

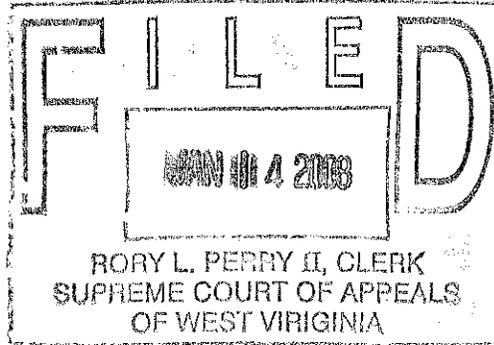
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 33701

**WILLIAM M. WOODSON,
Appellant,**

v.

**THE STATE OF WEST VIRGINIA,
Appellee.**



BRIEF OF APPELLANT

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INTRODUCTION

Appellant, 49-year-old William M. Woodson, has been partially confined to a wheelchair following a spinal injury since the 1990s. Nonetheless, he was convicted in the Circuit Court of Kanawha of First Degree Robbery and Malicious Wounding on September 26, 2005. Upon these convictions he was sentenced by the Circuit Court of Kanawha County to thirty-five (35) years for the First Degree Robbery of just over six dollars (\$6.00) and two to ten (2-10) years for the Malicious Wounding, said sentences to run consecutively. The theory of the prosecution's case at trial was that the Appellant had gotten out of his wheelchair and aided the codefendant in punching and/or kicking the alleged victim numerous times. Despite the Appellant's serious condition rendering him physically disabled, no testimony of any medical professionals as to the Appellant's physical capabilities was offered at trial. What was offered, and ultimately led to his conviction, were hearsay statements of his codefendant, who did not testify, but whose statements were nevertheless admitted, in violation of the Appellant's Sixth Amendment right to confront the witnesses against him, among various other improper and prejudicial information.

At trial, Appellant, Mr. Woodson was represented by Attorney Joseph C. Cometti, whose conduct during the trial constituted ineffective assistance of counsel and was enough, in itself, to have sunk the defense. Additionally, the Appellant's rights were violated during his trial in the following ways: 1) evidence of racial bias of the Appellant was improperly introduced at trial; 2) evidence of prior bad acts and or prior crimes of the Appellant was improperly introduced at trial; 3) Appellant's Sixth Amendment Right to Confront the Witnesses against him was violated in that hearsay statements of the co-defendant were admitted at trial; 4) the evidence presented at trial was insufficient to prove that the Appellant robbed the alleged victim and was likewise was insufficient to prove malicious wounding, additionally, the State did not charge the defendant with being an accessory but then proceeded on that theory at trial, thus the evidence presented constitutes a variance from the indictment, furthermore the indictment did not adequately charge the crimes for which the Appellant was convicted; 5) evidence was elicited at trial of a potential exculpatory witness to the events giving rise to Appellant's convictions, and such witness was never identified by the State or disclosed to the Defense prior to trial; 6) the sentence ordered by the trial judge was extremely excessive and constituted an abuse of discretion and cruel and unusual punishment; 7) Mr. Cometti's representation of the Appellant constituted ineffective assistance of counsel. Additionally, the Appellant contends that the numerous errors as reveal themselves upon a review of the record in this proceeding necessitate a reversal of his convictions and

sentences herein and the interests of justice and fundamental fairness support such decision of this Honorable Court.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an appeal of two felony convictions and sentences from Kanawha County Circuit Court. The Appellant, William M. Woodson, was convicted by a jury in the Circuit Court of Kanawha County on September 26, 2005, in Case No. 05-F-303, of one count of the felony offense of first degree robbery, and one count of the felony offense of malicious wounding. Upon the convictions, on October 24, 2005, Appellant was sentenced to a thirty-five (35) year term of imprisonment on Count I of the Indictment, First Degree Robbery, and received a consecutive sentence of imprisonment on Count II, Malicious Wounding for a period of two (2) to ten (10) years. Upon information and belief, the co-defendant in these crimes, pled guilty, and received a sentence of five (5) to eighteen (18) years imprisonment. An additional "resentencing hearing" was held by the trial court on October 31, 2005; however, said hearing was not held for the purpose of reconsidering the previous sentence imposed, but was held by the trial court as it had failed to advise the Appellant of his appellate rights at the original sentencing hearing held on October 24, 2005. Although trial Attorney Cometti, filed a Notice of Intent to Appeal for the convictions and sentences in this matter, Mr. Cometti once more provided ineffective assistance of counsel to your Appellant by failing to follow through on this Intent, as he never filed an appeal on the Appellant's behalf, and after the time deadline to file such appeal Mr. Cometti has subsequently become deceased. In order to

preserve the Appellant's rights to an appeal in this matter, Appellant's current counsel, W. Jesse Forbes, filed a Motion for Resentencing with the trial court, which Motion was granted by Final Order entered February 9, 2007, and which Final Order also re-sentenced the Appellant to the original sentences ordered by the trial court in this matter. It is from this Final Order of February 9, 2007, that Appellant appeals.

STATEMENT OF FACTS

The Appellant, 49-year-old, William Woodson, is partially confined to a wheelchair due to a spinal injury, and has an extensive history of alcohol and substance abuse problems. At trial the testimony presented from the alleged victim indicated that the Appellant, Mr. Woodson, was alleged to have gotten out of his wheelchair and aided the co-defendant, Edward Tom Brown, in kicking and punching the alleged victim in order for the co-defendant to take six dollars (\$6.00) from the person of the victim.

No testimony was presented that indicated that the Appellant, Mr. Woodson, ever received the six dollars in question, nor was any testimony presented as to what Appellant, Mr. Woodson's intentions on that evening were. The Appellant, Mr. Woodson, himself took the stand and testified that although due to intoxication he could not recall many of the events of the evening in question, he testified that he did not receive the six dollars, nor any portion thereof, nor did he engage in physically assaulting Mr. Barkey. No evidence was presented indicating that the Appellant, Mr. Woodson, intended to injure Mr. Barkey in any permanent way, nor was anything presented

tending to indicate that the Appellant, Mr. Woodson, acted with any malice toward Mr. Barkey.

On the evening of Sunday, December 5, 2004, the alleged victim, Timothy Barkey, rode his bike to East End Mart on Charleston, West Virginia's East End to purchase cigarettes. The East End Mart was closed, and, thus, he purchased the cigarettes at the Shop-N-Go. Upon purchasing the cigarettes, the victim testified that he was stopped by Edward Tom Brown who first asked the alleged victim for some change and then indicated his intention to take the victim's bicycle. At this time, the Appellant, Mr. Woodson, was all of the way across the parking lot a considerable distance away from Timothy Barkey and Edward Tom Brown. The alleged victim, Mr. Barkey, had been in an automobile accident many years before, which left him with a traumatic brain injury, and made him an extremely sympathetic witness for the jury. Mr. Brown, the testimony explained, confronted the alleged victim in an empty parking lot and the victim was punched and/or kicked in the face and six (\$6.00) dollars was taken from his person. Testimony at trial indicated that Mr. Brown may have first asked the alleged victim if he wanted to purchase drugs, prior to the incident. The Appellant, Mr. Woodson, apparently arrived on the scene in his wheelchair, and, according to the alleged victim, aided Mr. Brown in physically kicking and/or punching the alleged victim. Testimony at trial showed that the victim's nose was broken as a result of the incident. No testimony ever indicated that the Appellant, Mr. Woodson, took the Defendant's six dollars (\$6.00) personally.

ASSIGNMENTS OF ERROR

- I. THE IMPROPER INTRODUCTION OF PRIOR BAD ACT EVIDENCE UNFAIRLY PREJUDICED THE APPELLANT'S RIGHT TO A FAIR TRIAL
- II. THE IMPROPER INTRODUCTION OF PREJUDICIAL, CONFUSING, AND INFLAMMATORY RACIAL BIAS EVIDENCE UNFAIRLY PREJUDICED THE APPELLANT'S RIGHT TO A FAIR TRIAL
- III. THE TRIAL COURT ERRED BY FAILING TO MAKE RULINGS TO PROTECT THE APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AS HEARSAY STATEMENTS OF THE CO-DEFENDANT WERE ADMITTED AS EVIDENCE AND SAID CO-DEFENDANT WAS NOT PRESENT AT TRIAL FOR CROSS-EXAMINATION, THUS THE ADMISSION OF SAID HEARSAY WAS PLAIN ERROR.
- IV. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS OF FIRST DEGREE ROBBERY AND MALICIOUS WOUNDING AND CONSTITUTED A VARIANCE FROM THE INDICTMENT.
- V. POTENTIAL EXCULPATORY EVIDENCE IN THE FORM OF AN EYEWITNESS AT THE SCENE WAS ELICITED AT TRIAL BUT WAS NOT DISCLOSED TO THE DEFENSE PRIOR TO TRIAL.
- VI. THE SENTENCES ORDERED BY THE TRIAL COURT ARE EXCESSIVE AND CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.
- VII. THE APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED IN THIS CASE, DUE TO APPELLANT'S TRIAL COUNSEL'S DEFICIENT CONDUCT WHICH RESULTED IN THE INTRODUCTION OF HEARSAY STATEMENTS OF THE CO-DEFENDANT AND OTHER WITNESSES IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHTS, FAILURE TO IMPEACH WITNESSES AND INTRODUCE EVIDENCE; AND DUE TO TRIAL COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE THE CASE AND PREPARE A DEFENSE ALONG WITH OTHER ERRORS.

