

No. 35529

IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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Charleston

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APPELLANT'S APPEAL

STATE OF WEST VIRGINIA, PLAINTIFF BELOW /APPELLEE,

v.

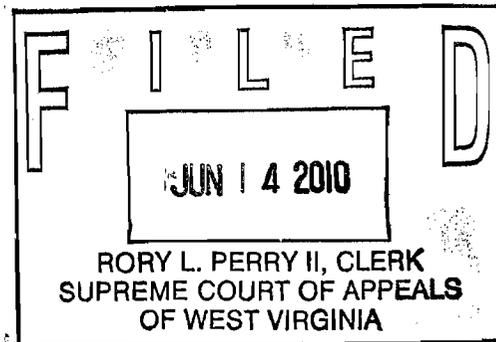
LARRY S. WHITE, II, DEFENDANT BELOW /APPELLANT

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Brief of the Appellant, Larry S. White, II Upon Appeal Granted on March 30, 2010  
from Judgment of January 2, 2009 From the Circuit Court of Jackson County

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## **I. INTRODUCTION AND JURISDICTIONAL BASIS**

Now comes the Appellant, Larry S. White, II, by counsel, Matthew L. Clark, pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure and files the within Brief of Appellant upon this court's Order of March 30, 2010, granting an appeal of Appellant's convictions for the offenses of Murder in the First Degree With Recommendation of Mercy, and Conspiracy to Commit a Felony, and consecutive sentences thereon rendered in the Circuit Court of Jackson County, West Virginia, Case Number 08-F-11, on the 22<sup>nd</sup> day of December, 2008 by Order, entered on the 2<sup>nd</sup> Day of January, 2009. Further, Appellant appeals the court's denial of Defendant's Motion for New Trial and Defendant's Amended Motion for New Trial, said Orders denying said motions, entered on the 2<sup>nd</sup> day of January, 2009 and the 24<sup>th</sup> day of September, 2009.

## **II. STATEMENT OF FACTS**

The Appellant, Larry S. White, II, was charged by a True Bill Indictment by the Grand Jury of Jackson County, West Virginia on the 26<sup>th</sup> day of February, 2008 with the crimes of murder and conspiracy to commit a felony. R. 1-2.

At trial, the State of West Virginia alleged that Appellant, Larry S. White, II, plotted and acted in concert with another individual, Roseann Osborne<sup>1</sup>, in carrying out the murder of Ms. Osborne's estranged husband, Mohammed Mahrous.

During the discovery phase of the case, it was revealed that the investigating authorities had conducted a warrantless search of a cellular telephone (#434-688-1106) obtained from the automobile believed to be owned by the victim, Mohammed Mahrous, and co-Defendant, Osborne, via the issuance of a warrant. However,

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<sup>1</sup> Roseann Osborne, a co-defendant, in this matter (Jackson County Case No. 08-F-12) was tried subsequent to Appellant and convicted of the same charges.

discovery also revealed that the subject cell phone, though lawfully seized pursuant to a warrant, was subjected to a search of its electronic contents absent further warrant. From that cell phone, investigators discovered that Appellant, Larry S. White, II, had made payments on said account and located an address book entry for "ATC". A call to the address book entry "ATC" resulted in police contact with the Appellant. Subsequent investigation revealed that Appellant was the account holder and thus owner of the searched cellular phone.

The evidence obtained from the cell phone's memory resulted in the State's investigators learning another cell phone number for Appellant, White, for which it obtained a lawful warrant for Cellular Site Tower Information of Appellant's Cellular Phone Account (#434-688-1505), Appellant White's other cell phone account. It also enabled the State to locate Appellant, White, and conduct a telephonic interview and subsequent in-person interview that resulted in Appellant, White, implicating himself in the charged crimes. R. 33-154.

Appellant, White, moved the court to suppress the evidence found in the search of the first cell phone's memory asserting violation of his Fourth Amendment guarantees against unlawful search or the otherwise lawfully seized first cell phone (434-688-1106) and also for suppression of the subsequent cellular tower location information from the second phone (434-688-1505) and statements given by him as the fruit of the poisonous tree. R. 155-186. The trial court denied the suppression motions. R. 195-207.

At trial, the court permitted individual voir dire of potential jurors. Defendant, White, made motions to strike several jurors for cause. Of those, the court denied

challenges to jurors, Tim Walters, Mary Conger, Michelle Lemon, and Cassia Scott. R. 393-396, 487-495.

Once testimony commenced, the State presented its case, followed by the Appellant's case. In Appellant's case, the defense presented the testimony of Timothy Saar, Ph.D. who testified that Appellant, Larry S. White, II, was suffering from Delusional Disorder-Persecutory Type that prevented him from being able to premeditate and deliberate or form the specific intent to kill Mohammed Mahrous. R. 1330-1404. The State rebutted Dr. Saar's testimony with that of David Clayman, Ph.D. who testified to his opinion that Appellant, White, did possess the requisite mental facilities to premeditate, deliberate and form the intent to kill. R. 1412-1457.

At the close of the State's case, Appellant moved for a judgment of acquittal, arguing that the State failed to present evidence that he engaged in a conspiracy and that the State failed to present any evidence of premeditation and deliberation to sustain a first degree murder charge. The motion was denied by the court. R. 1317-1319.

