at least due to inability to cross examine co-defendants.

In this regard, note the following in cross examination of Julie Browning by the

prosecutor:

> [Mr. Parsons:] Ma'am, do you admit that there was a conversation between you, Sherrie, and Marty about taking her to the doctor, taking her to the hospital?
>
> [Julie Browning:] Not that I recall. Not that I can remember.
>
> [Mr. Parsons:] That didn't happen?
>
> [Julie Browning:] No.
>
> [Mr. Parsons:] Do you recall telling Marty that you thought she should go to the hospital?
>
> [Jule Browning:] I don't remember that no. He wasn't there.
>
> [Mr. Parsons:] He wasn't there the 23rd, the 24th, or the 25th?
>
> [Julie Browning:] Well, he had to work on Christmas Eve. You'd have to tell me exactly what day and time this occurred, and I can tell you he wasn't – – he was working Christmas Eve.
>
> [Mr. Parsons:] Was there ever a time when you had a conversation with Marty Browning about taking the child to the hospital?
>
> [Julie Browning:] Not that I remember.

App., Vol. VI, p. 305-306

The prosecuting attorney had the opportunity to cross examine Julie Browning. Petitioner was denied that opportunity.

This issue was fundamental to Petitioner's conviction on Count Two. Petitioner simply was denied the right to confront, via cross examination, Julie Browning, who, in the testimony just cited, was adversarial to Petitioner.

Especially in light of Mr. Looney's testimony about a conversation he had with Petitioner, and overhearing a conversation between Petitioner and Julie Browning (*App.,* Vol. IV, p. 240-

243), both regarding whether or not to take R.B. to the hospital during her final illness, Petitioner needed to cross examine Julie Browning in his defense.

For example, Petitioner, if permitted to cross examine Julie Browning, would have inquired, "Isn't it accurate that you were home with R.B. during her final illness, while your husband, Marty Browning, was at work and not in a position to observe any symptoms displayed by R.B. at the time? Wouldn't Mr. Browning then have relied on how you described any symptoms that R.B. may have been displaying in deciding whether to take R.B. to the hospital?"

Cross examination provides an essential and unique opportunity to test and challenge the testimony of a witness.

Another example of Petitioner's cross examination of Mrs. Browning, if he had been permitted: "Isn't it true, contrary to what you have just testified to, that you had talked to Marty about taking R.B. to the hospital, and that you had told him that it was not necessary because you did not think the symptoms were that serious? You're not suggesting that Mr. Looney fabricated the conversation that he reports overhearing between you and Marty, or at least reports on Marty's end of the phone call, as well as the conversation that he had with Marty right after that phone call, are you?" *Loc. cit.*

These are clearly questions for cross examination of Julie Browning, which was not permitted by the trial court.

Mrs. Browning and Petitioner were adversarial to each other during such testimony by Mrs. Browning (*App.,* Vol. VI, 305-306), as well as by virtue of Mr. Looney's cited testimony.

The trial court denied Petitioner his right of cross examination of Julie Browning. This

was a violation of Petitioner's right of confrontation pursuant to the Confrontation Clause of the Sixth Amendment of the *United States Constitution.*

In fact, as stated, Petitioner was denied the ability to cross examine any witness called by another co-defendant's counsel.

And, as stated, Petitioner was denied the right of *direct* examination of any defense witness called by the attorney for a different co-defendant, other than Julie Browning and Sherrie Titchenell,

> THE COURT: Well, all three of you don't get to direct examination of the witness. I mean, and the way it's happened in the past is one counsel assigned - - ever which one is assigned, will take witness A, then before he finishes with witness A, he'll ask co-counsel, you got any questions you want me to ask, or whatever; and if not, then the witness goes to him.
> . . . I'm not going to permit three direct examinations. *App.,* Vol. V, p. 239.

The trial court similarly denied each attorney the right to *cross* examine any of the witnesses of the other co-defendants, including the co-defendants themselves. *Ibid.,* 253; *App.,* Vol. VI, 296.

