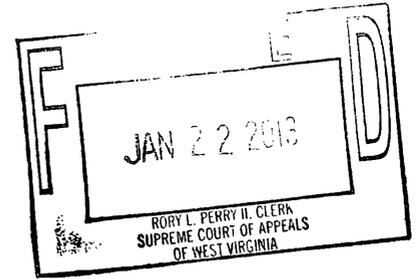


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket Number 12-0836



STATE OF WEST VIRGINIA,

Plaintiff-Respondent

v.

RAY DWAYNE COOK,

Defendant-Petitioner

PETITIONER'S BRIEF

Kevin D. Mills
WV Bar No. 2572
Kevin D. Mills & Associates, PLLC
1800 West King Street
Martinsburg, West Virginia, 25401
Phone: (304) 262-9300
Fax: (304) 262-9310
phoupt@wvacriminaldefense.com

Shawn R. McDermott
WV Bar No. 11264
Kevin D. Mills & Associates, PLLC
1800 West King Street
Martinsburg, West Virginia, 25401
Phone: (304) 262-9300
Fax: (304) 262-9310
smcdermott@wvacriminaldefense.com

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ASSIGNMENTS OF ERROR

1. Whether the Circuit Court erred in failing to suppress the firearm, holster, and ammunition seized from Mr. Cook's vehicle?
 - a. Whether the affidavit in support of the search warrant for Mr. Cook's vehicle was sufficient or "bare bones" and conclusory where the affidavit contained only two sentences?
 - b. Whether the seizure of the firearm, holster, and ammunition from Mr. Cook's vehicle satisfied the plain view exception to the warrant requirement where police could view the evidence from a legal vantage point but did not have legal access to the interior of the vehicle?
2. Whether the Circuit Court erred in failing to suppress the content, including text messages, that were recovered from Mr. Cook's cellular phone?
 - a. Whether the search warrant for the content of Mr. Cook's cellular phone failed the particularity requirement of the Fourth Amendment where the search warrant listed as the place to be searched the evidence room of the Ranson Police Department and listed the thing to be seized as the cellular phone?
 - b. Whether the affidavit in support of the search warrant for Mr. Cook's cellular phone was sufficient or "bare bones" and conclusory where the affidavit failed to allege a specific nexus between the evidence sought and the alleged murder?
 - c. Where there was no valid search warrant, whether the search of the content of the cellular phone was permissible pursuant to an exception to the warrant requirement as a search incident to arrest, where the phone was initially legitimately seized as a search incident to arrest but where the content of the phone was not searched until months after the initial arrest?
3. Whether the Circuit Court erred when it failed to suppress various statements of the Defendant that were elicited in violation of his rights?
 - a. Whether the Circuit Court erred when it failed to suppress Defendant's statements that were elicited in violation of his *Miranda* rights?
 - i. Whether a statement made by the Defendant to Captain Stevens in the parking lot of Southern States after Defendant was placed into custody was admissible under the public safety exception to *Miranda*?
 - ii. Whether statements made by the Defendant to Corporal Norris in his

police cruiser were inadmissible under *Miranda* because Defendant was in custody and the statements were elicited through the functional equivalent of questioning?

- iii. Whether statements made by the Defendant to Corporal Norris in the interview of the Ranson Police Department were inadmissible under *Miranda* and whether such questions fit under the narrow routing booking question exception to *Miranda* where the questions were asked prior to the administering of the *Miranda* warnings and prior to Defendant requesting counsel and where the questions related to the past and current use of prescription medication by the Defendant?
 - iv. Whether a statement made by the Defendant in the presence of Patrolman Henderson should be suppressed pursuant to *Miranda* where the statement was made subsequent to Defendant's invocation of his right to counsel and whether the State sufficiently proved that Defendant re-initiated the conversation and knowingly and intelligently waived his right to counsel?
- b. Whether the Circuit Court erred when it failed to suppress Defendant's post-arraignment statements as a violation of his Sixth Amendment right to counsel?
 - c. Whether the Circuit Court erred when it allowed the State to enter Defendant's statements that had been suppressed pursuant to *Miranda* into evidence in the cross-examination of the defense psychological expert, Dr. Bernard Lewis, to impeach Dr. Lewis pursuant to *State v. DeGraw*, 196 W. Va. 261, 470 S.E.2d 215 (1996)?
3. Whether the Circuit Court erred in denying Defendant's motion to suppress statements made to the State's psychological expert, Dr. David Clayman, or in the alternative striking the testimony of Dr. Clayman, where Dr. Clayman failed to follow the procedures set forth in *State v. Jackson*, 171 W. Va. 329, 298 S.E.2d 866 (1982) in order to comply with a defendant's constitutional rights during the State's independent psychological evaluation of a defendant claiming a mental defense?
 4. Whether the Circuit Court erred in denying the Defendant's motion to have the State present its medical and psychological evidence as to Defendant's state of mind in the case-in-chief, where the defense was diminished capacity?
 5. Whether the State's inadvertent suppressing of evidence until the close of the Defendant's case was a *Brady* violation that prejudiced Defendant's ability to receive a fair trial?
 6. Whether the State's publishing to the jury on the overhead projector of the transcript of the Defendant's invocation of his Fifth Amendment right to counsel in a post-arrest

interrogation was reversible error necessitating a new trial be granted?

7. Whether the State's psychological expert's reference to the Defendant being in jail custody at the time of his interview with the expert was reversible error necessitating the granting of a new trial?
8. Whether the Circuit Court's limiting of Defendant's motion to present a case in surrebuttal prejudiced Defendant's ability to have a fair trial?
9. Whether the Circuit Court's procedure concerning the bifurcated mercy phase of the trial was erroneous where the Circuit Court ordered the State to enter evidence and make argument before Defendant, where the Circuit Court allowed the State to enter previously inadmissible Rule 404(b) evidence where Defendant did not open the door in the mercy phase to such evidence, and where the Circuit Court failed to conduct an examination of State's evidence pursuant to Rules 401 and 403 of the West Virginia Rules of Evidence?

STATEMENT OF THE CASE

On July 15, 2011, members of the Ranson Police Department arrested Mr. Ray Cook after responding to a shooting that had occurred at the Southern States parking lot in Ranson, West Virginia. App. Vol. II, p. 88, June 6, 2012 Trial Tr. 12. Mr. Cook was found in the middle of the parking lot by the officers. *Id.* at 13. His girlfriend, Jenny Perrine, was found dead in her vehicle with numerous bullet wounds. *Id.* at 13. After committing the shooting, Mr. Cook had called 911 and requested assistance. *Id.* at 39. Mr. Cook readily admitted to shooting Ms. Perrine to the 911 operator, the officers responding to the scene, and the investigating officers. *Id.* at 39, 148, 168. Numerous witnesses at Southern States witnessed the shooting. *Id.* at 53-139. Furthermore, the State recovered a text from Mr. Cook to his ex-wife, Tara Myers, sent immediately prior to the shooting indicating that he was going to shoot Ms. Perrine. App. Vol. II, p. 89, June 7, 2012 Trial Tr. 34.

The State subsequently indicted Mr. Cook on one count of murder in the first degree and one count of brandishing a firearm. App. 1-3. The Circuit Court did not grant Mr. Cook bond.

A number of pretrial issues were raised by Mr. Cook, and two pretrial hearings were held before the Honorable David Sanders, Circuit Court Judge of Jefferson County. App. Vol. I, pp. 69-70.

Mr. Cook's trial began on June 4, 2012 and lasted until June 15, 2012. Mr. Cook did not contest his factual innocence at trial, but instead raised the defense of diminished capacity, arguing that his bipolar disorder as well as the side effects of the medication that he was on rendered him incapable of forming the necessary intent of premeditation and deliberation to commit first degree murder.

On June 15, 2012, the jury returned a verdict of guilty as to first degree murder and brandishing. App. Vol III, p. 94, June 15, 2012 Trial Tr. 99. Following the guilt phase of the trial, a bifurcated mercy phase was held. *Id.* at 103. The jury did not recommend mercy. *Id.* at 136. The Circuit Court subsequently sentenced Mr. Cook to the penitentiary for a term of life without mercy. App. 4.

1. First Pre-Trial Hearing

On May 15, 2012, the first pre-trial hearing was held. An evidentiary hearing was held on the Defendant's motions to suppress evidence and to suppress statements made by the Defendant. The State called the following witnesses: 1) 911 operator Brandon Potts, 2) Captain Glen Stevens of the Charles Town Police Department, 3) Officer Crystal Tharpe of the Ranson Police Department, 4) Corporal Patrick Norris of the Ranson Police Department, and 5) Patrolman William Henderson of the Ranson Police Department. App. Vol. I, p. 69, May 15, 2012 Pretrial Tr. 8-84. The State also entered the following relevant exhibits into evidence: 1) the audio of a 911 call made by the Defendant, 2) the search warrant for Defendant's vehicle, 3) the search

warrant for Defendant's cell phone, 4) the search warrant for Defendant's phone records, and 5) the video of Defendant in the interrogation room at the Ranson Police Department. *Id.* The Defendant did not call any witnesses. He entered his *Miranda* waiver form as Defendant's exhibit 1. Following the taking of evidence, the Court ordered that the parties file memoranda of law in support of their respective positions and ordered that the parties appear on May 24, 2012 to offer further argument on the Fourth and Fifth Amendment issues. *Id.* at 118.

At the initial pretrial hearing, defense counsel informed the Court that the State had agreed to allow the defense the opportunity to physically examine the evidence in the possession of the Ranson Police Department on the next day, May 16, 2012. *Id.* at 129. Furthermore, at this hearing Sgt. David Boober's forensic examination of Mr. Cook's cellular phone was disclosed for the first time. *Id.* at 130.

Defendant then made a motion regarding the order of proof at the trial in a diminished capacity case, and the Circuit Court ruled that Defendant had to present his expert witnesses first on the issue of diminished capacity and that the State could call its witnesses in rebuttal. *Id.* at 131.

Furthermore, the State informed the Court that it was not intending to introduce any Rule 404(b) evidence at trial, including any prior bad acts and Defendant's past battery conviction. *Id.* at 136. However, the State reserved the right to enter any Rule 404(b) evidence if Defendant opened the door by entering good character evidence. *Id.* at 137.

The Circuit Court then inquired about whether defense counsel had made provisions to have street clothes available for Mr. Cook at trial instead of his jail uniform. *Id.* at 164. Defense counsel indicated that he had made arrangements with the Eastern Regional Jail for Mr. Cook to

be dressed in street clothes prior to being transferred to the courthouse. *Id.*

2. Second Pre-Trial Hearing

On May 24, 2012, the second pre-trial hearing was held. App. Vol. I, p. 70. The Circuit Court had reviewed the respective memoranda of law submitted by the parties and allowed counsel to address the issues in open court. At this hearing, the following issues were addressed by counsel and ruled upon by the Circuit Court: 1) the legality of the seizure of evidence from the Defendant's vehicle; 2) the legality of the seizure of electronic information from the Defendant's cellular phone; 3) the admissibility of statement made by the Defendant to Captain Stevens of the Charles Town Police Department; 4) the admissibility of statements made by the Defendant while in Corporal Norris' cruiser; 5) the admissibility of statements made by the Defendant while in the police interview room; 6) the admissibility of statements made by the Defendant in the presence of Patrolman Henderson while being booked; 7) the admissibility of statements of the Defendant to Dr. Clayman during an interview of the Defendant on April 19, 2012; and 8) the admissibility of statements made by the Defendant to Lt. Roberts while being transported from Jefferson County Magistrate Court to the Eastern Regional Jail. App. Vol I, p. 70, May 24, 2012 Pretrial Tr. 1-148.

As to the motion to suppress evidence derived from the search of Defendant's vehicle, defense counsel argued that the affidavit in support of the search warrant was "bare-bones" and as such the search violated Defendant's rights under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution. *Id.* at 18-27. The State argued that the affidavit in support of the search warrant was sufficient and alternatively that the search of Defendant's vehicle fell under the 'plain view' exception to the warrant requirement. *Id.* at 10-17. After

considering the evidence, the submissions of counsel, and the arguments of counsel, the Circuit Court denied the Defendant's motion to suppress evidence that was seized during the search of Defendant's vehicle. *Id.* at 168-69. Without addressing the sufficiency of the affidavit in support of the search warrant, the Court ruled that the search of Defendant's vehicle was permissible without a warrant because "[t]he officers could observe in plain view, and without the benefit of further search, a gun, a gun holster, and ammunition on the passenger car seat.... Accordingly, pursuant to the 'plain view' exception to the warrant requirement the officers were authorized to conduct a warrantless search of the vehicle." App. 116, May 24, 2012 Pre-Trial Hearing Order at 5-6.

As to the motion to suppress evidence derived from the search of Defendant's cellular phone, defense counsel argued that the search warrant failed to specify the piece of property to be searched— the cellular phone and erroneously specified the place to be searched as the evidence room at the Ranson Police Department. App. Vol I, p. 70, May 24, 2012 Pretrial Tr. 37. The State argued that inherent in the request to search for the cellular phone was the request to search the contents of the cellular phone. *Id.* at 34. The Circuit Court denied the Defendant's motion to suppress and found that the officers had a "lawful right to search the contents of the cell phone pursuant to a search incident to a lawful arrest" and that the "search warrant sufficiently put the defendant on notice that the contents of the cell phone were subject to search." App. 116, May 24, 2012 Pre-Trial Hearing Order at 6-7.

As to the motion to suppress various statements made by the Defendant, the Circuit Court first addressed the statement that was made to Captain Stevens after Captain Stevens arrived at the Southern States and had placed Defendant in handcuffs. App. Vol I, p. 70, May 24, 2012

Pretrial Tr. 171. The Circuit Court denied Defendant's motion to suppress these statements, finding that *Miranda* warnings were not required because the statements "were not the product of questioning" and that even if the statements were elicited through questioning, there was a public safety exception to the *Miranda* warnings. App. 116, May 24, 2012 Pre-Trial Hearing Order at 7-8.

The Circuit Court then addressed the statements that were made to Corporal Norris while Mr. Cook was detained in Corporal Norris' cruiser. App. Vol I, p. 70, May 24, 2012 Pretrial Tr. 172-73. The Circuit Court found that these statements were not elicited from any questioning and were thus admissible. App. 116, May 24, 2012 Pre-Trial Hearing Order at 8.