At the close of evidence, after hearing the instructions of the court and arguments of counsel, the jury rendered a verdict of Guilty of First Degree Murder with a Recommendation of Mercy and Guilty of Conspiracy to Commit a Felony. R. 1555-1559. Shortly, thereafter, the court denied Defendant's Motion for a New Trial and sentenced Appellant White accordingly, specifying that the sentences be served consecutively. R. 233-239.

Subsequent to sentencing, Defendant filed a Renewed Motion for New Trial and then an Amended Renewed Motion for New Trial asserting that the State had failed to disclose certain Brady material to the Defendant prior to the trial, emphasizing a

certain video that it was alleged by the Appellant showed him leaving the scene of the crime. R. 240-247. Said video contained a time stamp that was contrary to the timeline of the State's case and thus exculpatory on the elements of premeditation and deliberation. After holding evidentiary hearing and hearing the arguments of counsel, the court denied the said Motions. R. 249-256.

### **III. ASSIGNMENTS OF ERROR**

**A. The trial court erred in failing to strike two prospective jurors for cause, Michelle Lemon and Cassia Scott, upon motion of Appellant's counsel based upon various answers given by the prospective jurors in voir dire.**

**B. The trial court erred in not granting Appellant's Motion for Judgment of Acquittal made at the close of the State's case in chief and renewed following the jury's verdict as the evidence on which jury reached a verdict of guilt on the Charges of Murder in the First Degree and Conspiracy to Commit a Felony-Murder in the First Degree was insufficient as a matter of law for a reasonable jury to find any conspiracy existed that the Appellant acted with premeditation, deliberation or a specific intent to kill the alleged victim**

**C. The trial court erred in admitting evidence that was fruit of an unlawful search of a cellular telephone owned by the Appellant, Larry S. White, II, and erred in its holding that Appellant did not maintain a legitimate, reasonable expectation of privacy in the electronic data of the cellular telephone. Said unlawful search produced evidence the provided a foundation to obtain further information including search warrants for Appellant's cellular phone accounts. Absent information obtained from the initial unlawful search, little, if any, evidence was present supportive of the issuance of a search warrant for Appellant's Cellular Phone Tower Information, police authorities would not have been able to make contact with Appellant's other phone for an initial telephonic interview and thus little evidence supportive of the convictions for Murder in the First Degree or Conspiracy to Commit a Felony-Murder in the First Degree.**

**D. The trial court erred in admitting evidence in violation Rule 801(d)(2)(e) of the West Virginia Rules of Evidence absent a proper foundation for admission of the statements of alleged co-conspirator.**

**E. The trial court erred in failing to grant the Appellant's Amended Renewed Motion for New Trial Filed in Light of Post-Trial Disclosure to Defendant of Material That Should Have Been Disclosed to Defendant Prior to Trial Pursuant to Brady v. Maryland.**

**F. The trial court erred in denying Appellant's Motion for New Trial as the evidence at trial was insufficient to support of verdicts of Murder in the First Degree and Conspiracy.**

**G. The trial court erred in denying Appellant's Motion for New Trial as cumulative error present in the pretrial, trial and post-trial proceedings mandated that a new trial be granted.**

#### **IV. NOTE OF ARGUMENT**

The Appellant, Larry S. White, II sets forth the following argument in support of the Assignments of Error set forth herein. Appellant addresses each Assignment of Error separately for the convenience of this Honorable Court.

**A. The trial court erred in failing to strike two prospective jurors for cause, Michelle Lemon and Cassia Scott, upon motion of Appellant's counsel based upon various answers given by the prospective jurors in voir dire.**

The trial court appropriately engaged in extensive voir dire of each prospective juror in this case. However, Appellant takes issue with the trial court's adverse ruling on Appellant's motions to disqualify for cause two prospective jurors, Michelle Lemon and Cassia Scott. This court has held that,

When a prospective juror makes a clear statement of bias during *voir dire*, the prospective juror is automatically disqualified and must be removed from the jury panel for cause. However, when a juror makes an inconclusive or vague statement that only indicates the possibility of bias or prejudice, the prospective juror must be questioned further by the trial court and/or counsel to determine if actual bias or prejudice exists. Likewise, an initial response by a prospective juror to a broad or general question during *voir dire* will not, in and of itself, be sufficient to determine whether a bias or prejudice exists. In such a situation, further inquiry by the trial court is required. Nonetheless, the trial court should exercise caution that such further *voir dire* questions to a prospective juror should be couched in neutral language intended to elicit the prospective juror's true feelings, beliefs, and thoughts-and not in language that suggests a specific response, or otherwise seeks to rehabilitate the juror. Thereafter, the totality of the circumstances must be considered, and where there is a probability of bias the prospective juror must be removed from the panel by the trial court for cause.

State v. Newcomb, 679 S.E.2d 675 (W. Va. 2009). Furthermore, this court has held,

The language of W. Va. Code § 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error.<sup>2</sup>

State v. Phillips, Syl Pt. 8, 461 S.E.2d 75 (1995). The United States Supreme Court of Appeals has recognized that a trial court may exclude for cause any prospective juror who will be unable to render an impartial verdict based upon the evidence. See Irvin v. Dowd, 366 U.S. 717, 723 (1961). Though challenges for cause are ordinarily left to the sound discretion of the trial court, this Court must evaluate the challenges to these jurors in light of the circumstances of each particular case.

