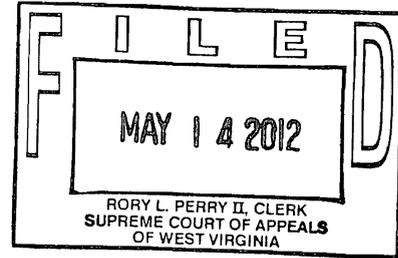


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1777



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

JOHN ALAN BOYCE,

*Defendant Below,
Petitioner.*

BRIEF IN RESPONSE TO THE PETITIONER'S BRIEF

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TABLE OF CONTENTS

	PAGE
I. STATEMENT OF THE CASE	1
II. SUMMARY OF ARGUMENT	3
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	5
IV. ARGUMENT	5
A. The circuit court did not err in determining that the Petitioner knowingly and intelligently entered into his 1992 plea agreement	5
B. The State of West Virginia did not violate the Petitioner’s constitutional rights under <i>Brady</i> or its progeny concerning the arrest and statement of the co-defendant, Doug E. Jones	17
V. CONCLUSION	23

TABLE OF AUTHORITIES

CASES	Page
<i>Call v. McKenzie</i> , 159 W. Va. 191, 220 S.E.2d 665 (1975)	7, 18
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	19
<i>State ex rel. Leung v. Sanders</i> , 213 W. Va. 569, 584 S.E.2d 203 (2003)	16-17
<i>State v. Hatfield</i> , 169 W. Va. 191, 286 S.E.2d 402 (1982)	19, 20
<i>State v. Jones</i> , 193 W. Va. 378, 456 S.E.2d 459 (1995)	20
<i>State v. Legg</i> , 207 W. Va. 686 536 S.E.2d 110 (2000)	18
<i>State v. Youngblood</i> , 221 W. Va. 20, 650 S.E.2d 119 (2007)	19-20
<i>United States v. Agurs</i> , 427 U.S. 97 (1976)	19

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Comes now the Respondent, the State of West Virginia, by counsel, C. Casey Forbes, Assistant Attorney General, pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, and files the within Brief in Response to the Petitioner's Brief.

I.

STATEMENT OF THE CASE

In 1991, the Grand Jury of Kanawha County indicted John Alan Boyce (hereinafter “the Petitioner”) for the murder of Frank Stafford (hereinafter “the victim”). App. at 1-2. On November 6, 1992, the Petitioner signed a plea agreement pleading guilty to first-degree murder. *Id.* at 3-7, 59-61. At the 1992 plea hearing, the Petitioner stated that he and the victim were fighting when the Petitioner held a shoe string around the victim’s throat until he was dead. *Id.* at 45-46. The prosecutor summarized the State’s evidence as follows:

It would be the State's evidence, your Honor, that between 10:00 p.m. on March 4th, 1991 and and [sic] 1:00 a.m. on March 5th, 1991, that the defendant and Doug Jones administered a beating to the victim, Frankie Stafford, off the side of the road on Davis Creek between Loudendale and Davis Creek; that, thereafter, they went to a home of an individual -- they put Frankie Stafford in the trunk alive, although beaten, they drove to the home of an individual, Pam Parsons, where they washed blood off their hands and arms.

The witness, Pam Parsons, would testify that, upon leaving, Mr. Boyce asked for a wash rag to wipe the steering wheel off. We have that washcloth. It has the victim's blood on it. Pam Parsons will also testify that she heard Frankie Stafford and had seen Frankie Stafford earlier that evening in the company of Mr. Jones and Mr. Boyce, and she heard him in the trunk begging to be let out. After that, sometime later that evening, the three people drove up Kirby Holler, which at the time was a very desolate place -- it was more of a four-wheel drive trail, although they got up in Mr. Jones' car which is a two-wheel drive car.

At that point, the State's evidence would be that Mr. Boyce used his shoe string to strangle Frankie Stafford and that he was found with a shoe string around his neck, and his hands were bound behind him, and he was thrown over the side of this trail.

The State would further have evidence that Mr. Boyce was later seen without his shoe strings by his brother as well as a couple of other witnesses.

Id. at 47-49.

The circuit court held an extensive plea hearing at which it reviewed the plea; informed the Petitioner of his rights; questioned the Petitioner about his mental state and his understanding of the plea; questioned the Petitioner's and State's attorneys; and spread the facts upon the record through both the Petitioner and attorneys. *See generally id.* 8-57. The circuit court also informed the Petitioner that in pleading guilty he waived his right to appeal. *Id.* at 43. At that 1992 hearing, the Petitioner orally stated his intention to plead guilty, and the circuit court accepted that guilty plea. *Id.* at 11, 45, 54-55. As part of the plea agreement, the State agreed to stand silent at sentencing as to whether mercy should be recommended. *Id.* at 3, 11.

