

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 24-16

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JAMES DEE MCKINNEY AKA 1227,  
*Petitioner,*

v.

STATE OF WEST VIRGINIA,  
*Respondent.*

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PETITIONER JAMES DEE MCKINNEY'S BRIEF

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Civil Action No. 23-F-36  
In the Circuit Court of Harrison County, West Virginia  
(Honorable Thomas A. Bedell)

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## **ASSIGNMENTS OF ERROR**

1. The Circuit Court impermissibly allowed testimony of a witness that did not appear at trial in violation of the Confrontation Clause.
2. The Circuit Court impermissibly allowed hearsay testimony to be admitted at trial.
3. The Circuit Court imposed an excessive sentence that shocks the conscious because it relied on improper factors and the sentence was disproportionate to the sentences given to the other actors involved in the incident.
4. The Circuit Court failed to instruct witnesses to not discuss the case with one another.

## **STATEMENT OF THE CASE**

On July 25, 2022, Petitioner James Dee McKinney (“Petitioner”), went to the residence of Charles Shaner and Sabrina Woodson to obtain drugs for him and his friends. (A.R. 755). During this time, Petitioner admittedly struggled with drugs and addiction. (A.R. 754). Petitioner went to Mr. Shaner and Ms. Woodson’s residence at the suggestion of Stoane Lockett, after informing Mr. Lockett that he no longer had a connection to buy drugs from. (A.R. 755). Petitioner was accompanied by Mr. Lockett, Joseph Robinson, and Jennifer Walls. *Id.*

Petitioner contends that upon arrival at Mr. Woodson’s and Ms. Shaner’s residence and his request for the drugs, Mr. Shaner began weighing out drugs for Petitioner. (A.R. 756). It was at this point that Mr. Shaner noticed that his wallet and the bag containing the remainder of his drugs were missing. (A.R. 757). Mr. Shaner then noticed that three cell phones were missing. *Id.* Petitioner maintains that Mr. Lockett was the one that removed the drugs, wallet, and phones from the residence. *Id.* Upon Mr. Shaner’s realization that certain items were missing, he began to “freak out” and Petitioner ran from the property. (A.R. 757–58). Petitioner admits he ran from the property with the drugs Mr. Shaner was weighing for him when Mr. Shaner began to “freak out.” (A.R. 758). As a result of the incident, Petitioner, Mr. Lockett, Mr. Robinson, and Ms. Walls were charged with a variety of crimes.

However, the testimony of Mr. Shaner and the testifying detectives varied greatly from that of Petitioner's. At trial, the State's witnesses testified that upon entering the home, Petitioner, Mr. Robinson, and Mr. Lockett demanded drugs and money. (A.R. 334). Mr. Shaner further testified that Petitioner carried a firearm and made threats to Mr. Shaner and Ms. Woodson during the incident at issue. (A.R. 334–35). However, Petitioner testified that he did not threaten Mr. Shaner or Ms. Woodson and that he did not have a firearm with him that evening. (A.R. 763–64).

At the conclusion of a four-day trial, the jury found Petitioner guilty of two counts of first degree robbery, one count of possession of a firearm by a person prohibited from possessing a firearm, and presentation of a firearm during the commission of a felony.<sup>1</sup> The Court imposed a determinate sentence of seventy-five (75) years; thirty (30) years for each count of first degree robbery, five (5) years for possession of a firearm by a prohibited person, and ten (10) years for presentation of a firearm during the commission of a felony, all to be served consecutively. (A.R. 882–84). For Petitioner, age 40, the cumulative sentence of seventy-five (75) years is effectively a life sentence. Petitioner now appeals his conviction and sentence based upon improper evidentiary findings and improper instructions proffered by the Circuit Court.

### **SUMMARY OF ARGUMENT**

The Circuit Court erred when it (1) allowed testimony that violated Petitioner's constitutional protections under the Confrontation Clause, (2) allowed improper hearsay testimony, (3) relied on improper factors to sentence Petitioner for a much greater time than that

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<sup>1</sup> At trial, Petitioner was also tried for and acquitted of the following charges related to an April 2023 incident: (1) first degree robbery, (2) possession of a firearm by a person prohibited of possessing a firearm, (3) assault during commission of a felony, and (4) presentation of a firearm during the commission of a felony.

of the other persons involved in the incident, and (4) failed to instruct witnesses not to discuss the case or their testimony with anyone outside of counsel.