DISCUSSION

In reviewing challenges to the findings and conclusions of a circuit court, the West Virginia Supreme Court of Appeals applies a two-prong standard of review, as stated in *Phillips v. Fox*, 193 W.Va. 657, 458 S.E.2d 327 (1995):

We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review. *Id.* at 661, 458 S.E.2d at 331 (citing *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995)).

Moreover, the Fourth Circuit Court of Appeals has held that the findings of a trial court are entitled to great weight, but they are never conclusive. *Kibert v. Blankenship*, 611 F.2d 520 (4th Cir. 1979) *rev'g* 454 F.Supp. 400 (W.D.Va. 1978). The *Kibert* court continued, a finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.*

With these general standards in mind, the Appellant will now address each assignment of error individually.

I. IMPROPER INTRODUCTION OF PRIOR BAD ACTS EVIDENCE

At trial in this matter, there was extensive testimony regarding whether the Appellant had engaged in prior bad acts or criminal activity in violation of his constitutional rights and right to a fair trial and due process of law. Such statements were not admitted pursuant to Rule 404, but instead were

introduced at trial with no limiting instructions or other corrective measures being taken by the trial court.

Rule 404(b) states "evidence of other crimes wrongs or acts is not admissible to prove that character of a person in order to show that he or she acted in conformity therewith." In *State v. McDaniel*, 211 W.Va. 9, 560 S.E.2d 484, (2001) the West Virginia Supreme Court laid out the standard for admitting evidence under Rule 404(b).

The Court stated,

"Where 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 the Rule 404(b) evidence is admissible, it **should instruct the jury on the limited purpose for which such evidence has 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." *State v. McDaniel*, 211 W.Va. 9, 560 S.E.2d 484, (2001)

Furthermore, the *McDaniel* court noted, that **“the prosecution in a criminal case shall provide reasonable notice in advance of trial....,”** that an in camera hearing is required (**“in camera hearing required by *Dolin and McGinnis*...”**), and that **“the jury must be instructed to limit its consideration of the evidence....”** *McDaniel*, at 9-11.

The Court reversed in *McDaniel* on the grounds that evidence that the defendant had previously raped a woman was improperly admitted under Rule 404(b).

The *McDaniel* court stated:

“The potential for unfair prejudice, by permitting evidence to come before the jury alleging that the defendant had previously raped a woman, was enormous. Any jury, no matter how well instructed, would be sorely tempted to convict a defendant simply because of such a prior act, regardless of the quantum of proof of the offense for which the defendant was actually charged. **“The trial court must understand that it alone stands as the trial barrier between legitimate use of Rule 404(b) evidence and its abuse.”** *State v. McGinnis*, 193 W.Va. at 155, 455 S.E.2d at 524. -*State v. McDaniel*, 211 W.Va. 9, 560 S.E.2d 484, (2001)

Furthermore, the Court, in *State v. McGinnis*, 193 W.Va. at 153 n. 5, 455 S.E.2d at 522 n. 5, citing I Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, 4-5(A) at 325 (3rd Ed. 1994), noted, Rule 404(b) evidence must not cause unfair prejudice. “Evidence of other vices and crimes is excluded not because of its inherent lack of probative value, but rather as a precaution against inciting undue prejudice and permitting the introduction of pointless collateral issues” *McGinnis*, at 153 n.5.

In *McDaniel*, the evidence was offered to show modus operandi, yet the court determined that such evidence was not sufficiently unique. Additionally, as noted in Syllabus Point 16 of *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), in the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to prove evidence which is relevant and legally connected with the charge for which the accused is being tried. See e.g., *State v. McDaniel*, 211 W.Va. 9, 560 S.E.2d 484, (2001).

In the instant case no formal offer of prior bad act evidence under Rule 404(b) was made. The State made no notice to the Appellant or the Court of its intention to offer 404(b) evidence as required under *McDaniel*. Yet at trial a multitude of prior bad act evidence came in without objection or any action being taken by the trial court to limit the prejudicial effect. The State's star witness, the alleged victim, Timothy Barkey, testified that, "**he [The Defendant] used to actually live in my building, and he got kicked out shortly after I moved in...**" Trial Transcript pg. 103. The alleged victim further testified that he had learned that the Appellant had been "kicked out" through hearsay from the building manager, Valerie Sanders. Moreover, the alleged victim's testimony portrayed the Appellant as a nearly homeless man of the streets. Barkey testified, "**he, you know, tried to bum change off of me...**" Trial Transcript pg. 103. Such statement that the Appellant had previously attempted to panhandle the alleged victim constitutes a prior bad act and/or

criminal activity, and, as such the Appellant was entitled to a Rule 404 proffer but no such proffer was made.

Additionally, as if attempting to impugn the Appellant with his own prior bad acts, without the benefit of a Rule 404 or 403 analysis wasn't enough, the evidence at trial continued in a manner which essentially put the Appellant on trial for all criminal activity in the area in which this crime is alleged to occur. Such testimony necessarily played to the jury's passions, as it placed the jury in this case in a role of not judging the facts of this lone incident but of attempting to attribute society's ills as a whole against this one criminal defendant, Appellant herein, in violation of his Constitutional rights and rights under the laws of this State. At page 105 of the Trial Transcript, the following exchange between Mr. Cometti and Mr. Barkey took place,

- Q. Did you have any thought that night about taking Ruffner Street over to Virginia, instead of taking Washington?
- A. No.
- Q. Isn't it a little safer going that way rather than staying over on Washington where all of the people hang out?
- A. Well, you have - actually, it's not, because it's not as welly [sic] lit going that way, and if you're on Washington Street, there's always cars going by, and it's well lit, and I felt safer on the well lit street than on a dark street.
- Q. Do you know - would it be fair to say that you know a fair number of, I don't want to say street people, but people who hang out and frequent streets and corners in that part of town?
- A. I just know them from volunteering at the soup kitchen.

At page 107, it continued with Mr. Barkey's testimony that, "There's street lights on Washington, but if I'm going Ruffner way back, then I'm riding in the dark, **susceptible to, you know, who might ever want to, you know -**

susceptible. Then at page 108, the following exchange took place between Mr. Cometti and Mr. Barkey,

- Q. So, if they had any lighting – well, they don't have any – they don't have a window on the front to that building, they've boarded that entire store front up, and –
- A. And I don't blame them for doing it either.
- Q. I'm sorry?
- A. I said, I wouldn't blame them for doing it because if, you know, the man that runs it, he just had a kid, and you know, I frankly don't feel safe, you know, that's why I go to him, because like he said, "If I would have been working, or if I had been open that day that wouldn't have happened to you."

The testimony regarding the character of the neighborhood and those hanging around in it as dangerous and potentially violent continued, at page 109, with the following,

- Q. Right. And if you look at the store from the front and it's closed, you can't see any glass, there are no windows, the whole thing has that wooden front on it that they built, and then the door on the front of the store itself is wooden and it's closed up; isn't that right?
- A. Yeah. When they close, they have a gated door, a gated glass door, but then they close the wooden doors to prevent people from breaking in.
- Q. From breaking the glass; right?
- A. And from breaking the glass, exactly.

Such introduction and allusion as to the Appellant as being either a street person or a person who contributes to a dangerous and violent area of Charleston, in which the crime is alleged to have occurred, was highly prejudicial and improper. While Mr. Cometti's conduct at trial will be discussed *infra*¹, such statements should have been addressed by the trial court as they portray the Appellant in a negative light before the jury with

¹ See Ineffective Assistance of Counsel ground, *infra*.

virtually no probative value, thus, under Rule 403 and 404, and relevant case law, such statements should have been struck from the case, and a limiting instruction given.

More damaging bad act evidence was introduced into the trial beginning on page 111 of the Trial Transcript.

- Q. Sure, sure. And then, once you got into the parking lot, you're still on your bike. And I want to know, did he [Co-defendant Edward Tom Brown] get in front of you and force you to slam on the brakes, or how was it that you -
- A. Well, I wasn't going fast enough to slam on the brake. But he [Co-defendant Edward Tom Brown] grabbed my bike, and that's when he said, **"Well, do you need anything?"** [Emphasis supplied]
- Q. Do you need anything?
- A. Yes, sir.
- Q. What did you mean - do you know what he meant by that?
- A. **He was speaking of drugs.** [Emphasis supplied]
- Q. **Was he asking you if you needed any drugs?** [Emphasis supplied]
- A. **I - supposedly, when he said, "Do you need anything?" And I said "No". That's what I supposed he was asking me.** [Emphasis supplied]
- Q. Okay. And so, he said that to you, before he said, "Do you have any money?" right?
- A. He said what, now? I'm sorry.
- Q. He said this, "Do you need anything?" before he said, "Do you have any money?" is that right?
- A. **He said - yeah, you know, "What do you need?", "What can I get you?"** [Emphasis supplied]
- Q. Okay.
- A. Then he said - then he asked me did I have any money.

Essentially the testimony of the State's star witness at trial not only introduced the notion that the Appellant was a panhandler and possibly a street person but went so far as to suggest that the Appellant was associated with a drug dealer. The tenor of the testimony to that point had been that the Appellant and the co-defendant, Mr. Brown, were known to associate together

and, thus, these statements portrayed the Appellant himself in an extremely negative light before the jury, suggesting that he was involved in other criminal activity involving drug transactions, and other potential felonies. Essentially, criminal drug activity was brought before the jury in this proceeding despite no charges involving drugs being implicated prior to trial. The introduction of such testimony, through hearsay statements offered by the alleged victim, was highly prejudicial and inflammatory. No proper foundation had been laid pursuant to Rule 404 to introduce such statements. The Appellant had been charged with no drug crimes in the instant case, yet such testimony went unheeded. Pursuant to Rule 403 such evidence should have been excluded by the trial court for the potential of its prejudicial effect upon the jury. Additionally, as discussed *infra*, Mr. Cometti's role in eliciting such testimony raises the question of ineffective assistance of counsel.

