IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,
Respondent

V.)

SHERIE M. TITCHENELL,
Petitioner

Appeal from a Final Order
of the Circuit Court of
Fayette County (20-F-76)

Petitioner's Brief

NOTICE
THIS FILING CONTAINS CONFIDENTIAL
RULE 40 MATERIALS

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NOTICE

Sections of this brief may appear similar to the briefs of the Petitioner's co-defendants (Docket No. 22-705 & 710). This has been done intentionally, with the express permission of both counsel and client for all three matters before the Court. Likewise, Petitioner and her counsel have given express permission for any and all portions of this brief to be used by her co-defendants.

ASSIGNMENTS OF ERROR

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW WHEN IT ALLOWED THE HEARSAY TESTIMONY OF R.J.B. AND PETITIONER'S CO-DEFENDANTS TO BE CONSIDERED BY THE JURY, OVER A CONFRONTATION CLAUSE AND DUE PROCESS OBJECTION BY COUNSEL, AND BY PRIOR ORDER OF THE CIRCUIT COURT.

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW WHEN IT PREVENTED PETITIONER'S COUNSEL FROM CROSS-EXAMININIG PETITIONER'S CO-DEFENDANT AT TRIAL, AFTER ADVERSE STATEMENTS WERE MADE AGAINST PETITIONER, AND WHEN THE CIRCUIT COURT PREVENTED PETITIONER'S COUNSEL FROM DIRECTLY EXAMINING DEFENSE WITNESSES.

III. THE CIRCUIT COURT ERRED BY ABUSING ITS JUDICIAL DISCRETION WHEN IT FAILED TO EXERCISE ANY JUDICICIAL DISCRETION IN ALLOWING EVIDENCE OF PETITIONER'S ALLEGED PRIOR BAD ACTS, WITHOUT A RULE 404(b) ANALYSIS, TO BE CONSIDERED BY THE JURY.

IV. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICITON OVER THOSE CERTAIN ALLEGED BAD ACTS OF THE PETITIONER THAT OCCURRED OUTSIDE OF FAYETTE COUNTY, AND YEARS PRIOR TO THE DEATH OF R.J.B.

STATEMENT OF THE CASE

The present matter comes before this Honorable Court on appeal from a final *Sentencing Order*[1], entered August 31, 2022, by the lower court, the Twelfth Judicial Circuit of West Virginia (Fayette County), the Honorable Paul M. Blake, Jr. presiding.

On December 26, 2018, Detective Sergeant James R. Pack of the Oak Hill, West Virginia Police Department, along with several supporting officers, were dispatched to Plateau Medical Center in Oak Hill, West Virginia, in reference to the death of the alleged victim in this matter, R.J.B. (A.R. Vol. I, Criminal Complaint, p. 3). R.J.B. had arrived at the hospital by ambulance for symptoms relating to cardiac arrest. *Id.*

[1] See (A.R. Vol. I, Sentencing Order, p. 54).

Officers were then advised that R.J.B. had several bruises on her body that caused hospital and EMS personnel to suspect child abuse and/or neglect. *Id.* After questioning R.J.B.'s father and Petitioner's co-defendant, Mr. Marty Browning, officers were notified that R.J.B. had passed away. *Id.* at 4. Due to the circumstances surrounding R.J.B.'s death, officers decided to launch an investigation against Petitioner and her co-defendants, Mr. Marty Browning and Mrs. Julie Browning (Julie Titchenell at said time). *Id.*

In the days after R.J.B.'s death, officers from the Oak Hill Police Department questioned the Petitioner and her co-defendants through voluntary interrogation, and then searched their home in Oak Hill, West Virginia. *Id* at 4-16. At the conclusion of the aforementioned questioning and search of Petitioner's home, a child abuse and neglect investigation was opened against the Petitioner and her co-defendants. *Id.* During this investigation, R.J.B.'s body was inspected by the Office of the Chief Medical Examiner of West Virginia, while both Oak Hill Police Department and Fayette County CPS investigators questioned multiple witnesses in both Fayette and Nicholas County in regard to alleged child abuse/neglect actions against R.J.B., perpetrated by Petitioner and her co-defendants. *Id.*

At the conclusion of the aforementioned joint police and CPS investigation against Petitioner and her co-defendants, police utilized the confidential hearsay therapy notes of another child that lived in the Titchenell/Browning home, B.M., as the primary basis for indicting Petitioner and her co-defendants. [2] *Id.* at 17-22.

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[2] It should be noted that these therapy notes were Ordered by the same lower court that presided in this felony matter. Specifically, when B.M. was taken into CPS custody, the lower court in a concurrent Juvenile Abuse &

The secondary basis for said indictment was the ultimate finding by the Medical Examiner (ten (10) months after R.J.B.'s death), that although R.J.B's manner of death was deemed to be "Undetermined" and likely due to sepsis following pneumonia, in light of prior CPS accusations in Nicholas County, the Examiner's office suspected abuse and/or neglect of R.J.B at the joint hands of her caregivers, the Petitioner and her co-defendants. See (A.R. Vol. I, Report of Death Investigation and Post-Mortem Examination Findings, p. 96).

Based upon the aforementioned police and CPS findings, Petitioner and her co-defendants were then jointly indicted by the Fayette County Grand Jury in the May 2020 term of Court on the following two (2) felony counts: 1) Death of a child by a parent, guardian or custodian or other person by child abuse (W.Va. Code § 61-8D-2a(a)); and 2) Child neglect resulting in death (W.Va. Code § 61-8D-4a). (A.R. Vol. I, Indictment, p. 23). In the interest of judicial economy, Petitioner and her co-defendants' cases were then set for a joint jury trial at their arraignment. *Id.*

In preparation of the Petitioner's joint trial with her co-defendants, Petitioner filed on or about October 6, 2020, *Defendant's Motion to Suppress Statements of Co-defendants*, which specifically asked the lower court to prevent the State from introducing testimonial evidence from or made by her co-defendants in the State's case-in-chief. See (A.R. Vol. I, Order Granting Defendant's Motion to Suppress Statements of Co-defendants, p. 25 *et seq.*).

Neglect case against Petitioner, Ordered B.M. to counseling to prepare her for testimony in the criminal trial against Petitioner. See Fayette County Juvenile Abuse & Neglect Case Nos. 19-JA-8, 9, and 10.