The Circuit Court improperly allowed hearsay testimony from a testifying detective regarding statements one of the victims allegedly made. This victim did not appear at trial or otherwise submit herself to cross examination. Respondent did not fulfill the requirements to establish the victim as unavailable and therefore, the admission of the statement violated Petitioner's Confrontation Clause rights and is grounds for reversal.

This same statement also violated the rule against hearsay because the detective testified as to an out of court statement, made by someone other than himself, for the truth of the matter asserted. Furthermore, this statement was highly prejudicial and offered little to no probative value. The Circuit Court should have granted the requested mistrial or at least instructed the jury to disregard the statement in the interest of fair justice. The failure to do so allowed improper influence on the jury, discredited the trial as a whole, and now provides grounds for reversal.

Furthermore, Peitioner's sentence far exceeds that of the other actors involved in the incident. In particular, there was one other actor who faced the exact same charges as Petitioner. However, this person was given a sentence of less than half of Petitioner's sentence. Moreover, the Circuit Court relied on an impermissible factor – Petitioner's failure to accept responsibility – when imposing this sentence. Relying on failure to accept responsibility as a ground for imposing an unduly long sentence is improper when a defendant maintained their innocence and exercised their Sixth Amendment right to a trial by a jury of their peers. Accordingly, the Circuit Court's reliance on Petitioner's "failure to accept responsibility" was improper and constitutes grounds for reversal of Petitioner's sentence.

Lastly, West Virginia Rule of Evidence 615 makes the exclusion of witnesses a matter of right. Furthermore, West Virginia precedent requires that once Rule 615 is invoked, the witnesses should be clearly instructed that when they leave the courtroom, they are not to discuss the case nor their testimony with anyone other than counsel for either side. Here, instead of issuing this instruction itself, the Circuit Court instructed counsel to provide this instruction to their witnesses. This was improper because this method provides no guarantee to Petitioner that Respondent's witnesses were ever actually given this instruction. Therefore, it is likely that Respondent's witnesses could have discussed the case and their testimony with one another and therefore prejudiced the proceedings. Accordingly, a reversal upon this ground is also warranted.

For these reasons, the Court should reverse Petitioner's sentence and conviction and remand the matter for a new trial.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This appeal is suitable for oral argument under West Virginia Rule of Appellate Procedure 19(a) because it involves the assignment of errors in the application of settled law.

#### **ARGUMENT**

##### **I. The Circuit Court impermissibly allowed testimony of a witness that did not appear at trial in violation of the Confrontation Clause.**

Both the United States Constitution and West Virginia Constitution are clear that a defendant's constitutional rights will be violated if a court permits the admission of testimonial evidence by a witness who does not appear at trial, so long as the witness is available to testify, and the accused has not had the opportunity to cross examine the witness. U.S. CONST. amend. VI; *see also* W. Va. CONST. art. III, § 14.

Pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Article III of the

Section 14 of 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.

Syl. Pt. 6, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006) (overruled on other grounds).

Here, the Circuit Court allowed testimony from one of Respondent's witnesses regarding statements one of the alleged victims made during a telephone call. This alleged victim did not appear at trial, nor did Respondent prove that she was unavailable. Furthermore, the statements from the victim were made during a telephone call with the officer only, and therefore Petitioner was unable to cross examine the alleged victim regarding these statements. Accordingly, this testimony was grounds for a mistrial, or at the very least, should have prompted an instruction by the Circuit Court for the jury to disregard these statements. The fact that the Circuit Court failed to assert either of these remedies is a reversible error that the Court should now remedy.

**A. The statement of the Ms. Woodson was testimonial.**

Under the Confrontation Clauses contained within both the United States and West Virginia Constitutions, "a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution." Syl. Pt. 9, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311. "A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency." *Id.*

The West Virginia Supreme Court has further clarified that, when it said in *Crawford* that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay

barred from use at trial, it meant that the Confrontation Clause only bars the use of statements made during “interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.” *Davis v. Washington*, 547 U.S. 813, 826 (2006) (citing *Crawford*, 541 U.S. at 53). In other words, witness statements made to law enforcement officers that are comparable to those that would be given in a courtroom – that is, statements about “what happened” – are testimonial statements, the use of which is proscribed by the Confrontation Clause. *Mechling*, 219 W. Va. at 376, 633 S.E.2d at 321.