The trial court simply assumed that the witnesses, and the interests, of all three co-defendants were equal. The court applied no analysis as required by this Court by *Kominar, supra,* Syl. Pts. 3-4, 9-10.

The denial of Petitioner the ability to conduct *direct* examination of defense witnesses called by the attorney for a different co-defendant is violative of due process, as guaranteed by the Sixth and Fourteenth Amendment of the *United States Constitution.*

Petitioner's inability to directly examine witnesses is essentially a denial of the right to counsel.

The Sixth Amendment provides that “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

In *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), the United States Supreme Court stated:

> It was held [in *Betts v. Brady,* 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942)] that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision. *Gideon,* at 339.
> [W]e think the Betts v. Brady holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that Betts v. Brady should be overruled.
> *Loc. cit.*
>
> We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before Betts v. Brady, this Court, after full consideration of all the historical data examined in Betts, had unequivocally declared that 'the right to the aid ofcounsel is of this fundamental character.' Powell v. Alabama, 287 U.S. 45, 68, 53 S.Ct. 55, 63, 77 L.Ed. 158 (1932). While the Court at the close of its Powell opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. Several years later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language:
>
> ‘We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.' Grosjean v. American Press Co., 297 U.S. 233, 243--244, 56 S.Ct. 444, 446, 80 L.Ed. 660 (1936).

And again in 1938 this Court said:

> '(The assistance of counsel) is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. * * * The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done." Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1019 1022, 82 L.Ed. 1461 (1938). To the same effect, see Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940), and Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859 (1941).
> *Gideon,* at 342-343.

"'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" *Gideon,* p. 344-345, *quoting Powell,supra,* 287 U.S. 45, 68-69, 53 S.Ct. 55, 64.

The denial by the trial court of Petitioner's right to conduct direct examination of witnesses called by other defense counsel forced a limitation of direct examination by Petitioner and his co-defendants. The trial court thereby severely limited and hampered, if not outright denied, Petitioner's right to counsel.

c.: Denial of Speedy-Trial Right

§62-3-21. Discharge for failure to try within certain time.

> Every person charged by presentment or indictment with a felony or misdemeanor and, remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the state being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict; and every person charged with a misdemeanor before a justice of the peace, city police judge, or any other inferior tribunal, and who has therein been

> found guilty and has appealed his conviction of guilt and sentence to a court of record, shall be forever discharged from further prosecution for the offense set forth in the warrant against him if after his having appealed such conviction and sentence, there be three regular terms of such court without a trial, unless the failure to try him was for one of the causes hereinabove set forth relating to proceedings on indictment.

See *Good v. Handlan*, 342 S.E.2d 111, 176 W.Va. 145 (W. Va. 1986).

The applicability of the "three-term rule" commences upon indictment. Syl. Pt. 2, *State ex rel. Webb v. Wilson*, 182 W.Va. 538, 390 S.E.2d 9 (W. Va. 1990). Petitioner and his co-defendants were indicted at the May, 2020, term of the Fayette County grand jury. *App.,* Vol. I, p. 1-2.

At pre-trial hearing Friday, June 3, 2022, Petitioner's *Motion to Dismiss,* based on violation of the three-term rule, was denied by the trial court. *App.,* Vol. I, p. 280, 301-311. Since trial commenced Monday June 6, 2022, this issue is presented by Petitioner on direct appeal.

The May, 2020, term of court is not counted against the State because it is the term in which Petitioner and the co-defendants were indicted. *W.Va. Code* 62-3-21.

Trial having been continued to the September, 2020, term of court (*App.,* Vol. I, p. 10), the trial court at hearing October 13, 2020, continued the trial to the January, 2021, term of court, upon request of all three co-defendants. *App.,* Vol. I, p. 11-12. Said continuance is therefore not counted against the state. (2)

---

(2) Some of the orders generated from the pre-trial hearings continuing trial are styled "State v. Sherie M. Titchenell, 20-F-76," and some are styled as against all three co-defendants, including all three indictment numbers. However, they all should be taken as styled against all three co-defendants, who were joined for trial, and appeared jointly at pre-trial hearings, although the motions, rulings, and findings within such orders apply to specific co-defendants as stated therein.

