

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BRIAN NOLL**  
**(Defendant Below)**  
**Petitioner**

v.

**Docket No. 33903**

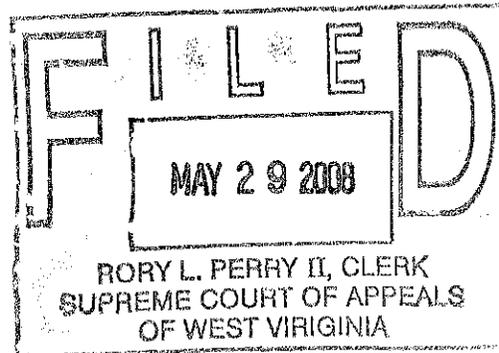
**STATE OF WEST VIRGINIA**  
**Respondent.**

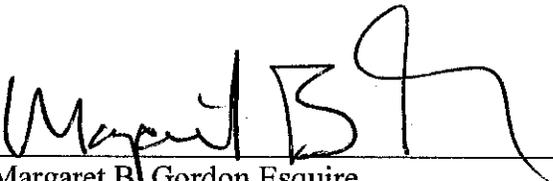
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**BRIAN NOLL'S INITIAL APPEAL BRIEF**

*BERKELEY COUNTY CRIMINAL CASE NOS. 04-F-13 and 04-F-181*

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### III.

#### KIND OF PROCEEDING AND NATURE OF RULING BELOW

1. At the February, 2004, term of the Berkeley County grand jury, an indictment was returned against Mr. Noll, alleging various acts of receiving and transferring stolen property. These acts are the basis of Berkeley County case no. 04-F-13, and Mr. Noll entered a plea of guilty to two counts of the lesser included offense of misdemeanor transferring/receiving stolen property for these acts. Mr. Noll does not appeal from his conviction in 04-F-13.

2. At, the October, 2004, term of the Berkeley County grand jury, an eleven count indictment was returned against Mr. Noll, alleging various counts of burglary or breaking and entering, larceny, and conspiracy, involving several different homes in Berkeley County, West Virginia. These acts are the basis of case no. 04-F-181, and errors at the trial, pretrial, and sentencing, form the basis of this appeal.

3. A pretrial hearing for 04-F-181 was held on February 4, 2005.

4. On February 7, 2005, the State filed a motion to sever counts 8 and 9 of this indictment, because the alleged victim was out of the country at the time that the trial was scheduled. Thus, two jury trials were held in case no. 04-F-181.

5. Jury selection on counts 1 - 7 and 10 - 11 was held on February 8, 2005, and testimony continued through February 9, 2005. On February 9, a Berkeley County petit jury found Mr. Walker guilty of counts 3, 4, 5, 6 and 7 of the indictment, but acquitted him of counts 1, 2, 10 and 11.

6. Jury selection on counts 8 and 9 was held on April 6, 2005. On this date, a Berkeley County petit jury found Mr. Walker not guilty of these counts.

7. Mr. Noll was sentenced on June 6, 2005, as follows:
- a. on count 3, burglary, for a period of not less than one nor more than 15 years;
  - b. on count 4, grand larceny, for a period of not less than one nor more than 10 years;
  - c. on count 5, burglary, for a period of not less than one nor more than 15 years. This sentence was incorrect, as Mr. Noll was only indicted for daytime breaking and entering; therefore, the sentence should have been not less than one nor more than 10 years;
  - d. on count 6, conspiracy to commit burglary, for a period of not less than one nor more than 5 years;
  - e. on count 7, grand larceny, for a period of not less than one nor more than ten years.

Counts 3 and 4 were to be served concurrently with each other, but consecutively to the other sentences; counts 5 and 7 were to be served concurrently with each other but consecutively to the other sentences; and count 6 was to be served consecutively to the other sentences, for a total combined sentence of not less than 3 nor more than 35 years.

In addition, based on his plea to two misdemeanor offenses of transferring stolen property in case no. 04-F-13, Mr. Noll was given an additional one year for each offense, with these sentences to be served concurrently to each other and concurrently with the other sentences. Thus Mr. Noll's total combined sentence on both cases was not less than 3 nor more than 35 years.

8. Mr. Noll was resentenced in this case on April 5, 2007, and on August 1, 2007, Mr. Noll was given until October 4, 2007, to file his Petition for Appeal.