In fact, the United States Supreme Court has further held that the protections of the Confrontation Clause may not be evaded simply “by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition.” *Davis*, 547 U.S. at 826. “Indeed, if there is one point for which no case - English or early American, state or federal - can be cited, that is it.” *Id.*

During the trial, Respondent called Detective Josh Cumberledge to testify. (A.R. 377). On cross examination, Petitioner asked Detective Cumberledge if he looked for, or located, a firearm inside Mr. Shaner and Ms. Woodson’s home and whether Mr. Shaner informed the detective that he owned a firearm similar to that allegedly used by Petitioner during the robbery. (A.R. 426–28). During this questioning, Detective Cumberledge repeatedly stated that he did not recall whether Mr. Shaner told him that he owned a firearm during one of their calls. *Id.* At this time, Petitioner provided a transcript of one of these telephone calls and asked the detective to review it. (A.R. 429). Petitioner asked the detective to “[p]lease read that quietly to yourself and see if that refreshes your recollection as to that particular conversation.” *Id.* After an in-camera discussion with the attorneys and the Judge, Petitioner asked Detective Cumberledge to continue reviewing the transcript and to “just let us know when you’re finished.” (A.R. 431).

At this time, Detective Cumberledge testified, unprompted, as follows:

Okay. Yes. I refreshed my memory on this. I do vividly recall a phone conversation from August 9th, '22 where Sabrina Woodson had called in where she was trying to inform me that through an acquaintance of Charlie's and Sabrina's who are also acquaintances of James McKinney that they have been openly telling everyone that they planned to kill--

*Id.* Detective Cumberledge was immediately cut off by Petitioner in an attempt to not further prejudice Petitioner and the proceeding. *Id.*

The incident at issue occurred on July 25, 2022. (A.R. 52). The call took place on August 9, 2022. (A.R. 431). Accordingly, there was no ongoing emergency when this statement was made to Detective Cumberledge. Syl. Pt. 9, *Mechling*, 219 W. Va. 366, 633 S.E.2d 311. Furthermore, this telephone call was made in the course of Detective Cumberledge's investigation, as evidenced by the following answers that were given by Detective Cumberledge at trial:

A. Now, this -- you said this particular conversation was not from the initial report where I had spoken with the victims on the day of the robbery, correct? This was later on throughout my investigation?

Q. Correct. I believe that the telephone call was dated -- excuse me, recording was dated August 9th.

A. Tuesday, August 9th. Okay. So this would've been a follow up afterwards.

(A.R. 429–30). Clearly, the August 9th call was part of Detective Cumberledge's investigation into the incident. This investigation had the purpose of establishing or proving past events that would later be relevant to the criminal prosecution of Petitioner. Syl. Pt. 9, *Mechling*, 219 W. Va. 366, 633 S.E.2d 311. This, coupled with the fact that there was no ongoing emergency, requires a finding that this statement was testimonial. Furthermore, *Davis* makes clear that an officer is not permitted to "recite unsworn hearsay testimony" or use any statement made during an interrogation

directed solely at establishing the facts of a past crime “in order to provide evidence to convict the perpetrator.” 547 U.S. at 826.

**B. Ms. Woodson was Not Unavailable.**

*Mechling* requires that the testimonial statement be by “a witness who does not appear at trial.” Syl. Pt. 6, 219 W. Va. 366, 633 S.E.2d 311. Ms. Woodson was not only a witness but an alleged victim of the incident. (A.R. 796). Furthermore, for reasons unknown, she did not appear or testify at trial. Accordingly, in order for her testimonial statement to be admitted, Respondent needed to prove Ms. Woodson was unavailable to testify, which Respondent did not do, and that Petitioner had the opportunity to cross examine her regarding her statements, which he did not have. Syl. Pt. 6, *Mechling*, 219 W. Va. 366, 633 S.E.2d 311. Respondent was well aware of the process required to deem a witness unavailable. (A.R. 29–32) (discussing the procedure for calling Joshua Boram in light of the fact he was unlikely to appear for trial). Despite this, Respondent engaged in no such practice regarding Ms. Woodson and did not attempt to classify her as an unavailable witness.