At a joint Motions Hearing held by the lower court on May 24, 2021, Petitioner and her co-defendants all made this aforementioned request and pursuant to this Honorable Court's decision in *State v. Mechling*, 219 W. Va. 366, 368, 633 S.E. 2d 311, 313 (2006), the lower court granted Petitioner and her co-defendants' joint request to suppress such statements, and further held that, "The State of West Virginia may not present statements made by the [Petitioner's] co-defendants in their case-in-chief." The State of West Virginia did not object to this request. (A.R. Vol. I, Order Granting Defendant's Motion to Suppress Statements of Co-defendants, p. 26).

After this hearing, and in an effort to improve its case in light of R.J.B.'s autopsy results listing an undetermined manner of death, on or about September 22, 2021, the State of West Virginia sought to bring in all prior allegations of child abuse and neglect against Petitioner and her co-defendants through *res gestae* intrinsic evidence. However, because the State was unsure of how the lower court would rule on said evidence, the State filed its *Notice of Intent to Use 404(b) Evidence*. See (A.R. Vol. I, Notice of Intent to use 404(b) Evidence, p. 45 *et seq.*).

These aforementioned allegations included previous investigations made by Nicholas County CPS that were ultimately found to be unsubstantiated[3]; testimony of R.J.B.'s physical education teacher from years before R.J.B.'s death concerning the same allegations[4]; and a prior unsubstantiated incident in which R.J.B. broke her leg.[5] All of these matters took place in Nicholas County, West Virginia, many alleged to have occurred years before R.J.B.'s death.

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[3] See (A.R. Vol. V, Trial Tr., June 9, 2022, p. 293-320).
[4] See Testimony of Carrie Ciliberti, (A.R. Vol. VIII, Evidentiary Hearing Transcript, February 8, 2022).
[5] See Testimony of Kara Gillespie, (A.R. Vol. VIII, Evidentiary Hearing Transcript, February 8, 2022).

In response to this action, on or about June 13, 2021, counsel for Petitioner's co-defendant filed, *Defendant Julie Browning's Motion in Limine*, to prevent the State from "shotgunning"[6] cumulative evidence from years prior to R.J.B.'s death without a Rule 404(b) Hearing. See (A.R. Vol. I, Defendant Julie Browning's Motion in Limine, p. 28). All of the defendants jointly supported and requested this motion on the basis that the State's evidence was unrelated to R.J.B.'s ultimate cause of death; had previously been investigated[7]; and fell outside of the lower court's Fayette County jurisdiction[8].

In further support of the argument that the lower court lacked jurisdiction, on or about June 16, 2021, Petitioner filed her *Motion to Dismiss the Indcitment*, which was likewise supported jointly by her co-defendants, in an effort to raise the issue of the lower court's subject matter jurisdiction over incidents alleged to have occurred in Nicholas County during the Indictment timeframe. See (A.R. Vol. I, Defendant's Motion to Dismiss the Indictment, p. 34 *et seq.*). Petitioner attached exhibits to this Motion proving that the abuse and neglect allegations the State sought to introduce were investigated in Nicholas County. *Id.*

Despite Petitioner's jurisdiction argument, the lower court dispensed with the notion of dismissing the Indictment on grounds of subject matter jurisdiction at a Motions Hearing on October 8, 2021. (A.R. Vol. I, Order (October 8, 2021 Hearing), p. 49 *et seq.*). The basis for this was the lower court's adoption of the State's argument that wrong acts committed in Nicholas County could be prosecuted in Fayette County, as this Honorable Court had authorized the State of West Virginia in Ohio County, in the case

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[6] See *State v. Thomas*, 157 W. Va. 640, 656, 203 S.E.2d 445, 456 (1974).
[7] See (A.R. Vol. V, Trial Tr., June 9, 2022, p. 293-320).
[8] See (A.R. Vol. II, Trial Tr., June 6, 2022, p. 227-228, ll. 15-24 & 1-23, respectively).

of *State v. Dennis*, 216 W. Va. 331, 607 S.E. 2d 437 (2004), to prosecute an ongoing kidnapping crime that took place in both West Virginia and Ohio, over the course of several days. *Id.* at 50.

The lower court did not find the Petitioner's counter argument that *Dennis* has nothing to do with an alleged crime that happened entirely within West Virginia, and that Petitioner had a constitutional right to be tried in the county in which she was alleged to have committed said past crime, to be persuasive. However, in light of the overarching 404(b) issue, the lower court did agree to take the ultimate matter of introducing alleged evidence of prior bad acts that occurred outside of Fayette County under advisement. *Id.* at 50.

The outstanding question of what prior bad act evidence would be permitted to be used against the Petitioner and her co-defendants at trial was ultimately determined on February 8, 2022, at a 404(b) Motions Hearing. After hearing testimony from Kara Gillespie, a nurse that performed one (1) intake treatment of R.J.B. on one (1) occasion in 2015 in Nicholas County, and Carrie Ciliberti, a physical education teacher for R.J.B. several years prior to her death, the lower court, without asking for Petitioner's opinion in regard to the State's argument, ruled that all evidence that was to be presented at trial from Nicholas County (a period comprising over three (3) years worth of time), was *res gestae* intrinsic evidence, as it was evidence meant to show, "common scheme, pattern, design, or whatever".[9] (A.R. Vol. VIII, Evidentiary Hearing Transcript, February 8, 2022, p. 103). This was despite the fact that no evidence was presented at said 404(b)

[9] Petitioner's co-defendants, Julie Browning and Marty Browning, did make formal objections to why this evidence was 404(b) evidence, which Petitioner supported, however the lower court made its ruling without allowing further comment from Petitioner.

hearing as to who abused and/or neglected R.J.B., and in addition to the liberal use of hearsay and double hearsay by the State's witnesses, over the joint objection of the defendants' counsel, to justify that anyone abused and/or neglected R.J.B. at all. (A.R. Vol. VIII, Evidentiary Hearing Transcript, February 8, 2022).