Next, the Circuit Court addressed the statements made by Mr. Cook while being questioned in the interview room at the Ranson Police Department. App. Vol I, p. 70, May 24, 2012 Pretrial Tr. 174-75. The Circuit Court found that the State may admit answers to any questions that Mr. Cook made prior to invoking his right to counsel, but that any statements made after invoking his right to counsel must be suppressed. App. 116, May 24, 2012 Pre-Trial Hearing Order at 8-10. The Circuit Court reasoned that the statements made before the administration of his *Miranda* rights and prior to his invocation of the right to counsel were merely background questions and were not interrogation. App. 116, May 24, 2012 Pre-Trial Hearing Order at 8-9. The Circuit Court suppressed all statements made by Mr. Cook after the invocation of his right to counsel, but ruled that such statements were only suppressed in the State's case-in-chief and may be used in rebuttal on the issue of the Defendant's mental state. App. 116, May 24, 2012 Pre-Trial Hearing Order at 9-10.

The Circuit Court then addressed Defendant's motion to suppress Defendant's statements

made to Dr. David Clayman as part of the State's psychological examination of Defendant pursuant to *State v. Jackson*. App. Vol I, p. 70, May 24, 2012 Pretrial Tr. 129-39. Defendant argued that the State failed to comply with the requirements of *Jackson* because Dr. Clayman failed to record the entire interview of the Defendant. *Id.* The Circuit Court denied the Defendant's motion to suppress the recording of the interview or strike the testimony of Dr. Clayman, finding that "the breaks in the recording were inadvertent and not part of any improper motive on the part of the state's expert." App. 116, May 24, 2012 Pre-Trial Hearing Order at 10.

The Circuit Court then addressed the statements that Defendant made while being booked by Officer Henderson of the Ranson Police Department. App. Vol. I, p. 70, May 24, 2012 Pretrial Tr. 178. The Court held that the statement was not the product of questioning and was voluntary and denied the Defendant's motion. App. 116, May 24, 2012 Pre-Trial Hearing Order at 11.

As to the statements made by Defendant to Lt. Roberts while being transported to the Eastern Regional Jail, Defendant argued that such statements were elicited in violation of *Miranda* and his Sixth Amendment right to counsel because they were elicited after he was arraigned and were the result of questioning by Lt. Roberts. App. 27. The State stipulated that it would not admit the statement in its case-in-chief but reserved the right to use it in rebuttal pursuant to *State v. DeGraw*, 196 W. Va. 261, 470 S.E.2d 215 (1996). App. Vol. I, p. 70, May 24, 2012 Pretrial Tr. 146.

3. Guilt Phase of Trial

On June 4, 2012, the Parties appeared before the Court in order for the jury pool of seventy-five citizens to complete a jury questionnaire offered by the parties. June 4, 2012 Trial

Tr.

On June 5, 2012, voir dire was conducted and lasted the whole day. App. Vol. I, p. 87, June 5, 2012 Trial Transcript.

On June 6, 2012, the jury was impaneled, and the State and the Defendant offered their respective opening statements. App. Vol. II, p. 88, June 6, 2012 Trial Tr. 15-47. The State then began calling their witnesses. *Id.* at 47. The State first called Brandon Potts, the 911 operator, to enter into evidence Mr. Cook's call to 911 on the day of the shooting. *Id.* The State then called eight witnesses who were present at the Southern States at the time of the shooting. *Id.* at 47-139. Next, the State called as a witness Captain Stevens, who testified to being the first responder to the scene of the shooting and entered into evidence a statement made by Mr. Cook—"I'm sorry, I don't normally act like this but I didn't take my medication." App. Vol. II, p. 88, June 6, 2012 Trial Tr. at 153. Next, the State called Corporal Norris as a witness. App. Vol. II, p. 88, June 6, 2012 Trial Tr. at 168. Through Corporal Norris, the State entered into evidence the items seized from Defendant's car—the firearm, magazine, and holster. *Id.* at 176-77. The State also entered into evidence the audio recording of Mr. Cook's statement to Corporal Norris in the police cruiser. *Id.* at 178. The State further entered into evidence Mr. Cook's statements made to Corporal Norris at the interview room of the Ranson Police Department about whether Mr. Cook was under the influence of drugs or on any prescription medication on the day of the shooting. *Id.* at 183.

APA Rasheed: During that exchange that we just heard,... did you ask the Defendant if he was under the influence of drugs or alcohol?

Cpl. Norris: Yes.

APA Rasheed: What was his response?

Cpl. Norris: That he was not.

APA Rasheed: Did you ask him if he was under the influence of any prescription medication?

Cpl. Norris: I did.

APA Rasheed: What was his response?

Cpl. Norris: He was not.

APA Rasheed: ... And did he mention taking any sort of medication at all the previous day?

Cpl. Norris: He did say he took his medication the previous day but he wasn't currently on it.

APA Rasheed: ... And you asked him about that specific day and what was his response?

Cpl. Norris: That he wasn't on it, he didn't take it today.

Id. at 183.

The State then called Officer Tharp as a witness and she testified as to the search and seizure of the firearm, magazine, and holster from Mr. Cook's vehicle. *Id.* at 237. The firearm, magazine, and holster were entered into evidence. *Id.* at 242.

On June 7, 2012, the State called Patrolman Henderson, Joy Skidmore, Erin Brandenburg, Tara Myers, Chastity Stotler, and Mark Stickel as witnesses. App. Vol. II, p. 89, June 7, 2012 Trial Tr. 3-98. Patrolman Henderson testified to the statement that Mr. Cook made while being processed before being taken to the Eastern Regional Jail.

APA Crofford: ... While you were engaged in fingerprinting or during that time did Mr. Cook make any statements?

Officer Henderson: Yes. After he was done we were standing in our little processing, which is in the hallway, he was facing another officer who I can't remember if it was either Corporal Norris or Lieutenant Roberts, he had his hands behind his back, as I was placing his handcuffs on him he made the comment that, "I am sorry that I screwed everybody's life up."

APA Crofford: ... And was that in response to any question or anything that was asked of him?

Officer Henderson: Not that I remember, no.

Id. at 5.

Joy Skidmore, an employee of Jefferson Pharmacy, where the decedent had worked, testified about the decedent and Mr. Cook arguing on the day of the shooting and testified to seeing Mr. Cook walk up to the decedent's car in the parking lot of the pharmacy and make a shooting motion with his hand. *Id.* at 11. Cross-examination of Ms. Skidmore was limited to her awareness of the extent of the relationship between the decedent and Mr. Cook. *Id.* at 12. Other employees of Jefferson Pharmacy, Kaleigh Payne Mills and Erin Brandenburg, then testified. *Id.* at 16, 34. The State then called Tara Myers, Mr. Cook's ex-wife, as a witness, to enter into evidence the text message that Mr. Cook sent to her minutes before the shooting indicating that he was going to kill Ms. Perrine. *Id.* at 68. On cross-examination, Ms. Myers testified that in the weeks before the shooting her and Mr. Cook's children had told her that Mr. Cook was brining them to stay with his mother at night because he was uneasy about his state of mind because of the medication that he was taking. *Id.* at 75.

As their last witnesses in their case-in-chief, the State called Chastity Stotler and Mark Stickel. *Id.* at 77. On direct examination, Chasity Stotler testified about Mr. Cook being controlling of Ms. Perrine and Ms. Perrine's desire to leave Mr. Cook. *Id.* at 77-86. On cross-

examination, Chastity Stotler was questioned about whether Ms. Perrine would share medication with Mr. Cook. *Id.* at 88.

Mr. Mills: You were aware that Jen helped him, tried to help him in suggesting dosages and even sharing some of her...

Ms. Stotler: No, sir.

Mr. Mills: ... medicines sometimes?

Ms. Stotler: I am not aware of that, sir.

Id. at 88.

At the close of the State's case-in-chief, Defendant made a Rule 29 motion for a directed verdict, and the Circuit Court denied the motion. *Id.* at 111-12.

The Defendant then called Dr. Bernard Lewis as his first witness to testify about Dr. Lewis' opinion that Mr. Cook was suffering from a diminished capacity at the time of the shooting. *Id.* at 125.

During a sidebar during the cross-examination of Dr. Lewis, the State indicated that it intended to introduce the entire statement of Mr. Cook, even after he asserted his right to counsel, into evidence based upon *State v. Degraw*. App. Vol. II, p. 90, June 8, 2012 Trial Tr. 45-50. Over objection of the Defendant, the Circuit Court ruled that Mr. Cook's post-invocation of right to counsel statements could come in for impeachment of Dr. Lewis. *Id.* at 49-50.

Following this ruling, the State indicated that it was going to redact the portion of the transcript of the statement where Mr. Cook invoked his right to counsel. *Id.* at 52. The State then attempted to enter this statement of Mr. Cook into evidence through Dr. Lewis. *Id.* at 58. Defendant then objected to the State commenting on the fact that Mr. Cook was being

interrogated during these statements. *Id.* at 59. Particularly, Defendant objected to the following question:

- Q. Well, he is in an interview room, he is with an officer, he is being questioned—well, not actually being questioned, what is happening is just an interchange between the two of them, and he says in that room, she keeps fucking with me, in that context doesn't that appear that he knows why he is there and is giving a justification for why he is there?

Id. at 58. Defendant made a motion for mistrial based upon the insinuation by the State of the *Miranda* interrogation of Mr. Cook, and the Court denied the motion. *Id.* at 61. The Circuit Court instructed the State to “be fastidious” about further questioning. *Id.* The State continued questioning Dr. Lewis about the post-invocation of right to counsel statements made by Mr. Cook and continued to use the overhead projector to project the transcript of the questions on the wall for the jury to see. *Id.* at 70. At one point in the examination of Dr. Lewis, the State, seemingly inadvertently, put the portion of the transcript where Mr. Cook requested counsel on the overhead projector and published this portion of the transcript to the jury. *Id.* Defense counsel and Mr. Cook took notice of this and immediately requested a sidebar. *Id.* The transcript that was published to the jury was marked as Court's Exhibit A. *Id.* at 74. Defendant then moved for a mistrial. *Id.* at 76. Defense counsel submitted to the Court that all of the jurors' attention were drawn to the display of the transcript on the wall and that it was seen by Mr. Mills, Mr. McDermott, and Mr. Cook. *Id.* at 77. The Circuit Court denied the motion for a mistrial, finding that even though Mr. Cook's request for counsel in the context of post-arrest questioning was published to the jury, the Court believed that it was unlikely that the jury actually saw it. *Id.* at 79.

I, frankly, believe the jurors didn't see it. But I am not going to quiz them on this because

I think even a cautionary instruction or asking them about it would simply call people's attention to something that I believe wasn't up there long enough.

Id. at 79.

Following Dr. Lewis' testimony, Defendant then called Robert Williams and Marjorie Cook as fact witnesses to Mr. Cook's mental state and behavior leading up to the shooting. *Id.* at 163, 171.

Defendant then called his pharmacological expert, Rodney Richmond, as a witness. *Id.* at 195. Mr. Richmond testified to the side effects that may be caused by the medications that Mr. Cook was taking— Ativan and Seroquel— and the side effects of medication that Mr. Cook had taken in the past.

After a three day weekend, the trial resumed on June 12, 2012 with a continuation of Mr. Richmond's testimony and expert testimony from the Defendant's psychiatric expert, Dr. Joseph Novello. *Id.* at 3, 57. Dr. Novello testified extensively on Mr. Cook's bipolar diagnosis and Mr. Cook's mental state at the time of the shooting. Dr. Novello offered an opinion that Mr. Cook was suffering from diminished capacity at the time of the shooting and was unable to form the requisite intent of premeditation.

On July 13, 2012, Dr. Novello finished testifying. During re-direct of Dr. Novello, defense counsel questioned Dr. Novello about the potential side effects of Ativan and asked Dr. Novello, "You are aware that Ativan was given to Ray Cook by Jen?" App. Vol III, p. 92, June 13, 2012 Trial Tr. 99. The State objected to this question, stating that "[t]here is no evidence to that effect." *Id.* at 99-100. Defense counsel argued that the State's witness, Ms. Stotler, had testified that Ms. Perrine was taking Ativan and giving it to Mr. Cook. *Id.* at 101. The State

disputed this contention. *Id.* Defense counsel then asked the State to “get me the bottle that was in her purse. I want to show him the bottle of Ativan. There is the Ativan. We looked at it.” *Id.* at 102. The State replied, “Not Ativan. It was not Ativan. No Ativan.... There was no Ativan anywhere found.” *Id.* The Court allowed defense counsel to rephrase his question to Dr. Novello. Following the examination of Dr. Novello, the Defendant rested his case. *Id.* at 129.

Defendant then renewed his motion for a judgment of acquittal, which the Circuit Court denied. *Id.* at 130.

Following the recess for lunch, defense counsel indicated that he had been advised by the State that the State had located the pill bottle containing the Ativan in Ms. Perrine’s purse. *Id.* at 132. The Circuit Court then allowed defense counsel to re-open his case, and defense counsel recalled Corporal Norris so that the Ativan pills that were found in Ms. Perrine’s purse could be entered into evidence. *Id.* at 136. On direct examination, Corporal Norris indicated that when he took the purse into evidence, he had inventoried its contents and had found the key chain with the Ativan pills. *Id.* at 137. The defense then rested again.

The State called its pharmacological expert, Dr. Ken Brasfield, and its psychological expert, Dr. David Clayman, as witnesses in its rebuttal case to rebut the opinion of the defense experts that Mr. Cook was suffering from a diminished capacity at the time of the shooting. *Id.* at 142.

At the end of the day on June 13, 2012, the Defendant and the State agreed to a stipulation to be read to the jury that Ms. Perrine had an active prescription for Ativan. *Id.* at 332.

During Dr. Clayman’s testimony on June 14, 2012, Dr. Clayman made reference to Mr.

Cook being incarcerated during his evaluation of Mr. Cook and defense counsel moved for a mistrial, which was denied by the Circuit Court. App. Vol. III, p. 93, June 14, 2012 Trial Tr. 56. The Circuit Court then instructed the jury to disregard this statement from Dr. Clayman. *Id.* at 64. Following Dr. Clayman's testimony, the State rested its case in rebuttal. Defendant then indicated that he intended to present a case in surrebuttal, and the State objected to it. *Id.* at 229. Defense counsel indicated that he intended to call Corporal Norris as a witness to further testify about the Ativan found in Ms. Perrine's purse, to call Mr. Cook's brother to testify about the medication that Mr. Cook was taking around the time of the shooting, and to call a witness at the Eastern Regional Jail regarding Mr. Cook's compliance with taking his Seroquel. *Id.* at 233. The Circuit Court ruled that the defense may only call Corporal Norris on the limited issue of entering the purse into evidence. *Id.* at 240. After being called by the defense, Corporal Norris testified contrary to his previous testimony that the first time that he saw the pill container in the purse was on June 13, 2012. *Id.* at 248.

On June 15, 2012, the Circuit Court read the instructions to the jury and closing argument was heard. App. Vol. III, p. 94, June 15, 2012 Trial Tr. 7-80. The instructions to the jury informed the jury about the law regarding diminished capacity and provided lesser-included offenses to first degree murder. App. 71. Prior to the instructions being read, defense counsel vouched the record with two written motions requesting a case in surrebuttal and moving to dismiss the case based upon the *Brady* violation of the State not disclosing the Ativan pills in Ms. Perrine's purse until after the defense case had rested. App. Vol. III, p. 94, June 15, 2012 Trial Tr. at 3.