At hearing February 19, 2021, the state moved to continue the trial from March 10, 2021. The court granted the state's motion and continued the trial, generally, within the January, 2021, term of Court. *App.,* Vol. I, p. 13-14. Since the continuance was not to the subsequent term of Court, said continuance does not implicate the three-term rule.

At hearing March 31, 2021, trial was continued, by the trial court *sua sponte,* to the May, 2021, term of court*,* "pursuant to COVID 19 protocols". *App.,* Vol. I, p. 15-16. Therefore, said continuance is not counted against the state.

At hearing June 30, 2021, trial was continued from July 14, 2021, to the September, 2021, term of court by the court on its own motion. *App.,* Vol. I, p. 17-23. Petitioner and his co-defendants presented their *Motion for Continuance Within Term. App.,* Vol. I, p. 111-112, 315-318. The State did not object to a continuance, but did object to a continuance within the term of court. *Ibid.,* p. 113. Since at this hearing the trial court moved the trial to the next (September, 2021) term of court, upon objection by the state to a continuance within the May, 2021, term, and denying Petitioner and co-defendants' motion to continue the trial *within* the May, 2021, term of Court (*App.,* Vol. I, p. 18), said continuance *is* counted against the state.

At hearing October 8, 2021, co-defendant Titchenell's motion to continue was granted. *App.,* Vol. I, p. 24-26. However, Titchenell's motion was to continue the trial *within* the September, 2021, term of court. *App.,* Vol. I, p. 7-9. The court on its own continued to the January, 2022, term of court. *App.,* Vol. I, p. 25. Petitioner and co-defendants did *not* waive their speedy-trial right to the next term of court.

The Order from the October 8, 2021, hearing noted that Petitioner "moved the Court to

have the continuance in this matter charged to the State. The Court **REFUSED** the motion indicating the State did move for a continuance." *App.,* Vol. I, p. 25-26. Petitioner can not discern the reasoning of this ruling. The fact remains, however, that the trial court continued the trial to the next term of court, and that neither Petitioner nor either co-defendant moved to continue to the next term of court. Neither Petitioner nor either co-defendant waived trial to the next term of court. Therefore, said continuance *is* counted against the state.

At hearing February 16, 2022, trial was continued from the January, 2022, term of court to June 6, 2022, within the May, 2022, term of court, over the objection of Petitioner. *App.,* Vol. I, p. 33-37.

Trial was continued from the January, 2022, term of court (March 1, 2022, trial date) to the May, 2022, term of court, by the Court on its own motion. *App.,* Vol. I, p. 36-37. The Court's reasons at the February 16, 2022, hearing included that Petitioner's attorney was to be occupied with an out-of-town medical appointment on the date of a pre-trial hearing, during which Chief Medical Examiner Allen Mock's deposition was to be taken. *Loc. cit.* However, Petitioner's attorney was to be available by TEAMS video-conferencing said date, which the Court, at first, at the February 14, 2022, pre-trial hearing, had found acceptable and had so ordered. *App.,* Vol. I, p. 29-32. Additionally, Petitioner had requested that, if the trial court were to continue the trial, that it be re-scheduled *within* the January, 2022, term of court. *App.,* Vol. I, p. 36. The Court gave additional reasons - the congestion of the Court's docket, the number of witnesses and

attorneys in this case, and the need to "address potential issues that may arise in the interim . . ." *App.,* Vol. I, p. 36.

However, none of these reasons is an exception, per *W.Va. Code* 62-3-21, to the three-term rule set out therein. Also, Dr. Mock's testimony could exactly and completely have been substituted for by Assistant Medical Examiner Dr. Can Metin Savasman's testimony, another state witness who testified regarding the autopsy report. *App.,* Vol. IV, p. 43-63. In fact, it was through Dr. Savasman's testimony that the autopsy report was admitted into evidence. *App.,* Vol. IV, p. 90.

Also, as stated, all that was at issue at the referenced February 16, 2022, hearing was the re-scheduling of a pre-trial hearing, not the re-scheduling of the trial itself. *App.,* Vol. I, p. 29-32.