Finally, in regard to the aforementioned 404(b) hearing, the lower court did not give findings of fact in regard to its decision to declare all evidence from Nicholas County intrinsic, did not address how said evidence was more probative than prejudicial under Rule 403, and ultimately did not ever enter an Order explaining the lower court's final decision.[10]

The aforementioned unsupported decision by the lower court to allow all prior allegations of abuse and neglect from Nicholas County was then used by the State to great effect at trial. Specifically, the State recalled both Carrie Ciliberti and Kara Gillespie back to testify at trial, and further called B.M., whose previously mentioned hearsay therapy notes were the Oak Hill Police Department's primary basis for their Complaint.[11]

All three (3) witnesses testified about abuse and neglect allegations against the Petitioner and her co-defendants (allowing the state to shotgun years worth of previous allegations made against the Petitioner in Nicholas County), that were ultimately investigated and found to be unsubstantiated by Nicholas County CPS[12]. However, the

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[10] The lower court did enter an Order to pay the State's expert for this hearing, but there is no record of the lower court ever addressing the 404(b) issue. (A.R. Vol. I, Order Directing the West Virginia Supreme Court of Appeals to Pay for Testimony of Dreama Short, Licensed Psychologist, p. 52; A.R. Vol. I, Certified Docket Sheet, p. 61).

[11] It should be noted that B.M. never testified at the February 8, 2022 404(b) Hearing, and neither the lower court nor defense counsel was aware of what prior alleged bad acts in Nicholas County she was going to testify to at trial.

[12] See (A.R. Vol. V, Trial Tr., June 9, 2022, p. 293-320).

most egregious violations of Petitioner and her co-defendants' right to a fair trial was yet to come.

During both the testimonies of Carrie Ciliberti and B.M. in the State's case-in-chief, the lower court allowed, over joint objections from defendants' counsel, both witnesses to present testimonial hearsay evidence from R.J.B., from 2014 until the week of R.J.B.'s death in 2018, in direct violation of the Petitioner's right to confront her accuser.[13] This witness testimony further included testimonial hearsay statements of alleged conversations between R.J.B., the Petitioner, and her co-defendants, that were presented to the jury for the purpose of proving that the defendants were abusive and/or neglectful to R.J.B., which resulted in her death.[14] This decision by the lower court was in direct violation of its earlier Suppression Order, occurred before Petitioner had an opportunity to cross-examine her co-defendants about their alleged statements, forced the Petitioner into a position in which she virtually had to testify in her defense, and ultimately resulted in her conviction of neglecting R.J.B. to death.[15]

After the State concluded its case-in-chief, Petitioner then sought to call her own defense witnesses to clarify the aforementioned Nicholas County abuse allegations, and to combat the hearsay testimony of R.J.B. through Carrie Ciliberti and B.M. However, in a move that surprised both Petitioner and her co-defendants, the lower court during the trial, *sua sponte*, and over objection of counsel, mandated that defense counsel

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[13] See (A.R. Vol. V, Trial Tr., June 9, 2022, p. 85-86; p. 102, ll. 1-24; p. 119, ll. 15-20; p. 84, ll. 5-10; p. 102, ll. 17-20; p. 95-99; and p. 99, ll. 9-19).

[14] See (A.R. Vol. V, Trial Tr. June 9, 2022, p. 178-181; p. 197-99).

[15] Petitioner avers that in regard to B.M.'s testimony, counsel was given a limited amount of therapy notes covering what B.M. was alleged to have previously told her therapist. However, the hearsay testimony of R.J.B. made at trial by B.M. against Petitioner completely blindsided Petitioner as B.M. did not testify at the 404(b) Hearing, and the exact nature of B.M.'s testimony had never been brought up until that moment at trial.

would not be able to independently perform direct examination on defense witnesses, and would further not be allowed to cross-examine witnesses that were called by other defense counsel, even in situations in which testimony was harmful to Petitioner.[16] See (A.R. Vol. V, Trial Tr., June 9, 2022, p. 238-239; and p. 252-253); and (A.R. Vol. VI, Trial Tr. June 10, 2022, p.295 & 296, ll. 21-24 & 2-6, respectively). The lower court even went so far as to prevent Petitioner from directly examining her own expert pathologist, Dr. Cyril Wecht.

This mandate was upheld only until the actual defendants began to testify, at which time the lower court strangely allowed Petitioner to question her co-defendant, Julie Browning, but only through direct examination, and only in regard to subjects that had not already been asked by the State during cross-examination, and by Mrs. Browning's counsel during direct. (A.R. Vol. V, Trial Tr., June 9, 2022, p. 238-239; and p. 252-253). This prohibition on asking about previously mentioned matters included when Petitioner's co-defendant, Julie Browning, testified on cross-examination with the State that Petitioner was responsible for neglecting R.J.B. the night before her death. See (A.R. Vol. VI, Trial Tr. June 10, 2022, p. 250-316).

At the conclusion of Petitioner's six (6) day jury trial, and after hearing all of the aforementioned damning hearsay testimony supposedly from R.J.B., and after further being crippled during her own defense case, Petitioner's jury ultimately found her innocent of Count One of the Indictment, but found that she was guilty of Count Two.

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[16] For example, if defendant Julie Browning's counsel called a witness during her defense case, Petitioner was prevented from directly asking any questions, on direct or cross, to Julie Browning's witness and vice versa. Petitioner's counsel was forced to field any questions he wanted to ask to co-defendants' witnesses through co-defendants' counsel. (This included Petitioner's own expert pathologist, Dr. Wecht, who was called by Mr. Browning's counsel). This prevented Petitioner's counsel from asking any questions to witnesses that would have harmed Petitioner's co-defendants.

This decision resulted in Petitioner being sentenced by the lower court to a indeterminate period of not less than three (3) nor more than fifteen (15) years in the State Penitentiary. (A.R. Vol. I, Sentencing Order, p. 54 *et seq.*). Despite her spotless criminal history, the lower court further elected to deny her probation given the nature of her conviction. *Id.*

In light of all of the foregoing, Petitioner filed her Notice to Appeal with this Honorable Court on September 20, 2022, and after a brief extension of time being granted by the Court to perfect her Appeal, the following matters are now mature for the Court's consideration.