Moreover, the prosecution and the Court failed to conduct the *in camera* hearing required by the West Virginia Supreme Court to determine the admissibility of 404(b) evidence. ("where an offer of evidence is made under subdivision (b) of this rule, the trial court, after conducting an *in camera* hearing, must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts;....See *State v. Williams* 198, WV 274, 480 SE. 2nd 1962 (1996).") The Court then must determine the relevancy of the evidence under Rule 401 and 402 and then conduct the balancing test required under the West Virginia Rules of Evidence. The Court then must:

“if the trial court is satisfied that Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and it should be repeated in the trial courts general charge... See *Taylor v. Cabell Huntington Hospital* 208 W.Va. 128, 538 S.E.2d 719; See e.g. *State v. McDaniel*, 211 W.Va. 9, 560 S.E.2d 484, (2001).

In this proceeding, despite the multitude of prior bad act evidence that came into the trial, no limiting instructions were made, no balancing test conducted under Rule 403 and no determination pursuant to Rule 404(b) was entered into by the trial court. Essentially, the Rules were ignored and the result was a biased and unfair trial, which necessitates reversal.

II. THE IMPROPER INTRODUCTION OF PREJUDICIAL, CONFUSING, AND INFLAMMATORY RACIAL BIAS EVIDENCE UNFAIRLY INTERFERED WITH THE APPELLANT’S RIGHT TO A FAIR TRIAL

From the outset, the element of race and potential racial bias played a role in this case. The Appellant’s own trial counsel called attention to the racial composition of the jury during jury selection. Arguing that, as the Appellant is African-American, there were not enough African-Americans on the jury. Additionally, testimony in the case brought race into play in this trial and created the potential for an improper, prejudicial or inflammatory effect before the jury. Certain evidence offered by the State in their case-in-chief in this proceeding improperly introduced the element of race and improperly indicated that the Appellant and the co-defendant were potentially acting with racially biased motives during the alleged criminal act. Such evidence was presented during the testimony of the State’s star witness, not in any rebuttal

to the Appellant's introduction of character evidence in this proceeding, as no such introduction was made. The cumulative effect of which was highly prejudicial, confusing, and inflammatory and had a likely prejudicial, confusing, and inflammatory effect on the jury, such as to cause the jury to return a verdict of guilty, where the evidence presented by the State was insufficient to sustain such a verdict.

In *State v. Guthrie* 194 W. Va. 657, 461 S.E.2d 163, the State offered similar racially inflammatory statements to rebut evidence of a defendant's good character. Mr. *Guthrie's* conviction was reversed and the Court made specific and controlling findings as to the admissibility of racially inflammatory evidence and the way it is to be handled by the courts of West Virginia in order to ensure a defendant a fair trial. Under controlling precedent of the West Virginia Supreme Court of Appeals, "**appellate courts give strict scrutiny to cases involving the alleged wrongful interjection of race, gender, or religion in criminal cases,**" and, "where these issues are wrongfully injected, reversal is usually the result." Syl. Pt. 9 *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995) (First-degree murder conviction reversed and remanded). In *Guthrie*, the court noted, "There is a plethora of authority supporting the notion that matters such as race, religion, and nationality should be kept from a jury's consideration." *Guthrie*, FN 32; See e.g., *Peck v. Bez*, 129 W.Va. 247, 40 S.E.2d 1 (1946) (where counsel for the plaintiff made reference to the defendant's religion and foreign nationality, the W.Va. Supreme Court reversed stating,

"[t]hese matters, of course, were not pertinent to the matters in issue and had no place in the argument." 129 W.Va. at 263, 40 S.E. 2d at 10.)

In *Guthrie*, the State elicited testimony as to the defendant's prejudices and racial biases over objection by the defense. *Guthrie*, at 186. Specifically, the defendant's father testified about whether the defendant believed whites were superior to blacks, and whether they had had discussions about the Ku Klux Klan. *Guthrie*, FN 30. The prosecution asserted that such testimony was proper because the defense had opened the door when it portrayed the defendant as a good, quiet, Bible-reading man, when in fact he had made bigoted remarks to the State's psychiatrist. The trial court allowed the testimony to come in.

The West Virginia Supreme Court strongly disagreed and reversed. Noting opinions such as *U.S. v. Kallin*, 50 F.3d 689 (9th Cir. 1995) (reversible error under Rule 403 to allow a witness to testify to the defendant's dislike for Mexicans), the West Virginia court opted to apply "**strict scrutiny to trial court rulings involving the alleged wrongful injection of race,**" instead of the deferential abuse of discretion standard ordinarily applied to trial court rulings. *Guthrie*, Syl Pt. 9. The court further noted, "**where these issues are wrongfully injected, reversal is usually the result.**" *Id.* Moreover, in *State v. Bennett*, 181 W.Va 269, 274, 382 S.E.2d 322, 327 (1989), the court condemned the practice of attorneys making unnecessary racial remarks in the presence of the jury. The *Bennett* court quoted from *McFarland v. Smith*, 611 F.2d 414, 417 (2d Cir. 1979) for the proposition that "**to raise the issue of race is to**

draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended." *McFarland*, at 417. The *Guthrie* court noted, in the same way the *McFarland* court had surmised, "the same rational applies to the prosecuting attorney drawing the jury's attention to racial, gender, and political comments made by the defendant which in no way relate to the crime." *Guthrie*, at 187, 681.

Similarly, in the instant case, no element of the alleged crime included a racial factor, nor did any evidence given by the State in its case in chief indicate a prior history of similar acts by the Appellant, yet the alleged racial biases of the Appellant were improperly allowed by the court to be introduced to the jury. No argument was made during the case that such evidence should have come in under Rule 404. Neither the trial court, the prosecution, nor the Appellant's own trial counsel protected him from the damaging introduction of racial motivation into his trial. Specifically, on direct testimony of their star witness, the State elicited the hearsay statements of the co-defendant, who did not testify at the Defendant's trial. Such damage began as follows,

- Q. Well, what did Mr. Brown [the co-defendant] say to you?
A. First, he asked me did I have any change, like I said. And then, he said, Well -
Q. What was your response to his question?

- A. I said, No, I don't have any change. And he said, Well, you're in the 'hood now. And he said, We're going to take your bike. So he proceeded - he grabbed onto my bike, and we proceeded to the - I don't know what direction - towards the riverbank, to the telephone right in front of the East End Mart.
- Q. When you say that you proceeded, did you willingly go with your bike over with him to the other end of the parking lot?
- A. Well, he had a hold of my bike, and I had a hold of one, and he said, Well you're in the 'hood now. He said, We're going to take your bike.
- Q. I mean, were you actively trying to stop him from pulling your bike over there?
- A. Yeah. I was trying to push him away.
- Q. Now, I want you to think about it, and be very specific. Did he - did Mr. Brown say, I'm going to take your bike? Or did he say, We are going to take your bike?
- A. He said, You're in the 'hood. We are going to take your bike now.
- Q. And after he told you that, and he had pulled your bike toward the river side of the East End Mart parking lot, what did you see?
- A. Then I seen the Defendant in his wheelchair. He was either sitting there by the phone, or had just rolled up by the phone.
- Q. And this is right after the comment that Mr. Brown made about, We are going to take your bike?
- A. Yeah.

At trial the prosecution made a point of contending that the "We" referenced above referred to the two co-defendants. In closing argument, at page 200 of the Trial Transcript, the State made a point of repeating the statement and utilizing it to implicate the Appellant. However, the statement to Mr. Barkey, that he was "in the 'hood now" clearly references the issue of race. Mr. Barkey, a Caucasian, was testifying regarding what the co-defendant, Mr. Brown, an African-American, had allegedly said, regarding what type of neighborhood Mr. Barkey was in. Though the prosecution made a point of stressing that "We" referred to both Mr. Brown and the Appellant, Mr.

Woodson, as logical a conclusion to the meaning of the statement is that Mr. Barkey was claiming that Mr. Brown indicated that he, a white man, was in the “hood” and that “We”, or African-Americans in general, were going to take your bike for being in the wrong neighborhood. Despite the prosecution’s efforts to paint the statement in another, more simplistic, light, its implication was likely not lost on the jury. Essentially, the State’s star witness was implying that the co-defendants harbored racially biased motivations for the alleged crime. Such introduction of racially charged and alleged racial biases are improper under the precedent of this Court.²

The *Guthrie* court did not even curb its disapproval of the introduction of racial bias testimony before the jury on the grounds that it might only improperly influence a jury in which a member of the minority allegedly disliked was a member of the jury. The *Guthrie* court instead quoted from *U.S. v. Ebens*, 800 F.2d 1422, 1434 (6th Cir. 1986), for the notion that **“we need not know the racial composition of the jury, for nearly all citizens find themselves repelled by such blatantly racist remarks and resentful of the person claimed to have uttered them.”** *Guthrie*, FN 41. This resentment that results towards a person who utters blatantly racist remarks was sure to have a likely prejudicial effect on the jurors in the instant case. In *Guthrie*, in Part C of the opinion, entitled “Misconduct of the Prosecuting Attorney” Part 2, the Court stated:

² Said introduction was compounded by the Prosecutions reference to the statement in closing argument, which may itself be a violation and ground for reversal.