9. Mr. Noll's appeal was accepted by this Court on April 2, 2008.

#### IV.

#### STATEMENT OF FACTS

1. This case arises from incidents that occurred during April and May, 2004, in which the State alleged that Mr. Noll was involved in a number of criminal activities including conspiracy, burglary, breaking and entering, and larceny, at six different residences in Berkeley County, West Virginia.

2. No physical evidence linking Mr. Noll to any of these crimes was ever produced by the State, and no fingerprints were taken in any of the victims' homes. Further, no analysis made of a shoe print marking the door of one of the homes. (Tr. of 2/8/05 at 184 - 185).

3. Mr. Noll maintained his innocence through the pretrial and trials held in Case No. 04-F-181.

4. On February 4, 2005, the State filed its notice of intent to use 404b evidence in 04-F-181. The specific evidence involved was that during an interview with Trooper Brian Bean, Mr. Noll denied all knowledge of any burglaries; however, he was wearing a gold necklace which was allegedly linked to a burglary in an indicted case in Morgan County, West Virginia. (Notice of intent to use 404b evidence). The State argued that this evidence was intrinsic. (Id.)

5. At the pretrial, held on February 4, 2005, the Circuit Court heard evidence on the 404b issue surrounding the necklace, and ruled as follows:

The Court FINDS that the State may use the statement of Brian Noll, denying the burglaries which is not challenged by the defense; moreover, the seizure [of] the necklace which was in plain view of the officer and is admissible, but there shall be no admission as to the fact that this necklace was later determined to have come from a Morgan County burglary.

Pretrial Order.

6. The State violated this Order throughout the trial, and introduced argument and testimony that this necklace was from a burglary, as follows:

a. In her opening statement, the Prosecutor stated that when questioned by law enforcement officers, Mr. Noll had “a chain pendant around his neck that belonged to a burglary”. (Tr. of 2/8/05 at 88).

b. During the testimony of Trooper B. Bean, that when he went to speak to Mr. Noll while he was incarcerated, that Mr. Noll was wearing a piece of jewelry that the Trooper was “subsequently [able to] determine. . .came from a burglary”. (Id. at 190). The impression given was that the jewelry came from one of the burglaries involved in this case. (Id).

c. During the testimony of Amanda Schultz, that a necklace would be discovered on Mr. Noll, which came from “stealing”. (Id. at 218).

d. During closing argument, the Prosecutor again argued that although Mr. Noll denied responsibilities for any of the burglaries, “yet around his neck is a gold chain which turned out to be from a burglary”. (Tr. of 2/9/05 at 37).

7. The State also violated Rule 404(b), as it introduced evidence that Mr. Noll was linked to other burglaries in the area, without noticing its intent to do so, as follows:

- a. In the State's opening statement, that "people involved in this particular case. . . were involved not only in a burglary ring. . . They supported their habit by stealing from people". (Tr. of 2/8/05 at 85).
- b. Again, in opening, that "in this particular case you have a ring operating". (Id. at 87).
- d. In questioning of Senior Trooper James Burkhart, after being asked if he had a suspect in mind, he replied "there had been several burglaries in that area. . .". (Id. at 161).
- e. By attempting to introduce a photo array of four homes, which Officer Spencer McCulley stated were homes that Amanda Schultz stated had been burglarized. (Id. at 185 – 186, offered as State's Exhibit 6). Mr. Noll was never connected by testimony to any of these homes, and there were homes on the array that were not involved in any way with Mr. Noll's indictments. In fact, Lieutenant K.C. Bohrer testified that "only two of . . . [the] photographs [on exhibit 6] relate to issues here today. . .". (Id. at 198 – 199). This exhibit was objected to by counsel (Id. at 199), and was never admitted by the Court.
- f. Again, in K.C. Bohrer's testimony, that "several burglaries, a lot of things were going on. . .". (Id.)
- g. In Amanda Schultz' testimony, that Mr. Noll would bring home money that he got "from stealing" to pay for her heroin habit. (Id. at 217).
- h. In closing argument, that this stealing had been going on for two years. (Tr. of 2/9/05 at 28).

8. The State also commented on Mr. Noll's right to remain silent, by asking Trooper Brian Bean, as follows:

Q.: Trooper Bean, specifically, when you go interview an individual, as you did with Mr. Noll, are they always forthcoming with information?

A. No, ma'am.

(Tr. of 2/8/05 at 193). In regards to this, the State also argued that defendants never "tell you everything they know when you go to interview them." (Tr. of 2/9/05 at 37.)