SUMMARY OF ARGUMENT

Petitioner asserts that the lower court erred as a matter of law when it allowed the hearsay testimony of R.J.B. and Petitioner's co-defendants to be considered by the jury in the State's case-in-chief, over a Confrontation and Due Process Clause objection by counsel, and by prior Order of the lower court. When the lower court allowed the hearsay testimony of R.J.B. and Petitioner's co-defendants to be considered by the jury, Petitioner's constitutionally guaranteed rights to confront her accuser and due process under the law were violated. Petitioner was never able to develop testimony in regard to these witnesses, and this directly resulted in Petitioner's conviction, as it was the chief evidence the State presented to the jury at trial; for these reasons, the lower court erred as a matter of law.

Further, the *sua sponte* mandate of the lower court that prevented defense counsel form independently examining defense witnesses, including in instances where

defendants' interests were adverse to each other, was a violation of Petitioner's right to defend herself with the constitutionally guaranteed right to effective assistance of counsel. This directly resulted in Petitioner's conviction.

Additionally, the lower court erred through an abuse of judicial discretion when it failed to exercise any judicial discretion at all when considering if evidence of previous unsubstantiated allegations of abuse and neglect against R.J.B.'s should presented to the jury at trial, and further by not explaining its findings and conclusions for such action in an Order.

Finally, the lower court erred as a matter of law as once it declared all evidence from Nicholas County, West Virginia, to be intrinsic criminal evidence, the lower court lost subject matter jurisdiction, as said criminal behavior must be prosecuted in the county in which the alleged crimes are claimed to have occurred.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As the principle issues in regard to these matters concern fundamental matters of public importance, and because several issues will likely present matters of first impression to the Court, the Petitioner would submit that pursuant to Rule 18(a) of the *Revised Rules of Appellant Procedure, Final Version*, oral argument is necessary. Specifically, Petitioner prays that these matters are set for Rule 20 argument.

ARGUMENT

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW WHEN IT ALLOWED THE HEARAY TESTIMONY OF R.J.B. AND PETITIONER'S CO-DEFENDANTS TO BE CONSIDERED BY THE JURY, OVER A CONFRONTATION CLAUSE AND DUE PROCESS OBJECTION BY COUNSEL, AND BY PRIOR ORDER OF THE CIRCUIT COURT.

The Petitioner asserts that the lower court erred as a matter of law when it allowed the State to present to the jury in its case-in-chief, the testimonial and non-testimonial hearsay of the alleged victim, R.J.B., and the adverse hearsay of Petitioner's co-defendants. Petitioner avers that to leave this decision undisturbed would ultimately subject the Petitioner to a violation of her rights under the Sixth Amendment right to confront her accuser; her Fourteenth Amendment right to due process under the Constitution of the United States of America; and Article III, § 14 and 10, respectively, of the Constitution of West Virginia.

In regard to the standard of review for evaluating the lower court's errors as a matter of law, the Petitioner avers that said matters are ultimately questions of law. Therefore, the Court's overall standard of review should be applied through a *de novo* standard of review. See Syl. Pt. 2, *State v. Boyce*, 230 W. Va. 725, 742 S.E.2d 413 (2013) (citing Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

A. Statements of R.J.B. used at trial.

As noted in the Statement of the Case section above, the State utilized the testimonial hearsay statements of R.J.B. through its witnesses, Carrie Ciliberti and B.M.

In regard to specific testimony, Carrie Ciliberti testified that while R.J.B. was at school in Nicholas County in or around 2015 through 2016, she noticed what were in her

opinion, suspicious bruises on R.J.B. (A.R. Vol. V, Trial Tr., June 9, 2022, p. 81, ll. 16; p. 96-102).

After having previously called Nicholas County CPS in regard to Petitioner and co-defendants' treatment of R.J.B. on separate occasions, Ms. Ciliberti asked R.J.B. about the aforementioned bruising for the purpose of reporting child abuse. (A.R. Vol. V, Trial Tr., June 9, 2022, p. 85-86; p. 102, ll. 1-24; and p. 119, ll. 15-20). Over the objection of counsel, Ms. Ciliberti was permitted by the lower court to testify that in regard to these bruises, R.J.B. had told her that, "[I]f you have any questions, I'm not allowed to answer you; you have to call my daddy and ask him." *Id.* at p. 84, ll. 5-10; p. 102, ll. 17-20, respectively. This was after having just testified that R.J.B. had told her that her father, co-defendant Marty Browning, had told her that R.J.B. could not keep a shirt the school had given her due to an alleged lack of clothing. *Id.* at p. 95-99; p. 99, ll. 9-19.[17]

In regard to the testimony of B.M., over the hearsay and confrontation clause objections of counsel, B.M. testified that R.J.B. stated that she: 1) Wanted to go to the hospital the night before she died to Petitioner and co-defendant, Julie Browning; 2) that Petitioner had said R.J.B. was "faking it"; 3) that Julie Browning, discussing the matter with Petitioner, had eventually told R.J.B. that, "[S]he was going to be spending Christmas in the hospital" , and asked R.J.B. if she was "ok with that"; and 4) that all three adults discussed taking R.J.B. to the hospital but chose not to. (A.R. Vol. V, Trial Tr. June 9, 2022, p. 178-181; p. 197-99).

[17] It should be noted that counsel also raised an objection to this line of hearsay testimony from Ms. Ciliberti during the State's presentation of her evidence at the abovementioned 404(b) Hearing on February 8, 2022. (A.R. Vol. VIII, Evidentiary Hearing Transcript, February 8, 2022, p. 35, ll. 9-16; and p. 43, ll. 5-10). Like at trial however, the lower court overruled counsel.

Petitioner will address the alleged statements of her co-defendants below, however in regard to the testimonial hearsay of R.J.B. offered by Ms. Ciliberti and B.M., Petitioner submits they were made directly against her right to confront her accuser.

In regard to Petitioner's right to confront the testimonial hearsay statements of R.J.B., this Honorable Court established in the case of *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."

Petitioner avers that in regard to hearsay testimony that this Honorable Court may not view as testimonial in nature, her rights were still violated under the Fourteenth Amendment right to due process as she was denied the ability to further develop the testimony of an unavailable witness.