On February 18, 1993, the Circuit Court of Kanawha County sentenced the Petitioner to life in the custody of the Division of Corrections without a recommendation of mercy. *Id.* at 62-64. A motion to reconsider was filed by the Petitioner on or about February 24, 1993, but that motion was denied on or about July 9, 1993. *Id.* at 65-66.

More than seventeen years later, on or about August 27, 2010, the Petitioner, *pro se*, filed a petition for a writ of habeas corpus with this Honorable Court. Supp. App. at 3. On October 27, 2010, upon consideration of the Petitioner's habeas petition, the Court awarded a rule returnable before the Circuit Court of Kanawha County directing the circuit court to resentence the Petitioner for the purpose of direct appeal. *Id.* Pursuant to this Court's directive, the circuit court resented the Petitioner and appointed appellate counsel on February 16, 2011. Granting the Petitioner's motion on June 6, 2011, the court enlarged the time in which to file an appeal. Again granting the Petitioner's motion on August 4, 2011, the court again enlarged the time in which to file an appeal. On October 17, 2011, the circuit court resented the Petitioner a second time. On November 29, 2011, the Petitioner was re-sentenced a third time. It appears to be from the third re-sentencing order of that the Petitioner now directly appeals.

II.

SUMMARY OF ARGUMENT

The Petitioner argues two grounds for relief: 1) the circuit court erred when it failed to adequately engage in a sufficient interrogation of the Petitioner to determine if he was knowingly and intelligently entering into the plea agreement; and 2) the State violated the Petitioner's constitutional rights when it failed to provide him with exculpatory evidence regarding the illegality

of his co-defendant's arrest and the taking of his statement. The State maintains that no error occurred.

First, the circuit court's interrogation of the Petitioner at the plea hearing, indeed the entire hearing, was far more than adequate. The hearing lasted for over an hour, and the circuit court extensively and exhaustively informed the Petitioner of his rights; questioned the Petitioner as to his background and understanding of the proceedings; spread the underlying facts upon the record; and properly fulfilled all legal requirements to accept the plea and determine that it was entered knowingly and intelligently.

Second, even if the parties or circuit court would have known the co-defendant's arrest and confession would later be deemed illegal and inadmissible at the co-defendant's trial, that information was irrelevant and immaterial to a finding of a knowing and intelligent plea in the Petitioner's case. The legality of the co-defendant's arrest and admissibility of the evidence at the co-defendant's trial had no bearing on the Petitioner's case, with the exception that the co-defendant's statement was allegedly used in the Petitioner's arrest. If the statement was so used, the police in 1991 did not know the statement would later be deemed inadmissible, and, regardless, ample other evidence existed to arrest the Petitioner and try him for first-degree murder. The Petitioner's circumstances would not have changed even if the court and parties would have known in 1992 of the 1995 co-defendant development.

The allegation of a *Brady* violation must also fail. First, to the extent the Petitioner is asserting the rights of the co-defendant, the Petitioner has no standing to do so. Second, the Petitioner waived all nonjurisdictional issues by pleading guilty. Finally, even if reviewed, the claim has no merit. The State did not know in 1991-92 that the Court would deem the co-defendant's arrest illegal and confession inadmissible in 1995. If they had, that fact would not have been

exculpatory nor impeachment evidence, and it would not have been material to the outcome of the case given the great weight of other evidence. Therefore, no *Brady* violation occurred.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not request oral argument in this matter. In accordance with R.A.P. 18(a), the State notes that the dispositive issues have been authoritatively decided, and the facts and legal arguments have been adequately presented in the briefs and record. The decisional process would not be significantly aided by oral argument. This matter is appropriate for memorandum decision.

IV.

ARGUMENT

A. The circuit court did not err in determining that the Petitioner knowingly and intelligently entered into his 1992 plea agreement.

The Petitioner asserts that the circuit court failed to properly interrogate him to determine whether he knowingly and intelligently entered into his 1992 plea agreement. Pet'r's Br. at 7-10. The Petitioner argues that he could not have knowingly and intelligently entered a plea of guilty in light of an alleged failure of the circuit court to discover or spread upon the record the status of the co-defendant's arrest and confession, which were in 1995 deemed illegal and inadmissible, respectively, by this Court in the co-defendant's case.¹ *Id.* The State strongly disagrees.