With regard to Michelle Lemon, Ms. Lemon properly informed the court that she had a personal relationship with Detective Anthony J. "Tony" Boggs, the lead investigator in the case. She testified that she visited Detective Boggs' mother frequently over a ten year period. She referred to Detective Boggs as "Tony," indicative of a personal relationship with him. The trial court overruled Defendant's objection to this juror on two grounds that the testimony did not establish a personal relationship between the juror and Detective Boggs and that such relationship would not influence her decision making in the case. R. 393-396.

With regard to Cassia Scott, her testimony revealed that she was a Jackson County Courthouse employee and had knowledge of the case in that capacity. R. 488. She did state that she believed she could be fair and impartial. R. 488. However, she also informed the court that her "perception was a sneak attack." R. 489. Ironically, the State argued that Defendant's actions were a "sneak attack." R. 730, 860-862. She also testified that she would be concerned with "keeping my emotions in check."

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<sup>2</sup> Each of the jurors challenged for cause were struck by the Appellant via peremptory challenge.

R. 490. When informed of the likely evidence in the case of the existence of an extra-marital affair that Defendant engaged and that psychological testimony would be a part of Defendant's defense, she was equivocal in her answers, "I don't know if I could - I think I could." Defendant moved to strike for cause on the basis of the juror's equivocation. The court overruled the motion. R. 494-495.

The very nature of Ms. Scott's disclosures reveal a predisposition toward Appellant's guilt, i.e. that he engaged in a sneak attack, and that she was equivocal on her ability to critically evaluate defense psychological testimony.

This Court has held that a trial judge has the obligation to determine whether bias or prejudice exists on a juror's part. Though the court may consider the juror's statements as relevant, the court must not take the juror's opinion of her own impartiality as conclusive. Syl. Pt. 4, State v. Miller, 476 S.E.2d 535 (W. Va. 1996); State v. Ashcraft, 309 S.E.2d 600 W. Va. 1983); State v. Williams, 230 S.E.2d 742 (W. Va. 1976). In the present case, the trial court erred and abused its discretion in taking each juror's declaration of impartiality at face value.

Thus, in view of these factors, the trial court abused its discretion in denying the Defendant's challenges of Ms. Lemon and Ms. Scott. This Court has acknowledged that the goal of jury selection is "to secure jurors who are not only free from prejudice, but who are also free from the suspicion of prejudice." State v. Beck, 286 S.E.2d 234 (W. Va. 1981). Abandonment by the trial court of its role in considering these jurors' bias against Appellant, outside of the jurors' declarations of impartiality, constitutes reversible error and thus requires that Appellant be granted a new trial on the charges.

***B. The trial court erred in not granting Appellant's Motion for Judgment of Acquittal made at the close of the State's case in chief and renewed following the jury's verdict as the evidence on which jury reached a verdict of guilt on the Charges of Murder in the First Degree and Conspiracy to Commit a***

***Felony-Murder in the First Degree was insufficient as a matter of law for a reasonable jury to find any conspiracy existed that the Appellant acted with premeditation, deliberation or a specific intent to kill the alleged victim***

At the close of the State's case, Defendant moved for Motion for Judgment of Acquittal pursuant to Rule 29(a) of the West Virginia Rules of Criminal Procedure. Defendant asserted that the State of West Virginia had failed to make a *prima facie* showing to the jury of the requisite elements of premeditation and deliberation on the charge of Murder in the First Degree and no evidence existed of a common plan a prerequisite to establishment of a conspiracy charge. The trial court denied the motion setting forth its grounds for denial. R. 1317-1319. This court has held,

Upon a motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to [the] prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.

State v. West, 169 S.E.2d 716 (W. Va. 1969); Syl Pt. 1, State v. Catlett, 536 S.E.2d 728 (W. Va. 2000). In the present case, substantial evidence did not exist upon which a jury might have found Appellant guilty beyond a reasonable doubt. The trial court based its ruling on inferences that might be made from the State's evidence presented. R. 1317-1319. A review of the State's evidence reveals that no substantial evidence existed of a conspiracy, elaborate or otherwise, to commit the crimes charged. Further, the only evidence of record was indicative of a spontaneous act rather than a premeditated and deliberate killing. As such, the trial court erred in not directing a verdict in favor of the Appellant and refusing to allow jury consideration of the charges of murder in the first degree and conspiracy. As such, a new trial is warranted.

***C. The trial court erred in admitting evidence that was fruit of an unlawful search of a cellular telephone owned by the Appellant, Larry S. White, II, and erred in its holding that Appellant did not maintain a legitimate, reasonable expectation of privacy in the electronic data of the cellular telephone. Said unlawful search produced evidence the provided a foundation***

***to obtain further information including search warrants for Appellant's cellular phone accounts. Absent information obtained from the initial unlawful search, little, if any, evidence was present supportive of the issuance of a search warrant for Appellant's Cellular Phone Tower Information, police authorities would not have been able to make contact with Appellants' other phone for an initial telephonic interview and thus little evidence supportive of the convictions for Murder in the First Degree or Conspiracy to Commit a Felony-Murder in the First Degree.***

At the trial court's pretrial proceedings, Appellant filed a Motion to Suppress Cellular Phone Records and Cellular Tower Information for Sprint Nextel Telephone Numbers 434-688-1505 and 434-688-1106. R. 155-169, 173-186. The court denied this motion in its Order Denying Defendants' Motions to Suppress Evidence.<sup>3</sup> The trial court erred in holding that Appellant did not have reasonable expectation of privacy in the cellular phone electronic content and in holding that the scope of a search warrant issued on September 18, 2007 by Magistrate Tom Reynolds of a 2004 Ford Truck possessed by Roseann Osborne, the co-defendant in this matter, extended to allow a search of the electronic contents of the subject cellular phone (434-688-1106) found within the confines of the truck itself. R. 195-209.

