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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA, Plaintiff Below,

Respondent,

vs.) No. 11-0090 (Fayette County Circuit Court No. 10-F-1662)

SAMUEL D. SCARBRO, JR., Defendant Below,

Petitioner.

PETITIONER'S REPLY BRIEF

Petitioner by Counsel
Thomas K. Fast (WVSB#6312)
Fast Law Office L.C.
Post Office Box 420
Fayetteville, WV 25840
Telephone: 304-574-0777
Facsimile: 304-574-0623
E-mail: fastlaw@wv-cis.net

Respondent by Counsel
Michelle Bishop (WVSB#7707)
Assistant Attorney General
Office of the Attorney General of WV
812 Quarrier Street
Sixth Floor
Charleston, WV 25301
Telephone: 304-558-5830
Facsimile: 304-558-5833
E-mail: michelle.bishop@wvago.gov

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Now comes your petitioner, Samuel D. Scarbro, Jr., by counsel, Thomas K. Fast, and provides the following reply to that Response Brief heretofore filed by the State of West Virginia.

The Petitioner incorporates herein by reference the Statement of Facts previously set forth in his Petitioner's Brief.

States Misstatements of Facts

The State makes critical errors in its facts. The State claims that the defendant below had a criminal history of a "conviction for felony possession of a firearm". Response Brief, p. 8. That is not true. The Defendant was convicted of misdemeanor possession of a firearm. See Appendix p. 300. The Circuit Court never found that the defendant had a prior felony because that was not the case.

The State argues that the defendant below "knowingly engaged in an hour-long spending spree". Response Brief, p. 8. Neither is that true. The jury convicted the defendant of a one

time, single use of an ATM card. It was a James Reid who actually used the card to purchase cigarets but the jury found the defendant was an accomplice. The jury found the defendant not guilty of four other counts. Therefore, the State cannot now argue that the defendant knowingly went on an hour long illegal spending spree.

Prior Inconsistent Statement of State's Key Witness

The State's main witness, James Reid, co-defendant, testified against the defendant. Mr. Reid had given a prior statement to J. L. Milam. Appendix 285. The defendant sought the introduction of Mr. Reid's prior statement claiming that it was inconsistent. The State objected. The Court denied the offer on grounds that it would clutter the record (eight page transcript) and the relevant information was solicited by cross examination testimony.

In its Response Brief, the State argues that the prior statement was not inconsistent and therefore is not admissible under *State v. Blake*, 197 W.Va.700; 478 S.E.2d 550 (1986). This is an untenable position. The prior statement of James Reid was in fact inconsistent, both in theme and in specific detail.

The following is a side-by-side comparison of the inconsistencies between James Reid's prior statement and his trial testimony. The setting is set forth in the Petitioner's Statement of Facts. It is important to note that Christine Lukach was a passenger in the vehicle and was the current girlfriend of the defendant and the ex-girlfriend of the James Reid.

James Reid's Statement to Trooper Milam	James Reid's Trial Testimony
"I'd asked her [Christine Lukach] to borrow her card, to loan me some money and she throwed her card up with it on the dash..." Appendix 287	And he [the Defendant] said, "Take that card [Cassie Withrow's card] and go ahead and get your cigarettes and your beer, Mr. Reid, and pay for the gas While you're in there". Appendix 109-110.
Q. All this time you're under the impression that it was, from what you're telling me, you were under the impression it was you ex-girlfriends [Christine Lukach] credit card, right? A. Yes. Appendix 288	Q. And when you got to Walmart, what happened? A. ...I went to Aisle 15 and...got cigarettes. I got two cartons; I got her a carton and me a carton. Q. How did you pay for them?
I asked to use her [Christine Lukach] card. Id.	A. With the Card [Cassie Withrow's card].
Q. Now, when I talk to her [Christine Lukach], is she going to say that she give you permission to use her credit card or? A. She should, I, I wouldn't see why she wouldn't. Id.	Q. Why did you use the card? A. ...Just they said that's – just use the card and pay me back like that. Appendix 112-113.
Q. Did you think it was odd that, that she [Christine Lukach] was letting use this card all over the neighborhood? A. Well, not really because I've had borrowed money from her before... Appendix 290.	
Q. Do you think its kind of odd that she [Christine Lukach] would let you use it 6 different places? A. No, no not really, I mean honestly no. Id.	I believe we went up into Oak Hill... to one of them stores up there....Gas, I think was the only thing purchased there... Q. And who went in and paid for that? A. I think Mr. Scarbro did. Appendix 111-112.