After deliberations were held, the jury returned a verdict of guilty to first degree murder.

Id. at 99.

Following the guilty verdict, the Circuit Court proceeded to the mercy phase of the trial. *Id.* at 106. Before proceeding to the mercy phase, the Circuit Court asked the parties how they would like to conduct the mercy phase. *Id.* at 106. Defendant and defense counsel indicated that they would not be calling any witnesses and would ask the Court just to proceed to argument. *Id.* at 106. Counsel for Defendant argued that since the Defendant had the burden in the mercy phase that if the Defendant did not produce evidence, the State should not be allowed to produce evidence, and that the Court should just proceed to argument. *Id.* at 107. Defense counsel argued,

I would assume that the burden is on the Defendant to produce evidence towards mercy and then have the right to make argument about it. The burden being ours, by us declining to go forward, then I would ask that the State be in turn held to that same— there is nothing to rebut, we would just argue the case to the jury. We are not going to call witnesses. There is nothing on our behalf to rebut so we ask that the State not call witnesses.

Id. at 107. The State objected to that procedure, stating that the mercy phase was equivalent to a sentencing hearing, and that the victim's relatives have a statutory right to be heard. *Id.* The Circuit Court allowed the State to call witnesses over the Defendant's objection. *Id.* at 108. The State then called Cheryl Perrine as a witness and had her read a statement to the jury. *Id.* at 111. The State further had the victim's advocate, Ms. Young, read a statement from Ms. Perrine's father, George Perrine. *Id.* at 116. The State then called Chastity Stotler to testify. *Id.* at 117. Ms. Stotler testified to Rule 404b evidence that was not entered in the guilt phase of the trial, regarding prior instances of physical abuse between Mr. Cook and Ms. Perrine. *Id.* at 118. Finally, the State had Carol Myers, Ms. Perrine's aunt, read a statement to the jury. *Id.* at 122.

The State then entered a 1999 battery conviction of Mr. Cook into evidence. *Id.* at 126. The State then offered argument and requested that the jury not give Mr. Cook mercy. *Id.* at 126. Defense counsel then offered argument to the jury that they should return a verdict of mercy. *Id.* at 129.

The jury did not add a recommendation of mercy to their verdict. *Id.* at 136. The Circuit Court sentenced Mr. Cook to life in prison without mercy. App. 4.

Following the imposition of sentence, Mr. Cook filed a post-trial motion requesting a new trial. That motion has not been ruled upon by the Circuit Court. Mr. Cook also timely filed his notice to appeal.

SUMMARY OF ARGUMENT

Mr. Cook first argues that the Circuit Court committed error when it failed to suppress evidence seized during illegal searches. First, Mr. Cook suggests that the Circuit Court erred in failing to suppress a firearm, magazine, and holster that was seized from Mr. Cook's vehicle pursuant to a search warrant that was "bare bones" and conclusory. Mr. Cook argues that the two sentence long affidavit in support of the search warrant failed to provide the Magistrate with any facts on which to be able to determine whether probable cause existed that Mr. Cook committed the offense and that evidence would be found in his vehicle. Mr. Cook further argues that no exception to the warrant requirement applied. The plain view exception to the warrant requirement did not apply because the officers did not have legal access to the inside of the vehicle. The search incident to arrest warrant requirement did not apply because the State could not prove that Mr. Cook was a recent occupant of the vehicle which they wanted to search.

As to the search issues, Mr. Cook next argues that the Circuit Court erred in failing to

suppress the content of his cellular phone, which was accessed pursuant to a search warrant that failed to particularize the place to be searched and the evidence to be seized. The search warrant specified that the place to be searched was the evidence room at the Ranson Police Department and that the evidence to be seized was the cellular phone, itself. Moreover, Mr. Cook argues that no exception to the warrant requirement applies. The search of the contents of the cellular phone could not be justified as a search incident to arrest because the search failed the contemporaneous requirement for such an exception to apply. The contents of the cellular phone was not searched until many months after Mr. Cook's initial arrest.

The second area of error that Mr. Cook alleges relates to the introduction of numerous statements against him, in violation of his Fifth Amendment and Sixth Amendment rights, as well as his right to due process provided by the common law in this State. Mr. Cook argues that the Circuit Court allowed the flood gates to open and that his conviction was based on numerous pre-trial statements that should have been suppressed pursuant to his constitutional rights. First, Mr. Cook argues that the Circuit Court erred when it failed to suppress a statement that Mr. Cook made to an officer responding to the scene of the shooting after it was clear that Mr. Cook was in custody and responding to direct questioning. Mr. Cook suggests that the public safety exception to *Miranda* should not apply in this instance. Second, Mr. Cook argues that the Circuit Court erred when it failed to suppress statements that Mr. Cook made in a police cruiser following his arrest where Mr. Cook had not been administered his *Miranda* rights. More importantly, Mr. Cook argues that statements that he made to an interrogating officer regarding his past use of pharmaceutical drugs should have been suppressed because these questions occurred prior to Mr. Cook being administered his *Miranda* warnings. Mr. Cook argues that these questions were

clearly related to his offense for which he was arrested because Mr. Cook had explained his actions at the scene of the shooting to the officers of being a result of not taking his psychiatric medication. Therefore, these questions should not be considered the type of questions that fit under the narrow routine booking question exception to *Miranda*. Moreover, Mr. Cook requested counsel immediately following the officer reading him his *Miranda* rights and suggests that such questions should have been asked following the officer reading him his *Miranda* rights. Next, Mr. Cook argues that statements that he made to an officer following his arraignment should have been properly suppressed. Mr. Cook argues that the State failed its heavy burden in demonstrating that Mr. Cook reinitiated conversation and waived his previously-invoked right to counsel. Mr. Cook further argues that such post-arraignment statements also violated his Sixth Amendment right to counsel.

Mr. Cook next argues that the Circuit Court committed error when it allowed the State to introduce previously-suppressed statements that were made post-invocation of his right to counsel. Mr. Cook argues that these statements were not appropriate for impeachment pursuant to *State v. DeGraw*, 196 W. Va. 261, 470 S.E.2d 215 (1996). Mr. Cook differentiates his case from *DeGraw* and argues that these statements that were elicited in violation of *Miranda* were not used to impeach Mr. Cook's prior statements, but were instead used to impeach Dr. Lewis, which is an improper purpose under *DeGraw*.

Mr. Cook next argues that the Circuit Court erred when it failed to suppress statements that he made to the State's psychological expert, Dr. Clayman, where an evaluation was ordered pursuant to *State v. Jackson*, 171 W. Va. 329, 298 S.E.2d 866 (1982). Mr. Cook argues that his interview with Dr. Clayman should have been suppressed because Dr. Clayman failed to follow

the dictates of *Jackson* by recording his entire interview with Mr. Cook. Mr. Cook argues that the effect of each of these errors regarding his statements as well as the cumulative effects of these errors prejudiced his ability to receive a fair trial.

As a third area of argument, Mr. Cook argues that the Circuit Court committed error in the ordering of the guilt phase of the first degree murder trial where Mr. Cook had raised the issue of diminished capacity. Mr. Cook suggests that allowing the State to call its expert witnesses for the first time on rebuttal improperly shifted the burden in the case. Moreover, Mr. Cook alleges that this prejudice was compounded where the Circuit Court denied Mr. Cook's motion to present a case in surrebuttal.

As the fourth area of argument, Mr. Cook suggests that the State's inadvertent suppressing of evidence that was not disclosed until Mr. Cook rested his case was a *Brady* violation and prejudiced Mr. Cook's ability to receive a fair trial. Mr. Cook argues that even though the disclosure was inadvertent, that because the material was in the State's possession, it still had a duty to discover the evidence and provide it to Mr. Cook. Moreover, Mr. Cook argues the evidence—Ativan pills found in the purse belonging to the decedent—was highly exculpatory and valuable as impeachment evidence because it tended to support Mr. Cook's theory of the case that the decedent was supplying him with Ativan pills, which according to other evidence was effecting Mr. Cook's mental state. Mr. Cook argues that the State failed to disclose the material in time for him to be able to use it effectively at trial.

As the fifth area of argument, Mr. Cook argues that the State's inadvertent publishing of a transcript on the overhead projector, which contained Mr. Cook's invocation of his right to counsel pursuant to *Miranda*, was prejudicial error necessitating the granting of a new trial. Mr.

Cook argues that publishing of such a transcript improperly violated Mr. Cook's Fifth Amendment privilege against self-incrimination and that the State cannot prove that such an error was harmless beyond a reasonable doubt.

As the sixth area of argument, Mr. Cook suggests that the State's psychological expert's reference in testimony to Mr. Cook being subjected to pre-trial incarceration was reversible error, alone and cumulatively with the other errors in this case, necessitating the granting of a new trial.

As the last area of argument, Mr. Cook avers that the Circuit Court's procedure that was employed during the bifurcated mercy phase of the trial violated his due process rights. Mr. Cook suggests that since he did not open the door with character evidence, the State should have been prohibited from entering previously-impermissible character evidence during the mercy phase. Further, Mr. Cook argues that he should have had the opportunity to present evidence and argue first during the mercy phase. Moreover, Mr. Cook suggests that the Circuit Court failed in its gate-keeping function when it did not determine whether the State's mercy-phase evidence was admissible pursuant to Rule 401 and 403 of the West Virginia Rules of Evidence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner suggests that oral argument is necessary pursuant to Rule 18(a). This case is appropriate for oral argument because the trial was long and complex, involving numerous issues of first impression for this Court, and because Petitioner was sentenced to life in prison without mercy.

Petitioner suggests that this case should be set for a Rule 20 argument. There are numerous issues presented that are issues of first impression for this Court, such as the issue of whether the warrantless search of the contents of a cellular phone can be justified as a search

incident to arrest, the proper procedure to be employed in the mercy phase of a first degree murder trial where the defendant does not open the door with character evidence, whether the publishing, without comment, of a defendant's post-arrest request for counsel is prejudicial error, and how far this Court's holding in *State v. DeGraw* can be expanded regarding the admissibility of otherwise-inadmissible statements in cases where a defendant's mental state is at issue.

ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT FAILED TO SUPPRESS ALL EVIDENCE THAT WAS SEIZED PURSUANT TO ILLEGAL SEARCHES AND SEIZURES

A. Standard of Review

A circuit court's "factual findings" on an order denying a motion to suppress evidence "are reviewed for clear error." Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996). However, "[i]n contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*." Syl. Pt. 2, *Lacy*, 196 W. Va. 104, 468 S.E.2d 719. Thus, "although most rulings of a trial court regarding the admission of evidence are reviewed under an abuse of discretion standard,... an appellate court reviews *de novo* the legal analysis underlying a trial court's decision." *State v. Wade*, 200 W. Va. 637, 652, 490 S.E.2d 724, 739, *cert. denied*, 522 U.S. 1003 (1997).

B. The Circuit Court Erred When it Failed to Suppress the Evidence Seized from the Search of Defendant's Vehicle Where the Search Conducted Pursuant to a Search Warrant that Contained a "Bare Bones" Affidavit

At 5:00 p.m., on July 15, 2011, Ranson Police Officer Tharp, as well as other officers,

executed a search warrant on Ray Cook's vehicle, a Mercury Mariner, that was located in the parking lot of the Southern States. The officers seized a 9mm handgun, two empty magazines, a holster, two white pills, a syringe, and the vehicle's registration.

Officer Tharp had obtained the search warrant from Jefferson County Magistrate Mary Rissler at approximately 4:30 p.m. on that same day. The affidavit in support of probable cause for the issuance of the search warrant contained, in total, two sentences:

An investigation into an incident where Mr. Ray Cook shot and killed his estranged girlfriend, Jenny Perrine, at the above named location. His vehicle is located in the parking lot with a weapon, magazines, and holster visible within the vehicle.

See Attachment A of Search Warrant for Vehicle.

Petitioner contends that this affidavit in support of probable cause is the definition of "bare bones," and based upon the affidavit failing to provide any indicia of probable cause, the Circuit Court should have suppressed the evidence seized as a result of the search of the vehicle.

"Both the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution provide that no warrant shall issue except upon probable cause supported by oath or affirmation..." Syl. Pt. 3, *State v. Adkins*, 176 W. Va. 613, 346 S.E.2d 762 (1986). "[T]he validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers." Syl. Pt. 4, *Adkins*, 176 W. Va. 613, 346 S.E.2d 762.

Probable cause for the issuance of a search warrant exists if the facts and circumstances provided to a magistrate in a written affidavit are sufficient to warrant the belief of a prudent person of reasonable caution that a crime has been committed and that the

specific fruits, instrumentalities, or contraband from that crime presently may be found at a specific location. It is not enough that a magistrate believes a crime has been committed. The magistrate also must have a reasonable belief that the place or person to be searched will yield certain specific classes of items. There must be a nexus between the criminal activity and the place or person searched and thing seized. The probable cause determination does not depend solely upon individual facts; rather, it depends on the cumulative effect of the facts in the totality of circumstances.

State v. Lilly, 194 W. Va. 595, 602, 461 S.E.2d 101, 108 (1995) (citing 1 Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure I-358 (1994)).

In determining whether a search warrant affidavit sufficiently supports probable cause, a reviewing court is limited to review of the four corners of the search warrant. *See State v. Worley*, 179 W. Va. 403, 409, 369 S.E.2d 706, 712 (1988). “[U]nder Rule 41(c) [of the West Virginia Rules of Criminal Procedure] it is improper for a circuit court to permit testimony at a suppression hearing concerning information not contained in the search warrant affidavit to bolster the sufficiency of the affidavit unless such information had been contemporaneously recorded at the time the warrant was issued and incorporated by reference into the search warrant affidavit.” *Adkins*, 176 W. Va. at 619, 346 S.E.2d at 768.

However, if a reviewing court finds insufficient probable cause in the search warrant affidavit, the burden then shifts to the State to demonstrate that a law enforcement officer acted in good faith in reliance on the warrant. *See United States v. Leon*, 468 U.S. 897, 919-21 (1984). If the officer was acting in good-faith reliance on the warrant, then evidence need not be suppressed. *Id.* at 921. However, there are certain circumstances where suppression remains an appropriate remedy. *Id.* at 923. Under the third delineated exception to the application of the *Leon* good faith exception, an officer may not reasonably rely upon a warrant obtained on the basis of a “bare bones” affidavit. “[T]he Supreme Court also established in *Leon* that an officer

may not reasonably rely upon a warrant obtained on the basis of a ‘bare bones’ affidavit.” *United States v. Johnson*, 4 Fed.Appx. 169 (4th Cir. 2001) (citing *United States v. Wilhelm*, 80 F.3d 116, 121–22 (4th Cir.1996)). “A ‘bare bones’ affidavit is one that contains ‘wholly conclusory statements, which lack the facts and the circumstances from which a magistrate can independently determine probable cause.’” *Id.* (citing *Wilhelm*, 80 F.3d at 121 and *United States v. Laury*, 985 F.2d 1293, 1311 n. 23 (5th Cir. 1993)).