This court must first resolve whether Appellant maintained a reasonable expectation of privacy in the electronic contents of the cell phone. In determining that question, the Fourth Amendment to the United States Constitution governs. The United States Supreme Court has held that a person may have legitimate expectation of privacy in personal property that may be conferred by either ownership or possession of that property.

The current state of the law in the United States of America regarding searches of the information that is contained within cellular phones is not settled. This particular warrantless search presents an issue of first impression for this Court. As

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<sup>3</sup> Appellant renewed the objection at trial

such, this Court may look to the guidance of other courts in determining whether constitutional error occurred. Appellant submits that the proper categorization of a cellular telephone is not analogous to a “closed container” but rather is entitled to a unique categorization that considers the tremendous amount of personal information that can now be stored in such devices. This court must review the trial court’s interpretation of the law in this regard *de novo*. Syl Pt. 3, State v. Vance, 535 S.E.2d 484 (W. Va. 2000).

First, a defendant must establish that he or she had a subjective expectation of privacy in the place or property searched. Smith v. Maryland, 442 U.S. 735, 740 (1979). Second, a defendant must establish that society would recognize his or her subjective expectation as objectively reasonable. Id. A Fourth Amendment violation does not automatically result from the illegal seizure of property from a person who is the owner, See Rawlings v. Kentucky, 448 U.S. 98 (1980).

In U.S. v. Finley, the Fifth Circuit affirmed a district court’s finding that Finley maintained a privacy interest a cell phone, not owned by him but only possessed by him. 477 F.3d 250, 259-60 (5th Cir.2007). Furthermore, in U.S. v. Park, a federal district court for the Northern District of California, implicitly recognized a privacy interest in a cell phone and likened a cell phone to a locked footlocker. CR 05-375, 2007 WL 1521573 (N.D. Cal. May 23, 2007). The Park court cited U.S. V. Chadwick, 433 U.S. 1 (1977), in support of this analogy. In the present case, the Motorola phone (434-688-1106) was owned by Defendant and registered to him by the cellular carrier but was recovered from the alleged victim’s vehicle. The State of West Virginia has acknowledged this fact as evidenced by a subsequent search warrant application, dated October 16, 2007. See Exhibit Seven to Defendant’s Memorandum in Support of Defendant’s Previously Filed Motions to Suppress (for reasons unknown to the

Appellant, exhibits to the Memorandum are not part and parcel of the court's official record).

In U.S. v. Zavala, 541 F. 2d 562 (5<sup>th</sup> Cir. 2008), the 5th Circuit, in reviewing a search of a cell phone incident to a traffic stop, held that "cell phones contain a wealth of private information, including emails, text messages, call histories address books, and subscriber numbers." The court held that Zavala had a "reasonable expectation of privacy regarding its contents." Id. at 577.

In the recent case of State v. Smith, 920 N.E.2d 949 (Ohio 2009) , the Supreme Court of Ohio took a reasoned approach to the search of cellular phones, recognizing the evolution of technology and the large amount of personal, private information that may be stored within the address books of such devices. In Smith, the court held that the Fourth Amendment to the United States Constitution required a warrant before police authorities could conduct a search of data found in the electronic memory of a cellular phone that was seized pursuant to a lawful arrest when the search is not necessary to protect the safety of law enforcement officers and there are no exigent circumstances. Notably, the Ohio Supreme Court rejected the Finley approach that regarded a cellular phone as a closed container on the basis that the United States Supreme Court's definition of "container" as articulated in New York v. Belton, 453 U.S. 454, fn. 4 (1981), expressly defined "container" as "any object capable of holding another object". The Ohio Supreme Court held that cellular phones and their internal address books defied any traditional classification and are subject to the Fourth Amendment warrant requirements. See also Quon v. Arch Wireless Operating Co., 529 F.3d 894 (9<sup>th</sup> Cir. 2008); U.S. v. James, No. 1:06CR134 CDP, 2008 WL 1925032 at \*4, (E.D. Mo. Apr. 29, 2008); U.S. v. Quintana, 594 F. Supp.2d 1291 (M.D. Fla. 2009); State v. Boyd, 295 Conn. 707, 723-724.

Other courts however have not recognized that an reasonable expectation of privacy exists in a an electronic device's electronic contents. See U.S. v. Murphy, 552 F.3d 405 (4<sup>th</sup> Cir. 2009) (summarizing other decisions permitting warrantless searches of electronic devices in searches incident to lawful arrests). Additionally, this court should note that the rationale for permitting such searches, excepting Murphy itself, is grounded in exigency.

In the present case before this court, the trial court held that the cellular phone in question is “no different than a “container” discovered during a lawful search pursuant to a warrant in which there is no reasonable cause to believe may contain evidence of crime and noted that the Appellant had cited no case to the contrary. However, it must be noted that the trial court's decision predated the Ohio Supreme Court's contrary holding in Smith by just over one (1) year. R. 264-265. Although it is undisputed that the police search of the vehicle in which the cellular phone was discovered was pursuant to lawful warrant, the logic utilized by the Ohio Supreme Court is applicable here as well. The phone was already in police custody. No exigency prevented the police from simply obtaining a search warrant for the data within the cellular phone. In the present case, nothing prevented the investigating officers from immediately obtaining a warrant based on the fact that they already had knowledge of a 911 call<sup>4</sup> being made regarding the crime and the fact that the phone was present in the victim's truck.<sup>5</sup> No exigency existed to forego the warrant requirement. The investigating officers merely jumped the gun rather than wait a short time necessary to obtain a warrant to conduct a lawful search. All courts that have allowed the “incident to arrest” searches have relied upon the rationales of

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<sup>4</sup>R. 61-62. Officer Burnem testified that the 911 call made from the scene of the crime was from the victim's telephone.

