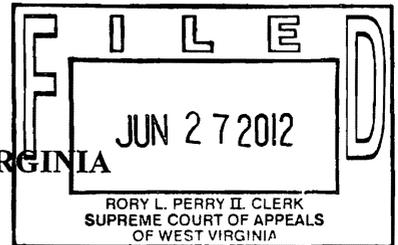


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0197



STATE OF WEST VIRGINIA,

*Plaintiff Below,  
Respondent,*

v.

LEVON FLOURNOY,

*Defendant Below,  
Petitioner.*

---

**RESPONSE BRIEF**

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RESPONSE BRIEF

---

I.

STATEMENT OF FACTS AND STATE OF THE CASE

On August 20, 2005, the Petitioner Levon Flournoy (“Flournoy”) and his sometime-paramour Victoria West (“West”) went to a mutual friend’s house to watch a NASCAR race. App. vol. VI at 1275. By all accounts, Flournoy and West had a turbulent relationship -- which was a pattern with Flournoy. *See, e.g.*, App. vol. I at 95-99, describing Flournoy’s long history of violent and troubled relationships with women, including five failed marriages.

During the NASCAR race, Flournoy was told that there was a newspaper story saying that Flournoy was being sued as the result of West forging checks in Flournoy’s name. App. vol. VI at 1276-77. A verbal altercation followed; Flournoy left and went back to his home with West. *Id.* at 1277-79. At Flournoy’s home, West stood on the front porch, while Flournoy went inside to get a bottle of water and a beer. *Id.* at 1281. While inside, Flournoy loaded his 9mm pistol, chambered

a round, put on the safety, and put the gun in his pocket. *Id.* at 1284. He rejoined West on the porch, and a friend who had been watching the race earlier stopped by Flournoy's house to talk to West. *Id.* at 1285-87. When the friend left, West and Flournoy both sat on the porch. *Id.* at 1288.

According to Flournoy, West wanted to have sex, but Flournoy declined and asked her to leave; according to Flournoy, West put her hand around his neck; Flournoy took his pistol from his pocket and shot West in the head at point-blank range, killing West. *Id.* at 1288-95. Flournoy fired two more shots, which he later said were missed suicide attempts. *Id.* at 1291.

At about 10:30 p.m. the Huntington police arrived, and Flournoy was taken into custody and was taken by Detective Chris Sperry to police headquarters, where Flournoy was fingerprinted, photographed, and tested for gunshot residue. App. vol. II at 19-24. Detective Sperry arrived at police headquarters at about 11:50 p.m. and proceeded to organize his paperwork *id.* at 27-28 and at about 12:56, Sperry read Flournoy his *Miranda* rights, and Flournoy agreed to give a voluntary recorded statement; Sperry began recording Flournoy's statement at about 12:58 a.m.; and the statement lasted until about 1:20 a.m.. *Id.* at 36. In his statement, Flournoy stated, *inter alia*, as follows:

DETECTIVE SPERRY: let's go back. I understand that [West] was on the porch with you or at your residence earlier. Let's just go back and tell me what happened.

FLOURNOY: Uh -- it -- we had been arguing, I guess.

SPERRY: Days, weeks or just --

FLOURNOY: Months.

SPERRY: Months. Okay.

FLOURNOY: Just go on and tell you, yes, now.

She had manipulated a hundred fifty thousand dollars worth of debt in my name. And the people wanted their money.

App. vol. IV at 725-26. Mr. Flournoy continued:

FLOURNOY: I just -- I didn't know what to do. So I went in the house and I -- I loaded my gun. I don't normally keep a loaded gun. I loaded my gun, and I was just going to shoot myself. I --

What Vicky did to me she was just going to do to somebody else. So I had made it up in my mind I was going to take her out and take me out too.

.....

SPERRY: How many shots do you remember firing?

FLOURNOY: Three shots. I fired one shot pointblank [sic] in her face. I was trying to shoot her in the mouth.

App. vol. IV, at 733-34.

On January 20, 2006, Flournoy was indicted by a Grand Jury in Cabell County for the murder of Victoria West. App. vol. I at 5. On April 5, 2006, Flournoy was ordered to undergo a psychiatric and psychological evaluation to determine whether Flournoy was competent to stand trial. *Id.* at 62. On April 6, 2006, the prosecution filed a discovery request asking for, *inter alia*, “[w]ritten notice of the defendant’s intention to offer a defense of insanity, mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt. W. Va. R. Crim. P. 12.2.” *Id.* at 65. No such notice was apparently given.