In the case *sub judice*, Petitioner asserts that in looking at the four corners of the search warrant affidavit, it is clear beyond per adventure that the affidavit is “bare bones” and wholly lacking in any indicia of probable cause to allow an officer to reasonably rely upon it. Petitioner asserts that the warrant is so “bare bones,” that this Court may shorten its analysis under *Adkins* and *Leon*. See *United States v. Stearn*, 597 F.3d 540 (3d Cir. 2010) (“Because the probable cause inquiry remains highly relevant to the reasonableness of an officer's reliance on a search warrant, it may be proper in some cases for a court to truncate its good faith analysis under exception to exclusionary rule if a search warrant affidavit is truly ‘bare bones.’”).

The instant affidavit contains two sentences, which are both entirely conclusory. The first sentence merely states, “A investigation into an incident where Mr. Ray Cook shot and killed his estranged girlfriend, Jenny Perrine, at the above named location.” This sentence fragment contains no supporting factual information for the basis of the belief and is entirely conclusory. A warrant cannot be obtained by merely stating that an investigation is occurring into a suspect of a crime. To do so would vitiate the purpose of the warrant requirement if all an officer had to say to a magistrate to get a warrant is that “I am conducting an investigation into drug dealing by Mr. Smith” or “I am conducting an investigation into murder by Mr. Smith.” Such a statement

provides a magistrate with no information in which to determine whether there is probable cause.

The second and final sentence in the affidavit reads, “His vehicle is located in the parking lot with a weapon, magazines, and holster visible within the vehicle.” *See* Attachment A to Search Warrant for Vehicle. First, this sentence completely fails to provide any nexus between the criminal activity and the place to be searched. *See People v. Gutierrez*, 222 P.3d 925, 940 (Colo. 2009) (“An affidavit is considered ‘bare-bones,’ and therefore an officer cannot reasonably rely on it, where the affidavit fails to establish a ‘minimally sufficient nexus between the illegal activity and the place to be searched....’ An affidavit that provides the details of an investigation, yet fails to establish a minimal nexus between the criminal activity described and the place to be searched, is nevertheless bare-bones.”). There is no factual allegation of criminal activity in the affidavit. There are details of any investigation in this affidavit. There are no details to lead any magistrate to determine that the crime of murder has actually occurred. The affidavit provides no information about how the affiant has learned that a “weapon, magazines, and holster is visible within the vehicle.” Has the affiant personally viewed these items? Had another officer viewed these items? Has an informant told the affiant that she has viewed such items? Based upon this sentence, there is no way for a magistrate to decide the source of such information. Moreover, the phrase “his vehicle” implies that the vehicle belongs to Ray Cook. Again, there is no supporting factual information supporting the Defendant’s ownership of the vehicle. The affidavit contains no statement that there was an admission by Defendant as to ownership or that the officer ran the vehicle’s tags. There is no information that anyone saw the Defendant in the vehicle or driving the vehicle or exercising any dominion and control over the vehicle. Without such information, there is no way that a magistrate can determine the validity

of this conclusory statement about ownership of the vehicle.

Furthermore, this sentence fails to provide factual information about the “weapon” seen in the vehicle. Is the weapon a knife? Is it a firearm? What type of firearm? Where is the nexus between the “weapon” and the “shooting?” Simply put, the second and final sentence of the search warrant is also wholly conclusory, without any supporting factual statements to allow a neutral and detached magistrate to make a determination of whether probable cause exists.

Looking solely to the four corners of the affidavit, the only evidence before the Magistrate when the search warrant was applied for by Officer Tharp were these two conclusory sentences. It certainly may have been possible for Officer Tharp to include additional information in the affidavit, but she did not. No warrant can legitimately be issued based on such a “bare bones” affidavit.

Compare the instant affidavit to the affidavit in *Lilly*, where this Court suppressed evidence seized pursuant to a “bare bones” and conclusory affidavit:

A reliable confidential informant informed Cpl. H. Whisman, that accused was growing marijuana plants in above residence. Cpl. Livingston spoke to informant and was advised by informant that accused has 30–50 plants in residence and also advised Cpl. Livingston that informant has seen the plants within the last 5 days and accused told informant that the plants were marijuana.” /s/ Corporal D.L. Livingston.

Lilly, 194 W. Va. 595, 599, 461 S.E.2d 101, 105. In *Worley*, this Court suppressed evidence seized during the search of a murder suspect’s trailer because the following affidavit was “bare bones” and conclusory:

Statement verifying that Danny Worley and Bobby Ungle were last scene [sic] with the victim[,] were also new [sic] leaving with victim in victims vehicle.

Worley, 179 W. Va. at 407, 369 S.E.2d at 710. Petitioner avers that the affidavit in this case was

equally insufficient and “bare bones” as the affidavits in *Lilly* and *Worley*. As such, Petitioner requests that this Court find that Circuit Court erred when it failed to suppress the evidence that was seized pursuant to a “bare bones” affidavit.

Furthermore, Petitioner suggests that the Circuit Court misapplied the law relating to the “plain view” exception to the warrant requirement. Petitioner suggests that this Court should find that the “plain view” exception does not apply to the search of Petitioner’s vehicle. Here, the “plain view” exception does not apply, because even though the officers could view the items in plain view, they did not have “lawful right of access to the [items themselves.]” *See Syl. Pt. 1, State v. Lopez*, 197 W. Va. 556, 476 S.E.2d 227 (1996).

The essential predicates of a plain view warrantless seizure are (1) that the officer did not violate the Fourth Amendment in arriving at the place from which the incriminating evidence could be viewed; (2) that the item was in plain view and its incriminating character was also immediately apparent; and (3) that not only was the officer lawfully located in a place from which the object could be plainly seen, but the officer also had a lawful right of access to the object itself.

Id. The third prong of the plain view test

is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent “exigent circumstances.” Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure....

State v. Julius, 185 W. Va. 422, 408 S.E.2d 1 (1991) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971)). “There is no question that the label “plain view” is confusing, as it is also applied to a situation where the police officer is present where he has a lawful right to be and sees in plain view an object that constitutes contraband or evidence of a crime. If this object is also in a public place, it may be seized without a warrant.” *State v. Woodson*, 181 W. Va. 325,

330-31, 382 S.E.2d 519, 524-25 (1989). Thus, just because an object is in plain view and is incriminating does not mean that the plain view exception applies unless an officer has the lawful right to enter into the area where the object is located to seize the object. For instance, if an officer sees a marijuana plant growing in the window of a house, the officer may still not enter the house without a search warrant. On the other hand, if an officer has entered a house pursuant to a valid search warrant and sees a marijuana plant in plain view, that officer may seize the marijuana plant. Conversely, if an officer sees a marijuana plant growing in a public place, the officer may seize the plant.

Here, while the officer may have been able to see the weapon, magazine, and holster in the vehicle, the officers had no legal right to enter the vehicle where the vehicle was lawfully parked. Thus, the officers were required to and did in fact seek a search warrant to enter the vehicle. However, because the search warrant affidavit was bare bones as indicated above, the entry into the vehicle was illegal and the seized firearm, magazine, and holster should have been suppressed. Instead this evidence was erroneously entered into evidence against Petitioner.

Nor can the search of Defendant's vehicle be justified as a valid search incident to arrest. "[W]hen an officer lawfully arrests 'the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile' and any containers therein." *Arizona v. Gant*, 556 U.S. 332, 341 (2009) (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)). The *Gant* majority reaffirmed that this exception to the warrant requirement "authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 556 U.S. at 343. The *Gant* majority added an additional prong

to this exception - if it is reasonable to believe that a vehicle that was recently occupied by an arrestee contains evidence of the offense of arrest. *Id.* Thus, after *Gant*, there is a two-part test to determine whether a warrantless search of an automobile is justified as a search incident to arrest. "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Gant*, 556 U.S. at 351.

In the instant case, Petitioner suggests that the State failed to present any evidence that officers arriving at the Southern States parking lot believed that Mr. Cook was a recent occupant of his automobile. When arriving at the scene, Mr. Cook was in the middle of the parking lot, not in any vehicle, and immediately surrendered to the officers. None of the officers saw Mr. Cook in any vehicle. Thus, because the officers did not have any information that Mr. Cook was the recent occupant of a vehicle, the search of Mr. Cook's vehicle could not be justified as a search incident to arrest.

Based on the foregoing, this Court should find that this evidence should have been suppressed and order a new trial whereby the State may not enter this inadmissible evidence.

C. The Circuit Court Erred When it Failed to Suppress the Information that Was Obtained from the Search of Defendant's Cellular Phone

Petitioner asserts that the Circuit Court erred when it failed to suppress the contents of his cellular phone, including text messages, from being entered into evidence. Petitioner contends

that all evidence derived from the search of his cell phone should be suppressed as the result of it being seized pursuant to an illegal search. Petitioner suggests that the search warrant affidavit in support of the search of the cellular phone failed the particularity requirement of the Fourth Amendment, that the affidavit was “bare bones” and conclusory, and that the search of the contents of the cellular phone cannot be justified as a search incident to arrest because the search fails the contemporaneous requirement.

Defendant was arrested on July 15, 2011 on the charge of murder. At the Southern States parking lot, Ranson police officers seized a number of items from Defendant when he was placed under arrest, including a Blackberry cellular phone, a hair band, a ball cap, a necklace, and a wallet. This initial seizure of the items was justified as a search incident to arrest. However, the officers did not search the content of the cellular phone on this date. Instead, on July 18, 2011, three days after the initial seizure, Cpl. Norris made an application for a warrant before Jefferson County Magistrate Mary Rissler. In the affidavit and complaint for the search warrant, Cpl. Norris alleged that evidence of the crime of murder, “namely [a] Blackberry ‘curve’ cell phone (Sprint S.P.), black elastic ‘hair pony,’ dark colored ball cap ‘the Franchise’ brand, silver ‘Marine Corps’ necklace and emblem, [and] black wallet” “is concealed in Room 205 @ 700 North Preston St., Ranson, WV 25438.” *See* Search Warrant for Cell Phone. The premises to be searched listed in the search warrant was the evidence room of the Ranson Police Department.

A bedrock principle of the Fourth Amendment requires that “search warrants must particularly describe the place to be searched and the things... to be seized.” *Lacy*, 196 W. Va. at 110, 468 S.E.2d at 725. “In determining whether a specific search warrant meets the particularity requirement, a circuit court must inquire whether an executing officer reading the description in

the warrant would reasonably know what items are to be seized.” *Lacy*, 196 W. Va. at 111, 468 S.E.2d at 726.

Petitioner asserts that because the search warrant only sought to seize the cellular phone from the evidence room at the Ranson Police Department, the search warrant failed to state with particularity the place to be searched—the actual cellular phone itself. Moreover, the search warrant completely failed to particularize the evidence to be seized—the contents of the cellular phone. Because the warrant in this case failed in the particularity requirement, the search of the contents of the cell phone was essentially conducted without a valid search warrant. Essentially, the search warrant in this case, which listed the cellular phone as the evidence to be seized and listed the place to be searched as the evidence room at the Ranson Police Department was illusory. Obviously, officers do not need to get a search warrant to search for evidence that is contained in their own evidence room. Mr. Cook has no reasonable expectation of privacy in the evidence room. However, officers do need to get a search warrant to search the contents of his cellular phone, to which Mr. Cook has a reasonable expectation of privacy, particularly when officers wish to search the cellular phone days after Mr. Cook’s arrest.

The instant case is substantially identical to the Supreme Court case of *Groh v. Ramirez*, 540 U.S. 551 (2004). In *Groh*, like in the instant case, the officer seeking the warrant erred in attempting to particularize the warrant. The warrant “failed to identify any of the items that petitioner intended to seize. In the portion of the form that called for a description of the ‘person or property’ to be seized, petitioner typed a description of respondents’ two-story blue house rather than the alleged stockpile of firearms.” *Id.* at 554. The Supreme Court found that “[t]he warrant was plainly invalid. The Fourth Amendment states unambiguously that ‘no Warrants

shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” *Id.* at 557. The warrant was wholly insufficient because it failed to provide a description of the evidence that was sought. *Id.* Moreover, the *Groh* Court found that even if the affidavit adequately described “the ‘things to be seized,’” that “does not save the warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents.” *Id.* The Supreme Court held that because “the warrant did not describe the items to be seized at all... the warrant was so obviously deficient that we must regard the search as ‘warrantless’ within the meaning of our case law.” *Id.* at 558. Here, just like in *Groh*, the search warrant completely fails the particularity requirement regarding the evidence to be seized as well as the place to be searched. The evidence to be seized does not list the contents of the cellular phone. Moreover, the place to be searched lists the evidence room instead of the cell phone. Such a warrant completely fails the particularity requirement and is akin to being a warrantless search.

Petitioner also suggests that the search warrant affidavit is “bare bones” in that it fails to provide any nexus between the content of the cellular phone and the alleged crime of murder.

The contents of the affidavit relevant to the cell phone states,

I also received, when [Ray Cook] was turned over to me, a Blackberry cell phone that was wrapped in the ball cap. I later learned that the suspect was on the cell phone with Jefferson County Headquarters at the time Charles Town units arrived on scene. In speaking with friends and family of the victim I also learned that there may be records of threatening communications, from the suspect to the victim (and acquaintances of his) contained within this phone.

See Attachment A to Search Warrant for Cell Phone. Petitioner asserts that this portion of the affidavit is wholly insufficient to establish probable cause of a nexus between the crime, murder,

and the contents of the cell phone. *See supra* Section I(B) of this Argument and *Adkins*, 176 W. Va. 613, 346 S.E.2d 762; *Lilly*, 194 W. Va. 595, 461 S.E.2d 101. This “bare bones” allegation of a nexus is akin to an officer putting information in an affidavit based upon an unnamed informant. Here, the officer does not identify the names of the “friends and family” that he spoke with or provide what these unnamed persons believe can be found on the phone. These allegations are merely hearsay of unnamed witnesses, which is wholly insufficient to establish probable cause. As such, the evidence seized pursuant to this search warrant, the contents of Defendant’s cellular phone, should have been suppressed.