<sup>5</sup>R 87. Magistrate Tom Reynolds testified on his known availability to police officers on the night in question.

exigency, "officer safety", and the potential for erased information. The Smith case cited herein is the most persuasive authority involving the most parallel scenario. The Smith decision was grounded in the principles enunciated in Park that cited Chadwick and Walter v. United States, 447 U.S. 649, 653-655 (1980) . Plainly, the investigating officers in this case searched the cell phone's contents for evidence of a crime.

However, the lawful possession of the phone by law enforcement does not entitle the police to the search of its contents. In Walter, the United States Supreme Court addressed the issue of whether lawful possession of shipped boxes of film entitled FBI agents to then review the content of the boxes. The court held that,

Even though the cases before us involve no invasion of the privacy of the home, and notwithstanding that the nature of the contents of these films was indicated by descriptive material on their individual containers, we are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances.

It is perfectly obvious that the agents' reason for viewing the films was to determine whether their owner was guilty of a federal offense. To be sure, the labels on the film boxes gave them probable cause to believe that the films were obscene and that their shipment in interstate commerce had offended the federal criminal code. But the labels were not sufficient to support a conviction and were not mentioned in the indictment. Further investigation — that is to say, a search of the contents of the films — was necessary in order to obtain the evidence which was to be used at trial.

The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents. Ever since 1878 when Mr. Justice Field's opinion for the Court in Ex parte Jackson, 96 U.S. 727, established that sealed packages in the mail cannot be opened without a warrant, it has been settled that an officer's authority to possess a package is distinct from his authority to examine its contents. See Arkansas v. Sanders, 442 U.S. 753, 758; United States v. Chadwick, 433 U.S. 1, 10. then the contents of the package are books or other materials arguably protected by the First Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that this requirement be scrupulously observed.

Id.

The investigating officers' zeal, while admirable, resulted in a constitutionally defective search of a cell phone, for which this Appellant maintained a legitimate, reasonable expectation of privacy, at least as reasonable and legitimate as the pornographer in Walter who shipped pornographic materials through the United States mail. As such, the Court erred in failing to suppress the information obtained from the cell phone by the investigating authorities as a result of this unconstitutional search.

Assuming that this court recognizes that Appellant maintained a reasonable expectation of privacy in the subject phone, this Court must then assess whether Appellant had abandoned the phone and thus relinquished control over said phone thus forfeiting his standing to contest the subject search. This court must review the trial court's findings of fact on these issues under the clearly erroneous standard

In order to have standing to challenge the search, "one must have been a victim of the search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed against someone else." Jones v. United States, 1960, 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed. 697, Corollaries to this rule are that one has no standing to challenge the search of an area or thing he has voluntarily abandoned and that "[p]olice pursuit or the existence of a police investigation does not of itself render an abandonment involuntary." United States v. Colbert, 5th Cir. 1973, en banc, 474 F.2d 174 at 176 [1973].

U.S. v. Maryland, 479 F.2d 566, 568 (5th Cir. 1973).

The trial court held that Appellant had effectively relinquished any privacy interest he may have had in the phone, finding that he surrendered custody and control of the phone to another person, Osborne. The trial court based its finding on certain facts; that Osborne possessed the cell phone when it was seized, that she had utilized the cell phone prior and subsequent to the commission of the crime to call both Appellant and others and that he had voluntarily left the phone in co-defendant

Osborne's possession.<sup>6</sup> The trial court wrongly concluded, in the face of a lack of supporting evidence, that Appellant had abandoned the phone pursuant to the holdings of U.S. v. Nordling, 804 F. 2d 1466 (9<sup>th</sup> Cir. 1986) and U.S. v. Maryland, 479 F.2d 566 (5<sup>th</sup> Cir. 1973). R. 206-209<sup>7</sup>

Inherent in the Nordling and Maryland decisions are facts that underlie each court's conclusion that the defendant had abandoned the searched property. In the present case, no such underlying facts are of record. Thus, the court's findings as to these issues are clearly erroneous. In Nordling, the court noted,

On the record before us, the district court's finding of abandonment was not clearly erroneous. We have recognized that abandonment is a question of intent. The inquiry should focus on whether, through words, acts or other objective indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure. *E.g.*, United States v. Cella, 568 F.2d 1266, 1283 (9<sup>th</sup> Cir. 1977); Jackson, 544 F.2d at 409. This determination is to be made in light of the totality of circumstances, and two important factors are denial of ownership and physical relinquishment of the property. Both of these factors are present here.

The trial court made a logistical leap to conclude that Appellant White allowed the co-defendant below, Osborne, to use a cell phone that was owned by him. The court concluded this based upon the phone being found in the victim's truck that co-Defendant Osborne apparently occupied contemporaneous with crime's commission. However, the trial court went even further in its findings that underlie the conclusion of abandonment, that the cell phone had been utilized prior and subsequent to the commission of the crime to call Appellant White and other persons and that he had voluntarily left the phone in Osborne's possession. R. 207-209. No evidence of record is supportive of these facts. However, those facts were subsequently uncovered in two

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<sup>6</sup> A review of the entire Pre-trial hearing reveals no such evidence being presented whatsoever.