9. The only evidence that connected Mr. Noll in any manner to any of these crimes was the testimony of Amanda Schultz. However, Ms. Schultz never gave any direct testimony that linked Mr. Noll to the offenses of which he was convicted.

10. In addition, Ms. Schultz' testimony was incredible, and it came from a heroin user with previous convictions for false swearing and different felonies. Thus, there were insufficient grounds for Mr. Noll's convictions. Mr. Noll's two juries recognized Ms. Schultz's unreliability, as the first jury acquitted Mr. Noll of counts 1, 2, 10 and 11, and the second jury acquitted Mr. Noll of both counts before the jury. In fact, there was no rational basis for Mr. Noll's conviction of only some of the counts of his indictment, and not the other counts, other than jury compromise.

11. Ms. Schultz' unreliability was shown in her testimony of February 8, 2005, where she had to admit as follows:

a. that she had previously been convicted of forgery, burglary and grand larceny (Tr. of 2/8/05 at 205);

b. that she had admitted to involvement in some of the break-ins for which Mr. Noll was being tried. Ms. Schultz plead to burglary and forgery for the events, and

was to be given a sentence of one to ten years in the penitentiary. (Id. at 206). One of the conditions of the plea was that she testify truthfully at Mr. Noll's trial (Id.).

c. That after her initial plea agreement with the State, the State found that she had previously committed another crime which she had not revealed to the investigating officers, and that this was why she was denied probation. (Id. at 206 – 207).

d. That she didn't know why she had contacted the officers to admit to these events. (Id. at 208). However, she was incarcerated at that time, and she was having substance abuse problems at the time of her incarceration (Id.)

e. That she had been a heroin addict for two years. (Id.) Ms. Schultz also admitted that before she was arrested, she was using sometimes a gram of heroin a day, which is worth between \$150.00 and \$200.00. (Id. at 217).

12. On cross-examination, Ms. Schultz admitted as follows:

a. That on September 10, 2004, she pled guilty to two counts of false pretenses (Id. at 226), which directly contradicted her testimony on direct, that she had never been convicted of false pretenses (Id. at 206)

b. That on November 3, 2004, Ms. Schultz signed a plea agreement for the incidents involved herein, to which she would plead guilty of one count of forgery, but the remaining counts would be dismissed, and she would be given probation (Id. at 228)

c. That on November 29<sup>th</sup>, 2004, Ms. Schultz signed a new plea agreement, in which she agreed to plead guilty to burglary, forgery, and two counts of uttering. (Id. at 229). Under this new plea, she would no longer get probation, but would be sentenced to a term of 1 – 10 years in the penitentiary. (Id. at 230).

d. That between November 3 and November 29, 2004, Ms. Schultz was charged with additional crimes which had occurred before she was put on bond, but which she had failed to reveal to the officers (Id. at 244, 251).

e. That these involved a break-in at another home; but when she talked to the officers in June of 2004, she did not tell them about this break-in; rather, she only told them about Mr. Noll's alleged criminal activities (Id. at 240).

f. That she did not know why she had not told the officers about her own criminal actions (Id. at 241).

g. That for a long time, her addiction "constituted five vials of heroin a day". (Id. at 234).

h. That she didn't think that this use had affected her memory (Id. at 236).

i. That she didn't remember when the break-ins for which she said Mr. Noll was responsible occurred. (Id. at 238).

j. That under all of her charges, Ms. Schultz could have been sentenced to 4 to 40 years in the penitentiary, but instead was allowed to plead guilty to one count, with a sentence of not less than one nor more than 10 years. (Id. at 243 - 246). This does not include the crimes for which Ms. Schultz was never charged.

13. Mr. Noll submits that the errors at his pretrial, trial, and sentencing require reversal of his convictions.

## V.

### ASSIGNMENTS OF ERROR

Mr. Noll was incorrectly convicted and denied a fair trial herein, based on the following errors:

- a. Mr. Noll's conviction should be reversed, as the Trial Court allowed the State to offer evidence pursuant to W.Va. Rules of Evidence Rule 404(b), in violation of its own Order barring this evidence, and which was not disclosed to Mr. Noll.
- b. Mr. Noll's conviction must be reversed, because of prosecutorial misconduct, including in commenting on Mr. Noll's 5<sup>th</sup> Amendment Right to remain silent.
- c. Mr. Noll's conviction must be reversed, because there was insufficient evidence to support the conviction.
- d. Mr. Noll's conviction must be reversed as the Circuit Court committed reversible error in allowing amendment of count 3 of the indictment, and in incorrectly sentencing Mr. Noll on count 5.
- e. Mr. Noll's conviction must be reversed, because of the cumulative effect of the errors at his trial.