Petitioner further suggests to this Court that the search cannot be justified as an exception to the warrant requirement for a search incident to arrest. This Court has not yet answered the question of whether police need a separate warrant to search the contents of a cellular phone that was validly seized without a warrant. In 2011, this Court held that “when searching a vehicle pursuant to a valid search warrant, no additional search warrant is required to examine the contents of items that are properly seized in the execution of the warrant, including, but not limited to, cellular telephones.” *State v. White*, 228 W. Va. 530, 546, 722 S.E.2d 566, 582 (2011). However, this Court did not decide and specifically left open the question of whether a search warrant is required to search the content of a cellular phone that is seized without a search warrant, but incident to an arrest. *White*, 228 W. Va. at 530, 722 S.E.2d at 582.

In support of his argument that a separate warrant was required to authorize a search of the contents of the cellular telephone, Mr. White cites numerous cases involving telephones that were seized without a warrant. Those cases simply are not applicable to the instant matter, because the Motorola cellular telephone at issue was seized in the execution of a valid search warrant. Instead, the question that must be answered to resolve this issue is whether a separate search warrant is required to examine the contents of items seized in the execution of a valid search warrant.

White, 228 W. Va. at 530, 722 S.E.2d at 582. This Court noted that there was a split of authority on whether a search warrant was required to search the contents of a cell phone seized lawfully, but without a warrant, but left open the question for another case. *White*, 228 W. Va. at 530 n. 19, 722 S.E.2d at 582 n. 19. “Mr. White acknowledges that there is a split of authority regarding whether a warrant is required to search the contents of a cellular telephone that is seized without a warrant. However, we need not discuss this authority insofar as the cellular telephone in the instant case was seized pursuant to a valid search warrant.” *White*, 228 W. Va. at 530 n. 19, 722 S.E.2d at 582 n. 19. Petitioner suggests that this case provides this Court with the opportunity to address this issue.

Courts across the country have acknowledged that a person has a reasonable expectation of privacy of the contents of his cell phone. *See, e.g., United States v. Zavala*, 541 F.2d 562, 577 (5th Cir. 2008); *State v. Smith*, 920 N.E.2d 949 (Ohio 2009); *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007); *United States v. Quintana*, 594 F.Supp.2d 1291 (M.D. Fla. 2009). The question that courts have been grappling with is whether a search incident to arrest, where officers validly seize a cellular phone, authorizes the officers to search the contents of the phone. Petitioner suggests that officers cannot search the contents of the cellular phone without a valid search warrant seeking such evidence.

In a case on point, the District Court for the Northern District of California held that a valid search of a defendant’s person subsequent to arrest, where a cell phone is seized, does not justify a warrantless search of the cell phone at the station house after the person has been arrested. *United States v. Park*, No. CR 05-375, 2007 WL 1521573 (N.D. Cal. May 23, 2007) (unreported).

[T]he Court finds the government has not met its burden to show that any exception to the warrant requirement applies.... [T]he station house searches of defendants' cellular phones occurred approximately an hour and a half after their arrests, and thus were not roughly contemporaneous with the arrests. Under these circumstances, such delayed searches would be lawful if they are considered "searches of the person," as opposed to "searches of possessions within an arrestee's immediate control." The Court finds that a modern cellular phone, which is capable of storing immense amounts of highly personal information, is properly considered a "possession within an arrestee's immediate control" rather than as an element of the person. As such, the Court concludes that once officers seized defendants' cellular phones at the station house, they were required to obtain a warrant to conduct the searches.

Id. at *1. The *Park* court found that because "the search of the cell phone was not contemporaneous with arrest" and "[m]ore fundamentally... cellular phones should be considered 'possessions within an arrestee's immediate control' and not part of 'the person,'" that the contents seized as a result of the search of the cell phone had to be suppressed. *Id.* at *8.

In the instant case, Petitioner asserts that as a general rule, officers should be required to obtain a warrant for the contents of a cellular phone that has been seized incident to a lawful arrest. The scope and breadth of private communications in cell phones, and particularly smart phones, far exceeds the typical information that may be contained in a closed container. Moreover, there are no weapons or contraband that would be found in a cell phone which a person under arrest could use to endanger the safety of an arresting officer. Simply put, Fourth Amendment jurisprudence needs to catch up with the reality of modern technological advances and the content of a cell phone must be given the appropriate protection.

However, even if we assume *arguendo* that the contents of a cell phone may be legitimately searched after the lawful seizure of a cell phone subsequent to an arrest, in the instant case, the search of the contents of the cell phone fails the contemporaneous requirement for searches incident to arrest. "Before a search will be upheld as a lawful search incident to an

arrest, it must be both spatial and contiguous to the arrest.” *Julius*, 185 W. Va. 422, 408 S.E.2d 1 (citing *Chimel v. California*, 395 U.S. 752 (1969) and *United States v. Edwards*, 415 U.S. 800, 803 (1974)).

The one court to directly address the issue in the context of the search of the contents of a cell phone has held that “[u]nder the Fourth Amendment, if officers do not contemporaneously search a cell phone when making an arrest, and instead seize it for later review at the station house, the subsequent search could not and should not be deemed incident to arrest, but will require a search warrant.” *United States v. Gomez*, 807 F.Supp.2d 1134 (S.D. Fla. 2011). “[W]hile [the plain view] doctrine permits the seizure of incriminating evidence, it does not authorize a warrantless search of the item for concealed evidence.” *Id.* at 1142 (citing *United States v. Miller*, 769 F.2d 554, 557 (9th Cir. 1985)). “[W]hen the temporal and spatial requirements of the search incident to arrest exception are not present, then a search without probable cause and without a warrant are invalid under the Fourth Amendment's per se rule.” *Id.* at 1144-45 (citing *United States v. Chadwick*, 433 U.S. 1, 15 (1977) for the holding that a “warrantless search of a locked footlocker that was lawfully seized as incident to defendant's arrest could not be justified under this exception because it was too “remote in time or place from the arrest,” and no other exigency existed”). In *Gomez*, the court held,

Obviously, had the agents here waited to search Defendant's cell phone until they were back at the station house, their search would have run afoul with the spatial and temporal safeguards.... [T]he search of the cell phone cannot be justified as a search incident to lawful arrest [because] ... Agent Mitchell accessed the text messages when Wall was being booked at the station house.”

Id. at 1148-49.

In the case of a cell or smartphone, for instance, a search contemporaneous with an arrest

would not possibly allow a law enforcement officer at the scene of an arrest from downloading the entire content of the phone's memory. It would not allow much more than what occurred here—a short, limited perusal of only recent calls to quickly determine if any incriminating evidence relevant to this drug crime can be identified.

Id. at 1149.

It should also be noted that, when a search incident to arrest goes beyond the strict temporal and spatial requirements of the doctrine, a different rule must govern. If officers do not contemporaneously search a cell phone, and instead seize it for later review at the station house the subsequent search could not and should not be deemed incident to arrest. It should instead fall under the *United States v. Place* line of cases, that hold that “[w]here law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.” A warrant must then be obtained. Because the search here was in fact contemporaneous with the arrest, *Place* has no bearing on the outcome.

Id. at 1149 (quoting *United States v. Place*, 462 U.S. 696, 701 (1983)).

In the instant case, the search of the contents of the cellular phone occurred many months after the arrest of Mr. Cook and the initial seizure of the phone. First, the invalid search warrant obtained for seizure of the cellular phone occurred on July 18, 2011, approximately three days after Mr. Cook’s arrest. Moreover, though, Sgt. Boober did not analyze the contents of the cell phone until December of 2011, approximately five months after the arrest of Mr. Cook and the seizure of his phone. No matter the case, whether the contents of the cellular phone were searched three days after Mr. Cook’s arrest or five months after Mr. Cook’s arrest, it is clear that the search of the contents of the phone failed the contemporaneous requirement for a search incident to arrest. Therefore, the Circuit Court erred when it failed to suppress all the contents of the cellular phone and any evidence derived therefrom, including Sgt. Boober’s analysis of the phone. Because there was no valid search warrant for the content of the phone and because there

was no valid exception to the warrant requirement, the search of the phone was illegal and the evidence derived therefrom should have been properly suppressed.

II. THE CIRCUIT COURT ERRED WHEN IT FAILED TO SUPPRESS DEFENDANT'S STATEMENTS THAT WERE ELICITED IN VIOLATION OF HIS RIGHTS

A. Standard of Review

“On appeal, legal conclusions made with regard to suppression determinations are reviewed de novo. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard.” Syl. Pt. 3, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994).

B. The Circuit Court Erred When It Failed to Suppress Defendant's Statements that Were Elicited in Violation of His *Miranda* Rights

“In *Miranda*, the Supreme Court held that, in order to protect a defendant's right against compelled self-incrimination under the Fifth Amendment, before police initiate custodial interrogation, they must advise a defendant that, in addition to other rights, he has the right to remain silent and the right to counsel.” *State v. Bradshaw*, 193 W. Va. 519, 528, 457 S.E.2d 456, 465 (1995) (citing *Miranda v. Arizona*, 384 U.S. 436, 467–72 (1966)). “Absent a knowing and intelligent waiver of the Fifth Amendment right against self-incrimination, a statement made by a suspect during in-custody interrogation is inadmissible.” *Bradshaw*, 193 W. Va. at 527, 457 S.E.2d at 464 (citing *Miranda*, 384 U.S. at 475). “The Supreme Court added another layer to that protection in *Edwards v. Arizona*, and its progeny, by holding that once a defendant invokes his right to an attorney under *Miranda*, the defendant must reinitiate contact in order for the authorities to resume interrogation.” *Bradshaw*, 193 W. Va. at 528, 457 S.E.2d at 465 (citing *Miranda*, 384 U.S. at 475) (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)).

There are a number of factual and legal understandings related to the *Miranda* issue that were not and are not in dispute. First, for the *Miranda* analysis, Mr. Cook was “in custody” as soon as Cpl. Stevens arrived at the parking lot at Southern States, ordered Mr. Cook to the ground, and placed Mr. Cook in handcuffs. Second, Mr. Cook was not read his *Miranda* rights until Corporal Norris began his questioning of Mr. Cook in the interview room at the Ranson Police Department. Third, Mr. Cook never waived his *Miranda* rights. Following the reading of his *Miranda* rights by Corporal Norris, Mr. Cook invoked his Fifth Amendment right to counsel by requesting an attorney. The only real issue in dispute is whether Mr. Cook’s statements were elicited as the result of questioning by the officers.

As to whether an officer’s interaction with a suspect is considered “interrogation,” pursuant to *Miranda*, the West Virginia Supreme Court has adopted the United States Supreme Court’s holding that “interrogation” is “either express questioning or its functional equivalent.” *State v. Newcomb*, 223 W. Va. 843, 862, 679 S.E.2d 675, 694 (2009).

[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term “interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

Newcomb, 223 W. Va. at 862, 679 S.E.2d at 694 (quoting *Rhode Island v. Innis*, 446 U.S. 291,

300–302 (1980)). Thus, “interrogation” involves any police techniques, not just explicit questioning, no matter how subtle, that are designed to elicit incriminating responses from a suspect.

1. Statement to Captain Stevens in Southern States Parking Lot

When Captain Stevens first arrived on the scene of the Southern States parking lot, he and the other responding officers encountered Mr. Cook in the surrender position in the parking lot.

May 15, 2012 Pretrial Tr. 15. While approaching Mr. Cook with his gun drawn, Captain Stevens asked Mr. Cook if he was the shooter, and Mr. Cook responded that “I am okay but she needs help. Go check on her.” *Id.* at 15. After Mr. Cook was put in handcuffs, Mr. Cook stated, “I shot her... I am sorry. I don’t normally act like this. I didn’t take my medication.” *Id.* at 15-16.

When asked if he had a weapon by Captain Stevens, Mr. Cook stated that it was in a parked SUV. *Id.* at 16.

Petitioner admits that there is no evidence that first statements that were made to Captain Stevens were made in response to any police interrogation. However, Petitioner suggests that the second statement made to Captain Stevens relating to the location of the firearm, was an answer directly related to explicit questioning by Captain Stevens about the whereabouts of the firearm. As such, Petitioner suggests that because he was not given his *Miranda* rights, this statement must be suppressed.

Furthermore, Petitioner suggests that the Circuit Court erred in finding that the emergency exception to the *Miranda* requirement applied, making Defendant’s statement admissible. Petitioner does not dispute that an emergency was present when Captain Stevens questioned him about the whereabouts of the firearm. However, Petitioner suggests to this Court

that the so-called “emergency exception” to *Miranda* is no longer good law. The “emergency exception” is based upon the Supreme Court case of *New York v. Quarles*, 467 U.S. 649 (1984). In that case, the Supreme Court carved out a public safety exception to *Miranda*, but based its holding on the presumption that a defendant does not have a constitutional right to *Miranda* warnings. However, in a 2000 Supreme Court case, the Court held that *Miranda* had announced a constitutional rule of law. See *Dickerson v. United States*, 530 U.S. 428, 437-44 (2000). Therefore, the reason for allowing an overriding of *Miranda*, the non-constitutional nature of *Miranda*, is no longer effective, because the Supreme Court has subsequently held that *Miranda* involves a constitutional dimension. See *Allen v. Roe*, 305 F.3d 1046, 1050 (9th Cir. 2002) (casting doubt on the *Quarles* emergency doctrine after *Dickerson* held that *Miranda* announced a constitutional rule of law). Therefore, Defendant suggests to this Court that even if an emergency was present, the statement made by Mr. Cook must be suppressed.

2. Statement to Corporal Norris in Police Cruiser

Petitioner further suggests that any statements made to Corporal Norris while Defendant was in the police cruiser, and prior to Defendant being read his *Miranda* rights, must also be suppressed. Petitioner suggests that it is clear that he was in custody and that such statements were elicited as the result of the functional equivalent of questioning. Thus, the Circuit Court erred in failing to suppress these statements.

On cross-examination at the May 15, 2012 pretrial hearing, Corporal Norris testified that he had put Mr. Cook in his cruiser after arriving at the scene of the shooting and had turned on the cruiser’s video to capture any statements that Mr. Cook may make while interacting with Corporal Norris. May 15, 2012 Pretrial Tr. 90. Corporal Norris testified that Mr. Cook was not

free to leave and that he did not read Mr. Cook his *Miranda* rights at that time. *Id.* at 91.

Corporal Norris testified that Mr. Cook was in the cruiser for approximately 30 to 35 minutes.

Id. at 92. During that time, Mr. Cook made a few statements about being sorry and not taking his bipolar medication. *Id.* at 94.

Mr. Cook suggests that Corporal Norris should have read Mr. Cook his *Miranda* rights at the scene, once he was under arrest, and should have known that any comments to Mr. Cook were likely to elicit incriminating information. Therefore, these statements should have been suppressed.

3. Statements to Corporal Norris in the Interview Room

Petitioner suggests that all statements that he made to Corporal Norris in the interview room of the Ranson Police Department should have been suppressed. While the Circuit Court suppressed the statements elicited from Mr. Cook by Corporal Norris after Mr. Cook requested counsel, the Circuit Court erred in failing to suppress the statements made by Mr. Cook in response to Corporal Norris' questioning prior to the administration of the *Miranda* warnings.