¹The Petitioner's assertion presupposes that the State failed to disclose exculpatory evidence in violation of *Brady* in the form of the co-defendant's illegal arrest and inadmissible statement—a assertion the State strongly contests. For the State's response to the alleged *Brady* violation, see Section II. B. *infra*.

Under West Virginia law, prior to the acceptance of a plea of guilty, the circuit court must undergo a plea colloquy with the defendant and counsel in open court. Rule 11 of the W. Va. Rules of Criminal Procedure states as follows:

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) If the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) That the defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that the defendant has the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, the right against compelled self-incrimination, and the right to call witnesses; and

(4) That if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) If the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false swearing.

Rule 11(c), W. Va. R. Crim. P. The circuit court must also determine whether the defendant knowing and intelligently entered the plea. Rule 11 continues:

(d) Ensuring That the Plea Is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether

the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the state and the defendant or the defendant's attorney.

Rule 11(d), W. Va. R. Crim. P.

In addition to Rule 11, the circuit court must also follow the directives of this Court. Before accepting a plea of guilty, the circuit court must comply with this Court's following requirements:

3. When a criminal defendant proposes to enter a plea of guilty, the trial judge should interrogate such defendant on the record with regard to his intelligent understanding of the following rights, some of which he will waive by pleading guilty; 1) the right to retain counsel of his choice, and if indigent, the right to court appointed counsel; 2) the right to consult with counsel and have counsel prepare the defense; 3) the right to a public trial by an impartial jury of twelve persons; 4) the right to have the State prove its case beyond a reasonable doubt and the right of the defendant to stand mute during the proceedings; 5) the right to confront and cross-examine his accusers; 6) the right to present witnesses in his own defense and to testify himself in his own defense; 7) the right to appeal the conviction for any errors of law; 8) the right to move to suppress illegally obtained evidence and illegally obtained confessions; and, 9) the right to challenge in the trial court and on appeal all pre-trial proceedings.

4. Where there is a plea bargain by which the defendant pleads guilty in consideration for some benefit conferred by the State, the trial court should spread the terms of the bargain upon the record and interrogate the defendant concerning whether he understands the rights he is waiving by pleading guilty and whether there is any pressure upon him to plead guilty other than the consideration admitted on the record.

5. A trial court should spread upon the record the defendant's education, whether he consulted with friends or relatives about his plea, any history of mental illness or drug use, the extent he consulted with counsel, and all other relevant matters which will demonstrate to an appellate court or a trial court proceeding in Habeas corpus that the defendant's plea was knowingly and intelligently made with due regard to the intelligent waiver of known rights.

Syl. Pts. 3-5, *Call v. McKenzie*, 159 W. Va. 191, 220 S.E.2d 665 (1975). The *Call* Court also noted that "the defendant must fully understand . . . that if he enters a plea of guilty he waives all non-jurisdictional defects in the criminal proceeding." *Id.* at 198, 220 S.E.2d at 671.

First, in the case *sub judice*, the circuit court's plea colloquy with the Petitioner was more than adequate. The plea hearing was extensive and lasted more than one hour. App. at 57. The circuit court exhaustively informed the Petitioner of all necessary information under the law, and the circuit court properly determined the Petitioner knowingly, voluntarily, and intelligently entered into his plea. The circuit court also interrogated the Petitioner and spread all necessary and pertinent facts upon the record.

To summarize the extensive plea hearing held on November 6, 1992, the proceedings went as follows: the circuit court first determined that the Petitioner, Petitioner's attorneys, and prosecutor were present for the purposes of entering an agreed plea of guilty. *Id.* at 9-10. The circuit court then read the indictment and each paragraph of the plea agreement to the Petitioner to ensure his intent and knowledge of the plea. *Id.* at 11-12. The Petitioner stated he had signed the plea agreement the day of the hearing, had considered the plea for 30 days prior to accepting it, and had consulted family concerning the decision. *Id.* at 13-16.

The court inquired as to the Petitioner's age and education, and the Petitioner responded that he was thirty-one with an eleventh-grade education. *Id.* at 16. He did not have trouble reading, writing, or understanding the English language. *Id.* The Petitioner had signed the plea agreement. *Id.* at 13. He understood the plea agreement and had no questions. *Id.* at 17. He agreed his counsel had discussed the matter with him, and he was pleased with their representation. *Id.* at 17-18.