## VI.

### STANDARD OF REVIEW

Errors of law made by the Circuit Court are reviewed *de novo* by the West Virginia Supreme Court of Appeals. *Craddock v. Watson*, 197 W.Va. 62, 475 S.E.2d 62 (1996). Challenges to findings of fact are reviewed under a clearly erroneous standard. Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

## VII.

### POINTS AND AUTHORITIES AND DISCUSSION OF LAW

#### **I. MR. NOLL'S CONVICTION MUST BE REVERSED, AS THE COURT ALLOWED THE STATE TO OFFER 404(b) EVIDENCE IN VIOLATION OF ITS PRETRIAL ORDER AND WITHOUT HOLDING THE HEARING REQUIRED BY *STATE V. MCGINNIS***

The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence 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 crimes" evidence is more probative than prejudicial under Rule 403.

*State v. LaRock*, 196 W.Va. 294, 310 – 11, 470 S.E.2d 613 (1996).

There were two errors regarding Rule 404(b) evidence that occurred at Mr. Noll's trial. The first was that the State introduced evidence regarding a necklace after the Circuit Court ruled that this could not be used. The second was that the State never noticed its intent to introduce testimony that Mr. Noll was linked to any other burglaries in the area. Both errors, and especially cumulatively, require reversal of Mr. Noll's convictions.

These errors are related, because the Circuit Court's ruling regarding the necklace prohibited introduction of evidence that the necklace came from a Morgan County burglary:

The Court FINDS that the State may use the statement of Brian Noll, denying the burglaries which is not challenged by the defense; moreover, the seizure [of] the necklace which was in plain view of the officer and is admissible, but there shall be no admission as to the fact that this necklace was later determined to have come from a Morgan County burglary.

The State repeatedly violated this Order, as set forth in the statement of facts.

The State may have attempted to circumvent this ruling by never introducing testimony that the necklace came from Morgan County. Rather, witnesses were allowed to testify that the necklace came from another burglary. However, the State never gave Rule 404(b) notice of intent to offer evidence of Mr. Noll's involvement in any other burglaries. The fact that Mr. Noll was allegedly involved in these activities came up repeatedly at the trial, again as set forth in the statement of facts.

Admission of this other evidence was in direct violation of Rule 404(b) of the West Virginia Rules of Evidence, and no hearing was conducted pursuant to Rule 404(b),

as required by *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), so that the Court could determine by a preponderance of the evidence that the evidence was true. Further, the jury was given no limiting instruction on how this evidence should be considered.

According to this Court's decision in *McGinnis* and subsequent cases,

When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered, and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court to merely cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction. When an offer of evidence is made under rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence as been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Syllabus Points 1 and 2, *McGinnis*, Id. Here, the Trial Court failed to conduct a *McGinnis* hearing or follow any of the other required *McGinnis* procedures for the "other burglary" evidence.

Mr. Noll's trial counsel did not object to this failure, although objection was made to admission of a photograph array which included pictures of homes that had been burglarized, but which were not involved in the events for which Mr. Noll was being tried. However, Mr. Noll believes that a trial court is required to conduct the *McGinnis* procedures, *sua sponte*, when made aware either prior to or during trial that evidence of crimes, wrongs, or bad acts, other than those in the indictment, are being offered by the State. The constant references throughout the State's arguments and presentation of evidence that Mr. Noll had been involved in other burglaries, and the State's connection of the necklace to a burglary, should have been the subject of *McGinnis* notice, hearing and instruction.

Mr. Noll also asserts that admission of this evidence is reviewable under the plain error doctrine, set forth in Syllabus Points 1 and 2 of *State v. Marple*, 197 W.Va. 47, 475 S.E.2d 47 (1996):

1. Plain error review creates a limited exception to the general forfeiture policy pronounced in Rule 103 (a) (1) of the West Virginia Rules of Evidence, in that where a circuit court's error seriously affects the fairness, integrity, and public reputation of the judicial process, an appellate court has the discretion to correct [the] error despite the defendant's failure to object. This salutary and protective device recognizes that in a criminal case, where a defendant's liberty interest is at stake, the rule of forfeiture should bend slightly, if necessary, to prevent a grave injustice.
2. For purpose of West Virginia's "plain error" rule, a "plain" error is one that is clear and uncontroverted at the time of appeal.