After taking Mr. Cook to the Ranson Police Department, Cpl. Norris placed Mr. Cook in the interrogation room. Mr. Cook had been placed under formal arrest and he was not free to leave. Cpl. Norris began his interrogation of Mr. Cook by telling him he was going to read him his *Miranda* rights. Prior to actually reading the *Miranda* rights, however, Cpl. Norris questioned Mr. Cook on his use of drugs.

Corporal Norris: Before we go any further I'm going to read you your rights, okay?

Ray Cook: (inaudible).

Corporal Norris: (inaudible). What's your name, sir?

Ray Cook: My name is Ray Cook.

Corporal Norris: What's your date of birth?

Ray Cook: May 15, 1974.

Corporal Norris: Are you under the influence of any drugs or alcohol?

Ray Cook: No (inaudible).

Corporal Norris: How about prescription medication?

Ray Cook: I got Seroquel but I don't take it. That might be one of the reasons.

Corporal Norris: Is that all you're prescribed?

Ray Cook: I got (inaudible) medicine and Jen she give me like anxiety medication every now and then.

Corporal Norris: Are you on that today?

Ray Cook: No. That's the thing. I didn't....

Corporal Norris: So you're not on anything?

Ray Cook: No (inaudible).

Corporal Norris: Did you take any of your prescription medication today?

Ray Cook: No. Just yesterday (inaudible).

Transcript of Taped Conversation Between Ray Cook and Corporal Norris, p. 3-4.

Petitioner contends that this initial statement about his use of medication is inadmissible and in violation of *Miranda* because the statement was elicited by Corporal Norris prior to Corporal Norris informing Defendant, who was in formal custody, of his *Miranda* rights. In the context of the instant case, these questions by Corporal Norris were clearly of an investigatory nature, designed to elicit incriminating responses. Corporal Norris was aware that Mr. Cook's

mental state would be a key issue in the murder investigation. Corporal Norris was aware from the 911 call made by Ray Cook that Mr. Cook had told the 911 operator that he had not taken his bipolar medication. Moreover, when Corporal Norris had placed Mr. Cook in his police cruiser, Corporal Norris had learned that Mr. Cook was claiming that he was not on his bipolar medication. The following colloquy occurred between Corporal Norris and Mr. Cook:

Corporal Norris: You need to relax and stay put.

Ray Cook: I'm not on my bipolar meds.

Corporal Norris: I'm not worried about your problems.

Transcript of Recording of Ray Cook in Police Cruiser at Southern States, p. 3. Thus, based upon his previous investigation, Corporal Norris was aware that Mr. Cook's use or nonuse of drugs would be an issue in the murder case. As such, questions regarding Mr. Cook's drug use prior to the reading of his *Miranda* rights were clearly investigatory questions that were likely to produce incriminatory responses. As such, this initial statement in the interrogation room should have been suppressed as a violation of Mr. Cook's *Miranda* rights.

This Court has not addressed whether there is a routine booking question exception to *Miranda*. This exception to *Miranda* was first recognized by the Supreme Court in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) and was limited to "biological data necessary to complete booking or pretrial services" such as an arrestee's "name, address, height, weight, eye color, date of birth, and age." *Id.* at 601-02. All courts that have addressed the issue have defined this exception narrowly to only include "questions [that] were part of a routine procedure to secure biographical data to complete the booking process." *United States v. Avery*, 717 F.2d 1020, 1024-25 (7th Cir. 1983) (holding "that courts should carefully scrutinize the factual setting of each encounter of

this type. Even a relatively innocuous series of questions may, in light of the factual circumstances and the susceptibility of a particular suspect, be reasonably likely to elicit an incriminating response.”); *see also United States v. Washington*, 462 F.3d 1124 (9th Cir. 2006) (“Routine gathering of background biographical information, such as identity, age, and address, usually does not constitute “interrogation,” for Miranda purposes.”); *United States v. Pacheco-Lopez*, 531 F.3d 420, 423 (6th Cir. 2008) (“Miranda warnings are not, however, required for questions “reasonably related to the police's administrative concerns,” such as the defendant's name, address, height, weight, eye color, date of birth and current address.”). Questions about how a suspect received an injury is not a routine booking question. *Franks v. State*, 486 S.E.2d 594 (Ga. 1997) (“Police question as to how suspect received obvious injury is not routine booking question, and therefore, asking suspect how he received injury is not automatically exempted from Miranda; asking suspect how he was injured is likely to elicit incriminating response because suspect's injury may be directly related to crime he is suspected of committing.”).

Most importantly, courts that have addressed the issue have held that questions about an arrestee’s drug use does not fall within the routine booking exception to *Miranda*, even if such questions are usually asked by an officer to all arrestees. *See Hughes v. State*, 695 A.2d 132 (Md. 1997) (holding that “[p]olice officer's question during postarrest processing as to whether defendant was narcotic or drug user did not fall within routine booking question exception to *Miranda*, and therefore testimony regarding defendant's response to such question was inadmissible, though question was contained on standard booking form, was asked of every arrestee and was purportedly used to address police department's concerns about safety of

arrestee and others and to determine voluntariness of any confession; question was more than reasonably likely to evoke incriminating response given that defendant had been arrested for suspected involvement in distribution of cocaine.”); *People v. Hernandez*, 790 N.Y.S.2d 356 (N.Y. 2004) (“Questioning of drug possession arrestee as to recent drug use did not come within “pedigree exception” to requirement that Miranda warnings be given, even if done as part of routine processing for purpose of determining arrestee's immediate health needs; questions were likely to elicit relevant, incriminating responses.”); *State v. Denney*, 218 P.3d 633 (Wash. App. 2009) (“Questions in standard questionnaire during booking relating to defendant's drug use amounted to “interrogation,” and thus, did not come within routine booking exception to Miranda; questions were designed to elicit incriminating response that was an admission to possession of controlled substance for which defendant had been arrested.”); *People v. Singh*, 816 N.Y.S.2d 669 (N.Y. 2006) (“Defendant's post-arrest statement in response to question during routine health screening as to his recent alcohol consumption did not fall within pedigree exception to Miranda rule, and thus response was not admissible in defendant's prosecution for driving while intoxicated.”); *United States v. Hinckley*, 672 F.2d 115, 125 (D.C. Cir. 1982) (“Thus, where the mental state of an arrestee looms as a likely issue, we can only conclude that a systematic 25 minute ‘background’ interview was designed to elicit ‘incriminating responses....”).

Thus, Petitioner suggests that the questions asked by Corporal Norris about Mr. Cook’s recent use of prescription medication do not fall within the routine booking exception to *Miranda* and should have properly been suppressed. Moreover, these statements were introduced into evidence on multiple occasions through the State’s direct and cross-examination of witnesses.

Moreover, following this initial questioning, Corporal Norris read Mr. Cook his *Miranda* rights, and Mr. Cook clearly invokes his right to counsel and his right to remain silent and refuses to waive his *Miranda* rights. After Corporal Norris reads Mr. Cook his rights, Mr. Cook responds:

Ray Cook: I'm going to go ahead and try to lawyer up, I guess. Try to talk to somebody try to help me out. There's no way around this.

Corporal Norris: You don't want to make any statement?

Ray Cook: (Inaudible).

Corporal Norris: Okay.

Ray Cook: That's about it.

Corporal Norris: All right.

Ray Cook: Talk to a lawyer.

Transcript of Taped Conversation Between Ray Cook and Corporal Norris, p. 5-6. The Circuit Court correctly suppressed this portion of Mr. Cook's statement and every statement that came after his invocation of his right to counsel. None of the questions following his invocation of his right to counsel could be considered routine booking questions.

Furthermore, Petitioner submits that Corporal Norris should have read Mr. Cook his *Miranda* rights prior to asking him questions about his prescription drug use. If these questions are indeed a part of the questions that Corporal Norris asks of every arrestee, there would be no harm for Corporal Norris to read a subject his *Miranda* rights first, and then ask questions, other than name, age, and address, regarding a subject's drug use. The failure of Corporal Norris to follow this procedure means that these questions concerning Mr. Cook's prescription drug use

should have properly been suppressed by the Circuit Court.

4. Statements to Patrolman Henderson while Being Booked

Petitioner asserts that the Circuit Court erred in failing to suppress the statement made by Mr. Cook to Patrolman Henderson while Patrolman Henderson was fingerprinting and booking Mr. Cook. Patrolman Henderson testified that Mr. Cook made a statement during processing that he was sorry for having messed up everyone's lives.

Patrolman Henderson testified, "I believe Mr. Cook was brought back by Corporal Norris and maybe Lieutenant Roberts from being arraigned. Once he was brought back to Ranson Police Department, I was told to go ahead and help process Mr. Cook." May 15, 2012 Pretrial Hearing Tr. 70.

Q. Had you had any conversation with him at that time?

A. It might have been, yes, that is correct.

Q. Did Mr. Cook make a statement, any statement that you overheard?

A. Yes, he did.... He said something to the effect, "I am sorry that I screwed other peoples lives up...."

May 15, 2012 Pretrial Hearing Tr. 71. Patrolman Henderson continued, "His back was turned towards me and he was facing I believe either Lieutenant Roberts or Corporal Norris and I was placing handcuffs on him to transport him to the ERJ." *Id.* at 71. Patrolman Henderson further testified that he did not ask Mr. Cook any questions and that he didn't "remember any questions being asked" by the other officers. *Id.* at 72. On cross-examination, Patrolman Henderson testified that one or two other officers were with him when he was processing Mr. Cook and that Mr. Cook and the other officers were having some conversation. *Id.* at 73. Corporal Norris

testified that he was not with Patrolman Henderson when Mr. Cook made this statement. *Id.* at 102. The State never called Lt. Roberts as a witness.

Petitioner asserts that the State had the burden to prove that this conversation was reinitiated by the Defendant and not by questioning of the police and that the Defendant then voluntarily waived his right to counsel. Petitioner suggests that the State failed to carry this heavy burden when it called Patrolman Henderson, who indicated he did not remember if conversation was occurring with Mr. Cook, and Corporal Norris, who indicated he was not present during this statement, but failed to call Lieutenant Roberts, who was the other officers during the booking who was apparently conversing with Mr. Cook.

“[O]ur law is clear that once the request for counsel is made, all interrogation that day or later stops, until counsel is provided. We cannot allow a request for counsel to be avoided by minimal unsuccessful efforts to get a particular lawyer; or by the government simply doing nothing.” *State v. Bradley*, 163 W. Va. 148, 150, 255 S.E.2d 356, 358 (1979) (citing *Miranda*, 384 U.S. 436; *State v. McNeal*, 162 W. Va. 550, 251 S.E.2d 484 (1978)). “When a criminal defendant requests counsel, it is the duty of those in whose custody he is, or if he is not in custody and is indigent, the duty of those to whom the request is made, to secure counsel for the accused within a reasonable time. In the interim, no interrogation shall be conducted, under any guise or by any artifice.” *Bradley*, 163 W. Va. at 150, 255 S.E.2d at 358; *see also McNeal*, 162 W. Va. at 553, 251 S.E.2d at 487 (“Once a suspect in custody has expressed his wish to be represented by counsel, the police must deal with him as if he is thus represented. Thereafter, it is improper for the police to initiate any communication with the suspect other than through his legal representative, even for the limited purpose of seeking to persuade him to reconsider his

decision on the presence of counsel.”). “Once a person under interrogation has exercised the right to remain silent guaranteed by W.Va. Const., art. III § 5, and U.S. Const. amend. V, the police must scrupulously honor that privilege. The failure to do so renders subsequent statements inadmissible at trial.” Syl. Pt. 1, *Woodson*, 181 W. Va. 325, 382 S.E.2d 519.

“For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel.” *State v. Jones*, 216 W. Va. 392, 398-99, 607 S.E.2d 498, 504-05 (2004).

An accused in custody, having expressed his desire to deal with police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, or unless he validly waives his earlier request for assistance of counsel, and such “rigid” prophylactic rule requires that courts first determine whether accused actually invoked his right to counsel and then, if accused invoked right to counsel, courts may admit his responses to further questioning only on finding that he initiated further discussions with police and knowingly and intelligently waived the right he had invoked.

Smith v. Illinois, 105 S.Ct. 490 (1984). “Even if a conversation taking place after the accused has expressed his desire to deal with the police only through counsel is initiated by the accused, where reinterrogation follows, the burden remains on the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation.” *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

The State failed to prove that Defendant initiated further discussions with the police and knowingly and intelligently waived the right to counsel that he had revoked. Moreover, the officers failed to provide the Defendant with the counsel that had been requested. Petitioner suggests that Patrolman Henderson’s testimony cannot carry the State’s heavy burden to prove that Defendant had reinitiated the conversation and had voluntarily waived his right to counsel.

Therefore, Petitioner suggests that the Circuit Court erred in failing to suppress this statement.

C. The Circuit Court Erred When It Failed to Suppress Defendant's Statements that the Investigating Officers Elicited in Violation of His Sixth Amendment Right to Counsel

Petitioner further suggests that the Circuit Court erred in failing to suppress Mr. Cook's post-arraignment statements as being elicited in violation of his Sixth Amendment right to counsel.

As indicated above, Patrolman Henderson testified, that after Mr. Cook was arraigned, he heard Mr. Cook make a statement that he was sorry for messing up everyone's lives. May 15, 2012 Pretrial Hearing Tr. 71. Another statement was made to Lieutenant Roberts while being transported to the Eastern Regional Jail, but the State agreed not to introduce this statement in its case-in-chief, and the State did not enter the statement in rebuttal at the trial.¹ May 24, 2012 Pretrial Tr. 146.

Petitioner suggests that the statement elicited during the booking process was not only a violation of his Fifth Amendment right to counsel, pursuant to *Miranda*, but also a violation of his Sixth Amendment right to counsel because at the time of the questioning and these statements, formal criminal proceedings had begun against Mr. Cook. Therefore, these statements should have been independently suppressed pursuant to the Sixth Amendment.

¹ On way to jail, Lt. Roberts asked if "Mr. Cook had a chance to notify his family of what occurred that day." *Id.* at 73. According to Patrolman Henderson, Mr. Cook responded that he thought his mom knew because he asked her to watch his dogs before leaving to meet the decedent. *Id.* at 73. On cross-examination at the pretrial hearing, Patrolman Henderson testified that Lt. Roberts told Mr. Cook that he should want to contact his family before they see it on the news. *Id.* at 80. Petitioner suggests that if the State had not withdrawn its intent to enter this statement into evidence, it is clear that it would have been suppressed pursuant to *Miranda* and the Sixth Amendment because the questioning was likely to elicit incriminating response from Mr. Cook.