At the circuit court’s request, Dr. Mark N. Casdorff, a psychiatrist, examined Flournoy. On May 10, 2006, Dr. Casdorff reported to the circuit court that:

Flournoy has the capacity to stand trial and participate with counsel in the preparation of his defence [sic] in the instant matter. Further, on or about the date in question, he was not suffering from any mental disease or defect, which would have precluded

his ability to conform his behavior to the requirements of the law, should he have chosen to.

App. vol. I at 78.

On June 15, 2006, Dr. David Clayman, a psychologist, examined Flournoy at the prosecution's request. Dr. Clayman reported:

[t]here is nothing to suggest that [Flournoy] was suffering from a mental disease or defect at the time of the alleged crime to the extent that [Flournoy] lacked substantial capacity to either appreciate the wrongfulness of his actions or to conform his conduct to the requirements of the law.

*Id.* at 100.

Flournoy's trial began on February 21, 2007 in Cabell County Circuit Court. The circuit court held an *in camera* hearing regarding the admissibility the recorded statement Flournoy gave after his arrest. In that hearing, Detective Sperry testified that after Flournoy was taken into custody, at around 10:30 p.m., he was transported to police headquarters -- where the police took photographs, fingerprints, and performed a gunshot residue test on Flournoy. App. vol. II at 24. Sperry testified that Flournoy was read and understood his rights, declined the assistance of counsel, and gave a voluntary statement to the police, that lasted from 12:58 a.m. to 1:22 a.m. *Id.* at 35-36. Flournoy testified at the *in camera* hearing that he did not remember anything about going over his *Miranda* rights, or signing his waiver of rights, or giving a statement to the police. *Id.* at 247. The circuit court ruled that Flournoy's statement was voluntary and admissible. The court stated:

There is no question in my mind that defendant freely and voluntarily waived those rights; that he was not -- even from his own admissions he was not under the influence of alcohol or any type controlled substances.

....

He was advised of his rights. He waived his rights. He was not promised anything. He was not under the influence. So, his statement was freely and voluntarily given by him after he waived his rights.

Concerning the direct presentment, I have no problem at all the way that this statement was taken from the defendant. You are talking about really a short period of time. . . .

I know there is a law that says you are to be directly presented in front of a Magistrate, but there are exceptions to that.

And I think that the time frame here -- and you are talking about the purpose of it. I think all of that was perfectly okay under the circumstances of this case.

*Id.* at 263-64.

As to the circumstances of West's killing, Flournoy testified at his trial as follows:

I went to get the beer and the water I came back through the living room. I have a leather bag that I keep a 9 mm in for traveling. So, instead of going all the way to the third floor to get the .22 -- the one in the robe -- I just took the 9mm out.

Force of habit. When I took the 9mm out I took a clip, put it in it, chambered it, put the safety on it, put it in my pocket. I wasn't thinking anything about it. It's a force of habit.

App. vol. VI at 1284.

Flournoy testified that he did not remember actually shooting West. *Id.* at 1290.

The psychiatrist Dr. Miller testified at Flournoy's trial as a defense expert witness. App. vol. IV at 755. Notably, Dr. Miller did not testify that at the time Flournoy shot West, Flournoy was suffering from a mental disease or defect that made Flournoy incapable of conforming his behavior to the requirements of the law. (As discussed *infra* at pp. 12-14, this is the standard for the insanity defense in West Virginia.) Dr. Miller did testify that Flournoy was suffering from Post-Traumatic Stress Disorder -- and that as a result of his PTSD, Flournoy's killing of West lacked premeditation, deliberation, maliciousness, and/or "intent" -- because according to Dr. Miller, Flournoy, was in a

“mental state where he was *easily provoked* . . . with a spontaneous act which was deadly.” *Id.* at 864-65 (emphasis added). Dr. Miller said, “I don’t think [Flournoy] premeditated, but I think PTSD *does not preclude one from having capacity.*” *Id.* at 882 (emphasis added).

The psychiatrist, Dr. Casdorff, testified for the prosecution that “I believe that [Flournoy] was not operating under any mental disease that would have prevented him from being capable of managing his behaviors. I believe he was responsible for his behavior at the time.” App. vol. V at 968. When asked whether Flournoy was suffering from “diminished capacity,” Dr. Casdorff replied “I believe he was not suffering from diminished capacity.” *Id.*

The psychologist Dr. Clayman testified for the prosecution that Flournoy was not suffering from Post-Traumatic Stress Disorder. App. vol. VI at 1373. Dr. Clayman testified that Flournoy was able to form the requisite *mens rea* for the act of murder; Dr. Clayman also stated, “[t]here is nothing to indicate up to the time of the event that he was suffering from any mental state that would have prohibited him from having the capacity to form intent.” *Id.* at 1377.