This bright line rule is enshrined and explained in Rule 804 of the *West Virginia Rules of Evidence*, in that although R.J.B. would be considered an "unavailable witness" under Rule 804(a)(4), her testimony should have been prevented at trial as Petitioner and her co-defendants were never given an opportunity to develop said testimony pursuant to Rule 804(b)(1)(B). Further, Petitioner avers that R.J.B.'s testimony was never offered by the State as an exception to Rule 804, Rule 803, or through Rule 807 at trial; nor did the lower court explain why it overruled counsels' objections to this

testimony. Finally, the lower court never explained why said testimony would not be more probative than prejudicial as is required by Rule 403.

Petitioner submits that when R.J.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 her co-defendants had not only previously neglected R.J.B. in Nicholas County, West Virginia, but also denied hospital treatment to R.J.B. after she asked for it the night before R.J.B.'s death.[18] This gross violation of Petitioner and co-defendants' rights had only one outcome once the jury heard R.J.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.

B. Statements of Co-defendants used at trial.

Petitioner avers that in direct violation of that certain *Order Granting Defendant's Motion to Suppress Statements of Co-defendants*[19], entered June 23, 2021, the State was allowed to utilize, in their case-in-chief, adverse hearsay statements of Petitioner's co-defendants at trial.

The first major violation of this Order was during the testimony of State's witness, Ms. Maria Parks. Ms. Parks testified, over a *Crawford* objection by all counsel, that during a doctor's visit sometime in 2015, she overheard Marty Browning,

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[18] It should be noted that in response to the State's tactic to use R.J.B.'s hearsay testimony, counsel for the Petitioner during direct examination of defense witness, Renee (Martha) Cannon, tried to utilize R.J.B.'s hearsay to rehabilitate the defendants and further explain a prior allegation of abuse and neglect used by the State. However, the lower court, without explanation, prevented the defendants from using R.J.B.'s testimony in the same manner the State had in its case-in-chief. (A.R. Vol. VI, Trial Tr., June 10, 2022, p. 224-231).

[19] See (A.R. Vol. I, Order Granting Defendant's Motion to Suppress Statements of Co-Defendants, p. 25).

Petitioner's co-defendant, through a wall, tell R.J.B. that if R.J.B. cried during a vaccination shot he would, "[P]unch the shit out of her other arm." (A.R. Vol. III, Trial Tr., June 7, 2022, p. 181-188; p. 181-186 (Objection)). This was used by the State to great effect with the jury, as it started a timeline all the way back to 2015 when the defendants were allegedly abusing R.J.B. in Nicholas County.

However, Mr. Browning never testified at trial; Petitioner was never able to examine this implicating hearsay statement to prove that she had no knowledge of this event.

The next major instance of the co-defendants' statements being used in the State's case-in-chief was when the State called Mr. Richard Looney. Mr. Looney testified, over objection, that Petitioner's household knew that R.J.B. was sick the week she died, and further ignored her condition. (A.R. Vol. IV, Trial Tr., June 8, 2022, p. 242-243). Mr. Looney based this assertion on an overheard conversation between Petitioner's co-defendants. *Id.* During the State's case-in-chief, Petitioner had no idea if her co-defendants would testify and as a result, she never had the opportunity to develop this testimony during the State's case.

Next came when as listed above, Carrie Ciliberti testified that Mr. Browning had told R.J.B. that she was not able to keep a shirt Ms. Ciliberti had given to her, and that she was not allowed to talk about suspected abuse at home. (A.R. Vol. V, Trial Tr., June 9, 2022, p. 95-99; p. 99, ll. 9-19; and p. 102, ll. 17-20). Yet again, Petitioner was chained to shared abuse and neglect allegations at home, but could not ask about her involvement in these incidents as the witness, Mr. Browning, had not yet testified, and never did.

The final and most egregious use of her co-defendants' statements however came when as listed above, during the testimony of B.M., the jury was told by B.M. that Petitioner and co-defendant, Julie Browning, had an entire conversation the night before R.J.B. died, about her deteriorating condition, and ultimately decided to do nothing to save her. (A.R. Vol. V, Trial Tr. June 9, 2022, p. 178-181; p. 197-99). Petitioner was never able to develop Julie Browning's testimony through cross-examination in the State and defense cases, and was even prevented from addressing the matter on direct when the lower court finally decided Petitioner could ask Julie Browning a limited number of direct examination questions during defense arguments. (A.R. Vol. VI, Trial Tr. June 10, 2022, p.295 & 296, ll. 21-24 & 2-6, respectively).

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 uphold its own prior Order, Petitioner was unable to confront her accusers; and develop witness testimony. Like with R.J.B.'s hearsay testimony above, this effectively lead to Petitioner being forced to take the stand to answer the egregious allegations thrown at her through hearsay conversations with unavailable witnesses.

This scenario again directly goes against this Honorable Court's abovementioned decision in *Mechling* and Rule 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 (3) 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.[20]

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

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW WHEN IT PREVENTED PETITIONER'S COUNSEL FROM CROSS-EXAMININIG PETITIONER'S CO-DEFENDANT AT TRIAL, AFTER ADVERSE STATEMENTS WERE MADE AGAINST PETITIONER, AND WHEN THE CIRCUIT COURT PREVENTED PETITIONER'S COUNSEL FROM DIRECTLY EXAMINING DEFENSE WITNESSES.

The Petitioner asserts that the lower court erred as a matter of law when it limited defense counsel from cross-examining Petitioner's co-defendant, Julie Browning at trial, when she made adverse statements against Petitioner; further, Petitioner avers that in a similar vein, the lower court erred when it prevented counsel from directly examining defense witnesses. Petitioner submits that to leave this decision undisturbed would ultimately subject the Petitioner to a violation of her rights under the Sixth Amendment right to counsel; her Fourteenth Amendment right to due process under the Constitution of the United States of America; and Article III, § 14 and 10, respectively, of the Constitution of West Virginia.

In regard to the standard of review for evaluating the lower court's errors as a matter of law, the Petitioner avers that like the previous section, these matters are ultimately questions of law. Therefore, the Court's overall standard of review should be applied through a *de novo* standard of review. See Syl. Pt. 2, *State v. Boyce*, 230 W. Va.

[20] See (A.R. Vol. I, Order Granting Defendant's Motion to Suppress Statements of Co-Defendants, p. 25).

725, 742 S.E.2d 413 (2013) (citing Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

A. Petitioner was prevented from cross-examining her co-defendant, Julie Browning, by the lower court, after adverse statements were made against the defendant.