Respondent may argue that Ms. Woodson was “unavailable” because of Petitioner’s alleged “intimidation” tactics and therefore the admission of the statement does not constitute grounds for reversal. *See Mechling*, 219 W. Va. at 366, 633 S.E.2d at 311 (holding that one who obtains the absence of a witness by wrongdoing forfeits his constitutional right to confrontation). However, this argument necessarily fails because, in order to allow such testimony, the State needed to establish that Ms. Woodson’s absence was caused by Petitioner’s wrongdoing. However, Respondent did not give any reason for Ms. Woodson’s absence and made no effort to have Ms. Woodson declared unavailable. Accordingly, Respondent should not now be allowed to retroactively argue the statement was permissible due to unavailability caused by alleged

intimidation. This unavailability needed to be established *prior to* the admission of the testimonial hearsay statement and cannot now be asserted to rebut the improper admission of the statement.

**C. Petitioner did not have an opportunity to cross examine Ms. Woodson.**

In addition to the fact that Ms. Woodson was not unavailable to testify at trial, Petitioner did not have an opportunity to cross examine Ms. Woodson about her statement. The August 9th call occurred between Detective Cumberledge and Ms. Woodson and/or Mr. Shaner as part of Detective Cumberledge's investigation. (A.R. 428). Petitioner was not present during this call and did not have the opportunity to cross examine Ms. Woodson regarding this statement. Furthermore, a deposition of Ms. Woodson was never taken, and as discussed above, Ms. Woodson did not appear at trial to testify and submit to cross examination. Accordingly, Petitioner never had the opportunity to cross examine Ms. Woodson.

**D. The Circuit Court should have granted Petitioner's request for a mistrial or instructed the jury to disregard the testimony, and its failure to do so constitutes reversible error.**

"Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. Pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975). "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is *no reasonable possibility* that the violation contributed to the conviction." *State v. Jenkins*, 195 W.Va. 620, 629, 466 S.E.2d 471, 480 (1995) (emphasis added) (quoting, Syl. Pt. 20, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974)). Moreover, once an error of constitutional dimensions is shown, the burden is upon "the beneficiary of a constitutional error" – usually the State – "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. Cal.*, 386 U.S. 18, 24 (1967).

Here, in order to hold that the violation of Petitioner’s constitutional right was harmless, this Court would have to determine that unsubstantiated testimony regarding Petitioner’s statements about killing the alleged victims did not contribute to Petitioner’s conviction. During the trial, Respondent made it its theme to portray Petitioner as a violent criminal that was capable of committing a violent robbery. (A.R. 432) (“Mr. Armstrong. The -- the entirety of this trial has been premised on threats and intimidation of witnesses by Mr. McKinney...”). Detective Cumberledge offered this improper testimony as a way of adding to the Respondent’s arguably improper portrayal of Petitioner and his alleged violent propensities. A jury would likely infer that someone who is willing to discuss killing people, would be capable of committing a robbery or may possess a firearm that could assist in the commission of such killing. Accordingly, this statement undoubtedly contributed to Petitioner’s conviction for robbery, possession of a firearm, and use of a firearm during the commission of a felony. Because the statement contributed to Petitioner’s conviction, the violation of Petitioner’s constitutional rights was not harmless, and this error must be reversed in the interest of justice.

Respondent may argue that that the testimony did not violate Petitioner’s Confrontation Clause rights because it was admitted during Petitioner’s cross examination of one of the State’s witnesses and therefore was not directly solicited by counsel for the State. *See State v. Dennis*, 216 W. Va. 331, 350, 607 S.E.2d 437, 456 (2004) (holding that “...a party ‘will not be permitted to complain of error in the admission of evidence which he offered or elicited.’” (citing *State v. Bowman*, 155 W. Va. 562, 184 S.E.2d 314 (1971))). In *Dennis*, the trial court allowed the victim’s statement to be read into the record by the detective who took the statement but only *after* the appellant had the detective read from the statement during cross examination. Here, the Petitioner did not ask the detective to read from the transcript. Petitioner gave the transcript to the detective

for the sole purpose of refreshing an adverse witness's recollection. Furthermore, Petitioner explicitly instructed the witness to read the statement to himself and let the Petitioner know if it refreshed his recollection. (A.R. 430–31). Detective Cumberlandge's reading of the hearsay statement was wholly unsolicited and improper.