"During the cross-examination of the defendant's father, the prosecuting attorney inquired about prejudicial statements allegedly made by the defendant. Bobby Lee Guthrie was asked if the defendant told him that men were better than women and women should stay at home, that whites were better than blacks, and whether the two of them discussed the Ku Klux Klan. Defense counsel objected to this line of questioning because of its highly prejudicial effect, particularly with the women on the jury and the one African-American juror. The State asserted it was proper cross-examination because the defense opened the door when it portrayed the defendant as a good, quiet, Bible-reading man when, in fact, he had made some bigoted comments to the State's psychiatrist, Dr. Ralph Smith. See footnote 30. The State also argues the defendant was not prejudiced by these few questions concerning his views because Dr. Smith was not called as a witness and this issue was not raised further. See footnote 30. Nevertheless, a curative instruction was not requested by either party and none was given."

"Appellate courts give strict scrutiny to cases involving the alleged wrongful interjection of race, gender, or religion in criminal cases and, where these issues are wrongfully injected, reversal is usually the result. See *Miller v. N.C.*, 583 F.2d 701 (4th Cir. 1978); *Weddington v. State*, 545, A.2d 607 (Del. Sup. 1988). In *State v. Bennett*, 181 W. Va. 269, 274, 382 S.E.2d 322, 327 (1989), this Court condemned the practice of attorneys making unnecessary racial remarks in the presence of the jury: Although Mr. Perrill referred to Dr. Arrieta as 'the colored lady' only once, it should not have been said for the obvious reason that it may be construed as an appeal to prejudice. 'To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended.'" *McFarland v. Smith*, 611 F.2d 414, 417 (2d Cir. 1979). "

All the testimony did was demonize the Appellant, herein, and give the jury grounds to convict him for having bad character, not on the weight of the evidence properly presented. To survive strict scrutiny, a compelling need would have to be shown as to why this particular type of evidence needed to come in to the trial. No such need was demonstrated. In fact no pause was

given by the Court to even consider if such testimony should be allowed. The injection of racially inflammatory evidence and the Appellant's alleged biases through such hearsay statements is extremely improper, confusing, prejudicial, and serves only to inflame a jury. Moreover, under Rule 608(b) extrinsic acts of defendant's bad character are not admissible.

The *Guthrie* Court went on to say:

“Prejudice is not the only threat. There is also a potential for confusing and misleading the jury. Quite apart from prejudice, there is a risk that undue emphasis on the defendant's racial, gender, and/or political views could direct the jury's attention from whether the defendant inflicted the fatal wound because of the “horseplay” or whether the defendant believed the victim was a threat to the defendant's philosophy or way of life. This deflection might seem like a minor matter easy to guard against in the instructions so far as confusion is concerned, but, when coupled with its potential for unfair prejudice, this evidence becomes overwhelmingly dangerous. Even if we concede that this evidence had some relevance on the impeachment issue, the risk of undue prejudice and the risk of confusion are alone enough to justify setting aside the verdict.”

And, the *Guthrie* Court continued:

“To achieve substantial justice in our courts, a trial judge must not permit a jury's finding to be affected or decided on account of racial or gender bias and whether one hold an unpopular political belief or opinion. **If Rule 403 is ever to have a significant and effective role in our trial courts, it must be used to bar the admission of this highly prejudicial evidence.** (*Emphasis added.*) See, e.g., *U.S. v. Kallin*, 50 F.3d 689 (9th Cir. 1995) (reversible error under Rule 403 to allow witness to testify to defendant's dislike for Mexicans). While due process does not confer upon a criminal defendant a right to an error-free trial, see *U.S. v. Hastings*, 461 U.S. 499, 103 S. Ct. 1924, 76 L.Ed.2d 96 (1983), See footnote 38 it unquestionably guarantees a fundamental right to a fair trial. See *Lutwak v. U. S.*, 344 U.S. 604, 73 S. Ct. 481, 97 L.Ed. 593 (1953). **We emphasize that it is a fundamental guarantee under the**

Due Process Clause of Section 10 of Article III of the West Virginia Constitution that these factors--race, religion, gender, political ideology--when prohibited by our laws shall not play any role in our system of criminal justice."

Moreover, in footnote 31 of *Guthrie*, the court went on to discuss whether or not direct testimony about extrinsic acts of bad character are admissible, stating:

"Footnote: 31. We consider the purpose of the prosecution's cross-examination was to impeach the witness by confronting him with information about his son that was inconsistent with the witness's testimony on direct examination. We note the prosecution made no effort to introduce the testimony of Dr. Smith. In this connection, however, it is well settled that a party may not present extrinsic evidence of specific instances of conduct to impeach a witness on a collateral matter. See W.Va. R. Evid. 608(b). A matter is considered noncollateral if "the matter is itself relevant in the litigation to establish a fact of consequence[.]" 1 McCormick on Evidence § 49 at 167 (4th ed. 1992). See also Michael on Behalf of Estate of Michael v. Sabado, ___W. Va.____, 453 S.E.2d 419 (1994)."

The *Guthrie* court noted that such racially bias testimony was not even proper during cross-examination, where an available State witness, Dr. Smith, was not even called. The fact that the prosecution in the instant case went to the lengths of eliciting testimony on direct from a witness they called for the direct purpose of eliciting such prejudicial, inflammatory, confusing, and improper testimony regarding the Appellant's alleged racial bias only makes this case a more egregious example of improper racially motivated testimony than was presented to the Court in *Guthrie*.

Therefore, under the likely prejudicial, confusing, and inflammatory effect test of *Guthrie*, evidence of the alleged racial bias of the Appellant, herein,

should have been excluded from this trial, and the failure to exclude the same constitutes reversible error.

III. **APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM**

The Sixth Amendment to the United States Constitution provides that “[i]n *all* criminal prosecutions, the accused *shall* enjoy the right” to be confronted with the witnesses against him. *Lilly v. Virginia*, 119 S. Ct. 1887 (1999). The purpose of this right is to, “...ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990). The United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004) and this Court, in *State v. Mechling*, No. 32873 (W.Va., June 30, 2006), have made clear hearsay statements of co-defendants should not be admitted in a trial against a criminal defendant. *See, e.g., State v. Ladd*, 210 W.Va. 413 (2001).

Moreover, the United States Supreme Court has held that where hearsay statements that do not fall within a “firmly rooted” exception to the hearsay rule are introduced at trial, the Confrontation Clause requires that a showing of “particularized guarantees of trustworthiness” of the statements be made, otherwise, such statements must be excluded. *Idaho v. Wright*, 497 U.S. 805 (1990); *Ohio v. Roberts*, 448 U.S. 56,66 (1980). Additionally, in *Gray v. Maryland*, the United States Supreme Court held that the use of an accomplice’s confession “creates a special and vital need for cross-

examination.” 523 U.S. 185, 194-195, 118 S.Ct. 1151, 140 L.Ed. 2d 294 (1998).

In Syllabus Point 13 of *In Interest of Anthony Ray Mc.*, 200 W.Va. 312, 489 S.E.2d 289 (1997), this Court held, “The burden [in a Confrontation Clause analysis] is squarely upon the prosecution to establish the challenged evidence is so trustworthy that adversarial testing would add little to its reliability. Furthermore, unless an affirmative reason arising from the circumstances in which the statement was made provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.” Moreover, this Court has noted that where hearsay statements at trial likely result in a material contribution to the evidence against a criminal defendant, the trial court must engage in a detailed analysis of the statements’ admissibility. *See Naum v. Halbritter*, 172 W.Va. 610, 309 S.E.2d 109 (1983) (out-of-court statements by deceased prostitute that she had sexual relations with prosecuting attorney were not admissible in prosecution of prosecutor for false swearing, because of Confrontation Clause). *See, e.g., State v. Kennedy*, 205 W.Va. 224 (1999); *State v. Jarrell*, 191 W.Va. 1 (1994) ; *State v. Mullens*, 179 W.Va. 567 (1988); *State v. James Edward S.*, 184 W.Va.408 (1990).

In the instant case, hearsay statements regarding material issues were introduced at the Appellant’s trial.³ Such statements were not firmly rooted hearsay exceptions, and therefore under the United States Supreme Court’s

³ Such statements are detailed in other sections of this Brief, but include the statements of co-defendant Brown, among others and examples are replete throughout the record of the trial of this case.

decision in *Idaho v. Wright, supra*, it is necessary to demonstrate that such statements were inherently trustworthy. However, no such showing was made at the trial in this matter.

Essentially, the hearsay statements at issue presented assertions of truth regarding material facts at issue in the case. Specifically, the hearsay statements of the co-defendant, in particular, that “We are going to take your bike now” were material and improperly admitted into the trial of this case. The purpose of the Confrontation Clause, as noted by the Court in *Craig, supra*, is to provide a criminal defendant with the ability to confront the witnesses against him, and test their statements through the adversarial process of cross examination. In the instant case, the trial court allowed hearsay statements of the co-defendant, who did not testify, that tended to support the guilt of the Appellant to come into the trial for their truth without this Constitutionally required process. Therefore, the introduction of such statements into this trial did not comport with United States Supreme Court precedent on this issue, and, thus, violated the Appellant’s rights under the Sixth Amendment’s Confrontation Clause.

IV. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS OF FIRST DEGREE ROBBERY AND MALICIOUS WOUNDING AND CONSTITUTED A VARIANCE FROM THE INDICTMENT.

Robbery is defined as a felonious taking and carrying away of money, goods, or other things of value from the person of another, or in their presence, against their will, by force, or putting in fear, and with the intent to permanently deprive such person of such property. First Degree Robbery is

defined as when any person commits, or attempts to commit, robbery by either (1) committing violence to another person, including, but not limited to, partial strangulation or suffocation, or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon.