Petitioner avers that during the defense portion of her trial, her co-defendant, Julie Browning, took the stand to testify in her own defense. (A.R. Vol. VI, Trial Tr. June 10, 2022, p. 250-316). During direct testimony from her counsel, Julie Browning testified that the day prior to R.J.B.'s death, Petitioner had noticed R.J.B. was not well, that Petitioner was in the process of checking her temperature that day, and that Petitioner changed R.J.B.'s clothes that night after R.J.B. vomited from being sick. *Id.* at p. 263-264. Further, Julie Browning testified that during the night before R.J.B.'s death, Petitioner was in the room R.J.B. had slept in for the purpose of monitoring the health of R.J.B. *Id.* p. 282, ll. 6-22. Finally, during cross-examination, Julie Browning testified that it was the Petitioner's duty to administer medication to R.J.B. on a daily basis, as Petitioner's co-defendants were at work. *Id.* at p. 307.

As noted above, Count Two of Petitioner's Indictment was a charge of "child neglect resulting in death", in that Petitioner, " unlawfully and feloniously neglect[ed] the child, R.J.B., a child under [her] care, custody, and control, . . . by the medical neglect of R.J.B." (A.R. Vol. I, Indictment, p. 23). The abovementioned assertions by Petitioner's co-defendant, Julie Browning, were adverse statements against Petitioner, as Julie claimed that Petitioner was seeing to the medical care of R.J.B. the day before she died. Normally following this testimony, Petitioner's counsel would ask questions through cross-examination to develop this testimony, however the lower court

mandated that Petitioner's counsel was limited to direct examination of Julie Browning, and that counsel would not be able to ask questions that had already been asked by Ms. Browning's counsel and State's counsel. (A.R. Vol. VI, Trial Tr. June 10, 2022, p.295 & 296, ll. 21-24 & 2-6, respectively)[21]. This was in direct violation of the fundamental and essential right Petitioner had to a fair trial, as Petitioner was denied effective assistance of counsel.

The Supreme Court of the United States has previously addressed issues concerning a defendant's right to counsel in the landmark case of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963). In *Gideon*, the Supreme Court held that in regard to criminal defendants, "The Sixth Amendment provides: In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." *Id.* at 339, and 794, respectively.

This sentiment was further incorporated to the states by the Court's holding that, "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." *Id.* at 343, 796 (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 243-244 (1936)).

Specifically addressing cross-examination, the Supreme Court held two years later that, "We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct.

[21] It should be noted that defendants' counsel had already objected to this limiting of what defense counsel could ask of defense witnesses. See (A.R. Vol. V, Trial Tr., June 9, 2022, p. 252-253). Counsel was not in a position to argue with the lower court further.

1065, 1068 (1965). "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. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." *Id.* at 405, 1068.[22]

In light of this precedent, when Petitioner was prevented from going back and asking Julie Browning about the care of R.J.B. the night before she died, she was denied the right to cross-examine the allegation by Julie that the Petitioner was responsible for caring for R.J.B. the night before her death. Petitioner submits that this limitation shocks the very foundation of the definition of a fair trial, and she should have been able to independently ask about these damning statements.[23]

As such, by the lower court's limitation, and in light of longstanding Supreme Court of the United States precedent, the Petitioner was denied her right to effective assistance of counsel through cross-examination, and ultimately due process under the law.[24] For this reason alone, her ultimate disposition should not be left undisturbed.

B. Petitioner was prevented from independently examining her witnesses.

In addition to not being able to cross-examine her co-defendant, Petitioner was denied effective assistance of counsel when the lower court, *sua sponte*, mandated that defense counsel, who were representing three (3) independent defendants, would be

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[22] See *Alford v. United States*, 282 U.S. 687, 51 S. Ct. 218 (1931) for further discussion on the assertion by the Supreme Court that cross-examination by counsel is a right, not a mere privilege.

[23] See *U.S. v. Caudle*, 606 F.2d 451, 1979 U.S. App. LEXIS 11362 (4th Cir. 1979) for further discussion in regard to independent examination by defense counsel about matters that have already been addressed by co-defendant counsel and the State on cross-examination.

[24] See also Syllabus Point 10 of *Kominar v. Health Mgmt. Assocs. of W. Va., Inc.*, 220 W. Va. 542, 2007 W. Va. LEXIS 51 (LEXIS 2007), in regard to the Court's prior cautioning of limiting cross-examination in light of potential adverse relationships between co-defendants.

prevented from independently examining defense witnesses, over the objection of counsel. (A.R. Vol. V, Trial Tr., June 9, 2022, p. 238-239; and p. 252-253).

Petitioner submits that this sudden and unexpected move was not done by the lower court in order to limit questioning that had already been asked by another co-defendants' counsel, this was done preemptively to prevent independent examination of Petitioner's own witnesses. However, the practical effect was that all questions that Petitioner wanted to ask had to first be filtered through her co-defendants' counsel, including certain questions that would put her co-defendants in an adverse position to Petitioner; questions co-defendant counsel would never ask. Petitioner was even put in a position in which she had to filter her questions to her own expert witness, Dr. Cyril Wecht, through co-defendant counsel; a move that frustrated all of the defendants as they had already agreed to share their one (1) expert witness in the interest of judicial economy.

Consistent with the Supreme Court of the United States' decision in *Gideon* above, Petitioner submits that this "chain gang" mentality when asking defense witnesses questions, deprived her of independent counsel performing independent examination of her witnesses. For these reasons, Petitioner submits she was denied her right to effective assistance of counsel, and due process.

III. THE CIRCUIT COURT ERRED BY ABUSING ITS JUDICIAL DISCRETION WHEN IT FAILED TO EXERCISE ANY JUDICICIAL DISCRETION IN ALLOWING EVIDENCE OF PETITIONER'S ALLEGED PRIOR BAD ACTS, WITHOUT A RULE 404(b) ANALYSIS, TO BE CONSIDERED BY THE JURY.

Petitioner avers that the lower court abused its judicial discretion when it allowed over three (3) years of alleged prior bad acts to be used by the State in its case-in-chief

against the Petitioner. Specifically, Petitioner submits that the below mentioned evidence of abuse and neglect from Nicholas County, West Virginia, was not intrinsic *res gestae* evidence as the lower court found, but rather Rule 404(b) prior bad acts evidence that was separated both by significant time and alleged manner. As this evidence was presented to the jury without proper analysis and discretion, it inevitably led to Petitioner's conviction through introducing any and every allegation the State could levy against the defendants.