Additionally, this Court has held that a testifying police officer is a representative of the State. *See State v. Boyd*, 238 W. Va. 420, 441, 796 S.E.2d 207, 228 (2017) (permitting a testifying officer to remain in the courtroom as the State's representative). Accordingly, Detective Cumberlandge was testifying as a representative of the State and therefore, his testimony constituted improper testimony proffered by Respondent. Because this testimony was inadmissible, the Circuit Court should have granted Petitioner's request for a mistrial. Furthermore, if a testifying detective proffers improper testimony *that the State did not solicit*, a proper course of action is for the court to sustain the objection and instruct the jury to disregard the testimony. *See State v. Pickens*, 2014 WL 5545999, at \*2 (November 3, 2014) (holding that the officer's testimony did not constitute grounds for remand because the court promptly sustained the objection and directed the jury to disregard the statement). Here, even if the Court determines that the improper testimony was not grounds for a mistrial, it should, at the very least, hold that the failure to instruct the jury to disregard Detective Cumberlandge's testimony was improper and, as a result, violated Petitioner's constitutional rights.

## **II. The Circuit Court impermissibly allowed hearsay testimony to be presented at trial.**

As a rule, out-of-court statements by someone other than the declarant during sworn testimony are not admissible unless:

- 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of a party's action;
- 2) the

statement is not hearsay under the rules, or 3) the statement is hearsay but falls within an exception provided for in the rules.

Syl. Pt. 1, *State v. Maynard*, 183 W. Va. 1, 393 S.E.2d 221 (1990). “Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. W. Va. R. Evid. 801(c).” *State v. Sutphin*, 195 W. Va. 551, 560, 466 S.E.2d 402, 411 (1995). “Hearsay is not admissible unless it falls under one of the exceptions to the hearsay rule.” *Id.* (citing W. Va. R. Evid. 802).

As discussed above, Detective Cumberledge testified that during the August 9th telephone call with Ms. Woodson, she informed him she learned through “an acquaintance” of hers and Mr. Shaner’s “who are also acquaintances of [Petitioner] that they have been openly telling everybody that they planned to kill--” (A.R. 431). This testimony contains multiple levels of hearsay because it includes numerous statements made by persons other than the testifying declarant offered to prove that Petitioner is a violent person and had a reason for wanting to kill Mr. Shaner and Ms. Woodson.

**A. This statement was not admissible under the West Virginia Rules of Evidence.**

The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart Rule 803(24) require that five general factors must be met in order for hearsay evidence to be admissible under the rules.

First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove the material fact. Third, the statement must be shown to be more probative in the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admission of the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence.

Syl. Pt. 5, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987). None of these factors are met here.

First, the testimony by Detective Cumberledge is not trustworthy because it discusses a statement allegedly made by Petitioner to an unknown person, who then told another person(s), who ultimately told Ms. Woodson. This string of relaying the statement to various persons mirrors that of a game of telephone, which undermines the trustworthiness of the statement. Second, Detective Cumberledge specifically offered this testimony to show the jury that Petitioner is violent and has a reason to want to harm Mr. Shaner and Ms. Woodson. Third, although the statement may have been probative<sup>2</sup> in establishing Petitioner's alleged violent nature, it does not comport with the general purpose of the rules of evidence or the interest of justice, as required by factor four. *See* W. Va. R. Evid. 403 (prohibiting testimony if "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, [or] misleading the jury . . .").

Detective Cumberledge's hearsay statement is highly prejudicial because it caused the jury to draw an inference that if Petitioner was capable of threatening to kill someone, he would be capable of committing a robbery or possessing a firearm. Furthermore, the fact that this statement was admitted in violation of the Confrontation Clause, as discussed more fully above, is wholly contrary to the interest of justice. Fifth and finally, Respondent did not inform Petitioner that it sought to introduce this evidence through Detective Cumberledge or any other witness. Again, the fact that this evidence was introduced on cross examination is irrelevant because Detective Cumberledge testified as a representative of Respondent. Accordingly, the testimony was inadmissible under the West Virginia Rules of Evidence.

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<sup>2</sup> Indeed, such multi-level hearsay statements are, by their very nature, not particularly or fairly probative; hence the exclusion of such statements under the Rules.