Flournoy offered proposed jury instructions on the defense of insanity, which the circuit court refused to give. *Id.* at 1404-31,<sup>1</sup> but did give instructions requested by the State on “diminished capacity”. App. vol. VII at 1529-30. In making this ruling, the circuit court said

Now, the defense has offered several instructions dealing with insanity, and the Court is of the opinion this is not a case involving insanity. It’s not a defense in this case. There was no testimony from anybody that the defendant was under West Virginia law insane at the time of the commission of the crime.

....

In the Court’s opinion insanity and diminished capacity are totally two separate issues.

App. vol. VI at 1394-95.

The circuit court also stated, “I’ve always thought that was the law in West Virginia if you are going to plead Not Guilty by Reason of Insanity that had to be your plea at the time, but I may be wrong. *Id.* at 1422.”<sup>2</sup>

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<sup>1</sup> The language of one of the refused instructions stated:

There exists in the trial of an accused a presumption that the accused was sane at the time of the alleged commission of the alleged offense. If, however, any evidence introduced by the accused or the State fairly raises doubt upon the issue of the accused’s sanity at the time, the presumption of sanity ceases to exist and the State then has the burden to establish the sanity of the accused beyond a reasonable doubt. If the whole proof upon the issue leaves the jury with a reasonable doubt as to the accused’s sanity at that time, the jury must accord him the benefit of the doubt and acquit him. *Id.* at 1404-05.

The remainder of Flournoy’s proposed jury instructions on insanity can be found at App. vol. VI at 1408-31.

<sup>2</sup>The circuit court was correct. West Virginia Rules of Criminal Procedure Rule 12.2 states: “If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the state in writing of such intention and file a copy of such (continued...) ”

On February 28, 2007, the jury found Flournoy guilty of murder in the first degree, without a recommendation of mercy. App. vol. VII at 1601.

The Petitioner's Assignments of Error in the instant case are as follows:

(1) that it was error for the trial court to permit the jury to hear the post-arrest statement of Flournoy because Flournoy was not taken before a Magistrate without unreasonable delay;

(2) that the trial court abused its discretion when it refused to give Flournoy's proposed insanity instructions to the jury;

(3) that W. Va. Code, 62-3-15 [1994] is unconstitutional because it provides no guidance concerning what factors a jury may and may not consider when deciding the issue of mercy, and that the trial court erred in failing to give instructions on such factors to the jury; and

(4) that the trial court gave no guidance to the jury regarding the use of their notes during deliberations.

## II.

### **SUMMARY OF RESPONDENT'S ARGUMENT AND STATEMENT REGARDING ORAL ARGUMENT**

(1) The circuit court did not err in allowing the jury to hear Flournoy's statement because his statement was voluntary and there was no unreasonable delay before he was taken before a magistrate.

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<sup>2</sup>(...continued)  
notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense." W. Va. R. Crim. P. 12.2(a). The Record does not appear to show any Notice by Flournoy, pursuant to W. Va. R. Crim P. 12.2(a), of an intended insanity defense.

(2) The circuit court did not err by refusing to give instructions on insanity because there was no evidence that supported the giving of such instructions. Furthermore, nothing in the record suggests that Flournoy gave notice to the prosecutor of his intention to offer insanity as a defense, in accordance with W. Va. R. Crim. P. 12.2(a).

(3) This Court has held on numerous occasions that “guidance” instructions to a jury on the issue of mercy would constitute reversible error by a circuit court. Flournoy’s assertion that W. Va. Code, § 62-3-15 [1994] is unconstitutional because it fails to guide the jury in its mercy deliberation is contrary to the jurisprudence of this Court.

(4) The circuit court gave instructions on the use of notes to the jury in accordance with applicable West Virginia law. Flournoy neither offered instructions on the matter of the use of notes nor objected to the instructions given. Failure to raise this issue at the trial level subjects the issue to plain error review, and plain error was not argued and is not present.

The Respondent does not believe that oral argument is necessary in the instant case. There are no unsettled issues of law and the record is clear.