In regard to the standard of review for evaluating the exclusion of evidence as it relates to the lower court's discretion, this Honorable Court held in Syllabus Point 5 of *State v. Henson*, 239 W. Va. 898, 2017 W. Va. LEXIS 865 (LEXIS 2017) that:

> "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syl. Pt. 10, *State v. Huffman*, 141 W. Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds by State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994).

Further, the Court has noted in Syllabus Point 4 of *State v. Rodoussakis*, 204 W. Va. 58, 1998 W. Va. LEXIS 211 (LEXIS 1998), that, "A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard."

In regard to a trial court's *West Virginia Rules of Evidence*, Rule 404(b) decision, the Court has thoroughly addressed this in *State v. LaRock*, 196 W. Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996), with the following:

> "The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403. *See State v. Dillon*, 191 W. Va. 648, 661, 447 S.E.2d 583, 596 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993); *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986)."

The Court further cautioned in *LaRock* that, "This Court takes seriously claims of unfair prejudice. In *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), we recognized the prejudice inherent in admitting evidence of other crimes. We suggested a defendant must be tried for what he or she did, not for who he or she is." *Id* at 311 and 630, respectively.

Petitioner acknowledges there are some factual similarities between *LaRock* and the present matter before the Court. Both involve the long-term relationship between caregivers and their alleged victims. However, these similarities are superficial in nature, as the lower court in the present matter not only failed to articulate why all alleged prior bad acts that were said to have occurred in Nicholas County, West Virignia were to be let in (as in *LaRock*), but ultimately found all of these acts to be intrinsic *res gestae* evidence; completely avoiding the Rule 404(b) analysis altogether. (A.R. Vol. VIII, Evidentiary Hearing Transcript, p. 103, ll. 20-23). In the same sentence though, the lower court recognized that said aforementioned evidence was, ". . . evidence to show common scheme, pattern, design, or whatever." *Id.*

Petitioner submits that in light of viewing the trial record concerning evidence of alleged prior abuse and neglect in Nicholas County, West Virginia, the Court must view the present evidence on a case-by-case basis, and correct the lower court if such evidence caused a "miscarriage of justice" in Petitioner's trial.[25] Petitioner avers that as no evidence presented at her 404(b) Evidentiary Hearing on February 8, 2022 implicated her directly; and because the vast majority of these prior Nicholas County CPS claims had previously been investigated and found to have no substantiations of abuse and neglect, to allow them into evidence at trial was a miscarriage of justice.[26]

The State's tactic at trial was to convict Petitioner through unidentifiable alleged prior bad acts of all three (3) defendants combined. This type of behavior by the State was defined as "inflammatory" and expressly prohibited by this Honorable Court in Syllabus Point 3 of *State v. Spicer*, 162 W. Va. 127, 128, 245 S.E. 2d 922, 924 (1978).[27]

> "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." *Id.*

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[25] Specifically, the Court has held that concerning the three pronged 404(b) test standard mentioned in *LaRock*, "Even when all three prerequisites are established, whether to correct error remains discretionary with the appellate court. *Olano* instructed us on the criteria for the exercise of this discretion. We should correct error which caused a "miscarriage of justice," that is, conviction of an innocent person. Aside from preventing such miscarriages of justice, the standard to apply is whether the error "'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at , 113 S. Ct. at 1779, 123 L. Ed. 2d at 521. (Citation omitted). The *Olano/Atkinson/Miller* standard requires a case-by-case exercise of discretion." *State v. LaRock*, 196 W. Va. 294, 317, 470 S.E.2d 613, 636 (1996).

[26] See the testimony of Bryanna Baker, former Nicholas County CPS worker(A.R. Vol. V, Trial Tr., June 9, 2022, p. 293-320); and (A.R. Vol. VIII, Evidentiary Hearing Transcript, February 8, 2022).

[27] See State of West Virginia's Opening and Closing Arguments, (A.R. Vol. II, Trial Tr., June 6, 2022; and A.R. Vol. VII, Trial Tr., June 13, 2022).

Further, upon viewing the record as a whole, Petitioner avers that all of the evidence of her alleged prior bad acts with her co-defendants in Nicholas County, West Virginia, was textbook "shotgunning", as defined by this Court in *State v. Thomas*, 157 W. Va. 640, 656, 203 S.E.2d 445, 456 (1974). Petitioner argues that the State's behavior at trial, when viewing the record as a whole, is best expressed by the Court's following guidance:

> "A prudent prosecutor limits himself to what is needed to prove the charge in the indictment. In the process of proving the charge, other offenses may sometimes come to light incidentally, but when the prosecution devotes excessive trial time to this type of 'background' material, it runs the risk of trespassing into the impermissible area and jeopardizing any resulting conviction." *State v. Thomas,* 157 W. Va. 640, 656, 203 S.E.2d 445, 456 (1974) (citing *United States v. Mastrototaro*, 455 F.2d 802, 804 (4th Cir. 1972)).

For these reasons, Petitioner submits that the caviler attitude of the State and the lower court in allowing three (3) years worth of unsubstantiated evidence of child abuse and neglect against R.J.B. to be considered by the jury, despite the fact that no perpetrator of these acts was ever identified, constituted a severe abuse of judicial discretion. This judicial abuse resulted in a miscarriage of justice in that Petitioner was convicted by overwhelming evidence that *someone* abused R.J.B. in Nicholas County, West Virginia, and therefore Petitioner must be guilty when it was alleged to have happened in Fayette County. How severe this past abuse was, whose care R.J.B. was under when it happened, and when this abuse occurred was not important to the State.

IV. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICITON OVER THOSE CERTAIN ALLEGED BAD ACTS OF THE PETITIONER THAT OCCURRED OUTSIDE OF FAYETTE COUNTY, AND YEARS PRIOR TO THE DEATH OF R.J.B.