**B. The statement is grounds for reversal because it was hearsay that caused a harmful error and violated Petitioner’s constitutional rights.**

This Court has held that:

[w]here improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

Syl. Pt. 3, *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990) (citing Syl. Pt. 2, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979), cert denied, 445 U.S. 904 (1980); Syl. Pt. 3, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990) (quoting Syl. Pt. 6, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987))).

To be clear, Petitioner contends that, here, the improper hearsay testimony *was* constitutional in nature because it violated his protections under the Confrontation Clause. Notwithstanding that contention, and putting that argument aside for purposes of evaluating the hearsay argument, Petitioner evaluates the hearsay testimony under the holding in *Edward Charles L.* It is unclear whether the jury would have convicted Petitioner if it had not heard and considered the improper testimony from Detective Cumberland. However, the improper testimony was of such nature that it likely led to the jury’s conviction of Petitioner. First, the hearsay testimony demonstrates the alleged violent nature of Petitioner. Unsubstantiated hearsay testimony about the Petitioner’s desire to kill the alleged victims shows an indifference to human life and establishes a violent propensity. Furthermore, the hearsay testimony draws an improper connection from Petitioner to the alleged victims. Why would Petitioner be discussing

killing the alleged victims if he never robbed them? Surely, the jury asked itself that very question and ultimately concluded that the Petitioner must have known the alleged victims if he was discussing wanting to kill them. Furthermore, did Petitioner say he wanted to kill the alleged victims so as not to get caught or punished for the robbery? Again, another question the jury likely asked itself. For the foregoing reasons, this statement likely led to Petitioner's conviction. If the jury would not have convicted Petitioner without hearing this testimony, then allowing such testimony was a harmful error that caused an improper prejudicial effect on the jury and the conviction must be reversed.

Even if this Court cannot affirmatively conclude that Petitioner would not have been convicted but for the introduction of the testimony, a harmful error still occurred when the testimony was admitted because it had a highly prejudicial effect on the jury. For the reasons stated above, this statement necessarily caused the jury to draw improper inferences regarding Petitioner's relationship with the alleged victims and Petitioner's violent propensities. For this reason, admission of the testimony was a harmful error that requires reversal of the conviction.

**III. The Circuit Court imposed an excessive sentence that shocks the conscious because it relied on improper factors and Petitioner's sentence was much greater than the sentence given to Petitioner's similarly situated co-actor.**

When determining Petitioner's sentence, the Circuit Court relied on improper factors like the fact that Petitioner maintained his innocence throughout the proceeding and the Circuit Court's opinion that Petitioner lied while testifying. The Circuit Court also gave Petitioner a much greater sentence than that of his co-actor, who was charged with the exact same crimes for conduct arising out of the same incident. Accordingly, because the sentence is unfair, it should be reversed.

**A. This Court may review Petitioner’s first-degree robbery sentence because there is no maximum sentence for first degree robbery.**

“The Supreme Court of Appeals reviews sentencing orders...under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” *State v. McDonald*, 2023 WL 2945044, at \*3 (April 14, 2023) (citing in part, Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)). “Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). However, the Supreme Court typically limits proportionality reviews to sentences “where there is either no fixed maximum set by statute or where there is a life recidivist sentence.” *Id.* at Syl. Pt. 4, in part. Because sentences for first-degree robbery have no maximum, the Supreme Court has previously reviewed them for proportionality. See *State v. Gibbs*, 238 W. Va. 646, 659–61, 797 S.E.2d 623, 636–38 (2017).<sup>3</sup> Accordingly, here, this Court may review Petitioner’s sentence because there is no maximum sentence under the first-degree robbery statute and the Circuit Court relied on impermissible factors when imposing Petitioner’s sentence.

Petitioner was sentenced to a total of seventy-five (75) years for the charges associated with the incident. (A.R. 4–5). He was sentenced for a determinate period of thirty (30) years, with credit for four hundred and thirty-eight (438) days for the first degree robbery of Mr. Shaner; a determinate period of thirty (30) years for the first degree robbery of Ms. Woodson; a determinate period of five (5) years for possession of a firearm by a prohibited person; and a determinate period of ten (10) years for presentation of a firearm during the commission of a felony. (A.R. 4–7). These sentences were ordered to be served consecutively. *Id.*

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<sup>3</sup> West Virginia Code Section 61-2-12(a) states that a person who is deemed guilty of and convicted for robbery in the first degree, “shall be imprisoned in a state correctional facility *not less than ten years*” (emphasis added).