The court then explained the consequence of the plea agreement to the Petitioner—that he would be guilty as to first-degree murder. *Id.* at 18. The following exchange occurred:

THE COURT: Do you understand that a plea of guilty to Murder of the First Degree with the State of West Virginia remaining silent, as they have agreed to do, means, number one, that you will, and

I underline the word will, will be sentenced by me to the penitentiary of this state for the rest of your natural life. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you also understand that it is solely and entirely up to me, as I understand your agreement, as to whether I withhold -- to make it absolutely clear, Mr. Boyce, when I say "whether I withhold," which means I may not give you a recommendation of mercy, if that be my decision, I will simply sentence you to the penitentiary of this state for a term of the rest of your natural life and will not add a recommendation of mercy, which will mean, if I choose that to be the sentence, that you will never, ever, again in your lifetime, natural lifetime, be eligible for release from the penitentiary. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Likewise, an option I have is to sentence you to the penitentiary of this state for the rest of your natural life and I can add a recommendation of mercy. If I should choose to do that, that would mean your sentence still is to the penitentiary of this state for the rest of your natural life; however, after you serve a minimum of ten years, the law recognizes that you will be eligible for consideration for release on parole by the Board of Probation and Parole.

That does not guarantee in any way that the Board of Probation and Parole will release you on parole after serving ten years, only that you are eligible for consideration for release. They will interview you and make a decision of whether you should or should not be released on parole at that time.

They may very well reject your release on parole at that time and keep on interviewing you year and after year. You may serve 15 years and you then may be released by the Board of Probation and Parole. You may serve 30 years and then be released at that point by the Board of Probation and Parole.

And, to take it on out, even though you are eligible for release on parole, you may never be released by the board of Probation and Parole on parole. In other words, even if I add a recommendation of mercy to your sentence, it does not in any way guarantee your release from the penitentiary at any time during your natural life. Do you understand me?

THE DEFENDANT: Yes, sir.

Id. at 19-20. Knowing the consequences of the plea, the Petitioner then stated his intention to move forward. *Id.* at 21.

The court asked the Petitioner if he was under the care of a doctor or had seen a doctor while in prison or was under any medication, and the Petitioner stated that he had only seen a dentist and was not under any medication. *Id.* at 22-23. He agreed with the court that he was not suffering from any mental disability nor impairment state at the time of the acceptance of the plea or the hearing. *Id.*

The colloquy between the circuit court and the Petitioner continued:

THE COURT: Do you wish me to accept this agreement, Mr. Boyce?

THE DEFENDANT: Yes, sir.

THE COURT: Are you sure?

THE DEFENDANT: Positive, sir.

THE COURT: I can't talk you out of it?

THE DEFENDANT: No, sir.

THE COURT: No matter what I tell you?

THE DEFENDANT: No, sir.

Id. at 23.

The Petitioner's counsel, Mr. Smith, then stated that the Petitioner was not apparently under any threat nor mental disability, and no inducement or promise apart from the plea agreement itself was known to the Petitioner or his counsel. *Id.* at 23-24. Counsel for the Petitioner and the State both agreed that the plea was in the best interests of the Petitioner and the community. *Id.* at 26.

The court then reviewed with the Petitioner the charge of first-degree murder, its lesser-included offenses, and the definitions thereof. *Id.* at 27-29. The Petitioner had no questions concerning those charges and offenses. *Id.*

The court also reviewed the Petitioner's understanding of potential defenses he might have if he went to trial, and the court explained to the Petitioner that he was "surrendering, dispensing of, in other words, and giving up forever" certain rights, including a right to a trial by jury, to testify on his own behalf or remain silent, and other rights listed in the plea agreement. *Id.* at 30-36, 41-44. The Petitioner stated again that he understood. *Id.* at 33.

The court then inquired of the evidence at issue in the case and whether the admissibility of such evidence might be challenged. *Id.* at 36-41. The court informed the Petitioner that by pleading guilty he would waive the right to challenge such evidence. *Id.* at 40-41.

At this stage in the plea hearing, the court paused to ask the Petitioner about his comprehension of the proceeding thus far. The following exchange occurred:

THE COURT: I have gone over a number of rights and proceedings with you, Mr. Boyce. Have you understood each and every one of them, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions, whatsoever, about any of them?

THE DEFENDANT: No, sir.

THE COURT: Do you understand this is an important proceeding to you, Mr. Boyce?

THE DEFENDANT: Very important.

THE COURT: I agree with you. I sense by watching you and talking with you here for the last 50 minutes or so that you understand precisely that this may very well be the most important 45 or 50 minutes of your life. It has very serious consequences. And I am very serious when I ask you whether you have understood each and every thing we have talked about. And if you have any questions, now is the time to ask.

THE DEFENDANT: I understand them all.