Plain error is only countenanced by the appellate court if the error "affects substantial rights and seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Marple*, *id* at 52. "In criminal cases, plain error is error which is so conspicuous that the trial judge and prosecutor were derelict in countenancing it, even

absent the defendant's timely assistance in detecting the error". *Id.* In this regards, this Court must determine whether the error actually affected the jury's verdict:

3. In determining whether the assigned plain error affected the "substantial rights" of a defendant, the defendant need not establish that in a trial without the error a reasonable jury would have acquitted; rather, the defendant need only demonstrate the jury verdict in his or her case was actually affected by the assigned but unobjected to error.

*Marple* at Syllabus Point 3.

Here, admission of the 404b evidence, and violation of the Pretrial Order, meets these test. First, for both categories of evidence, the error was "plain". This is especially true for the necklace, where admission was in direct violation of the Circuit Court's order. However, there can be no question under West Virginia jurisprudence of the requirement of *McGinnis* notice and hearing when the State seeks to introduce 404b evidence. Thus, there is no question that the basis for alleging error *sub judice* is "clear and uncontroverted" as of the time of this appeal.

In addition, admission of the evidence must affected Mr. Noll's substantial rights, given that there was no direct evidence linking him to any of the events for which he was tried. Thus, the testimony that Mr. Noll was "involved in" other burglaries in the area, proven by the fact that he was wearing a "stolen" necklace, can only have made the jury believe that Mr. Noll was a "bad actor" who should be convicted.

This is particularly true concerning the necklace. Three of the counts in this case involved an alleged burglary at the residence of Tribly Land at which a substantial amount of jewelry, including necklaces, was taken<sup>1</sup>. (see, Itemized List of Property Regarding Count 7, attached by agreement to jury instructions). Thus, the fact that Mr. Noll was wearing a necklace that purportedly came from a burglary can only have left the

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<sup>1</sup> These were count 5, burglary; count 6, conspiracy to commit burglary, and count 7, grand larceny.

jury with the inaccurate impression that the necklace came from Ms. Land's home. The jury was even given a list of the property that came from the Land home (Tr. of 2/9/05 at 18), and in deliberations could easily have matched the necklace with an item on this list. Thus, there can be no question that the jury verdict in this case "was actually affected by the assigned but unobjected to error". *Marple* at Syllabus Point 3.<sup>2</sup>

In summary, Mr. Noll's jury repeatedly heard that Mr. Noll had been involved in other burglaries, and that the necklace he was wearing was from a burglary. The fact that the State introduced evidence that the necklace was from a burglary violated the Court's Pretrial Order. Further, Mr. Noll was never given notice that the State intended to say that he was involved in other burglaries, and no *McGinnis* hearing was ever held on this issue. Therefore, the Court never conducted the required balancing test, and the jury was never instructed on how to consider this evidence. This is clearly error which must result in reversal of Mr. Noll's convictions.

**II. MR. NOLL'S CONVICTIONS MUST BE REVERSED BECAUSE OF PROSECUTORIAL MISCONDUCT, INCLUDING IN COMMENTING ON MR. NOLL'S 5<sup>TH</sup> AMENDMENT RIGHT TO REMAIN SILENT.**

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<sup>2</sup> The holding in *State v. Rector*, 167 W.Va. 748, 280 S.E.2d 597 (1981), is also relevant to this inquiry. *Rector* was decided prior to the present Rule 404(b), and when the State's right to offer collateral crime evidence was governed by *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). In *Rector*, the Supreme Court reversed a conviction for possession and delivery of marijuana, because the State admitted into evidence drug paraphernalia and marijuana that was not tied directly into the charge for which the defendant was on trial. On these facts, the Supreme Court held,

It is reversible error for a trial judge to admit into evidence in a criminal trial of a defendant charged with a marijuana violation drug paraphernalia and marijuana belonging to a state witness when such drug paraphernalia and marijuana have not been associated with the defendant and have no probative value relating to the guilt of the defendant.

*Rector* at Syllabus Point 3.