In the instant case, no evidence was ever presented to indicate that Mr. Woodson, the Appellant herein, took any money, or other things of value from Mr. Barkey, the alleged victim. The only testimony on the issue was that the co-defendant, Mr. Brown took the victim's six dollars. The victim never testified that he saw Mr. Woodson, the Appellant, receive any part of the money. The bicycle was not taken. The only testimony presented at trial regarding any intent to rob, was the hearsay statement of the co-defendant, Mr. Brown, by the victim, in which Mr. Brown is alleged to have said that "We are going to take your bike now." Given that the Appellant, Mr. Woodson, is confined to a wheelchair his intent to take a bicycle would likely be low. However, no testimony or evidence was presented to indicate that he ever intended to take, or received the six dollars in question. In fact, the only testimony on the issue came from the Appellant himself, who testified that he did not receive the money. Moreover, the State did not indict Mr. Woodson as an accessory, but nonetheless proceeded upon that theory at trial. Ultimately the evidence to convict Mr. Woodson of First Degree Robbery in this case was nonexistent, and therefore requires reversal. The Defendant submits that given the fact that he is confined to a wheelchair that no rational trier of fact could have found that all the elements of robbery existed in this case beyond a

reasonable, and thus his conviction should be set aside. In a sufficiency of the evidence challenge of a conviction, the United States Supreme Court of Appeals and this Honorable Court have held that “[t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and Syl. Pt. 1, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163.

Malicious Wounding occurs when any person maliciously shoots, cuts, stabs, or wounds any person, or by means causes him bodily injury with the intent to maim, disfigure, disable or kill. Malice has been defined as an action flowing from anger, hatred, revenge or any other wicked or corrupt motive; an act done with wrongful intent, under circumstances that indicate a heart and mind heedless of all social duty and fatally bent on mischief.

The evidence presented at trial did not show that the Appellant had malice nor that he caused Mr. Barkey bodily injury with the intent to maim, disfigure, disable or kill him. In the most favorable light to the State the evidence, which was contested by the Appellant’s testimony, indicated that Mr. Barkey was kicked and/or punched by the Appellant. No evidence showed that Mr. Woodson harbored an intent to do any permanent damage to Mr. Barkey, nor was anything presented tending to show that Mr. Woodson acted with the requisite malice necessary to support a conviction of Malicious Wounding. No weapons were implicated and no mens rea was shown to support the

conviction. Thus, there was absolutely no evidence presented that could convince a rationale trier of fact that all the essential elements of the crime were present beyond a reasonable doubt, and therefore this Court should reverse the conviction under Guthrie, and Jackson, supra.

V. POTENTIAL EXCULPATORY EVIDENCE IN THE FORM OF AN EYEWITNESS AT THE SCENE WAS ELICITED AT TRIAL BUT WAS NOT DISCLOSED TO THE DEFENSE PRIOR TO TRIAL

As noted by the West Virginia Supreme Court of Appeals, “In the context of criminal trials, it is without question that it is **a constitutional violation of a defendant's right to a fair trial for a prosecutor to withhold or suppress exculpatory evidence.**” *Lawyer Disciplinary Bd. v. Hatcher*, 199 W.Va. 227, 232, 483 S.E.2d 810, 815 (1997). This holding derives its authority from the United States Supreme Court’s landmark decision in the case of *Brady v. Maryland*, 373 U.S. 83 (1963), holding, “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87. The United States Supreme Court has expanded upon its holding in *Brady*, in *United States v. Agurs*, 427 U.S. 97 (1976), holding that the prosecution has a duty to disclose exculpatory evidence whether a request is made for it or not, and, in *United States v. Bagley*, 473 U.S. 667 (1985), holding that there is **no difference between exculpatory and impeachment evidence for Brady purposes.** See, e.g., *Youngblood v. West Virginia*, United States Supreme Court No. 05-6997

(Decided June 19, 2006) (Noting, “**This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence**”). The decision in *Bagley* also held that exculpatory or favorable evidence is material to a defendant “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Bagley*, 473 U.S. at 682. See Syl. pt. 6, *State v. Kerns*, 187 W.Va. 620, 420 S.E.2d 891 (1992); *State v. Ward*, 188 W.Va. at 391, 424 S.E.2d at 736; *State v. Fortner*, 182 W.Va. at 353, 387 S.E.2d at 820. In another decision, *Kyles v. Whitley*, 514 U.S. 419 (1995), several implications flowing from *Bagley* were expounded. First, *Kyles* held that under *Bagley* “a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.” *Kyles*, 514 U.S. at 434. Essentially, under *Bagley* the issue becomes, not whether the disclosure would have resulted in acquittal, but, whether, in the absence of the evidence, the defendant received a fair trial. Thus, establishing reasonable probability under *Bagley* means showing that the government’s nondisclosure undermines confidence in the outcome of the prosecution. *Id.*

In the instant proceeding during the testimony of the State’s star witness, the witness indicated at page 92 of the Trial Transcript, that he heard a lady from a nearby apartment who was apparently witnessing the event. Such potential eyewitness to the crime was apparently never disclosed by the

State prior to trial despite their having previously taken statements from the alleged victim. Thus, if the State was aware of the potential eyewitness, such witness could have potentially provided exculpatory information to the defense but was not disclosed prior to trial. Therefore, the discovery of such witness during the prosecution's case-in-chief, should warrant reversal. Specifically, the testimony of this undisclosed eyewitness could have supported the Appellant's version of the events or at least impeached the victim's testimony, and therefore the outcome of the trial is called into serious question, and a reasonable probability exists that the result of the trial would have been different.

VI. THE SENTENCES ORDERED BY THE TRIAL COURT ARE EXCESSIVE AND CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

The Appellant, 49-year-old, William Woodson was sentenced to a thirty-five (35) year term of imprisonment on Count I of the Indictment, First Degree Robbery, and received a consecutive sentence of imprisonment on Count II, Malicious Wounding for a period of two (2) to ten (10) years. Upon information and belief, the co-defendant in these crimes, pled guilty, and received a sentence of five (5) to eighteen (18) years imprisonment.

Evidence at trial indicated that the co-defendant, Edward Tom Brown, was the principal aggressor in this matter, and that the Appellant, Mr. Woodson, if involved at all, was involved only as an accessory. Nonetheless, the co-defendant pled guilty to second degree robbery and received a five to eighteen (5-18) year sentence. The disparity between the sentences of these co-

defendants should lead this Court to determine that Mr. Woodson's sentence is improperly excessive and disproportionate to that of his co-defendant and thus constitutes cruel and unusual punishment. Furthermore, Mr. Woodson's extensive medical problems from the spinal injury which necessitates his being confined to a wheelchair, combined with his age, of 49 years, and prior substance abuse problems makes his sentence of thirty-five years and two to ten years, running consecutively to very likely be a life sentence. Given the aforementioned lack of evidence to support the convictions it is excessive and disproportionate to have this Appellant sentenced to such a lengthy prison term, when the principal aggressor, the co-defendant, will be back out on the streets considerably more quickly. Therefore, such sentences require reversal for resentencing in line with a sentence more akin to that of the co-defendant.

The Appellant submits that the consecutive sentences he received in the above-referenced criminal matter were disproportionate to the sentence received by the co-defendant, who was the principal aggressor in the offense, and were disproportionate to sentences given other offenders convicted of the same and/or similar crimes, and as a result that said sentence is illegal as it violates his Constitutional rights to be free from Cruel & Unusual Punishment. The Appellant recognizes that his sentence is within legislatively prescribed limits, however, he submits that the severity and length of his sentence is "shocking" and "offensive to human dignity," and constitutes an abuse of discretion by the Court, when his co-defendant received a considerably lighter sentence upon his plea of guilty.

Punishment may be constitutionally impermissible, although not cruel or unusual in its method, **if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity**, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense. (*emphasis added herein*), **Syl. Pt. 5, State v. Cooper**, 172 W.Va. 266, 304 S.E.2d 851 (1983).

In Syllabus Point 8 of **State v. Vance**, 164 W.Va. 216, 262 S.E.2d 423 (1980), the West Virginia Supreme Court of Appeals held that “Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: ‘Penalties shall be proportioned to the character and degree of the offence.’” In that same case, the W.Va. Supreme Court also recognized that, “[a] criminal sentence may be so long as to violate the proportionality principle implicit in the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.” *Id.*, Syllabus Point 7. The Appellant, Mr. Woodson submits to this Honorable Court that the effective length of his sentence is tantamount to a life sentence, and that this severely lengthy sentence is wholly disproportionate to the offenses of which he was convicted, given the lack of evidence supporting the same, wholly disproportionate to the sentence received by his co-defendant, the principal aggressor of the offenses, and thus it violates his constitutional rights to be free from cruel and unusual punishment.

Although this high Court has generally declined to intervene in cases where judicially imposed sentences are within legislatively prescribed limits, this Supreme Court has also held that “when our sensibilities are affronted and proportional principles ignored, there is an abuse of discretion that must be corrected.” **State v. Cooper**, 172 W.Va. 266 at 271, 304 SE.2d 851, 856 (1983). The Appellant submits that given the sentence received by the co-defendant, who was the principal aggressor of the offense, the Appellant’s age and serious medical conditions, and other factors within the pre-sentence report, render the outrageously lengthy sentence he received to be unfair, unconstitutional, offensive to human dignity and sensibilities, disproportional, cruel and unusual, and constitutes such an abuse of discretion and a violation of his constitutional rights, and thus it must be corrected under **Cooper**, *supra*, and its progeny. In **State v. David D.W.**, 214 W.Va. 167 at 177, 588 S.E.2d 156, (2003), the Supreme Court again quotes **Cooper**, *supra.*, and states that:

“ In determining whether a sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, two tests are employed. The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test. **Cooper**, *supra*, at 172 W.Va. at 272, 304 S.E.2d at 857.