THE COURT: And if you need to ask me something, I want you to do that. If you need to talk to these lawyers privately, I will excuse you-all to go back here privately, or I will let you talk at the table, whatever you wish. Because I need to know to satisfy myself that you are here voluntarily, freely, and that your actions here today in pleading guilty are your actions, your decision, and that you are doing so intelligently and knowing the consequences of your actions here in court. Do you understand me, sir?

THE DEFENDANT: Yes, sir.

THE COURT: So can you assure me that there are no questions to this point, that you are here of your own free will and there is nothing that I have said or done so far that could change your mind or that you don't want to speak to your lawyers about anything and that you are ready to proceed?

THE DEFENDANT: I am ready to proceed, your Honor.

Id. at 43-45.

At this point, the court enquired of the Petitioner as to his plea for the charge of first-degree murder. *Id.* at 45. The Petitioner stated on the record, "Guilty, your Honor." *Id.*

The court asked the Petitioner and attorneys about the factual underpinnings of the guilty plea. As stated above, the Petitioner expressed in his own words that he and the victim were fighting when the Petitioner killed the victim by wrapping a shoe string around his throat until he was dead.

Id. at 45-46. The prosecutor provided the following summary of the State's evidence:

It would be the State's evidence, your Honor, that between 10:00 p.m. on March 4th, 1991 and and 1:00 a.m. on March 5th, 1991, that the defendant and Doug Jones administered a beating to the victim, Frankie Stafford, off the side of the road on Davis Creek between Loudendale and Davis Creek; that, thereafter, they went to a home of an individual -- they put Frankie Stafford in the trunk alive, although beaten, they drove to the home of an individual, Pam Parsons, where they washed blood off their hands and arms.

The witness, Pam Parsons, would testify that, upon leaving, Mr. Boyce asked for a wash rag to wipe the steering wheel off. We have that washcloth. It has the victim's blood on it. Pam Parsons will also testify that she heard Frankie Stafford and had seen Frankie Stafford earlier that evening in the company of Mr. Jones and Mr. Boyce, and she heard him in the trunk begging to be let out. After that, sometime later that evening, the three people drove up Kirby Holler, which at the time was a very desolate place -- it was more of a four-wheel drive trail, although they got up in Mr. Jones' car which is a two-wheel drive car.

At that point, the State's evidence would be that Mr. Boyce used his shoe string to strangle Frankie Stafford and that he was found with a shoe string around his neck, and his hands were bound behind him, and he was thrown over the side of this trail.

The State would further have evidence that Mr. Boyce was later seen without his shoe strings by his brother as well as a couple of other witnesses.

Id. at 47-49.

Toward the end of the plea hearing, the circuit court again gave the Petitioner an opportunity to reconsider his decision:

THE COURT: [The written plea agreement] is dated 11/6, 1992, and it has Mr. Boyce's signature as well as Mr. Smith's and Mr. Jones' of the same date. When you signed all three pages, Mr. Boyce, did you, once again, intend to acknowledge to me and

to tell me this time in writing that not only is it your desire to plead guilty to Murder of the First Degree, but that you understand all of the rights as set forth in this plea of guilty that you are dispensing with or waiving or surrendering and that you are guilty of Murder of the First Degree?

THE DEFENDANT: Yes.

THE COURT: And that you understand the full nature, meaning and extent of the charge of Murder of the First Degree?

THE DEFENDANT: Yes, sir.

THE COURT: I will give you one last opportunity, Mr. Boyce, to change your mind. It is not too late at his point in time. Once you leave the courtroom here today, however, it would be a very, very, very rare event or situation where you will be permitted to cancel, revoke or withdraw the plea of guilty to Murder of the First Degree. But, I will still give you that opportunity right now and not ask you any questions. You have to tell me, though, whether you wish to proceed with this plea of guilty or you want to withdraw or cancel it. You tell me, sir.

THE DEFENDANT: I would like to continue.

Id. at 51-52.

As shown by the illustrations above, the plea colloquy in this case was exhaustive and far more than adequate. The circuit court properly complied with Rule 11 of the Rules of Criminal Procedure and the *Call v. McKenzie* factors. The Petitioner was informed of his constitutional and other rights, and he stated several times his intent to move forward with a knowing and intelligent plea of guilty. The circuit court continually asked the Petitioner if he understood his rights, had questions, and wanted to proceed, and the Petitioner continually agreed that he understood his rights, had no questions, and wanted to proceed. The Petitioner responded at times with “yes” and “no” answers, but at other times, he responded in full statements, such as “[p]ositive” (referring to his

plea), “I understand them all” (referring to his rights), “[v]ery important” (referring to the nature of the proceeding), and “I am ready to proceed, your Honor.”