"A judgment of conviction will . . . be set aside because of improper remarks made by a prosecuting attorney to a jury which . . . clearly prejudice the accused or result in manifest injustice." *State v. Sugg*, 193 W.Va. 388, 405, 456 S.E.2d 469 (1995).<sup>3</sup> In *Sugg*, the Supreme Court stated at Syllabus Point 6 that:

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Two types of prosecutorial misconduct resulted in reversible error here. The first was the introduction of the 404(b) evidence as set forth in the previous section. This evidence, and particularly the photo array containing pictures of houses that allegedly had been burglarized, gave the impression that Mr. Noll had been involved in numerous burglaries that were not before the Court. This error was compounded by the introduction of evidence that the necklace was from a burglary, with the implication that the necklace came from one of the cases for which the jury was hearing evidence. This clearly misled the jury and prejudiced Mr. Noll, and without this evidence, it is likely that there would have been no conviction. This meets the *Sugg* test set forth above.

The State also committed error by questioning its witnesses regarding Mr. Noll's right to remain silent. This occurred in the State's case in chief, when Trooper Brian Bean was asked if defendants, such as Mr. Noll, are always forthcoming with information. This error was compounded when the State argued about the same in its closing statement.

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<sup>3</sup> In this case, the statement is made in the negative: "A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice".

West Virginia cases have held that the State cannot make unfair use of a defendant's silence. *State v. Hager*, 204 W.Va. 28, 511 S.E.2d 139 (1998) (*per curiam*). It is similarly reversible error for the State to cross-examine a defendant on pretrial silence, or to comment about the same to the jury. *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977), at Syllabus Point 1. In *State v. Marple*, *id.*, this Court recognized that clear error occurs when a witness in a criminal trial is questioned about a defendant's pretrial, post Miranda silence. This issue was most recently reviewed in *State v. Murray*, 220 W.Va. 735, 649 S.E.2d 509 (2007), which found that the State's comments concerning Mr. Murray's failure to take responsibility for his actions were a violation of Mr. Murray's right to remain silent, an error requiring reversal of his conviction.

Here, the State's elicited direct testimony regarding Mr. Noll's right to remain silent, and argued about this in closing to the jury. This improper testimony would leave any reasonable juror with the belief that regardless of how weak the State's evidence, Mr. Noll was guilty, because defendants never offer all of the information that they know.

This Court should also consider this issue under the plain error doctrine. In *State v. Marple*, this Court has already found that "plain" error is committed when a comment is made on a defendant's pretrial silence. *Marple*, *id.* at 52. In *Marple*, this Court chose not to reverse the defendant's conviction, finding that there was sufficient admissible evidence upon which "the jury would have reached the same verdict absent the post-Miranda silence testimony". *Id.* at 53. Thus, the error did not affect the defendant's "substantial rights". Further, this Court recognized that the pretrial, post Miranda comment came in the form of a single question, and that the prosecutor "did not address the issue. . . during its closing argument". *Id.*

Here, in contrast there was a paucity of substantive admissible evidence to prove Mr. Noll's guilt, and the State did argue concerning Mr. Noll's post-Miranda silence to the jury. Thus, this error, particularly combined with the improper use of 404(b) evidence and the other legal errors in this case as set forth below, compels reversal.

**III. MR. NOLL'S CONVICTIONS MUST BE REVERSED, BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS.**

Mr. Noll's convictions should be reversed, because there was insufficient evidence tying him to the break-ins at the homes of either Andre Frye, represented by counts 3 and 4 of the indictment, or Trilby Land, represented by counts 5, 6 and 7.

First, there were no photographs of either home that were ever identified by either the alleged victims as the homes into which Mr. Noll allegedly entered. Again, the only connection between these crimes and Mr. Noll, other than hearsay, was the testimony of Amanda Schultz. In her testimony, Ms. Schultz did identify two photographs as homes allegedly entered (Tr. of 2/8/05 at 209 - 210), but these were never identified by Ms. Land or Mr. Frye as their homes. Further, these photographs were never introduced into evidence, because they were on an exhibit that contained photographs of other homes that had been burglarized but were not connected to the events for which Mr. Noll was being tried. (Id. at 199). Thus, there was no way for the jury to connect these homes with Mr. Noll, or even to know if these were the homes of Tribly Land or Andre Frye.

In addition, there was no evidence that connected property taken from the Land home with Mr. Noll. In her direct testimony, Ms. Land stated that she had had two jewelry boxes stolen from her home. She identified the one that was returned to her as "a purple flower box" (Id. at 127), and Ms. Schultz did testify that she had seen a jewelry

box, which had been thrown into the woods, which had come from "a" home. (Id. at 211). However, the State never asked Ms. Schultz to describe the jewelry box, nor was a picture introduced into evidence. Thus, there was insufficient evidence to prove that Mr. Noll was in any way tied to any crime involving the particular jewelry boxes taken from Ms. Land's home. Further, Ms. Schultz testified that when she first saw the jewelry box, she was in the truck with Aaron Rockwell, and that Mr. Rockwell was the individual who threw the jewelry and jewelry box into the woods. (Id. at 211)<sup>4</sup>. Therefore, there was insufficient evidence to support Mr. Noll's convictions on counts 5, 6, and 7, and Mr. Noll's motion for judgment of acquittal on these counts should have been granted.