### **III.**

#### **ARGUMENT**

##### **A. FLOURNOY’S STATEMENT**

In Syllabus Point 5 of *State v. Starr*, 158 W. Va. 905, 216 S.E.2d 242 (1975), this Court stated “[t]he State must prove, at least by a preponderance of the evidence, that confessions or

statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.”<sup>3</sup>

This Court has made it clear that the “prompt presentment” rule codified at *W. Va. Code* § 62-1-5 [1997]<sup>4</sup> and W. Va. R. Crim. P. Rule 5 [1996]<sup>5</sup> is not designed to prevent police from properly processing arrested persons, nor to bar the taking of voluntary statements from arrested persons. Rather, the rule is designed to prevent prolonged post-processing interrogation by the State for the purposes of coercing an involuntary statement.

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<sup>3</sup> Flournoy also argues that the police did not have probable cause to arrest Flournoy. Pet’r’s Br. at 16. In Syllabus Point 1 of *State v. Plantz*, 155 W. Va. 24, 180 S.E.2d 614 (1971), this Court stated: “Probable cause to make an arrest without a warrant exists when the facts and the circumstances within the knowledge of the arresting officers are sufficient to warrant a prudent man in believing that an offense has been committed or is being committed.”

A review of the testimony in the instant case shows that police had probable cause to arrest Flournoy at the scene. Flournoy threatened suicide and wrestled with emergency personnel for the firearm, while West was dead on Flournoy’s porch from a gunshot wound. App. vol III. at 325, 333-34. The police did not act improperly by taking Flournoy into custody.

<sup>4</sup> *W. Va. Code* § 62-1-5 [1997] states in pertinent part:

(a)(1) An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence or as otherwise authorized by law, shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made.

<sup>5</sup>W. Va. R. Crim. P. Rule 5 [1996] states in pertinent part:

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivision of this rule.

Thus, this Court stated in *State v. Whitt*, 184 W. Va. 340, 345, 400 S.E.2d 584, 589 (1990):

Under our prompt presentment rules . . . delay in transporting a defendant to police headquarters and the time consumed in routine processing is not critical for prompt presentment purposes . . . [and] delay in presenting the defendant to a magistrate after he has confessed does not violate our prompt presentment statute either, because the purpose of the statute is to avoid prolonged interrogation in order to coerce a confession. (citations omitted.)

In the instant case, Flournoy was taken into police custody at the crime scene. He was promptly taken to police headquarters for normal processing -- which included initial questioning, photographs, gunshot residue tests, and fingerprinting. App. vol. II at 23-24. While being processed, Flournoy was fully advised of his *Miranda* rights, and he agreed to and did give a statement. *Id.* at 29-36. There is nothing in the record that would suggest that the police delayed presenting Flournoy before a magistrate in order to “coerce” a “confession” or to conduct a “prolonged interrogation.” To the contrary, Flournoy freely gave his statement in a timely fashion -- as the circuit court properly concluded. *See p. 5 supra.*

In Syllabus Point 1, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996), this Court stated:

When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

For the above reasons, the circuit court did not clearly err in finding Flournoy’s statement to be voluntary, or in finding that there was no unreasonable delay in taking him to a magistrate; and there was therefore no legal error in allowing the jury to hear Flournoy’s statement.

## B. INSANITY INSTRUCTIONS

Flournoy contends that the circuit court committed error when it refused to give his proffered instructions on the defense of insanity. However, the circuit court correctly determined that there was no evidence that warranted the giving of insanity defense instructions.

Initially, as noted *supra* at p. 7, West Virginia Rule of Criminal Procedure 12.2(a) states that:

[i]f a defendant intends to rely upon the defense of insanity at the time of the alleged crime, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the state in writing of such intention and file a copy of such notice with the clerk. **If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. . . .**

(emphasis added).

Nothing in the Petitioner's Brief points to any notification to the circuit court or the prosecution from Flournoy regarding his intent to use insanity as a defense. Therefore, Flournoy's argument that he should have been allowed to raise this defense is without merit.

Assuming *arguendo* that Flournoy had satisfied the Rule 12.2 requirement, the question before the circuit court would be whether there was an evidentiary basis for such instructions. Syllabus Point 1 of *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996), states "[a]s a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion." In Syllabus Point 4 of *State v. Collins*, 154 W. Va. 771, 180 S.E.2d 54 (1971), this Court said, "[i]nstructions must be based upon the evidence and an instruction which is not supported by evidence should not be given."

The test standard for insanity as a legal defense in West Virginia

is a variation of the American Law Institute Test . . . : 'A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or

defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.’