Next, as to the Petitioner’s claim that he could not have entered into a knowing and intelligent plea because he was not properly informed of the co-defendant’s illegal arrest and inadmissible statement, the State also disagrees. Pet’r’s Br. at 7-10. First, the State did not know in 1992-93 that the co-defendant’s arrest and confession would be deemed illegal and inadmissible, respectively, in 1995, but even if known, which it could not have been, the status of the co-defendant’s arrest and confession was irrelevant and immaterial to the Petitioner’s plea of guilty.

The co-defendant’s arrest and confession had no bearing on the Petitioner’s case, other than the claim that the co-defendant’s statement led to the Petitioner’s arrest. This Court’s determination in 1995 that the co-defendant’s confession was inadmissible *against the co-defendant* would not have barred the police from using it to find probable cause to arrest the Petitioner in 1992—before it was deemed inadmissible. Regardless, the Petitioner’s arrest was inevitable even without the co-defendant’s statement given the mountain of evidence pointing to the Petitioner. The State had witnesses and physical evidence linking the Petitioner to the crime. For example, Pam Parsons heard the victim in the Petitioner’s trunk on the day of the murder and gave the Petitioner a rag to wipe blood off his car, and the truck driver Mark Baire helped the Petitioner remove his car from the murder scene the day after the murder. As to physical evidence, the State had the Petitioner’s shoelace found around the victim’s neck as the murder weapon and witnesses who saw the Petitioner later without a shoelace, the Petitioner’s car, and the bloody rag.

Moreover, this Court’s invalidation of the co-defendant’s statement would not have barred the co-defendant from testifying against the Petitioner. This Court has held that “[o]ne specific

aspect of standing is that one generally lacks standing to assert the rights of another.” *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 578, 584 S.E.2d 203, 212 (2003). The Petitioner could not have prevented the co-defendant from testifying against him even after the co-defendant’s prior statement to the police was deemed inadmissible at the co-defendant’s trial.

Therefore, this Court’s determination years after the Petitioner accepted his plea that the co-defendant’s arrest was illegal and confession inadmissible was not error in any regard concerning the knowing and intelligent nature of the Petitioner’s plea agreement. Until the Court handed down its decision in 1995, the co-defendant’s confession was not inadmissible, and even after it was deemed inadmissible, the co-defendant’s inadmissible confession and broader statement would have had no bearing against the Petitioner in terms of exculpatory, impeachment, or other evidence. The Petitioner’s circumstances at the time of the plea agreement would not have been markedly different, if at all, if the State could have foreseen that the co-defendant’s arrest and statement were to be deemed illegal and inadmissible.

Lastly, regardless of the co-defendant’s statement (later deemed inadmissible), the evidence against the Petitioner was great. In pleading guilty, the Petitioner received the benefit of the State standing silent as to the circuit court’s determination of whether to recommend mercy.

Therefore, the circuit court did not err regarding its determination that the Petitioner entered into a knowing, intelligent, and voluntary plea of guilty. The circuit court’s plea colloquy was more than adequate to determine the knowing and intelligent nature of the Petitioner’s plea of guilty.

B. The State of West Virginia did not violate the Petitioner's constitutional rights under *Brady* or its progeny concerning the arrest and statement of the co-defendant, Doug E. Jones.

The Petitioner next argues that the State of West Virginia violated his constitutional rights under *Brady* and its progeny when the State failed to provide him in 1991-92 with allegedly exculpatory evidence, to-wit: the fact that this Court deemed the co-defendant's arrest illegal and his subsequent confession inadmissible at the co-defendant's trial. Pet'r's Br. at 10-15. The State strongly disagrees that a *Brady* violation occurred.

First, it should be noted that to the extent this assignment of error seeks to assert the rights of the co-defendant as imputed to the Petitioner's case, the Petitioner lacks standing to do so. In his brief, the Petitioner claims that his arrest was the fruit of the poisonous tree of the co-defendant's illegal arrest and inadmissible confession, which confession apparently aided police in arresting the Petitioner. Pet'r's Br. at 12. However, the Petitioner's case is separate and distinct from the co-defendant's arrest and statement. To extend the famous metaphor, the co-defendant's poisonous fruit did not infect the Petitioner's tree and its fruit.

This Court has held:

“Generally, standing is defined as ‘[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.’ ” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting Black's Law Dictionary 1413 (7th ed. 1999)). “ ‘Our standing inquiry focuses on the appropriateness of a party bringing the questioned controversy to the court.’ ” *Id.*, 213 W. Va. at 95, 576 S.E.2d at 822 (quoting *Louisiana Env'tl. Action Network v. Browner*, 87 F.3d 1379, 1382 (D.C.Cir.1996)). One specific aspect of standing is that one generally lacks standing to assert the rights of another.