“Th[e] Fifth Amendment right to counsel is triggered when a defendant is taken into custody by law enforcement officials who desire to interrogate him. [However,] [t]he Sixth Amendment [explicit] right to counsel arises ... when adversary judicial proceedings have been commenced against a defendant.” *State v. Williams*, 226 W. Va. 626, 629, 704 S.E.2d 418, 421 (2010). In other words, “[t]he Sixth Amendment right to counsel attaches at the time judicial proceedings have been initiated against a defendant whether by way of formal charges, preliminary hearing, indictment, information, or arraignment.” *Williams*, 226 W. Va. at 629, 704 S.E.2d at 421 (quoting *State v. Bowyer*, 181 W. Va. 26, 380 S.E.2d 193 (1989)). “Pursuant to the Sixth Amendment right to counsel, ‘incriminating statements obtained by police pertaining to pending charges are inadmissible at the trial of those charges....’” *Williams*, 226 W. Va. at 630, 704 S.E.2d at 422 (quoting *Maine v. Moulton*, 474 U.S. 159, 180 (1985)).

Here, the statements elicited by Lt. Roberts and Officer Henderson occurred after Mr. Cook had been formally arraigned at the Jefferson County Magistrate Court. At that time, Mr. Cook indicated that he wanted to hire an attorney to represent him. Because formal proceedings had been initiated, no officer had any right to speak to Mr. Cook about his case without an attorney present. Yet, Lt. Roberts and Officer Henderson continued to speak to and question Mr. Cook about the case. As noted above, the State had a high burden in proving the Mr. Cook reinitiated the conversation and the Mr. Cook waived his right to counsel, which Petitioner suggests the State has not met. Because Mr. Cook had not been afforded his Sixth Amendment right to an attorney, any statements made by Mr. Cook subsequent to formal proceedings being initiated at his arraignment, including the statements to Lt. Roberts and Officer Henderson during fingerprinting and transport to the Eastern Regional Jail, should have been suppressed. Even if

this Court finds that the questioning was not a violation of Mr. Cook's Fifth Amendment rights, Mr. Cook's Sixth Amendment right to counsel must be more zealously guarded and this Court must find that the continued questioning, no matter how subtle, requires suppression of the statements pursuant to the Sixth Amendment.

D. The Circuit Court Erred When It Allowed the State to Enter Defendant's Statements that Were Suppressed Pursuant to *Miranda* in the State's Rebuttal Case Where the Defendant Had Not Testified

Petitioner further contends that the Circuit Court erred when it allowed the State to enter previously-held inadmissible statements of the Defendant to be entered into evidence during cross-examination of Defendant's psychological and psychiatric experts pursuant to *State v. DeGraw*, 196 W. Va. 261, 470 S.E.2d 215 (1996).

During cross-examination of Defendant's psychological expert, Dr. Lewis, the State indicated that it intended to introduce the entire statement of Mr. Cook, even after he asserted his right to counsel, into evidence based upon *DeGraw*. June 8, 2012 Trial Tr. 45-50. Over objection of the Defendant, the Circuit Court ruled that Mr. Cook's post-invocation of right to counsel statements could come in for the impeachment of Dr. Lewis. *Id.* at 49-50. In allowing the State to enter this statement into evidence, the Circuit Court reasoned that "I think the State has identified this evidence as what it thinks would be crucial evidence in their attempt to impeach the testimony of this witness." *Id.* at 49.

Petitioner asserts that the Circuit Court's reliance on *DeGraw* was misplaced. *DeGraw* stands for the proposition that the State can use previously-suppressed statements of a defendant to impeach statements that a defendant made to a psychological expert. Importantly, the *DeGraw* Court stated that such previously-inadmissible statements cannot be used to impeach the expert

witness, him or herself.

The first issue in *DeGraw* was

whether the Appellant's Fifth Amendment right to remain silent was violated when the trial court admitted the Appellant's voluntary statements, which were given to police in violation of *Miranda* and, therefore, ruled inadmissible in the State's case-in-chief, as evidence to rebut his diminished capacity defense. The Appellant argues that the State was able to use the inadmissible statements to impeach him even though he never took the witness stand. In contrast, the State contends that the defense elicited an opinion from the Appellant's psychiatrist that the Appellant could have blacked out the morning he killed the victim. The State maintains that it demonstrated on cross-examination that this opinion was based largely upon the Appellant's statements to his psychiatrist. These statements, which were recited in detail to the jury, included claims that the Appellant did not remember anything from the morning of the crime. Thus, the State argues that its rebuttal, which was limited to showing that the Appellant had some recall of the events that occurred while he was allegedly blacked out, was properly admitted to impeach the statements the Appellant made to his psychiatrist.

DeGraw, 196 W. Va. at 267, 470 S.E.2d at 221. The Court held “that pursuant to the Supreme Court's decision in *James*, the scope of the impeachment exception pertaining to the admissibility of a defendant's voluntary, yet illegally obtained statement, does not permit prosecutors to use such statements to impeach the credibility of defense witnesses.” *DeGraw*, 196 W. Va. at 268, 470 S.E.2d at 222. “However, the *James* decision is distinguishable from the present case because the State was offering the defendant's illegally obtained statement not to impeach a defense witness's testimony, but to impeach the contradictory statements the defendant made to that witness.” *DeGraw*, 196 W. Va. at 268, 470 S.E.2d at 222. The Court reasoned, “We do not think that such a defendant should be allowed to lie to the psychiatrist and get away with it when there is evidence tending to show that he lied and that the psychiatrist's diagnosis was based on that lie.” *DeGraw*, 196 W. Va. at 268, 470 S.E.2d at 222. “A defendant may still avoid admission of the suppressed evidence if he or she does not open the door by telling something to

a psychiatrist that is contradicted by that evidence.” *DeGraw*, 196 W. Va. at 270 n. 11, 470 S.E.2d at 224 n. 11 (citation omitted); *see also People v. Welsh*, 80 P.3d 296, 310 (Colo. 2003) (“Unlike the defendants in *Wilkes* and *DeGraw*, however, the defendant in this case never made any inculpatory statements to law enforcement personnel, nor did she say anything which can be described as inconsistent with having no memory of the shooting. Rather, she simply did not answer any questions regarding what took place at the apartment. Here, there is no direct contradiction between the defendant’s silence after the crime and her later statements that she did not recall the shooting.”).

In the instant case, unlike *DeGraw*, the previously-held inadmissible statement was being used to impeach Dr. Lewis’ credibility, not any statement that Mr. Cook made to Dr. Lewis. Nothing that Mr. Cook said to Corporal Norris contradicted what he said to Dr. Lewis. He told both Dr. Lewis and Corporal Norris about his taking of Seroquel and Ativan on the day prior to the shooting but not the day of the shooting. Mr. Cook told both Dr. Lewis and Corporal Norris about his relationship with Ms. Perrine and how the anxiety about that relationship was exacerbating his mental illness. The State entered into evidence statements Mr. Cook made about Ms. Perrine “giv[ing] me so much hope and then she kept fucking with me and I am just so tired of it.” June 8, 2012 Trial Tr. 58. The State repeated this statement about four or five times with Dr. Lewis. *Id.* at 58-61. This statement does nothing but serve to prejudice the jury and does not impeach anything that Mr. Cook said to Dr. Lewis. The State seems to have been saying that it was offering the statement to show that Mr. Cook was responsive to questioning. However, whether Mr. Cook was responsive to questioning was never an issue brought up by Dr. Lewis.

Furthermore, if the statement was merely being offered to show that Mr. Cook was responsive to questioning, there were a myriad of other statements that the Circuit Court did not find violated *Miranda* that the State could have introduced into evidence. The State did not need to enter the post-invocation of counsel statements of Mr. Cook on that point. The only reason that the State did was because the State believed these statements, which were suppressed, were highly inculpatory.

Thus, Petitioner suggests that this previously-held inadmissible statement was not admissible pursuant to *DeGraw* and that moving this statement into evidence violated Mr. Cook's Fifth Amendment rights pursuant to *Miranda*.

III. THE CIRCUIT COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS MADE TO THE STATE'S PSYCHOLOGICAL EXPERT, DR. DAVID CLAYMAN OR IN THE ALTERNATIVE TO STRIKE DR. CLAYMAN'S TESTIMONY WHERE DR. CLAYMAN FAILED TO FOLLOW THE *STATE V. JACKSON* PROCEDURES BY RECORDING HIS ENTIRE INTERVIEW OF THE DEFENDANT

Petitioner argues that the Circuit Court erred when it denied the Defendant's motion to suppress statements that he made to the State's psychological expert, Dr. Clayman, or in the alternative where the Circuit Court denied Defendant's motion to strike Dr. Clayman's testimony. Petitioner suggests that the statement should have been suppressed or the testimony struck because Dr. Clayman failed to follow the procedures set forth in *State v. Jackson*, 171 W. Va. 329, 298 S.E.2d 866 (1982). Moreover, Petitioner suggests that the *Jackson* procedure opened a flood gate for allowing a multitude of Mr. Cook's statements to be entered into evidence.

In the case below, Petitioner had filed a notice of intent to present a mental defense and provided the State with expert disclosures from a psychologist, Dr. Bernard Lewis, a psychiatrist,

Dr. Joseph Novello, and a pharmacologist, Rodney Richmond. The State, invoking the rule in *Jackson*, moved for an independent evaluation of the Defendant by the State's own expert, Dr. Clayman. Dr. Clayman interviewed the Defendant at the Southern Regional Jail on April 19, 2012. May 15, 2012 Pretrial Tr. 90. The interview lasted several hours. The State provided defense counsel with a recording of this interview. After listening to the interview, having the interview transcribed, and speaking to the Defendant about the interview, it became apparent that portions of the interview had not been recorded. Thereafter, Defendant moved for relief based upon this violation of the procedure in *Jackson* and consequently the violation of Defendant's Fifth and Sixth Amendment rights to counsel.

In *State v. Jackson*, this Court wrestled with the competing interests of the Defendant and the State where the Defendant intends to introduce evidence of a mental defense. On the one hand, the Defendant has a privilege against self-incrimination. On the other hand, the State will have difficulty proving the Defendant's sanity beyond a reasonable doubt if it cannot have its own expert conduct an independent evaluation of the Defendant.

The *Jackson* Court reasoned, "The United States Supreme Court has declared that both Fifth and Sixth Amendment rights are implicated in court-ordered pre-trial psychiatric inquiries." *Jackson*, 171 W. Va. at 332, 298 S.E.2d at 869 (citing *Estelle v. Smith*, 451 U.S. 454 (1981)).

We agree with those courts that hold that a defendant may be compelled to participate in a psychiatric examination for competence to stand trial and for criminal responsibility if he presents or intends to present an insanity defense relying on expert psychiatric or psychological evidence. We acknowledge that a court-ordered psychiatrist is, for purposes of a self-incrimination analysis, a state agent who questions a defendant while he is in custody.

Jackson, 171 W. Va. at 333, 298 S.E.2d at 870. "[A] pre-trial psychiatric examination is a

“custodial interrogation” by a state agent. The Fifth Amendment and W.Va. Const. art. III, § 5 self-incrimination privileges are implicated.” *Jackson*, 171 W. Va. at 334, 298 S.E.2d at 871.

It is possible to compel a defendant to be examined by a psychiatrist to evaluate his insanity defense, without abrogating his Fifth Amendment privilege against self-incrimination. While some courts have required *Miranda* warnings, we feel safeguards other than *Miranda* protections can adequately protect a defendant and also provide the state an opportunity to get its own evidence about mental condition.

Jackson, 171 W. Va. at 334, 298 S.E.2d at 871.

There should be an in camera hearing before the government psychiatrist testifies, to excise any portions of his report and proposed testimony that include incriminating statements. A psychiatrist can testify to the bases of his medical opinion, but without reference to a defendant's specific statements about his criminal offense. This in camera hearing should obviate the need for an instruction limiting a jury's consideration of a psychiatrist's testimony to facts or opinions on the issue of insanity (probably a useless act when a medical person has testified to a defendant's revelation to him of incriminating facts). Should there be any question about any such revelation to the medical witness, inadvertently mentioned to the jury, then, of course, a limiting instruction should be given.

Jackson, 171 W. Va. at 334-35, 298 S.E.2d at 871-72 (citations omitted). This rule has been codified in Rule 12.2(c) of the West Virginia Rules of Criminal Procedure:

Psychiatric Examination. In an appropriate case, the court may, upon motion of the attorney for the state, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.” (Emphasis supplied).

W. Va. R. Crim. Pro. 12.2(c).

The *Jackson* Court continued, “The apparent coercive nature of the interview is alleviated by the in camera hearing protection so that his statements cannot be used against him. This protects the first two prongs of *Miranda* warnings.” *Jackson*, 171 W. Va. at 335, 298 S.E.2d at

872.

The third element of a defendant's Miranda protections involves his right to counsel. This federal and concomitant state right to counsel, W.Va. Const. art. III, § 14, arise at each "critical stage" of an adversarial criminal process. A "critical stage" is "where the defendant's right to a fair trial will be affected." Certainly, the results of a psychiatric examination bear greatly on his fair trial rights.

Jackson, 171 W. Va. at 335, 298 S.E.2d at 872 (citations omitted). "We find that W.Va. Const. art. III, § 14 affords a defendant the right to assistance of counsel at a pre-trial psychiatric interview, but does not require counsel's presence at the actual examination. Some state courts have permitted a lawyer to be present, but we believe counsel's presence could affect the examination's accuracy and effectiveness." *Jackson*, 171 W. Va. at 335, 298 S.E.2d at 872. "Further, we find that Alaska's requirement that psychiatric interviews be tape-recorded, is useful." *Jackson*, 171 W. Va. at 336, 298 S.E.2d at 873 (citing *Houston v. State*, 602 P.2d 784, 796 (Alaska 1979)).

To summarize, protection of a defendant's constitutional privilege against self-incrimination and right to assistance of counsel at pre-trial court-ordered psychiatric examinations, requires that a tape-recording of the entire interview be given to his and the government's lawyer, and an in camera suppression hearing be held to guarantee that the court-ordered psychiatrist's testimony will not contain any incriminating statements made by the defendant.

Jackson, 171 W. Va. at 336, 298 S.E.2d at 873.

In the instant case, Petitioner suggests that Dr. Clayman failed to follow the procedures set forth in *Jackson* by recording his entire interview with Mr. Cook. Voir dire of Dr. Clayman was conducted on this issue at the May 15, 2012 Pretrial Hearing. Tr. 90-119. Furthermore, Mr. Cook testified about this issue at the hearing. Tr. 123-29. Though the length of the missing portions of the recordings were disputed and the content of the missing recordings were disputed,

it was uncontested that the recording of Dr. Clayman's interview with Mr. Cook was missing sections where Dr. Clayman had failed to turn the audio recorder back on after several breaks in the interview. Petitioner suggests to this Court that having such gaps in the recording violated *Jackson* which mandated that "a tape-recording of the entire interview" be given to counsel in order to protect a defendant's constitutional rights. *See Jackson*, 171 W. Va. at 336, 298 S.E.2d at 873. The failure to record the entire interview violated Mr. Cook's constitutional privilege against self-incrimination and his right to counsel at all critical stages of the trial. Petitioner suggests that the proper remedy should have been to either exclude the entirety of Petitioner's statement or strike the testimony of Dr. Clayman.