2 *Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure* 109-10 (2d ed. 1993). In *State v. Massey*, 178 W. Va. 427, 433, 359 S.E.2d 865, 871 (1987), this Court stated:

We have traditionally used the test for insanity as contained in Syllabus Point 2, in part, of *State v. Myers*, 159 W.Va. 353, 222 S.E.2d 300 (1976):

“When a defendant in a criminal case raises the issue of insanity, the test of his responsibility for his act is whether, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law . . . .”

West Virginia law, in sum, has firmly established that a defendant in a murder trial must proffer some competent evidence showing that the defendant, at the time of a killing and as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law of insanity before it can be properly used as an absolute defense. As Professor Cleckley, has written,

in West Virginia to entitle the defendant to an insanity instruction the defendant must present some competent evidence on the subject. For example, the defendant cannot ask the jury simply to consider, as an alternative to guilt or innocence, that the defendant could have been insane at the time of the alleged crime.

2 *Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure* 108 (2d ed. 1993).

In the instant case, the complete defense of insanity was not supported by any of the evidence presented at trial. *See* discussion at pp. 5-6 *supra*. Flournoy’s own expert witness, Dr. Miller, stated that Flournoy’s acknowledged mental problems, while arguably supporting the partial defense of “diminished capacity,” did not render Flournoy “incapable” of obeying the law. *Id.*

In *State v. Schofield*, 175 W. Va. 99, 331 S.E.2d 829 (1985), this Court held that the lower court did not err in refusing to instruct the jury on insanity, because of the lack of any substantial evidence at trial of the defendant's insanity. This Court stated:

In *State v. Woods*, 169 W.Va. 767, 289 S.E.2d 500 (1982) we found that it was error to charge the jury with a theory that was unsupported by any evidence. As insanity is an affirmative defense, the burden is on the appellant to produce sufficient evidence to allow the jury to believe that there was a reasonable doubt as to the defendant's sanity, Syllabus Point 3, *State v. Daggett*, 167 W.Va. 411, 280 S.E.2d 545 (1981). Four experts in pretrial medical examinations found Miss Schofield sane. Additional competent evidence of insanity would have been needed to shift the burden of persuasion to the state and allow the court to give an insanity instruction. But Miss Schofield relies on *State v. Wimer*, 168 W.Va. 417, 284 S.E.2d 890 (1981), where this Court held: “[T]he testimony of expert witnesses is not exclusive and the jury has the right to weigh the testimony of all witnesses, experts and otherwise.” *State v. Wimer, supra*, 168 W.Va. at 428, 284 S.E.2d at 896. We have, however, reviewed the record in this case and find that no lay testimony was introduced in this case and the trial court was correct that an insanity issue was not raised.

*Id.* at 107-08, 331 S.E.2d at 838 (1985).

In the instant case, the circuit court did not err in refusing to give Flournoy's requested insanity instructions.

### C. MERCY

Flournoy asserts that instructions should have been given to the jury explaining certain factors that should not be considered in determining mercy -- such as race, gender, sexual orientation, etc. Flournoy argues that W. Va. Code, § 62-3-15 [1994] is unconstitutional because it does not require such instructions.

In West Virginia, “under both statutory and case law, the recommendation of mercy in a first degree murder case lies solely in the discretion of the jury,” *State v. Triplett*, 187 W. Va. 760, 769, 421 S.E.2d 511, 520 (1992). Syllabus Point 1 of *State v. Miller*, 178 W. Va. 618, 363 S.E.2d 504

(1987) states, “[a]n instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should **not** be given.” (emphasis added).

Following *Miller*, if the circuit court had given the jury instructions in the instant case on factors that the jury could consider in convicting Flournoy, then the circuit court would quite possibly have committed reversible error. The court did not err in this regard.

#### **D. JURY INSTRUCTIONS ON NOTES**

The Petitioner argues that the jury’s verdict should be set aside because the trial judge “failed . . . to give proper instructions to the jury about the use of notes and note taking.” (Pet’r’s Br. at 23.) In the instant case, the circuit court did give the jury an instruction regarding note-taking. The court told the jury:

Now, we have given you some notepads and a pencil and I’m going to give you some instructions concerning that.

The first thing I want you to do -- that should not have anything on it -- is write your name on the first page, if you would please. Each one of you write your name on that.

Have you already done that? Okay.