State ex rel. Leung v. Sanders, 213 W. Va. 569, 578, 584 S.E.2d 203, 212 (2003). Therefore, the Petitioner has no standing to assert that a violation of the co-defendant's rights was a violation of his rights.

Second, in accepting an unconditional plea agreement, the Petitioner waived his right to appeal any nonjurisdictional error including an allegation under *Brady* that is nonjurisdictional. In *Call*, this Court stated "the defendant must fully understand . . . that if he enters a plea of guilty he waives all non-jurisdictional defects in the criminal proceeding." *Call v. McKenzie*, 159 W. Va. 191, 220 S.E.2d 665 (1975). The Court has further explained:

When a defendant unconditionally and voluntarily pleads guilty to an offense, the defendant generally waives nonjurisdictional objections to a circuit court's rulings, and therefore cannot appeal those questions to a higher court. Claims of nonjurisdictional defects in the proceedings, such as unlawfully or unconstitutionally obtained evidence or illegal detention, generally will not survive a plea bargain. *See, e.g., Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981).

State v. Legg, 207 W. Va. 686 n.7, 536 S.E.2d 110 n.7 (2000).

In this case, the Petitioner knowingly, intelligently, and voluntarily pleaded guilty to first-degree murder. The plea agreement neither in writing or as spread upon the record at the plea hearing allowed the Petitioner to reserve any issues for appeal. The written plea agreement did state in paragraph four:

It is expressly understood that should the within plea be vacated, set aside or overturned by any State or Federal Court, the parties will be returned to their original positions and the State will be free to proceed on the original charges. Further, that should either the State or the defendant violate or fail to fully comply with any provisions of this Agreement, the within plea, conviction and sentence shall be vacated and set aside by the Court upon the motion of the offended party, whether the State or the defendant, and the parties will be returned to their original positions before the entry of this plea, any charges dismissed or reduced, as a result of this plea bargain will be reinstated.

The above four (4) paragraphs constitute the entire agreement between JOHN A. BOYCE and the State of West Virginia.

App. at 4. This explanation of the potentiality of vacation, setting aside, or reversal of the plea was not a reservation of the Petitioner's right to appeal any issue. The circuit court even informed the Petitioner that in pleading guilty he waived his right to appeal. *Id.* at 43.

Therefore, as this issue is nonjurisdictional in nature, this Honorable Court should not review it. The Petitioner waived his right to appeal upon his plea of guilty.

Finally as to the merits of this claim, if the Court does review this issue on appeal, the Petitioner's assertion is without merit. The United States Supreme Court explained in *Brady v. Maryland* that State suppression of evidence favorable to the defendant and material to the outcome of the case is a violation of a defendant's federal due process rights. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). The Court later held that the federal due process requirement is not as broad as statutory or other discovery rules; the Constitution only requires the disclosure of exculpatory or impeachment evidence favorable to the defendant and material to the case. *United States v. Agurs*, 427 U.S. 97, 104 (1976). In *Agurs*, the Court explained that "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Id.* The State has an affirmative duty to disclose such material exculpatory or impeachment evidence, even without request. *Id.*

This Court similarly interprets the West Virginia Constitution as requiring the State to disclose exculpatory and/or impeachment evidence that is favorable to the defendant and material to the outcome of the case. See Syl. Pt. 4, *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982)(exculpatory evidence must be provided under W. Va. due process); *State v. Youngblood*, 221

W. Va. 206, 50 S.E.2d 119 (2007)(the Court discusses the history of federal *Brady* violations and state *Hatfield* violations; impeachment evidence is included in the state due process requirement).

A due process violation under *Brady* and *Hatfield* requires three elements:

There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue 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*, 221 W. Va. 20, 650 S.E.2d 119 (2007). Furthermore, information known to law enforcement is imputed to the prosecutor. *Id.* at Syl. Pt. 1.

In this case, the Petitioner claims the State withheld evidence that the co-defendant's arrest was illegal and his subsequent statement was inadmissible. Pet'r's Br. at 10-15. This claim must fail.

First, the State did not withhold this "evidence." For a proper understanding of this issue, it is important to note the chronology of events. The murder occurred in March 1991. App. at 47. The Petitioner pleaded guilty in 1992. *Id.* at 4, 9, 13, 58-59, 62. Not until 1995—three years after the Petitioner pleaded guilty—did this Court deem the co-defendant's arrest illegal and confession inadmissible against that co-defendant. See *State v. Jones*, 193 W. Va. 378, 456 S.E.2d 459 (1995).