Mr. Noll's convictions could not stand, however, even if Ms. Schultz gave evidence that tied Mr. Noll to these crimes, as the only evidence came from Ms. Schultz, a convicted drug user who could give no specific information about any of the events involved herein. As a matter of law, Ms. Schultz' testimony is not credible, and is insufficient to support any conviction.

Based thereon, because there was insufficient evidence to support Mr. Noll's convictions, they should be reversed.

#### **IV. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN ALLOWING AMENDMENT OF COUNT 3 OF THE INDICTMENT, AND IN INCORRECTLY SENTENCING MR. NOLL ON COUNT 5.**

Mr. Noll's convictions for burglary under counts 3 and 5 of the indictment must be reversed, because the Court allowed actual or constructive amendment of indictment, by the proof at the trial and by the instructions given to the petit jury. Here, for count 3,

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<sup>4</sup> Ms. Schultz did testify that she "guessed" that both Mr. Rockwell and Mr. Noll "had the jewelry box", although Mr. Rockwell was the one who "threwed it" into the woods along the road. (Id. at 211). Ms. Schultz also testified that she "thought" that Mr. Noll and Mr. Rockwell were together "when they did it [got into the house where the jewelry box was taken]". Id. at 212 - 213.

involving Andre Frye, Mr. Noll was indicted for nighttime burglary; however, the evidence at the trial was that the events occurred during the daytime. (Tr. of 2/8/05 at 107). The same holds true for count 5, involving the break-in at Ms. Land's home. This indictment recited that this event had happened during the daytime, and that the entry had been without breaking (Id. at 13). The evidence at the trial differed from this, however, and Mr. Noll was sentenced for a daytime burglary and given one to fifteen years, instead of for daytime breaking and entering, for which he should have been given a sentence of one to ten years. Thus, the proof at the trial did not support the events for which Mr. Noll was indicted, and Mr. Noll was incorrectly sentenced on count 5.

In *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995), the West Virginia Supreme Court recognized, in Syllabus Point 1, that "A defendant has a right under the Grand Jury Clause of Section 4 of Article III of the West Virginia Constitution to be tried only on felony offenses for which a grand jury has returned an indictment". In this case, Justice Cleckley recognized that a circuit court can amend an indictment, consistent with Rule 7(e) of the Rules of Criminal Procedure, but only if "the amendment is not substantial, is sufficiently definite and certain, does not take the defendant by surprise, and any evidence the defendant had before the amendment is equally available after the amendment." *Adams* at Syllabus Point 2. However, "any substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury. An amendment of form which does not require resubmission. . . occurs when the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced." *Adams* at Syllabus Point 3. Justice Cleckley also specifically recognized

that an amendment can be made if the amendment "does not strike any substantive portion of the charging paragraph. . .". *Id.* at 283.

What occurred here was, in effect, an actual or constructive amendment of Mr. Noll's indictment, an amendment which allowed the change of the offenses charged. This violates the holding in *Adams*.

Mr. Noll believes that this resulted in reversible error, under *State v. Johnson*, 197 W.Va. 575, 476 S.E.2d 522 (1996):

If the proof adduced at trial differs from the allegations in an indictment, it must be determined whether the difference is a variance or an actual or constructive amendment to the indictment. If the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced, then the difference between the proof adduced at trial and the indictment is a variance which does not usurp the traditional safeguards of the grand jury. However, if the defendant is misled, is subjected to an added burden of proof, or is otherwise prejudiced, the difference between the proof at trial and the indictment is an actual or constructive amendment of the indictment which is reversible error.

Further, in *Johnson*, Justice McHugh recognized that the "notice, double jeopardy and screening functions of the grand jury are less likely to be trampled upon if the defendant's charges are narrowed by the variance between the indictment and the proof at trial".

*Johnson* at 581. *Johnson* quoted the test set out in Syllabus Point 3 of *Adams*, quoted above, as a test to help determine if a variance is reversible error, including whether or not the "the defendant is misled, is subjected to any added burden of proof, or is otherwise prejudiced".