Now, we have provided you all with notepads and pencils. And under the laws of this State you are allowed to take any notes if you want to. The law in no way requires that you take any notes at all, but this case will take several days. And there may be something that you feel is noteworthy that you want to just make a note of when the testimony comes out. So, we provide those to you so that -- to refresh your memory. If you feel like it’s necessary, you can use your notes. You will have those in the jury room with you when you go back to decide this case.

Like I say, you are not required to take any notes at all. We have some jurors, particularly teachers, they take a lot of notes. I don’t think there’s any teachers on here. I’m not sure. But anyway, other people don’t take any notes. They rely totally on their memory. So, that’s up to you. Some of them doodle, you know, whatever.

At the end of all of the evidence and when you have taken them into the jury room and you have decided the case we simply ask that you tear off all of your notes and tear them up or either take them with you. We are not interested in your notes.

We will be taking them up from you on the breaks. So, that's why I am asking -- you will have your name on the first page. If you want to take any notes, begin with the second page because we don't want anything on the first page except your name.

So, I'm just -- we just provide those to you to help you in this case. And, like I say, it will take several days. So, there will probably be some pretty technical testimony in this case.

(App. vol. III at 310-11.)

Nowhere in the Petitioner's Brief does the Petitioner point to any request to the circuit court for additional or different instructions about the jury's use of their notes; it does not appear that any such request was made, much less denied. Therefore, any arguable deficiency error in the trial court's instructions would necessarily have to meet the "plain error" standard. In this regard, nowhere in the Petitioner's Brief is any prejudice alleged resulting from the trial court's actions; while a showing of serious prejudice is essential to establishing "plain error." *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114, (1995).<sup>6</sup>

In *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992) this Court approved of juror note taking, and approved an instruction that informed the jury about their use of notes. While the court's

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<sup>6</sup> Syl. Pt. 9, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) states:

Assuming that an error is 'plain,' the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means that the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court and is the defendant rather than the prosecutor who bears the burden of persuasion with respect to prejudice.

instruction in the instant case was less thorough than the instruction approved in *Triplett*, the instruction in the instant case did accurately instruct the jury about note-taking. And, as noted, the Petitioner never asked for a different or modified instruction.

Numerous courts have found that failure to preserve an alleged insufficiency in instructions to the jury about note-taking bars consideration of the insufficiency claim on appeal, especially in the absence of demonstrated prejudice. *See, e.g., Watkins v. State*, 393 S.W.2d 141 (Tenn. 1965) (failure to object to court's actions regarding juror note-taking was waiver of issue on appeal where no showing of prejudice was made); *People v. Taylor*, 793 N.Y.S.2d 29 (App. Div. 2005) (defendant's failure to object to court's instructions to jury about note-taking constitutes waiver and no prejudice was shown that would allow court to review alleged error in the interests of justice); *People v. Morris*, 807 P.2d 949, 986 (Cal. 1991) (trial court not required to instruct jury about use of notes *sua sponte*; no prejudice was shown from lack of instruction); *accord, People v. Grizman*, 755 P.2d 917 (Cal. 1988). *See also Myers v. State*, 499 So. 2d 895, 897 (Fla. 1986) (defendant's failure to request note-taking instruction barred consideration of issue on appeal in absence of prejudice that "vitiate[s] the entire trial.").

The Petitioner did not preserve this issue for appeal, and does not allege any actual prejudice flowing from the court's actions – so the plain error doctrine does not apply. For this reason, the Petitioner's Fourth Assignment of Error is without merit.

#### IV.

#### CONCLUSION

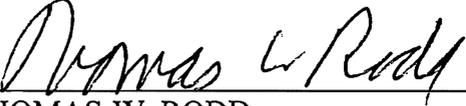
For the aforementioned reasons, this court should affirm the Petitioner's conviction and sentence.

Respectfully submitted,

STATE OF WEST VIRGINIA  
*Respondent*

*By counsel,*

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL

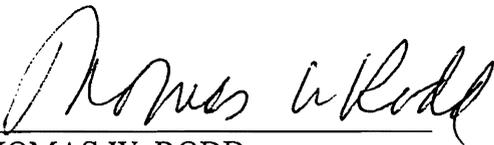
  
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**CERTIFICATE OF SERVICE**

I, THOMAS W RODD, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *RESPONSE BRIEF* upon counsel for the Petitioner, by depositing said copy in the United States mail, with first-class postage prepaid, on this 27<sup>th</sup> day of June, 2012, addressed as follows:

To: Gina M. Stanley, Esq.  
Cabell County Public Defender Office  
320 9th Street  
Huntington, West Virginia 25701

  
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THOMAS W. RODD