Prior to this Court's opinion in 1995, the State did not know that the co-defendant's arrest was illegal and confession inadmissible against that co-defendant. Therefore, under due process of law, the State had no duty in 1992 to predict such an outcome and inform the Petitioner of that future determination.

Second, the illegality of the co-defendant's arrest and inadmissibility of his confession at his own trial was not exculpatory nor impeachment evidence for the Petitioner. Under *Brady* and its progeny, the State has a duty to disclose evidence that is exculpatory or may be used to impeach a witness. The illegality of the co-defendant's arrest and inadmissibility of his statement do not fall under either category, as far as can be perceived by the State almost twenty years after the fact and without further information in the record on the subject. At most, the co-defendant's statement was used by police to arrest the Petitioner and might potentially have been used at the Petitioner's trial to impeach the co-defendant if he failed to testify in concert with that statement. Pet'r's Br. at 11. However, even if those assertions are true, ample evidence existed without the co-defendant's statement to arrest the Petitioner on suspicion of murder. As to the potential use of the statement as impeachment material, the Petitioner does not claim the State withheld the co-defendant's statement. Instead, the Petitioner claims the State withheld the status of that statement—the fact that the co-defendant's arrest was later deemed illegal and his confession later deemed inadmissible at the co-defendant's trial.

To be exculpatory, the fact that the co-defendant's arrest and statement were illegal and inadmissible against the co-defendant would have to somehow free the Petitioner from blame. Although the co-defendant's statement appears to implicate the Petitioner as the murderer, the inadmissibility of that statement at the co-defendant's trial does not remove blame from the Petitioner. Ample evidence placed blame on the Petitioner, such as the shoelace, the car, the bloody rag, and several other witnesses accounts of the evening. To be impeachment evidence, the fact that the co-defendant's arrest and statement were illegal and inadmissible against the co-defendant would have to somehow discredit the co-defendant as a witness. The error by police in arresting the

co-defendant and taking his statement in violation of the Fourth Amendment would not bear on the co-defendant's credibility as a witness. The State is not accused of withholding the co-defendant's statement, which could potentially be impeachment material, and the illegal nature of the co-defendant's arrest and inadmissible nature of the co-defendant's statement could not be impeachment material.

Therefore, the State did not withhold exculpatory nor impeachment evidence. A violation of *Brady* or its progeny did not occur.

Finally, the illegality of the co-defendant's arrest and inadmissibility of his confession at his own trial were not material to the outcome of the Petitioner's case. Under *Brady* and its progeny, a violation occurs only when the State withholds evidence that is material to the outcome of the case. Here, the status of the co-defendant's arrest and statement would have had no material difference on the outcome of the Petitioner's case. The co-defendant would still have been able to testify against the Petitioner, and even if not, ample other evidence existed. Mrs. Parsons could have testified to hearing the victim in the truck of the Petitioner's car. Mr. Baire could have testified to helping to Petitioner move his car from the murder scene the morning after the murder. Physical evidence linked the Petitioner to the murder, such as the bloody washcloth and the Petitioner's shoestring found around the victim's neck. The status of the co-defendant's arrest and statement does not rise to the level of materiality necessary for this Court to find a violation of *Brady* or its progeny.

Therefore, no error occurred. The State did not withhold evidence; the allegedly withheld evidence was not exculpatory nor impeachment material; and the allegedly withheld evidence was not material to the outcome of the Petitioner's case.

V.

CONCLUSION

For the reasons herein stated, the State respectfully requests that this Court uphold the plea agreement and sentence of the Circuit Court of Kanawha County.

Respectfully submitted,

State of West Virginia,
Respondent,

By Counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

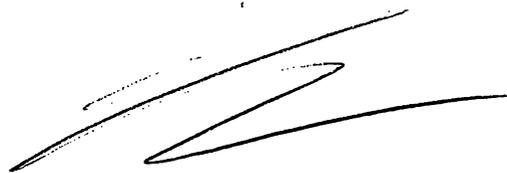


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CERTIFICATE OF SERVICE

I, C. CASEY FORBES, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the "*BRIEF IN RESPONSE TO THE PETITIONER'S BRIEF*" upon counsel for the Petitioner by depositing said copy in the United State mail, with first-class postage prepaid, on the 14th day of May, 2012, addressed as follows:

To: Shawn D. Bayliss, Esq.
Bayliss Law Offices
3554 Teays Valley Road, Suite 114
Hurricane, West Virginia 25526



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