Petitioner avers that her Indictment included allegations of abuse and neglect from the period of August 28, 2014, through December 26, 2018. See (A.R. Vol. I, Indictment, p. 23). Petitioner was a citizen of Nicholas County, West Virginia, residing in Mount Lookout, West Virginia, from 2014 through January of 2018. (A.R. Vol. I, Defendant's Motion to Dismiss the Indictment, p. 34). As such, Petitioner submits that to charge her in Fayette County for crimes she was alleged to have committed in Nicholas County, was a violation of her constitutional right to be tried in the county where the alleged offenses occurred. The lower court, as a matter of law, lacked subject matter jurisdiction over Petitioner's alleged crimes that occurred outside of Fayette County.

As the question of subject-matter jurisdiction is a matter of law question that cannot be waived, the Petitioner avers that the standard of review for the Court is one of *de novo*. See Syl. Pt. 2, *State v. Boyce*, 230 W. Va. 725, 742 S.E.2d 413 (2013) (citing Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).[28]

Pursuant to Article III, § 14 of the Constitution of West Virginia, "Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, *and in the county where the alleged offense was*

[28] See also A.A. v. S.H., 242 W. Va. 523, 531-32, 836 S.E.2d 490, 498-99 (2019) for argument supporting *de novo* review regarding subject-matter jurisdiction.

committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county." (Emphasis added).

Further, Rule 8(a)(2) of the *West Virginia Rules of Criminal Procedure* specifically requires that joined offenses may only be brought together if said offenses occurred within the same county.

> "If two or more offenses are known or should have been known by the exercise of due diligence to the attorney for the state at the time of commencement of the prosecution *and were committed within the same county having jurisdiction and venue of the offenses*, all such offenses upon which the attorney for the state elects to proceed shall be prosecuted by separate counts in a single prosecution if they are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan, whether felonies or misdemeanors or both." *Id.* (Emphasis added).

Petitioner raised this exact issue of subject-matter jurisdiction through *Defendant's Motion to Dismiss the Indictment*, and even attached CPS referrals proving that Petitioner lived in Nicholas County to her Motion. See (A.R. Vol. I, Defendant's Motion to Dismiss the Indictment, p. 37-43). However, the lower court brushed the issue aside at the Petitioner's October 8, 2022, Motions Hearing. The basis for this was the adoption of the State's argument found in *State v. Dennis*, 216 W. Va. 331, 343, 607 S.E.2d 437, 449 (2004) by the lower court. (A.R. Vol. I, Order (October 8, 2021 Hearing, p. 50). In *Dennis*, this Court allowed the State and lower court to have jurisdiction over the defendant if one element of the crime occurred in West Virginia. *Id.* However, the question for the Court in *Dennis* was an issue of jurisdiction and venue between two *states*, West Virginia and Ohio, not between interstate counties like in the present matter before the Court.

In a move that confused Petitioner at trial, the lower court appeared to forget that it had previously ruled that all evidence from Nicholas County was intrinsic evidence, and stated that it now would come in under Rule 404(b). See (A.R. Vol. II, Trial Tr., June 6, 2022, p. 227-228, ll. 15-24 & 1-23, respectively). Further adding to this confusion, the lower court then held that for it to have jurisdiction over Petitioner's past alleged abuse and neglect allegations, said allegations would have had to occur in Fayette County; effectively agreeing with Petitioner's position that the lower court lacked jurisdiction over crimes said to have occurred in Nicholas County. *Id.*

Petitioner prays that if this Court has any doubt she resided in Nicholas County, West Virginia, from 2014 through January of 2018, that the Court will examine the testimony of State's witnesses for allegations of abuse and neglect having occurred prior to 2018; they all were said to have occurred in Nicholas County, West Virginia.[29]

As such, the Petitioner asserts that her constitutional right to be tried where her allegations were said to have occurred were violated by the lower court. The State and the lower court lacked jurisdiction when the State went beyond its border to prosecute alleged past crimes that happened wholly within the border of Nicholas County, West Virginia. As subject-matter jurisdiction cannot be waived, and because the jury was allowed to consider the aforementioned past crimes in their decision to convict Petitioner, her conviction should be overturned.

[29] See testimony of Carrie Ciliberti, (A.R. Vol. V, Trial Tr., June 9, 2022 & A.R. Vol. VIII, Evidentiary Hearing Transcript, February 8, 2022); testimony of Kara Gillespie (A.R. Vol. V, Trial Tr., June 9, 2022 & A.R. Vol. VIII, Evidentiary Hearing Transcript, February 8, 2022); testimony of Maria Parks (A.R. Vol. IV, Trial Tr., June 7, 2022); and Bryanna Baker (A.R. Vol. V, Trial Tr., June 9, 2022).

CONCLUSION

WHEREFORE, the Petitioner, for all those certain reasons listed above, prays that this Honorable court find that the Circuit Court erred as a matter of law and/or abused its judicial discretion when it: 1) Allowed the hearsay testimony of R.J.B. and Petitioner's co-defendants to be considered by the jury, without Petitioner having the opportunity to develop said testimony; 2) prevented Petitioner from cross-examining her co-defendants and prevented her counsel from independently examining defense witnesses; 3) allowed alleged prior bad acts from a period of three (3) years, outside of Fayette County, to be considered by the jury without a Rule 404(b) analysis; and 4) ruled it had subject matter jurisdiction over past alleged crimes that happened wholly outside of the lower court's jurisdiction. Further, Petitioner prays that this Honorable Court find that the Circuit court's final *Sentencing Order* should be reversed and remanded; that the Court Order the Petitioner's trial conviction be set aside, and that she be discharged from custody, or in the alternative, Order that the Petitioner be granted a new trial; and for any and all further and general relief as this Honorable Court may deem just and proper.

Respectfully submitted,
Sherie M. Titchenell,
Petitioner,
By counsel,

/s/ Evan J. Dove
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CERTIFICATE OF SERVICE

I, Evan J. Dove, Esq., do hereby certify that the foregoing *PETITIONER'S BRIEF* was served upon Gail V. Lipscomb, Esq., Assistant Attorney General, Office of the Attorney General, Appellate Division, 1900 Kanawha Blvd. E., State Capitol, Bldg. 6, Ste. 406, Charleston, WV 25305, by email notification and/or electronic filing service through the File & ServeXpress e-filing system, this 8th day of February, 2023.

/s/ Evan J. Dove
Evan J. Dove, Esq.
WVSB #13196