The State argues that the prior statement of James Reid is not inconsistent with his trial testimony and therefore was not admissible under *Blake*, supra. As pointed out, Reid's prior statement was not only inconsistent, but was diabolically opposed to his trial testimony. In Syl. Pt. 1 of *Blake*, the Court held:

> Three requirements must be satisfied before admission at trial of a prior inconsistent statement allegedly made by a witness: (1) **The statement actually must be inconsistent, but there is no requirement that the statement be diametrically opposed**; (2) If the statement comes in the form of extrinsic evidence as opposed to oral cross-examination of the witness to be impeached, the area of impeachment must pertain to a matter of sufficient relevancy and the explicit requirements of Rule 613(b) of the West Virginia Rules of Evidence – notice and an opportunity to explain or deny – must be met; and, finally, (3) The jury must be instructed that the evidence is admissible only to impeach the witness and not as evidence of a material fact.

Syl. Pt. 1, *Blake, supra,* (Emphasis added). The test is "inconsistency". Here, the Petitioner has shown diabolical inconsistency.

Further, it matters not whether the proffered statement was in the form of an audio, video or transcript. Mr. Reid identified the transcript as his prior statement given to Trooper Milam. Appendix 122. The Statement was given by the State to the defendant in pre-trial discovery with no caveat of inaccurate transcription problems.

Ultimately, the prior statement of James Reid, the State's main witness, a co-defendant, was critically inconsistent and should have been admitted for the jury to consider. In *State v. Barnett*, 701 S.E 2d 460; 2010 W.Va. LEXIS 89 (2010), this Court reversed over the failure of the trial court to admit the prior inconsistent statement of the co-defendant witness even after the witness admitted his inconsistencies while testifying. The lower court reasoned that since the

witness admitted his own inconsistencies, it was not necessary to admit the statement. This Court recognized the high priority in aiding the jury's ability to assess witness credibility. This Court held:

> In summary, and with satisfaction of the Blake factors having been attained, and noting that the evidence sought to be introduced by the appellants was of value to the jury in assessing the credibility of the state's key witness, we conclude that the lower court abused its discretion by excluding the prior inconsistent statements of the State's key witness Brian Dement. Under the facts and circumstances of this case as presented on this appeal, we find that the circuit court's refusal to allow the presentation of the actual inconsistent statements was an abuse of discretion and warrants a reversal of the appellants' conviction and remand for a new trail.

Barnett, supra 701 S.E 2d at 471.

Failure to Give Limiting Instruction

Second, the Petitioner assigned as error under Syl. Pt. 3 of *State v. Caudill*, 170 W.Va. 74; 289 S.E. 2d 748 (1982), that the lower Court failed to instruct the jury that the co-defendant's testimony about his guilty plea to the same charge made against the defendant was for credibility purposes only and not to show the defendant's guilt. The State responds that because the defendant did not object and call for such a limiting instruction, the defendant waived this right. There is no law that the defendant carries a burden to prove his innocence by requiring the Court to give proper limiting instructions. In Syl. Pt. 3 of *State v. Caudill*, 170 W.Va. 74; 289 S.E. 2d 748, this Court held:

> In a criminal trial an accomplice may testify as a witness on behalf of the state to having entered a plea of guilty to the crime charged against a defendant where such testimony is not for the purpose of proving the guilt of the defendant and is relevant to the issue of the witness–accomplice's credibility. The failure by a trial judge to give a jury instruction so limiting such testimony is, however,

reversible error.

It is true that the defendant did not object and seek on his own a limiting instruction. However, this Court also gave a strong indicator that such onus is not on the defendant but on the Court to give such an instruction, whether or not the state or defendant seeks one. In *State v. Barnett*, supra,, this Court noted:

> The State contends that because the required instruction was not requested, and no objection was made, the appellants waived any error. Alternatively, the State contends that any error was harmless. The appellants posit that our holding in Caudill makes the instruction to the jury mandatory, despite the lack of an objection to the lower's [sic] court's failure to give the appropriate instruction. **We observe that our holding in Caudill would appear to require the trial court to give such an instruction.** Because of our resolution of this appeal on the cross-examination issue, it is not necessary for us to now consider whether the trial court's failure to give such an instruction was plain error.