The West Virginia Supreme Court has adopted a two-part test to determine if a sentence is unconstitutionally excessive. The first test is a subjective test, which “asks whether the sentence for the particular crime shocks the conscience of the court and society.” *State v. Cooper*, 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983). “If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.” *Id.* “When it cannot be said that a sentence shocks the conscious, a disproportionality challenge is guided by the objective test.” *Id.* When determining disproportionality, “consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.” Syl. Pt. 5, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).

Here, Petitioner’s sentence shocks the conscious for two reasons. First, the sentence is shocking because the Circuit Court relied on improper factors when imposing the sentence. Second, the sentence is shocking when compared to the sentences of the other persons involved in the incident.

**B. The Circuit Court impermissibly relied on Petitioner’s lack of remorse as a basis for his sentence.**

The Circuit Court justified Petitioner’s lengthy sentence, in part, due to the “defendant’s lack of remorse and acceptance of responsibility.” (A.R. 5). Increasing a defendant’s sentence based on a lack of remorse or the failure to accept responsibility, when the defendant maintains his innocence, is wholly improper. A court should not, and cannot, hold a defendant’s decision to go to trial against in him. The Sixth Amendment undeniably grants citizens the right to a trial by a jury of their peers. This protection would be substantially impaired if defendants were punished for exercising that right and maintaining their innocence.

Furthermore, the Circuit Court based its opinion of Petitioner's lack of remorse, in part, on its belief that Petitioner committed perjury on the stand. (A.R. 882). The decision of whether a witness is credible and/or told the truth is one for the jury. *See Ward v. Brown*, 53 W. Va. 227, 268 (1903) (“[t]he jury are the exclusive judges of the weight of the testimony”). Accordingly, it was improper for the Circuit Court to render an opinion as to Petitioner's truthfulness and increase his sentence on a perceived lack thereof. Accordingly, the Circuit Court relied on improper factors when imposing Petitioner's sentence.

**C. The sentences of the other persons involved in the incident are much less than Petitioner's sentence.**

The fact that a co-defendant received a much lighter sentence is relevant to the Court's proportionality inquiry. *State v. Buck*, 173 W. Va. 243, 246, 314 S.E.2d 406, 410 (1984).

“Disparate sentences for co-defendants are not per se unconstitutional. Courts consider many factors such as co-defendant's respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. If defendants are similarly situated, some courts will reverse on disparity of sentence alone.” *State v. Cooper*, 173 W. Va. 266, 271, 304 S.E.2d 851, 856 (1983).

There were three other actors involved in the incident. Jennifer Walls, Stoane Lockett, and Joseph Robinson were all alleged to have been involved or admitted to being involved in the incident. Ms. Walls was sentenced for a term of one (1) year to five (5) years, with credit for two hundred and twenty-nine (229) days previously served, for one count of conspiracy to commit first degree robbery. Ms. Walls' sentence was suspended, and she was placed on supervised probation for a term of five (5) years. Mr. Lockett was sentenced to twenty (20) years, with credit for one hundred and seventy-eight (178) days previously served for aiding and abetting first degree

robbery. However, Mr. Lockett's sentence was also suspended, and he was placed on supervised probation for a period of five (5) years.

Joseph Robinson was charged with first degree robbery of Mr. Shaner, first degree robbery of Ms. Woodson, possession of a firearm by a prohibited person, and presentation of a firearm during the commission of a felony. These are the exact same charges Petitioner faced and therefore Petitioner and Mr. Robinson were similarly situated. However, Mr. Robinson was only sentenced to twenty-eight (28) years for one count of first-degree robbery of Mr. Shaner. Mr. Robinson did not receive a sentence for the second charge of first-degree robbery, possession of a firearm by a prohibited person, or presentation of a firearm during the commission of a felony. Despite having the exact same charges for conduct arising from the same incident, Mr. Robinson's sentence was less than half of Petitioner's sentence. This is disproportionate and unfair to Petitioner.

The Circuit Court's reliance on improper sentencing factors and unfair treatment of Petitioner are reversible errors that this court should rectify. Accordingly, Petitioner's sentence should be vacated.