The trial had been scheduled for March 1, 2022. There was more than enough time to re-schedule trial *within* the January, 2022, term of court, which would not end until the middle of May, 2022. The trial court provide no reason as to why moving the trial beyond the end of the May, 2022, term of court (approximately May 20, 2022) by two to three weeks (to June 6, 2022) resolved any exigency that could not have been accommodated by moving the trial from March 1, 2022, to any point during the *more than two and one-half months* remaining in the then-current term of court from the March 1, 2022, trial date until the end of the term of court (approximately May 20, 2022).

Further, the trial court, in moving the trial out of term, relied on none of the

exceptions to the three-term rule as set out in *W.Va. Code* 62-3-21. *App.,* Vol. I, p. 36.

Petitioner's counsel was available for pre-trial and trial proceedings within the January, 2022, term of court, evidenced by his objection to continuance beyond that term of court. *App.,* Vol. I, p. 36. Dr. Mock was available for trial, evidenced by his appearance June 8, 2022, to testify at trial in person. There was nothing offered by the state to suggest that the reason for Dr. Mock's original plan to testify by video in February, 2022, would perdure the remainder of the January, 2022, term of court, until the end of said term of court (approximately May 20, 2022). In fact, in its *Hearing Order* from the February 14, 2022, hearing, the trial court set out acceptable procedure for a witness to testify by video. *App.,* Vol. I, p. 31-32. Indeed, Petitioner's forensic pathologist, Dr. Cyril Wecht, testified at trial by video. *App.,* Vol. VI, p. 102-192.

Therefore, the continuance of the trial by the court, at the February 16, 2022, hearing, from the January, 2022, term of court to the May, 2022, term of court, *is* counted against the state.

Wherefore, the three-term rule, as set out in *W.Va. Code* 62-3-21, having been violated, Petitioner's *Motion to Dismiss* should have been granted by the trial court at the June 3, 2022, pre-trial hearing.

d.: Improper Admission of Hearsay

The trial court erred when it permitted the State to elicit hearsay of R.B., and the adverse testimony of one of Petitioner's co-defendants, in violation of Petitioner's Sixth Amendment right of confrontation.

i.: Hearsay Statements of R.B.

The State utilized the testimonial hearsay of R.B. through its witnesses, Carrie Ciliberti and B.M. Specifically, Carrie Ciliberti (R.B.'s gym teacher) testified that while R.B. was at school in Nicholas County in 2015 and 2016, she noticed, on two occasions, what were in her opinion suspicious bruises on RB. *App.,* Vol. V, p. 81, 96, 100-101. The second of these occasions was testified to by Ms. Ciliberti as to what R.B. had said to her: "[d]o you want to see my boo-boos?" *Ibid.,* p. 101-102. R.B. also was reported by Ms. Ciliberti to have said, "[I]f you have any questions, I'm not allowed to answer you; you have to call my daddy and ask him." *Ibid.,* p. 102.

After having previously called Nicholas County CPS in regard to report allegations about the three co-defendants' treatment of R.B. on separate occasions, Ms. Ciliberti observed R.B.'s aforementioned bruising for the purpose of reporting child abuse. *App.,* Vol. V, p. 85-86, 101-102, 119. As a teacher, Ms. Ciliberti was a mandatory reporter of suspected abuse. Over the objection of counsel, Ms. Ciliberti was permitted by the trial court to testify as to what R.B. had said in regard to these bruises. *Ibid.,* at p. 84, p. 101-102. This was after having just testified that R.B. had told her that Petitioner

had told her that she could not keep a shirt the school had given her, implying an implication of improper, or lack of, clothing. *Id*. at p. 95-99. (3)

In regard to the testimony of B.M. as to R.B.'s hearsay, B.M. testified that R.B. had stated to Julie Browning that she wanted to go to the hospital, even though she would be in the hospital Christmas. *App.,* Vol. V, p. 197-198.

Regarding the hearsay of R.B. offered by Ms. Ciliberti and B.M., Petitioner submits they were made directly against her right to confront her accuser.