<sup>7</sup>R. 65-67, 97-99, and 122-123 contains details of the search of the phone's contents as well as an admissions by Officer Burnem and Detective Boggs that police did not know who was the owner of the cell phone at the time of the search of its contents as well as the lack of any exigent circumstances.

ways, the unlawful search of the phone itself and from the phone records eventually obtained by warrant served upon the cell phone carrier, Sprint Nextel. The trial court utilized the data obtained from the unlawful search of the physical phone itself and information obtained as a result of that data that provided the evidentiary foundation for issuance of the warrant upon Sprint Nextel to underpin its conclusion of abandonment. Arguably the mere allowance of a third party to utilize the cell phone does not in and of itself compromise the privacy right found by the Fifth Circuit in Finley or the Ohio Supreme Court in Smith. However, no evidence of record is indicative of Appellant's purposeful surrender or abandonment of his cell phone to the general public or Osborne to the extent to waive his legitimate privacy interest. In fact, at the time of the unlawful search, the police had not determined who even owned the cell phone, only that it had been seized from the victim's truck. R. 131. The contents of the phone's memory are not privy to the "network" involved in the carrying of calls or messages. Thus, the "pen register" decision of Smith v. Maryland, 442 U.S. 735 (1979), finding no reasonable expectation of privacy is inapplicable in the within case. At best, Roseann Osborne was simply a permitted user of the phone. The trial court did note an inference of permission based upon calls between the two cell phones owned by Larry S. White, II. Yet, at the time of this search, said telephone calls between the two co-defendants had not yet been ascertained. Evidence of those calls was obtained as a result of the search itself. R. 96-101, 917-920. The fruits of this search also provided the basis for a search warrant to obtain Appellant White's Cell Site Tower Information as obtained from Sprint/Nextel by warrant issued by Magistrate Jackie Casto. See Exhibit Five, Defendant's Memorandum in Support of Motions to Suppress; R. 69-78(for reasons unknown to the Appellant, exhibits to the Memorandum are not part and parcel of the court's official record).

Absent the unlawful search of the cellular phone, no facts were available to obtain this warrant or even identify this Appellant's other cell phone number. As such, all evidence obtained from root of the poisonous tree, the unlawful search of the cellular phone's electronic contents, should have been suppressed. The trial court's holding that Appellant White relinquished control of the cell phone, thus giving up any privacy interest he had in the phone's contents is based on factors of which there is no evidence or from evidence obtained from the unlawful search itself. This is classic "bootstrapping." As this constitutes constitutional, reversible error, Appellant White should be granted a new trial and the trial court directed to suppress all evidence obtained from the unlawful search of the cellular phone's content and re-evaluate the issuance of any warrants the relied in whole or in part from any evidence derived or obtained unlawfully from the cellular phone's electronic contents absent the unconstitutionally obtained evidence.

***D. The trial court erred in admitting evidence in violation Rule 801(d)(2)(e) of the West Virginia Rules of Evidence absent a proper foundation for admission of the statements of alleged co-conspirator.***

The trial court admitted certain statements made by co-defendant, Roseann Osborne, in the trial of this Appellant. The trial court's ruling constitutes an abuse of its discretion. The trial court grounded the admission of these statements as those of a co-conspirator pursuant to Rule 801(d)(2)(e) of the West Virginia Rules of Evidence. The federal jurisprudence subsequent to the landmark Crawford v. Washington, 541 U.S. 36 (2004), decision has uniformly held that statements of a co-conspirator are not testimonial in nature and thus not subject to Crawford analysis. Rule 801(d)(2)(e) classifies a statement as not hearsay if "the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and furtherance of the conspiracy." In State v. Miller, 466 S.E.2d 507 (W. Va. 1995), this court addressed

the foundational requisite for admission of testimony under this rule:

According to State v. Fairchild, 298 S.E.2d 110, 117 ( W. Va. 1982), "evidence of acts or declarations of co-conspirators or co-actors is admissible only if a proper foundation, or prima facie case, is established. . . . The required foundation consists of: (1) proof of a conspiracy existing between the declarant and the defendant; and (2) proof that the act or declaration was made during and in pursuance of the conspiracy or joint enterprise. (Citation omitted). See Bourjaily v. U.S., 483 U.S. 171, 176-81 1987) (holding the Fed.R.Evid.801(d)(2)(E) requires proof of the conspiracy by a preponderance of the evidence and allows consideration of the offered declaration as part of the proof of the conspiracy); State v. Nixon, 359 S.E.2d 566, 570 (W. Va. 1987).

The State failed to meet its burden to produce a preponderance of evidence of the first element of the foundation, a common plan, conspiracy or joint enterprise. Specifically, the court allowed evidence of statements made by Roseann Osborne given to police and Angela Barney to allegedly conceal the identity of the Appellant. R. 1050-1062. (setting forth the trial court's rationale in allowing said evidence). These statements were revealed to Appellant in the police interrogation of him in an effort to confront him with Ms. Osborne's statements. Further, testimony was given by Officers Bernard Fox and George Burnem concerning statements made to them by Ms. Osborne in an alleged effort to conceal the identity of the Appellant. R. 1093-1094, 113-1117, Additionally, the court allowed statements made by Roseann Osborne to Angela Barney on this same basis. R. 1073-1074.