**IV. The Circuit Court failed to instruct witnesses to not discuss the case with one another.**

Rule 615 of the West Virginia Rules of Evidence makes the exclusion of witnesses a matter of right, and the decision is no longer committed to the trial court's discretion. Syl. Pt. 1, *State v. Omechinski*, 196 W. Va. 41, 468 S.E.2d 173 (1996). A failure to instruct the witnesses fully after Rule 615 of the West Virginia Rules of Evidence is invoked may cause reversal. *Id.* at Syl. Pt. 4. When the Rule is invoked, the witnesses should be clearly directed that they must all "leave the courtroom, with the exceptions the rule permits, *and that they are not to discuss the case or what their testimony has been or will be or what occurs in the courtroom with anyone other than counsel for either side.*" *Id.* (emphasis added).

“In criminal cases, when a trial court fails to comply with Rule 615 of the West Virginia Rules of Evidence, prejudice is presumed and reversal is required unless the prosecution proves by a preponderance of the evidence that the error was harmless.” *Id.* at Syl. Pt. 6. “A failure to instruct the witnesses fully after [Rule 615] is invoked may cause reversal.” *Id.* at 47, 179. The rights granted under Rule 615 of the West Virginia Rules of Evidence are not self-executing. In the absence of a specific request by the complaining party, a defendant may not claim error as a result of the failure of the trial court to instruct witnesses as to the impact of a sequestration order. *Id.* at Syl. Pt. 5.

Here, at the request of the parties, the Circuit Court ordered that “all witnesses for both parties be sequestered during the trial and that said witnesses be directed not to discuss their testimony with one another.” (A.R. 26). The Circuit Court instructed counsel to instruct witnesses to remain outside of the courtroom and to not discuss their testimony. However, *Omechinski* places this burden on the *court*, rather than counsel, and therefore the circuit should have instructed each witness not to discuss their testimony with other witnesses. *See Omechinski*, 196 W. Va. at 46 (“Rule 615...should not be read as merely authorizing the judge to physically exclude [witnesses] from the courtroom. In fact it is said that in addition to instructing the witnesses to leave the courtroom, the judge should instruct them not to discuss the case... [with other witnesses].” (citing Edward W. Cleary, *McCormick on Evidence* § 48.1 at 9 (3rd ed. 1987 Supp.))). Furthermore, a defendant is not in a position to proffer instructions to the State’s witnesses or ensure they do not speak with one another. Accordingly, the Circuit Court should have given this instruction. However, this instruction was not given to the following witnesses: James Copenhaver; Jon Montgomery; John Frisby; Joseph Burge; Everett Shiffra; Deputy Kristopher Wariner; Sergeant Ryan Harris; Sergeant Gary Spitznogle; John Wayne Smith, Jr.; Stoane Lockett; Charles Shaner;

Deputy Justin Talkington; Deputy Dillon Nuzum; Deputy Tyler Gordon; Detective Josh Cumberledge; Officer Justin Hetherington; Calissa Carper; Steven King; and William Tobin. (A.R. 78, 88, 93, 132, 149, 248, 256, 261, 273, 328, 359, 364, 373, 376–77, 500, 509, 615, 635, 744).

Because the Circuit Court failed to provide this instruction to every single witness, it is unclear whether the witnesses knew they were not permitted to discuss their testimony with one another. Accordingly, the witnesses likely discussed the trial with one another. Furthermore, *Omechinski* presumes there was prejudice unless proved by a preponderance of the evidence that prejudice did not occur. Here, Respondent cannot determine whether the witnesses discussed the matter and their testimony with one another and therefore cannot establish by a preponderance of the evidence that the failure to give this instruction did not prejudice Petitioner. Accordingly, the Court should reserve Petitioner’s conviction.

### **CONCLUSION**

For the foregoing reasons, Petitioner’s conviction should be reversed, his sentence should be vacated, and this matter should be remanded for further proceedings.

*/s/ John D. Pizzo*  
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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Case No. 24-16**

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**JAMES DEE MCKINNEY AKA 1227,  
*Petitioner,***

**v.**

**STATE OF WEST VIRGINIA  
*Respondent.***

I hereby certify that on the 11th day of April, 2024, I filed ***PETITIONER JAMES DEE MCKINNEY'S BRIEF*** via the File and ServeXpress system upon the following counsel of record:

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