Barnett, supra 701 S.E 2d at footnote 11 (emphasis added).

Here, it was plain error for the Court not to give a cautionary instruction on what weight to give the co-defendant's testimony of his guilty plea. The Jury very well may have concluded that such evidence was a showing of the defendant's guilt as well.

Nor was the remaining evidence so overwhelming that the jury could have easily convicted the defendant without the limiting instruction, as argued by the State. The defendant was charged with five counts of fraudulent use of an ATM access device. The co-defendant plead guilty to one count of such charge. The Jury found the defendant not guilty of four counts. The jury convicted the defendant of one count, the Walmart cigaret purchase count. It is very conceivable that the lack of a limiting instruction to the jury to not consider the co-defendant's guilty plea as evidence of guilt against the defendant, very well may have pushed the jury towards a guilty conviction of the Walmart count as well.

Cruel and Disproportionate Sentence

Lastly, the Petitioner assigned as error his determinate sentence of two years for a $136.37 cigarette purchase, that he actually did not make, but rather th co-defendant, James Reid, made. The State really stretches some facts in its response to this assignment. First, the State calls the defendant's actions a "spending spree". Response Brief, 8, 18. That is simply not accurate. The Jury didn't think so. The State argues that the Defendant "likely directed Mr. Reid to use the Card". Response Brief, 18. This just underscores the inaccuracies between Mr. Reid's prior statement and his trial testimony. The state argues that the Petitioner never took responsibility for his actions. In fact, the defendant did take responsibility for his actions in that he did not know Mr. Reid was using the card, and when he suspicioned that he was, the defendant took Mr . Reid home. Lastly, the State argues that the Defendant carried a record of felony possession of a fire arm. That also is just a wrong assumption. The defendant had no prior felonies. The Defendant had a misdemeanor possession of a fire arm. Not a felony.

Ultimately, it is shocking to send a man to the penitentiary for two years over a 136.37 purchase, assuming that the defendant was guilty.

CONCLUSION

Accordingly, your Petitioner, Samuel D. Scarbro, Jr., petitions this Court to find that the lower Court committed reversible error by failing to give the jury an opportunity to review the State's lead witness' prior inconsistent statements which contained overwhelming contradictions to what he had just testified to under oath before the jury. The prior statements significantly question the witness' credibility.

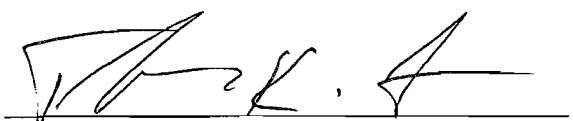
Mr. Scarbro further petitions this Court to find that the lower Court committed reversible

error by failing to provide a limiting instruction to the jury when the State called as its main witness one whom the Defendant purportedly aided and abetted and elicited testimony from the witness of his guilty plea of the same crime as charged against Defendant. Such an instruction is mandatory.

Lastly, Mr. Scarbro petitions this Court to find that his determinant sentence of two years over a $136.37 purchase of cigarets violates the proportionality principles found in the West Virginia and United States Constitutions.

The relief sought is that this matter be reversed and remanded for a new trial on Count Three of the Indictment or otherwise remanded for re-sentencing.

Respectfully submitted,
SAMUEL D. SCARBRO, JR.
By Counsel.



Thomas K. Fast (WVSB#6312)
FAST LAW OFFICE L.C.
201 North Court Street
Post Office Box 420
Fayetteville, West Virginia 25840
Telephone: (304) 574-0777
Facsimile: (304) 574-0623

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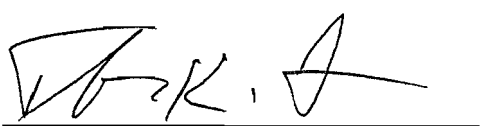
CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of the foregoing ***PETITIONER'S REPLY BRIEF*** upon the following by depositing the same in the regular course of the United States Mail, First Class, postage prepaid, at the address indicated, on this the **20th** day of **June**, 2011.

Michelle Bishop
Assistant Attorney General
Office of the Attorney General of WV
812 Quarrier Street
Sixth Floor
Charleston, West Virginia 25301



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