This Court established in *State v. Mechling*, 219 W.Va. 366, 368, 633 S.E. 2d 311, 313 (2006), that, "Pursuant to *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness."

This bright-line rule is further enshrined and explained in Rule 804 of the *West Virginia Rules of Evidence*, in that although R.B. would be considered an "unavailable witness" under Rule 804(a)(4), her testimony should have been prevented at trial as Petitioner and his co-defendants were never given an opportunity to develop said testimony pursuant to Rule 804(b)(1)(B).

---

(3) It should be noted that a defense objection was raised to this line of hearsay testimony from Ms. Ciliberti twice during the State's presentation of its evidence at the above-mentioned 404(b) Hearing on February 8, 2022. *App.,* Vol. I, p. 171 and p. 179. As at trial however, the lower court overruled counsel.

Further, Petitioner avers that R.B.'s hearsay testimony was never offered by the State as an exception pursuant to *WVRE* 804, *WVRE* 803, or *WVRE* 807 at trial; nor did the lower court explain why it overruled counsels' objections to this testimony. Additionally, the lower court never explained how said testimony would not be more probative than prejudicial as ultimately required by Rule 403. Also, Petitioner's Fourteenth Amendment's due-process protection was violated because, pursuant to Rule 804, the unavailability of R.B. as a witness did not present an exception allowing for such hearsay.

Petitioner submits that when R.B.'s testimony was presented without the opportunity to develop said testimony in cross examination, the jury was presented with a one-sided damning argument that Petitioner and his co-defendants had not only previously neglected R.B. in Nicholas County, but also had denied hospital treatment to R.B. after she had asked for it the night before her death. (4) This gross violation of Petitioner's and co-defendants' rights could only one outcome once the jury heard R.B.'s hearsay testimony - a guilty verdict concerning neglect.

For these reasons, the lower court erred as a matter of law in allowing this testimony to be considered by the jury.

ii.: Statements of Co-Defendants Used at Trial

Petitioner avers that in direct violation of the lower court's *Order Granting Defendant's Motion to Suppress Statements of Co-Defendants* (*App.,* Vol. I, p. 319-321),

---

(4) It should be noted that in response to the State's tactic to use R..B.'s hearsay testimony, counsel for Ms. Titchenell, during direct examination of defense witness Renee (Martha) Cannon, tried to utilize R.B.'s hearsay to rehabilitate the defendants and, further, to counter a prior allegation of abuse and neglect elicited by the state. However, the lower court, without explanation, denied the defendants the ability to use R.B.'s hearsay in a like manner as had the state in its case in chief. *App.,* Vol. VI, p. 224-231.

entered June 23, 2021, the State was permitted to utilize, in its case in chief, adverse hearsay statements of Petitioner's co-defendants at trial.

B.M. testified, over the hearsay and confrontation-clause objections of counsel, that Ms. Titchenell had told her to deny, if asked at school or by CPS, the alleged abuse in the home. *App.,* Vol. V, p. 178-182. The admission of this testimony by the trial court was prejudicial error, contrary to the court's pre-trial ruling in the above-cited *Order Granting Defendant's Motion to Suppress Statements of Co-Defendants*. Also, since the implication here was that all three co-defendants had been involved in Ms. Titchenell's alleged instruction to be untruthful, Petitioner was prejudiced, both (a) because of the denial of Confrontation Clause protection as outlined in said *Order;* and (b) because of the trial court's in-trial denial of Petitioner's right to cross examination any defense witnesses, including those adversarial to Petitioner. *App.,* Vol. VI, p. 295-296; *Petitioner's Brief, supra,* p. 20-21.

Another instance of the co-defendants' statements being used in the state's case in chief was when the state called Richard Looney. Mr. Looney testified, over objection, about what Petitioner had stated, possibly about what Julie Browning had stated, and what Petitioner reported as to what Julie Browning had stated. (5) The allegation therein was that Petitioner and co-defendants knew that R.B. was sick, yet declined to take her to the hospital. *App.,* Vol. IV, p. 242-243.