A review of the entirety of the transcript to the point of the court's ruling reveals a total lack of evidence of a common plan or scheme. The basis provided by the trial court for admission of these statements of an alleged co-conspirator failed to articulate with any specificity what the conspiracy or scheme allegedly was. Though circumstantial evidence is certainly relevant to the court's finding, the court abused its discretion in admitting such evidence. As such, this court must order a new trial and vacate Appellant's conviction.

***E. The trial court erred in failing to grant the Appellant's Amended Renewed Motion for New Trial Filed in Light of Post-Trial Disclosure to Defendant of Material That Should Have Been Disclosed to Defendant Prior to Trial Pursuant to Brady v. Maryland.***

Following denial of the Appellant's Motion for a New Trial, the trial court sentenced Appellant in accordance with the jury's verdict. R. 213-232. After January 1, 2009, the Jackson County Prosecutor's office underwent an electoral change with James P. McHugh replacing Shannon Baldwin as Prosecuting Attorney. Prior to the trial of the co-defendant, Roseann Osborne, the State of West Virginia disclosed to Ms. Osborne certain court records from the State of North Carolina involving domestic violence petitions against the victim in this case, Mr. Mahrous. Further, the State of West Virginia disclosed to Ms. Osborne's defense team certain video taken from a surveillance camera of the Ravenswood Specialty Metals Plant in close proximity to the scene of the alleged crime, Ravenswood City Park. After conferring with counsel for the Appellant, Prosecutor McHugh released said materials to Appellant White's counsel that led to Appellant White filing a Renewed Motion for a New Trial and an Amended Renewed Motion for a New Trial arguing that both the domestic violence records and the subject video were exculpatory in nature and thus subject to pretrial disclosure. R. 240-248. The court held hearing on this matter and found that the North Carolina domestic records had not been disclosed to Appellant pretrial but that neither the Prosecutor's Office nor the police authorities had obtained or possessed the records until February, 2009. R. 252-253. Further, the court held that the domestic violence records were inconsistent with Appellant's trial defense and of little value otherwise to the defense. R. 253.

Additionally, the trial court found that the subject video had been known to the State of West Virginia and, though not actually disclosed to the Appellant prior to

trial in video form was not “suppressed” by the State of West Virginia in such a manner to implicate this court’s holding in Syl Pt. 2, State v. Youngblood, 650 S.E.2d 119 (W. Va. 2007). R. 254-255. Essentially, the court held that the State’s following notation in the voluminous discovery packet provided to Appellant’s counsel constituted adequate disclosure,

1) CD containing video surveillance of Route 68 and the entrance to the Riverfront Park from the Ravenswood Specialties Services Plaintiff located southeast of the River Front Park obtained by Ptl. D.G. Prechtl on 09-20-07.

R. 246. Appellant notes for the court that all other evidence was disclosed in its documentary form, be it video or audio, prior to the trial, raising the question of why the subject video was not so disclosed in a similar manner.

In determining whether the trial court erred, this court must evaluate the same in light of Brady v. Maryland, 373 U.S. 83 (1963) and State v. Hatfield, 286 S.E.2d 402 (W. Va. 1982) and determine whether Appellant’s due process rights were violated. The court’s conduct is reviewed for abuse of discretion. To find such violation Appellant need demonstrate three components of such violation, (1) the evidence at trial must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material. i.e. it must have prejudiced the defense at trial. Syl Pt. 2, State v. Youngblood, 650 S.E.2d 119 (W. Va. 2007). Further, the court must assess the materiality of the “suppressed” evidence.

The evidence is material only 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.

State v. Fortner, 387 S.E.2d 812, 820 (W .Va. 1989)(quoting U.S. v. Bagley, 473 U.S. 667 (1985)). The trial court must evaluate the materiality in light of the entire record of the trial. U.S. v. Agurs, 427 U.S. 97, 112 (1976).

While the trial court's Order specifies that it was uncontested that Appellant White did kill the victim, it was contested whether such action was premeditated and deliberate and whether the act was the subject of a conspiracy. However, the subject video, were it able to be authenticated in some way, provided some evidence that contradicted the timeline set forth by the State of West Virginia. Should the video have been fully disclosed, different strategic decisions, including the Appellant's decision to not take the stand in his own defense, may have been made. While the trial court concluded that the surveillance video would be unavailable to contest the State's "crucial" timeline evidence, said video could have been presented to State's witnesses who testified of their arrival to the scene, as the video clearly shows flashing lights arriving at the scene. R. 255. Further, Defendant may have rendered testimony regarding his activities, supported by the video evidence. The striking aspect of the video is the complete lack of time between what the Appellant would have asserted was his vehicle leaving the scene and the arrival of emergency and police personnel, and evidence being contrary to a conspiracy or plan between the two alleged co-defendants.<sup>8</sup>

Though the trial court cited the correct rule in evaluating the subject video, it applied the rule in a vacuum. The trial court erred in not considering the manner in which the video may have been used to impeach the State's witnesses and timeline evidence, the manner in which the Appellant himself could have testified to the subject

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<sup>8</sup> It was established at trial that co-Defendant Osborne made the 911 call that triggered the emergency response. Defense counsel argued in closing that the "Roseann called 911 before Sam (the Appellant) even had time to hit the county line." R. 1537. The video, had it not been suppressed, revealed that the call had to have been made prior to Appellant even travelling a few hundred yards from the scene.

truck in the video being his and that the video, if authenticated, would contradict the State's entire theory of the case, i.e. that the Appellant waited at the park for the victim to arrive acting in concert with the co-defendant and struck the fatal blows from behind. Thus, a review of the entirety of the trial record does demonstrate that the suppressed video "could reasonably be taken to put the whole case in such a different light to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 434 (1995). The court's holding that the video would not cause a reasonable jury to conclude differently as to the guilt of the Appellant to Murder in the First Degree and Conspiracy was clearly erroneous. This clearly erroneous conclusion warrants reversal by this court and a new trial ordered.