The Appellant, Mr. Woodson, submits that his sentence in this matter would pass this subjective test as violating the proportionality principle, as it is so shocking in its length and severity given the nature of the offenses, the

length of the sentence of the primary aggressor, his co-defendant, Appellant's criminal history, Mr. Woodson's serious medical conditions, and the lack of permanent damage done to the victim and the small monetary amount of loss to the victim. This Honorable Court recognized in **State v. McKenzie**, that disparate sentences of codefendants that are similarly situated may be considered in evaluating whether a sentence is so grossly disproportionate to an offense that it violates our constitution. 166 W.Va. 790, 277 S.E.2d 624. If defendants are similarly situated, some courts will reverse on disparity of sentence alone. See **State v. Cooper**, supra, citing e.g. **People v. Godinez**, 47 Ill Dec. 311, 92 Ill.App.3d 523, 415 N.E.2d 36 (1980), **People v. Catalano**, 101 Misc.2d 436, 421 N.Y.S.2d 310 (1979). Although Mr. Woodson's case does not involve a recidivist life sentence, the rationale utilized by this Honorable Court in determining whether such cases involved disproportionate sentences, is highly instructive and applicable to the same determination in the case at bar.

In the alternative, the Appellant submits that an examination of the criteria under the objective test would definitely render his sentence disproportionate and thus unconstitutional. Syllabus Point 5 of **Wanstreet v. Bordenkircher**, 166 W.Va. 523, 276 S.E.2d 205 (1981) sets forth the objective test on this issue as follows:

In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, 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.

Mr. Nelson submits that if all of these factors are considered in the instant case, that it is clear that his current sentence is disproportionate and therefore unconstitutional. The Appellant, who is confined to a wheelchair received a much longer sentence than his co-defendant, who was the primary aggressor, and who has two strong working legs, and who inflicted most if not all of the physical damage upon the victim. Appellant's sentence of 35 years for the First Degree Robbery of just over \$6.00 (six dollars) and two to ten years for the Malicious Wounding offense, said sentences to run consecutively, are grossly disproportionate to the sentence of five (5) to eighteen (18) years given to his co-defendant, who pled guilty, and in effect such sentences may amount to life imprisonment for Mr. Woodson, given his age and serious medical conditions. Appellant submits that the trial in effect punished him for exercising his constitutional rights to have a jury trial, and that the lengthy sentence is wholly disproportionate to his role in the offenses and the sentence of his co-defendant, and the imposition of the sentence by the trial court abused its discretion and violated the proportionality clauses in the West Virginia and United States Constitutions regarding cruel and unusual punishment.

Although this Honorable sustained a twenty-five year term of imprisonment in *State v. Newman*, 108 W.Va. 642, 152 S.E. 195, 197 (1930), the Court also stated therein as follows:

It would not be clear to the mind of the layman what impelled the difference in punishment of two persons each equally guilty. While the sentence of Kirtley for larceny has no bearing on the severity of the punishment given Newman, the fact that Kirtley escaped the charge of robbery, of which he was clearly guilty, beclouds the justice of the severe punishment upon his companion

in that crime. The primary object of punishment is retributory justice, and unless such justice be shown in the sentence of the court it is not likely to deter others from committing crime nor to reform the person sentenced. An excessive punishment, instead of being a deterrent, often results in the generation of an angry public contempt of justice because of its severity, and does not reform the criminal who perceives injustice towards himself. The best course for the courts is to adapt the duration of the punishment to the prisoner's guilt, keeping in view his character and susceptibility to reformation as an ingredient 1 Kerr's Whart. Crim.Laws, §§ 12, 22. These general observations are here made because some of our courts too often impose such severe and excessive punishments are calculated to bring the administration of justice into public disfavor.

The Appellant submits that the imposition of such a lengthy, severe, excessive, and disproportionate sentence upon him as opposed to the sentence received by his co-defendant the primary aggressor in the offenses violates these principles of justice and fairness.

State v. Houston, 166 W.Va. 202, 273 S.E.2d 375 (1980), involved review of the term of an armed robbery sentence to determine if it was disproportionate, and in that opinion the Court addressed factors that would bear upon the appropriateness of the sentence, and quoting from **People v. Adkins**, 41 Ill.2d 297, 300-01, 242 N.E.2d 258, 260-61 (1968), which stated in part:

It [the court] may look to the facts of the [crime], and it may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense. In doing so it may inquire into the general moral character of the offender, his mentality, his habits, his social environments, his abnormal or subnormal tendencies, his age, his natural inclination or aversion to commit crime, the stimuli which motivate his conduct, and, as was said in *People v. Popsecue*, 345 Ill. 142, 177 N.E. 739, 77 A.L.R. 1199, the judge should know something of the life, family, occupation and record of the person about to be sentenced.

Mr. Woodson, the Appellant, submits that the sentencing court considered none of these matters, as consideration of the same would have led to a more lenient sentence in line with the factors before the court at disposition.

VII. THE APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED IN THIS CASE, DUE TO APPELLANT'S TRIAL COUNSEL'S DEFICIENT CONDUCT WHICH RESULTED IN THE INTRODUCTION OF HEARSAY STATEMENTS OF THE CO-DEFENDANT AND OTHER WITNESSES IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHTS, FAILURE TO IMPEACH WITNESSES AND INTRODUCE EVIDENCE; AND DUE TO TRIAL COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE THE CASE AND PREPARE A DEFENSE, ALONG WITH OTHER ERRORS.

Article III, Section 14 of the Constitution of West Virginia, and the Sixth Amendment to the Constitution of the United States guarantee the right to the assistance of counsel. The right of one accused of a crime to the assistance of counsel is a fundamental right, essential to a fair trial. *Id.* Under both the United States Constitution and the Constitution of West Virginia, the right of a criminal defendant to assistance of counsel is a right to effective assistance of counsel. *State v. Reedy*, 177 W.Va. 406 (1986).

That the right to assistance of counsel in criminal cases includes the right to effective assistance of counsel was articulated by the United States Supreme Court in the leading case of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Strickland*, a two-pronged test was established for the review of claims of ineffective assistance of counsel. Generally, the first prong requires that a criminal defendant show that counsel's performance was deficient, and the second prong requires a showing

that the deficient performance prejudiced the defense. The *Strickland* test was expressly recognized by the West Virginia Supreme Court of Appeals in *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Describing the test in detail, Syllabus Point 5 of *Miller* holds:

In the West Virginia Courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

The West Virginia Supreme Court of Appeals further held in Syllabus Point 1 of *State ex rel. Vernatter v. Warden*, 207 W.Va. 11, 528 S.E.2d 207 (1999), as follows:

An ineffective assistance of counsel claim presents a mixed question of law and fact; we review the circuit court's findings of historical fact for clear error and its legal conclusions *de novo*. This means that we review the ultimate legal claim of ineffective assistance of counsel *de novo* and the circuit court's findings of underlying predicate facts more deferentially. (Quoting *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 320, 465 S.E.2d 416, 422 (1995)).

The first prong of the *Strickland* test requires the court to review counsel's performance and determine whether it was deficient. In doing so, Syllabus Point 6 of *Miller*, 459 S.E.2d 114 (W.Va.1995) holds that,

Courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Additionally, as noted by the Court in Syllabus Point 21, of *State v. Thomas*, 203 S.E.2d 445 (1974), where a counsel's performance arises from occurrences involving strategy or tactics, his conduct will be deemed effective assistance of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused. Although a presumption exists that counsel's conduct falls within the wide range of reasonable professional assistance, such presumption may be overcome where counsel's conduct was clearly outside the range of professionally competent standards. *Strickland; Miller, supra*.

Following the showing that counsel's conduct fails to meet this standard, a court then must determine whether there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland; Miller, supra*. Moreover, *Cannellas v. McKenzie*, 160 W.Va. 431, 236 S.E.2d 327 (1977), provides: "In determining appropriate relief in habeas corpus for ineffective assistance of counsel at the appellate stage, the court should consider whether there is a probability of actual injury as a result of such ineffective assistance or alternatively, whether the injury is entirely speculative or theoretical, and where there is a probability of actual injury, the appropriate relief is discharge of the appellant from custody."

In the instant case, the Appellant's trial counsel's conduct was deficient in a number of ways: 1) failure to object, ask for mistrial or otherwise address the introduction of the co-defendant's hearsay statements; his elicitation of

drug and racial evidence into the trial, his failure to adequately investigate this case, and numerous other errors were so egregious as to go beyond any realm of objectively reasonable conduct of a criminal defense attorney. The unprofessional conduct of Mr. Cometti in that the errors in examining witnesses were enough to have sunk the defense.

A. Trial Counsel's Failure to Investigate the Case.

The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. The West Virginia Supreme Court has held that in order to provide effective assistance of counsel to an accused in a criminal proceeding, counsel must make a "reasonable investigation" of the case. See Syl. pts. 1 and 2, *Ronnie R. v. Trent*, 194 W. Va. 364, 460 S.E.2d 499 (1995); *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995). Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must, at a minimum, conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. *Wickline v. House*, 188 W.Va. 344, 424 S.E.2d 579 (1992) (per curiam); *State ex rel. Kidd v. Leverette*, 178 W.Va. 324, 359 S.E.2d 344 (1987). Thus, the presumption that counsel's conduct is reasonable is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation. *Wajda v. U.S.*, 64 F.3d 385, 387 (8th Cir.1995). As suggested in *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes

particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. Courts applying the *Strickland* standard have found no difficulty finding ineffective assistance of counsel where an attorney neither conducted a reasonable investigation nor demonstrated a strategic reason for failing to do so. *See Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir.1994).