Here, Mr. Noll was misled by the indictment, and the language may have affected his desire to seek a plea. Further, with the change from daytime breaking and entering to daytime burglary, the proof at trial substantially widened, rather than narrowed, the

charges that Mr. Noll faced, as it substantially simplified the proof that the State was required to offer.

Finally, by allowing this actual or constructive amendment, the Court has trampled on the role of the grand jury. In a climate of lax and vague pleadings, such as is being allowed here, citizens are in jeopardy of being tried for and convicted of offenses for which a grand jury never made a finding of probable cause. Here, the grand jury only indicted Mr. Noll based on the facts set forth in the indictment. We cannot now know, and can only guess, if a true bill would have been returned against Mr. Noll based on the evidenced produced at trial.

In his Handbook on West Virginia Criminal Procedure, Professor Cleckley makes clear that this is impermissible:

An indictment must identify defendant's conduct as to time, place and manner with sufficient particularity that the precise activity considered by the grand jury cannot at trial be confused with other contemporaneous activity by defendant. To require less of the indictment would, in effect, permit the defendant's trial and perhaps his conviction to rest on a guess as to what particular conduct the grand jury considered. Since such an essential elements defect cannot be cured by a guilty verdict, there is no reason to allow a verdict to cure a defect of specificity. In *Russell v. United States*, 369 U.S. 749, 770, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), the Supreme Court stated:

To allow the prosecutor, or the Court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty the intervention of the grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

<sup>1</sup> Cleckley *Handbook on West Virginia Criminal Procedure*, I-669 (2000).

Therefore as the changes in the indictment here were substantial amendments that were not resubmitted to the grand jury, the difference between the indictment and the verdict created reversible error, and Mr. Noll's convictions under counts 3 and 5 must be reversed.<sup>5</sup>

**V. MR. NOLL'S CONVICTIONS SHOULD BE REVERSED  
DUE TO THE CUMULATIVE EFFECT OF THE ERRORS AT HIS  
TRIAL.**

The cumulative effect of the numerous errors in Mr. Noll's case denied him the right to a fair and impartial trial as guaranteed by Article III, Sections 10 and 14 of the West Virginia Constitution, and the Fourteenth Amendment of the United States Constitution. In Syllabus Point 5 of *State v. Walker*, 188 W.Va. 661, 425 S.E.2d 616, (1992), this Court reiterated that,

[w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial kept the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.

This is specifically true here, given that no evidence ever linked Mr. Noll to the crimes of which he was convicted. Rather, it appears that he was convicted, because there had been a string of burglaries in the Berkeley County area, and because he was wearing a necklace that came from a burglary not connected with this case. Thus, Mr. Noll was essentially convicted based on conjecture and suspicion.

**VIII.**

**CONCLUSION**

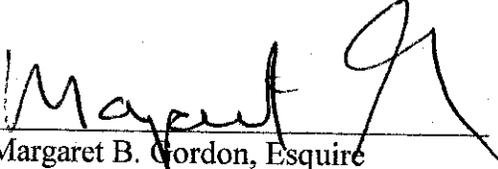
As set forth above, Mr. Noll's convictions should be reversed by this Court<sup>6</sup>.

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<sup>5</sup> Mr. Noll anticipates that the State will argue that this error was cured, when Mr. Noll was only convicted of daytime burglary. This, however, does not change the fact that the indictments as presented were not proven by the evidence presented at the trial.

Respectfully submitted,

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<sup>6</sup> In this Appeal, Mr. Noll has not asserted ineffective assistance of counsel, but he also does not waive this claim based on counsel's errors in presentation of his case, including failing to object to the errors raised herein.

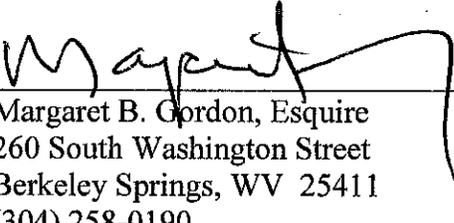
CERTIFICATE OF SERVICE

Type of Service: Unites States First-Class, Postage Prepaid Mail

Date of Service: May 24, 2008

Persons Served: The Honorable Pamela Games-Neeley  
Berkeley County Prosecutor  
Berkeley County Judicial Center  
380 West South Street  
Martinsburg, WV 25401

Item Served: Brian Noll's Initial Appeal Brief

  
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