***F. The trial court erred in denying Appellant's Motion for New Trial as the evidence at trial was insufficient to support of verdicts of Murder in the First Degree and Conspiracy.***

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry 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 proved beyond a reasonable doubt.

Syl Pt. 1, State v. Guthrie, 461 S.E.2d 163 (W. Va. 1995)

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl Pt. 2, Id.

Though Appellant admittedly must carry a heavy burden to in asserting that his convictions were based on insufficient evidence, a complete review of the record reveals that no direct evidence was ever admitted to trial which inferred some plot between him and the co-defendant, Osborne, with whom he was convicted of conspiring. As such the court abused its discretion in denying the said Motion. The trial court allowed the jury to consider inference on top of inference rather than inference based on the evidence in finding the requisite elements of premeditation and deliberation as well as the elements of requisite to the conspiracy charge. Absent such evidence, the convictions for Murder in the First Degree and Conspiracy must be reversed and a new trial ordered. At most, the evidence adduced at trial was sufficient for a conviction of Murder in the Second Degree.

***G. The trial court erred in denying Appellant's Motion for New Trial as cumulative error present in the pretrial, trial and post-trial proceedings mandated that a new trial be granted***

As has been demonstrated throughout Appellant's Brief, serious, constitutional error contaminated the trial that this Appellant as evidenced by the trial court's erroneous rulings in the pre-trial, trial and post-trial phases. The cumulative effect of this error was to deprive Appellant of a fair trial pursuant to the West Virginia and United States Constitutions. If this court is to hold that any one of the errors set forth herein does not rise to the level of reversible error that deprived Appellant of his constitutional rights, this court must find that the cumulative effect of the numerous errors mandate reversal of these convictions. This court has held,

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.

State v. Walker, 425 S.E.2d 616, Syl. Pt. 5 (W.Va. 1992).

In its holding in Walker, the court plainly provided a remedy for persons convicted unfairly because of the cumulative effect of a trial court's piece by piece destruction of a defendant's fair trial rights by numerous instances of otherwise "harmless" error. In explaining the court's holding in Walker, Justice Neely recognized that "significant pieces of evidence were improperly admitted." Id. at 623. "When the circumstantial nature of the evidence requires the jury to construct a chain of logical inferences to find guilt, strict adherence to the rules of evidence becomes critically important." Id. In order for the jury to return the verdicts of First Degree Murder and Conspiracy, it was necessary for the jury to construct such a chain of inferences from circumstantial evidence. The trial court allowed admission of elements of circumstantial evidence that were unconstitutionally obtained by the State as set forth herein all the while Appellant was deprived of other circumstantial evidence bearing on his lack of guilt by the suppression of such evidence by the State of West Virginia.

Thus, Appellant's case is analogous to the case in Walker. Even if the court is to hold that each error individually was harmless standing alone, the court must not ignore the precedent of Walker and thus find that the cumulative error present in Mr. White's criminal proceedings amounted to a serious constitutional violation of his fair trial guarantees. In the face of such error, this court must reverse Appellant's conviction and order a new trial.

## **V. CONCLUSION**

Appellant, Larry S. White, II, moves that this court reverse the convictions of the Circuit Court of Jackson County, West Virginia for Murder in the First Degree, sentenced to life with the possibility of parole, and Conspiracy, sentence to one (1) to five (5) years consecutive to the Murder sentence. Our system of justice is founded

upon the principle that every defendant is constitutionally entitled to a fair trial. The errors set forth herein yield no other conclusion than Appellant's rights were violated. Despite the trial court's efforts at obtaining a fair and impartial jury, the panel was irreparably tainted. The trial court erred in allowing evidence obtained from unconstitutional search and further evidence that was obtained from a warrant that derived from that unconstitutional search of Appellant's cellular phone's electronic data.. Following the trial, the trial court erred in failing to order a new trial based on defense counsel's discovery that certain exculpatory evidence was suppressed by the State's agents. Upon these grounds and other grounds set forth herein, Larry S. White, II, requests this Supreme Court of Appeals of the State of West Virginia for appeal of his conviction and sentence and prays that he be granted a new trial on the charges against him.

Respectfully submitted,

LARRY S. WHITE, II

By Counsel.



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No. 35529

IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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Charleston

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APPELLANT'S APPEAL

STATE OF WEST VIRGINIA, PLAINTIFF BELOW /APPELLEE,

v.

LARRY S. WHITE, II, DEFENDANT BELOW /APPELLANT

**CERTIFICATE OF SERVICE**

I, Matthew L. Clark, Counsel for Larry S. White, II, do hereby certify that I have served a true and correct a copy of the foregoing Brief of the Appellant, Larry S. White, II, upon Thomas W. Smith, Sr. Deputy Attorney General, by United States Mail, postage prepaid, at his mailing address of State Capitol, Room E-26, Charleston, West Virginia, 25305, on this the 11 day of June, 2010.



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