In *Wickline, supra*, the Court found that trial counsel's failure to have an expert evaluate the defendant's neurological state at the time she waived her *Miranda* rights constituted ineffective assistance. The *Wickline* court noted, that by not properly investigating, in terms of obtaining an expert to review the defendant's mental state, given the facts available to the trial counsel indicating a problem therewith, was not merely a strategic decision, but was deficient under *Strickland/Miller*. Furthermore, the *Wickline* court held, given that the mental state went to the defendant's ability to waive her *Miranda* rights, and confess, the second prong of *Strickland/Miller* was also satisfied.

Likewise, in the instant case, Appellant's trial counsel, Mr. Cometti failed to adequately investigate the case. Given the fact that the Appellant is partially confined to a wheelchair, due to a gunshot wound which caused a spinal injury in the 1990s, as well as the Defendant's history of alcohol and substance abuse problems, a medical expert in the area of orthopedics and/or neurology, psychiatry, psychology, or even general medicine would have proved extremely beneficial to the defense, particularly with the alleged victim testifying that he felt the Defendant may have kicked him from the wheelchair up to fifty (50) times. Such a medical expert would have been able to examine the Appellant

and determine if he was physically capable of performing the kicking and/or hitting of the victim. Moreover, given the Appellant's lengthy history of alcohol and substance abuse, a psychiatric or psychological expert should have been consulted as to whether the Appellant even possessed the mental faculties to form the requisite intent to perform the alleged criminal actions of which he was accused. Instead Attorney Cometti failed to consult or hire any such medical experts, and instead relied solely on the Appellant's testimony to explain his medical condition. This cannot be considered a reasonable and competent strategy or any common sense way to mount a criminal defense; Attorney Cometti failed to hire any such medical experts to review the case, examine the Appellant, or testify at trial.

Thus, Cometti's failure to hire an expert in this case for the purposes of investigating the mental and physical capabilities of the Appellant was, under the first prong of *Strickland/Miller*, as explained by the Court in *Wickline*, deficient under an objective standard of reasonableness. Furthermore, given the complex nature of the Appellant's medical and mental conditions, and the highly probative value to the defense's investigation of this case, the second prong is also satisfied, in that an expert, would have been able to provide the defense with valuable insights as to the Appellant's actual capabilities for participation in the events that ultimately resulted in his conviction of two very serious felony offenses for which he was essentially given a life sentence, given the lengthy and consecutive nature of the sentences and his advanced age and medical condition.

Additionally, trial counsel's failure to hire a private investigator, and/or a medical expert, or to do any investigation into the story of the State's star witness and victim, Timothy Barkey, was likewise deficient conduct under the above standard. As noted in the testimony at trial and dwelled upon by the prosecution, the victim, Timothy Barkey, suffers from a traumatic brain injury, that affects his speech and response times, that he incurred during a car accident in the 1990s. Additionally, it is clear from the victim's testimony at trial and his prior written statements that his memory and recollection of the events varies from time to time, making his mental faculties a clear material issue for an adequate and competent trial defense of the Appellant. Thus, in order to provide an adequate and competent defense at trial, it would have been necessary for trial counsel to investigate whether this traumatic injury to the victim's brain would have affected the victim's memory and thus his recollection of the events in question.⁴ A medical expert should have been hired and consulted on this issue, since at trial it was entirely the victim's testimony that identified the Appellant as one of the perpetrators in these crimes. A minimal pre-trial investigation, such as hiring a private investigator to interview the victim may have also alerted trial counsel to the problems with the victim's memory, and then trial counsel could have impeached the victim's testimony at trial, or hired a medical expert to address the memory problems that the victim's severe brain injury entailed. This is only one small example of what might have turned up had Mr. Cometti done an adequate, or even

⁴ Testimony of Mr. Barkey at trial indicated that he may have had memory issues due to either his alcohol abuse or prior traumatic brain injury, or a combination thereof.

minimally competent investigation. The failure to do so indicates that trial counsel did not conduct the “reasonable investigation” required by the Court in its decisions *Ronnie R. v. Trent*, and *State ex rel. Daniel v. Legursky, supra*. Therefore, under *Strickland/Miller*, the adequacy of trial counsel’s investigation was deficient under an objective standard, and a different result was probable had such investigation been conducted. Therefore, this Court applying its prior decisions on this matter, should reverse.

Furthermore, it came out at trial that a potential eyewitness to the alleged crime had been seen/heard by the alleged victim. He testified on direct examination by the State that he, “heard a lady from a nearby apartment say, “Leave him alone.” And I yelled out, “Call 911”, and when I yelled out Call 911, they started kicking me harder and more frequently.” Trial Transcript pg. 92. As discussed *infra*, no such potential eyewitness was provided in discovery from the State. Nonetheless, an adequate investigation into this case prior to trial could have potentially uncovered the only eyewitness to this matter that was not directly involved in it, and thus the only objective testimony as to what happened. Despite this fact, the Appellant’s trial counsel failed to conduct such an investigation, and, thus, the Appellant was left without the ammunition he needed to present an adequate defense in the trial of this proceeding.

Furthermore, the Appellant’s trial counsel did not adequately prepare the Appellant prior to or during trial to determine whether or not he should waive his Fifth Amendment rights and testify in this proceeding. Additionally, the

trial counsel did not call any doctors that had previously treated Mr. Woodson, nor did he adequately investigate this matter prior to sentencing.

B. Improper Introduction of Co-Defendant Convictions and Co-Defendant's Hearsay Statements.

Prior to the Appellant's trial, his co-defendant, Edward Brown, had pled guilty to the robbery and assault on the victim, Timothy Barkey. As detailed above in this Petition, Attorney Cometti elicited evidence of the co-defendant's hearsay statements at the Appellant's trial in his cross-examination of the State's witnesses. Moreover, following this improper and prejudicial introduction, trial Attorney Cometti failed to object, move to strike, ask for a limiting instruction, or move for a mistrial. Such failure goes beyond mere incompetence, and under the *Strickland/Miller* test is clearly deficient under an objective standard of reasonableness.

Further, Attorney Cometti, on pages 121 through 127 of the Trial Transcript, introduces a prior statement of the State's star witness, the alleged victim, through the alleged victim, and allowed him to testify regarding said statement. The effect of this introduction did nothing more than bolster the alleged victim's statements at trial, and damage his own client's case.

Upon opening up this festering can of worms, trial counsel failed to object to the inadmissible evidence, failed to move to strike the answers, failed to ask the Court for a cautionary instruction, and failed to move for a mistrial in order to protect Appellant Woodson's right to a fair trial.⁵ Such failure to

⁵ Incidentally, the Trial Court had a responsibility to intervene when this happened. A cautionary instruction can limit the prejudice to the defendant. This instruction must be given in order to preserve a fair trial even if the

address the issue of a co-defendant's hearsay statements being introduced at trial violated the Appellant's right to the effective assistance of counsel, in that an attorney with the bare minimum of professional competency would not have stood idly by as improper and inflammatory evidence regarding the hearsay statements of a co-defendant was introduced in front of the jury. Such inaction was deficient under prong one of the *Strickland/Miller* test, and with regard to prong two, certainly there exists a reasonable probability that but for the introduction of the fact that a co-defendant in this case had been convicted a different result would of occurred. Furthermore, had defense counsel moved for a mistrial there was a reasonable probability that such motion would have been granted and, thus, a different result of this trial would have occurred.

Essentially defense counsel helped to convict his own client. He elicited the introduction of inadmissible and prejudicial evidence of co-defendant hearsay statements and further bolstered the State's case. Yet trial counsel failed to object, move to strike, ask or for a limiting instruction, or move for a mistrial. It is clear that the performance of defense counsel was, by any objective standard, deficient, and therefore satisfies prong one of the *Strickland* test. Furthermore, under the second prong of *Strickland*, a review of the evidence before the trial court shows that but for the improper evidence admitted into evidence through the victim's testimony and further elicited by the Appellant's trial counsel, and the failure of trial counsel to present an adequate and competent defense for the Appellant, a reasonable probability

defense lawyer caused the problem. In this case the Trial Court failed to do so. *See State v. Woods*, 167 W.Va. 700, 280 S.E.2d 309(1981).

certainly exists that the result of the proceeding would have been different. Thus, the Appellant's federal and state constitutional rights to the effective assistance of counsel were violated, and the Court should grant him relief on this ground.

C. Trial Counsel Failed to Reasonably Address the Violation of Appellant's Sixth Amendment Right to Confront the Witnesses Against Him.

The Sixth Amendment to the United States Constitution provides that “[i]n *all* criminal prosecutions, the accused *shall* enjoy the right” to be confronted with the witnesses against him. *Lilly v. Virginia*, 119 S. Ct. 1887 (1999). The purpose of this right is to, “...ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990). Moreover, the United States Supreme Court has held that where hearsay statements that do not fall within a “firmly rooted” exception to the hearsay rule are introduced at trial, the Confrontation Clause requires that a showing of “particularized guarantees of trustworthiness” of the statements be made, otherwise, such statements must be excluded. *Idaho v. Wright*, 497 U.S. 805 (1990); *Ohio v. Roberts*, 448 U.S. 56,66 (1980).