At that time Petitioner had no idea if Julie Browning would testify. Therefore, pursuant to the trial court's *Order Granting Defendant's Motion to Suppress Statements of Co-Defendants* (*App.,* Vol. I, p. 319-321), Julie Browning's hearsay

---

(5) Also, *WVRE* 805 is implicated here, because what Mr. Looney reports that Petitioner said had been said to Petitioner by Julie Browning, was not admissible, pursuant to the trial court's *Order Granting Defendant's Motion to Suppress Statements of Co-Defendants* (*App.,* Vol. I, p. 319-321). In other words, it was not true that "each part of the combined statements conform[ed] with an exception to the rule.

coming in through Mr. Looney was error.

A further, egregious, use of Petitioner's co-defendants' statements came when, during the testimony of B.M., the jury was told by B.M. that co-defendants Titchenell and Julie Browning had an entire conversation the night before R.B. died, about her deteriorating condition, and had ultimately decided to do nothing to save her. *App.,* Vol. V, p. 197-198 and p. 178-180 (Petitioner's objection). Since Petitioner was present during this conversation (*Ibid.,* p. 198), B.M.'s testimony here redounded to his detriment as well.

Petitioner submits that by the State's actions in using co-defendant statements in its case-in-chief, combined with the lower court's refusal to hold up its own prior Order, Petitioner was unable to confront adverse witnesses and develop testimony in his favor. Also, note the trial court's prohibition of cross examination of a co-defendant by the attorneys for the other co-defendants. *App.,* Vol. VI, p. 295-296; *Petitioner's Brief, supra,* p. 20-21.

This scenario directly goes against this Court's decision in *Mechling, supra,* and *WVRE* 804. The State was duly aware that it could not use co-defendant statements against Petitioner when it decided to proceed with a joint trial against all three defendants in the interest of judicial economy; it simply decided to ignore this problem and hope the lower court would give it the benefit of judicial economy without any evidentiary drawbacks.

For these reasons, the lower court erred as a matter of law in allowing this testimony to be considered by the jury.

VI.: Conclusion

The trial court erred by improperly admitting evidence as intrinsic and by not conducting any analysis pursuant to *WVRE* 404(b), nor any balancing test pursuant to *WVRE* Rule 403.

The court further erred by improperly prohibiting direct examination by defense counsel of witnesses called by a co-defendant's counsel, other than the co-defendants themselves, and by not permitting cross examination of any witness called by a co-defendant, including an adverse co-defendant.

Furthermore, the trial court erred in denying Petitioner's *Motion to Dismiss,* said motion based on violation of the "three-term rule," thereby denying Petitioner his right to a speedy trial.

Additionally, the trial court erred through a multi-faceted improper admission of hearsay, in violation of Petitioner's right of confrontation, right to cross-examination, and Fourteenth Amendment due process guarantee.

Wherefore, Petitioner moves this Court to reverse Petitioner's conviction herein, further moving this Court to remand for dismissal, or for a new trial, or to grant other relief as deemed meet by this Court.

_____/s/_____Steven K. Mancini

Steven K. Mancini

Counsel for Petitioner, Marty L. Browning

State Bar ID#: 5921

P.O. Box 5514, Beckley, WV 25801

304- 327-6840; Fax: 304-324-8782; stevekm101@gmail.com

CERTIFICATE OF SERVICE

This is to certify that undersigned has served, by e-filing, filed today, February 3, 2023, a true copy of the foregoing ***Petitioner's Brief*** and ***Appendix*** upon the following, via the West Virginia Supreme Court of Appeals' File &Serve Xpress/E-file system:

William E. Longwell, Esq.

Asst. Atty. General, *Counsel for Respondent*

Office of the WV Atty. General, Appellate Div.

State Capitol, Bldg. 6, Ste. 406

1900 Kanawha Blvd. East

Charleston, WV 25305

___/s/_____ Steven K. Mancini

Steven K. Mancini, *Counsel for Petitioner*

State Bar ID#: 5921

P.O. Box 5514, Beckley, WV 25801

304-327-6840; Fax: 304-324-8782; stevekm101@gmail.com