In Syllabus Point 13 of *In Interest of Anthony Ray Mc.*, 200 W.Va. 312, 489 S.E.2d 289 (1997), this Court held, “The burden [in a Confrontation Clause analysis] is squarely upon the prosecution to establish the challenged evidence is so trustworthy that adversarial testing would add little to its

reliability. Furthermore, unless an affirmative reason arising from the circumstances in which the statement was made provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.” Moreover, this Court has noted that where hearsay statements at trial likely result in a material contribution to the evidence against a criminal defendant, the trial court must engage in a detailed analysis of the statements admissibility. See *Naum v. Halbritter*, 172 W.Va. 610, 309 S.E.2d 109 (1983) (out-of-court statements by deceased prostitute that she had sexual relations with prosecuting attorney were not admissible in prosecution of prosecutor for false swearing, because of Confrontation Clause); See, e.g., *State v. Kennedy*, 205 W.Va. 224 (1999); *State v. Jarrell*, 191 W.Va. 1 (1994) ; *State v. Mullens*, 179 W.Va. 567 (1988); *State v. James Edward S.*, 184 W.Va.408 (1990).

Under the West Virginia and United States Supreme Court’s analysis of the Confrontation Clause, the admission of the hearsay statements of Appellant’s co-defendant at trial clearly violated the Appellant’s right to confront the witnesses against him. Nonetheless, after eliciting the aforementioned hearsay statements regarding the material issue of what the co-defendant said, trial counsel failed to object, failed to move to strike, and failed to ask for a mistrial. Under the *Strickland/Miller* test such failure certainly meets prong one, in that Appellant’s trial counsel did not merely stand idly by as his client’s constitutional rights were butchered, but in fact,

Mr. Cometti, in effect, wielded the knife. And given the material nature of the statements to the case at bar, prong two of *Strickland/Miller* was also satisfied.

Such hearsay statements of the Appellant's co-defendant were certainly in violation of the Confrontation Clause, under the litany of *Ohio v. Roberts*, and this Court's *Naum* case. Furthermore, Mr. Cometti, during his cross examination of the victim elicited the introduction of prejudicial hearsay statements of the co-defendant, then failed to object, move to strike, move for a mistrial, or ask for a limiting instruction.

Ultimately, the Appellant's Sixth Amendment right to confront the witnesses against him was violated in this case due to his trial counsel's conduct. Under the standards set forth above from both the United States and West Virginia Supreme Courts, where hearsay, that does not fall within a firmly rooted exception is introduced at trial, a showing must be made that such hearsay is inherently trustworthy. No such showing was made in this case. Nonetheless, Attorney Cometti failed to object to its introduction, failed to move to move to strike, or for a mistrial, and failed to ask for a limiting instruction. Such failure is clearly deficient under reasonable standards, and thus, prong one of the *Strickland/Miller* test was violated. Furthermore, given the nature of the statements made, had they not come into this trial a different result is surely probable. Therefore, Attorney Cometti's conduct with regard to the violations of the Appellant's Sixth Amendment rights constituted ineffective assistance of counsel.

D. Trial Counsel's Failure to Strike Harmful Jurors

During jury selection it came to light that the two jurors had been the victims of domestic violence. Additionally these two victims were the only African American jurors on the panel. One of these jurors, Juror Long, admitted during voir dire to having known the investigating officer in this matter in school some years before. Though not struck for cause, the Appellant contends that he asked his trial counsel to strike these persons. Nevertheless both women remained on the jury panel.⁶

E. Elicitation of Racial Bias and Prior Bad Acts

As detailed above in this Brief, the Appellant's trial counsel elicited extremely damaging and improper testimony through his questioning of the alleged victim, in the form of potential racial bias of the Appellant and prior bad acts of the Appellant. Such elicitation could have no strategic purpose. The combination of being inadequately prepared for trial and generally making poor decisions during trial led to such introduction. Additionally, the failure to seek corrective measures from the trial court upon stepping into these tragic problems constitutes ineffective assistance pursuant to the *Strickland/Miller* analysis.

F. Cumulative Effect

In addition to the individual deprivations of the Constitutional right to the effective assistance of counsel, under *Strickland* and its progeny, Defense Counsel Cometti conducted himself in such a manner during the trial of this

⁶ The Appellant additionally asserts that the jury composition including these jurors was unfair and prejudicial and violated his right to a fair trial substantively as well as through the ineffective assistance of counsel.

case that the cumulative effect, was enough to have sunk the defense. Cometti's elicitation and failure to address the introduction of co-defendant's hearsay statements in violation of Appellant's Sixth Amendment Rights; his elicitation of racially biased motivations and other bad acts of his own client, his failure to investigate; his failure to adequately meet with his client prior to trial; his failure to strike two African-American female jurors that the Appellant had asked him to strike; his failure to call a medical expert to discuss the Appellant's physical condition as part of the defense would necessarily need to address whether the Appellant was physically capable of doing any of the actions, i.e. kicking and hitting the victim, of which he stood accused; trial counsel's failure to obtain a medical expert to address whether the Appellant possessed the mental functioning necessary to form the intent required to commit such crimes; and numerous other errors, both cumulatively and individually, were so egregious as to be beyond any realm of objectively reasonable conduct of a criminal defense attorney. Therefore, under the *Strickland/Miller* test, both prongs are satisfied in this case and the convictions should be reversed by this Court.

CONCLUSION

The Appellant, 49-year-old, William Woodson's rights were violated during the trial of his case, as detailed above, in the following ways: 1) evidence of racial bias of the Appellant was improperly introduced at trial; 2) evidence of prior bad acts and or prior crimes of the Appellant was improperly

introduced at trial; 3) Appellant's Sixth Amendment Right to Confront the Witnesses against him was violated in that hearsay statements of the co-defendant were admitted at trial; 4) the evidence presented at trial was insufficient to prove that the Appellant robbed the alleged victim and was likewise insufficient to prove malicious wounding, additionally, the State did not charge the defendant with being an accessory but then proceeded on that theory at trial, thus the evidence presented constitutes a variance from the indictment, furthermore, the indictment did not adequately charge the crimes for which the Appellant was convicted; 5) evidence was elicited at trial of a potential exculpatory witness to the events giving rise to Appellant's convictions, and such witness was never identified by the State or disclosed to the Defense prior to trial; 6) the sentence ordered by the trial judge was extremely excessive, disproportionate to that of his co-defendant, thus it constitutes cruel and unusual punishment and constituted an abuse of discretion by the trial court; 7) Mr. Cometti's representation of the Appellant constituted ineffective assistance of counsel. Any one of these grounds standing alone would warrant reversal of this case for retrial and/or resentencing. Cumulatively, these errors demonstrate that Mr. Woodson was not afforded the basic rights all citizens of West Virginia are entitled to, and, therefore, a reversal of this case for a new and fair trial and/or at least resentencing is required in the interests of justice and fundamental fairness. "Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from

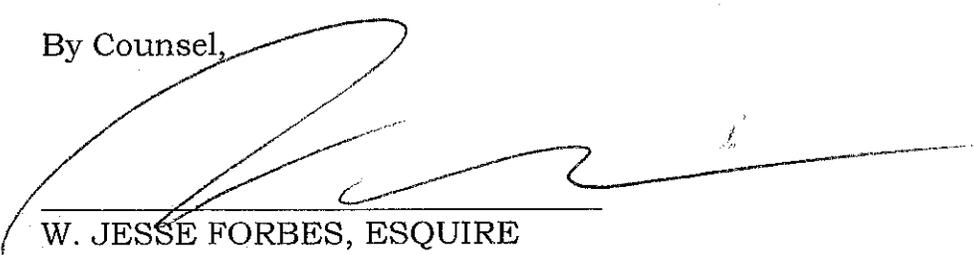
receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.” Syllabus Pt. 11, State v. Cecil, 2007 WVSC 33298-112107 citing Syllabus Pt. 5, State v. Smith, 156 W.Va. 385, 193 S.E.2d 550 (1972). Additionally, Mr. Woodson asserts that the errors that reveal themselves upon a review of the record in this proceeding warrant reversal of his convictions and sentence and require a new trial.

RELIEF REQUESTED

The Appellant, 49-year-old William M. Woodson respectfully prays that this Honorable Court will, for the foregoing reasons, set aside his convictions on the crimes of First degree robbery, and Malicious Wounding and enter judgment of acquittal, or, in the alternative, to grant him a new trial on those charges and order his release on bail pending such trial, or to remand his case for re-sentencing in a more lenient manner. The Appellant further prays that this Honorable Court grant any and all additional relief it deems appropriate.

Respectfully submitted,
WILLIAM M. WOODSON,
Appellant.

By Counsel,

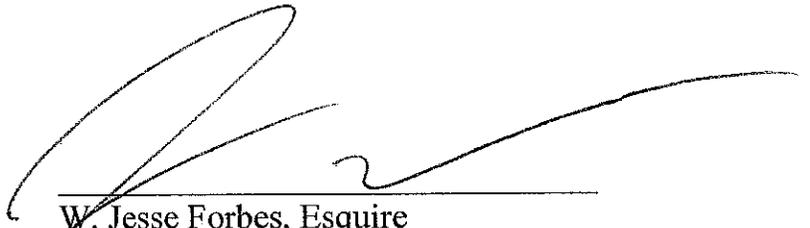


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CERTIFICATE OF SERVICE

I, W. JESSE FORBES, counsel for Appellant, do hereby certify that I served the foregoing "BRIEF ON BEHALF OF APPELLANT" on counsel for the Appellee via hand delivery, this 14th day of January, 2008, addressed as follows:

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