Furthermore, Petitioner suggests that the allowance of a pre-trial interview of Mr. Cook by the State pursuant to *Jackson* opened the flood gates for the almost entirety of the State's case to be about Mr. Cook's statements during his interview with the State's expert. Dr. Clayman essentially took the place of the investigating officer and was allowed to interrogate Mr. Cook for many hours. These statements came in under the guise that they could be used pursuant to *DeGraw* for impeachment of a Defendant who never even took the stand to testify. Petitioner suggests that no curative instruction regarding these statements not coming in as substantive evidence could not correct the fact that the jury was bombarded by these out-of-court statements made by Mr. Cook in his interview with Dr. Clayman. Thus, Petitioner suggests that the *Jackson* procedure, as employed in this case, violated Mr. Cook's Fifth Amendment privilege against self-incrimination where Mr. Cook chose to exercise such a right at trial.

IV. THE CIRCUIT COURT ERRED IN REJECTING THE DEFENDANT'S MOTION TO HAVE THE STATE PRESENT ITS MEDICAL AND PSYCHOLOGICAL EVIDENCE AS TO DEFENDANT'S STATE OF MIND IN THE STATE'S CASE-IN-CHIEF

Petitioner further suggests that the Circuit Court erred in denying Defendant's motion to have the State present its medical and psychological evidence as to Defendant's state of mind in the State's case-in-chief, rather than in the rebuttal case. The denial of this motion was compounded when the Circuit Court denied the Defendant's motion to put on a case in surrebuttal. *See infra* Argument, Section The denial of this motion forced Defendant to attempt to address the testimony of the State's psychological expert, Dr. Clayman, without knowing what testimony Dr. Clayman would offer.

V. THE STATE'S *BRADY* VIOLATION REQUIRES THIS COURT TO GRANT A NEW TRIAL

A. Standard of Review

"The decision to declare a mistrial, discharge the jury, and order a new trial in a criminal case is a matter within the sound discretion of the trial court." Syl. pt. 8, *State v. Davis*, 182 W. Va. 482, 388 S.E.2d 508 (1989). "The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard." *State v. Lowery*, 222 W. Va. 284, 288, 664 S.E.2d 169, 173 (2008).

"This Court's standard of review concerning a motion to dismiss an indictment is, generally, de novo. However, in addition to the de novo standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's "clearly erroneous" standard of review is invoked concerning the circuit court's findings of fact." Syl. Pt. 1, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009).

B. Due Process Violation Under *Brady v. Maryland*

On June 13, 2012, after approximately eight days of trial and after the defense had rested, the State disclosed a crucial piece of exculpatory evidence, a pill-container key chain that

contained Ativan pills, that was seized from the deceased's purse on the day of the shooting.

The only reason that this evidence was learned about and disclosed was because defense counsel had erroneously thought that he had saw these pills during his evidence review. At that time, the State being unaware of its existence, stated on the record that there was no Ativan from the deceased in evidence. However, defense counsel's faulty memory caused Cpl. Norris to investigate further and locate the pill-container key chain containing the Ativan in the deceased's purse. Following the disclosure of this highly material evidence on the penultimate day of trial, Defendant moved for a mistrial. The Circuit Court denied this motion. Defendant then filed a motion to dismiss the case based upon the *Brady* violation. The Circuit Court denied this motion as well.

"A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution." Syl. Pt. 4, *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982). "To begin, the United States Supreme Court held in *Brady* that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *State v. Youngblood*, 221 W. Va. 20, 27-28, 650 S.E.2d 119, 126-27 (2007) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). A showing of "bad faith" is only necessary "when a *Brady* violation involves 'the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.'" *Youngblood*, 221 W. Va. at 28 n. 13, 650 S.E.2d at 127 n. 13 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) and citing *State v.*

Osakalumi, 194 W. Va. 758, 461 S.E.2d 504 (1995)).

“The requirement under *Brady* that evidence must be requested by a defendant was later modified in [*Agurs*], where it was said that ‘there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request.’” *Youngblood*, 221 W. Va. at 28, 650 S.E.2d at 127 (quoting *United States v. Agurs*, 427 U.S. 97, 110 (1976)). Thus, *Brady* “[d]isclosure is required even in the absence of discovery motions.” *State v. Cowan*, 156 W. Va. 827, 833, 197 S.E.2d 641, 645 (1973).

“Although ‘*Brady* addressed only exculpatory evidence, this doctrine has been expanded to include impeachment evidence as well as exculpatory evidence.’ The United States Supreme Court has expressly ‘disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes[.]’” *Youngblood*, 221 W. Va. at 28, 650 S.E.2d at 127 (quoting *Thompson v. Cain*, 161 F.3d 802, 806 (5th Cir.1998) and *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) and citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

In summary, this Court held that “[t]here are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83 (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 wilfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.” Syl. pt. 2, *Youngblood*, 221 W.Va. 20, 650 S.E.2d 119.

- 1. The Evidence Was Favorable to Defendant as Both Exculpatory Evidence and Impeachment Evidence**

Petitioner suggests to this Court that the evidence– the pill container and Ativan prescription pills that belonged to the victim– qualifies as both exculpatory and impeachment evidence. Mr. Cook’s theory of the defense was that he was suffering from a diminished capacity at the time of the shooting that was brought on by his underlying bipolar disorder and the medication that he was taking– both Seroquel and Ativan. Mr. Cook had a prescription for the Seroquel but did not have a prescription for the Ativan. According to medical records introduced into evidence, Mr. Cook had previously, a few years before the shooting, taken Ativan, but had adverse reactions to the medication, necessitating that he stop taking it. Moreover, both the Defendant’s and the State’s pharmacological experts– Rodney Richmond and Dr. Ken Brasfield respectively– offered expert testimony that side effects of Ativan include aggression, confusion, and acute rage. Dr. Brasfield, the State’s expert, in fact testified that the Ativan could have caused the shooting. The jury heard evidence, in the form of Mr. Cook’s statements to the Defendant’s and the State’s psychological experts, that the victim, Ms. Perrine, had a supply of Ativan pills and was giving those pills to Mr. Cook. However, Mr. Cook’s defense team had no evidence that Ms. Perrine actually had access to Ativan pills to be able to give Mr. Cook. That is, there was no evidence to support Mr. Cook’s statements to the psychologists until the penultimate day of trial when it was discovered that Ms. Perrine had a key chain attached to her purse that contained a supply of Ativan pills. Petitioner suggests that the fact that Ms. Perrine had Ativan pills on her person at the time of the shooting is highly exculpatory as it tends to show that Mr. Cook’s theory that Ms. Perrine was giving him Ativan pills without a prescription was true.

Moreover, though, had the Ativan pills in Ms. Perrine’s possession at the time of the

shooting been disclosed earlier, defense counsel would have been able to use the pills for impeachment purposes. These pills would have been a crucial piece of evidence used in the cross-examination of many of the State's witnesses from Jefferson Pharmacy, where Ms. Perrine had worked. Defense counsel had originally asked these witnesses about Ms. Perrine's use of Ativan and giving of Ativan to Mr. Cook, but the witnesses answered that they were unaware of these facts. Had defense counsel had access to this critical evidence earlier, such information could have been used to impeach these witnesses.

Moreover, if the pills had been turned over earlier, Petitioner would have been able to have his own pharmacological expert examine them and offer an opinion based upon the specific doses that were in Ms. Perrine's possession. Petitioner was prevented from being able to do this because of the late disclosure on the penultimate day of trial.

Petitioner suggests that this too-late disclosed evidence was highly exculpatory and would have also had significant impeachment value.

2. The Evidence Was Inadvertently Suppressed by the State Until the Penultimate Day of Trial

Furthermore, it is clear beyond peradventure that the Ativan pills had been suppressed, though inadvertently, by the State.

This Court has noted "that evidence is considered suppressed when 'the existence of the evidence was known, or reasonably should have been known, to the government, the evidence was not otherwise available to the defendant through the exercise of reasonable diligence, and the government either willfully or inadvertently withheld the evidence until it was too late for the defense to make use of it.'" *Youngblood*, 221 W. Va. at 31 n. 21, 650 S.E.2d at 130 n. 21

(quoting *United States v. Knight*, 342 F.3d 697, 705 (7th Cir.2003)). Thus, even if the failure to disclose is inadvertent, it can still be a *Brady* violation. In *State v. Farris*, this Court held,

We find nothing in the record to suggest that the prosecutor acted willfully in suppressing the report prepared by Ms. Brozowski. In fact, the contrary appears to be true as demonstrated by the prosecutor's expression of surprise during the first trial when Ms. Brozowski's examination of Barbara R. was being explored on cross examination. Willful suppression of evidence, however, is not required to satisfy the second *Brady* component. Suppression of evidence may occur through inadvertence by the prosecutor and still satisfy the second component of *Brady*[.]

State v. Farris, 221 W. Va. 676, 682, 656 S.E.2d 121, 127 (W. Va. 2007).

Here, the victim's purse and hence the pills and the pill container had been in the State's possession in the evidence room at the Ranson Police Department since the shooting in July of 2011. Thus, the State had this evidence in its possession for approximately one year before it was disclosed to the Defendant. A thorough examination of the evidence during this time period should have turned up this evidence. Just because the suppression of this evidence was inadvertent should not matter. A reasonable investigation by the State should have turned up this evidence. This investigation of the evidence in its own possession should have occurred prior to the penultimate day of the trial.

Moreover, a *Brady* violation is not remedied by the State having an open file policy.

State v. Kennedy, 205 W. Va. 224, 232, 517 S.E.2d 457, 465 (1999).

Although the prosecution argues that he had an open file policy, this policy does not excuse his failure to disclose the tape recording. Even if the prosecution was unaware of the tape's existence, which seems quite unlikely considering all the circumstances, what Trooper Johnson knew must be imputed to the prosecution. He was a part of the prosecution. It is not enough for the prosecution to simply say that he provided the defense all evidence he chose to put in the file.... '[A] prosecutor is required to disclose statements to which he has access even though he does not have the present physical possession of the statements.'

State v. Hall, 174 W. Va. 787, 791, 329 S.E.2d 860, 864 (1985) (quoting *State v. Watson*, 173 W. Va. 553, 558, 318 S.E.2d 603, 609 (1984)).

Here, the State did have an open file policy and allowed defense counsel to examine its file and evidence for a few hours on one day. During that review, defense counsel looked at hundreds of pieces of evidence as well as stacks of documentary evidence. In that review, defense counsel uncovered many materials that had not been provided by the State— including the forensic analysis of the Defendant’s cellular phone. However, it is unfair to expect defense counsel to play a game of hide and seek with the State’s evidence. The State cannot bury its head in the sand when it comes to exculpatory evidence that it has possession of in its own evidence, particularly where the State has a year to find such evidence if it was unaware of its existence.

Furthermore, defense counsel had to go to extraordinary measures to finally be able to locate the exculpatory evidence. Defense counsel requested that the investigating officer, Cpl. Norris, go to the evidence room and bring out the purse so that he could search for the Ativan pills. The State initially objected to this request, stating that there were no pills in the purse. However, eventually, Cpl. Norris decided to check the purse and uncovered the exculpatory evidence.

As such, Petitioner suggests to this Court that although from all appearances the suppression of this exculpatory evidence was inadvertent, it was still suppressed as defined by *Youngblood* and *Brady*.

3. The Evidence Was Material and the Late Disclosure on the Penultimate Day of Trial Prejudiced the Defense

Finally, as Petitioner suggests is abundantly clear from the argument above, the Ativan

pills were material to Defendant's case and the late disclosure of the pills prejudiced Defendant's case. While it is not desirable to declare a mistrial after eight days of trial, where the failure to declare a mistrial results in manifest injustice to the Defendant such a ruling is proper.

While the exculpatory evidence had been turned over prior to the jury's deliberation, it was turned over much too late for the Defendant to be able to use it effectively. It was not disclosed until the State's rebuttal case— after the State's case-in-chief and after the defense had already rested and already called its experts. Further exacerbating the prejudice, the Circuit Court denied Defendant's request to put on a case in surrebuttal except for the limited purpose of entering the late-disclosed pills into evidence.

Because of the late disclosure, defense counsel was unable to use it as the lynchpin piece of his cross-examination as he would have if it had been timely disclosed. Defense counsel would have used the Ativan pills to cross-examine the State's witnesses from Jefferson County Pharmacy. Moreover, defense counsel was unable to have his own experts— his psychiatrist, psychologist, and pharmacologist testify and offer an opinion on this late-disclosed evidence. Petitioner suggests that being allowed to enter the pills into evidence and stipulations do not remedy the harm. There is simply no substitution for the actual use of this evidence at trial where such evidence would have been a cornerstone of the defense.

Based on the foregoing, Petitioner avers that the disclosure of the Ativan pills on the penultimate day of trial was a *Brady* violation that prevented Petitioner from exercising his constitutional due process rights to a fair trial. Thus, Petitioner suggests to this Court that, even though the failure to disclose was inadvertent, either dismissal of the case or granting of a mistrial was the appropriate remedy for the State's *Brady* violation. Petitioner requests that this

Court grant him a new trial so that he be able to exercise his due process rights and use this exculpatory material effectively.

VI. THE STATE'S PUBLISHING OF DEFENDANT'S INVOCATION OF HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT AND TO COUNSEL, PURSUANT TO *MIRANDA*, WAS REVERSIBLE ERROR NECESSITATING A NEW TRIAL BE GRANTED

A. Standard of Review

The State “bears the burden of proving that the admitted errors pass muster under the harmless-beyond-a-reasonable-doubt standard.” *United States v. Kallin*, 50 F.3d 689, 693 (9th Cir. 1995) (citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

B. The Inadvertent Publishing of Defendant’s Invocation of His Right to Silence and Right to Counsel on an Overhead Projection on the Wall of the Courtroom Violated Defendant’s Fifth Amendment Rights

During trial, the State sought to impeach the defense experts on diminished capacity, by entering into evidence the statements made by the Defendant to Corporal Norris, after Defendant had invoked his right to counsel pursuant to *Miranda*. This Court had ruled that these statements were inadmissible in the State’s case-in-chief, but were admissible to impeach Defendant’s diminished capacity defense, pursuant to *State v. DeGraw*. The State sought to use these statements made by the Defendant after invocation of his right to counsel by publishing the transcripts of the statements on an overhead projector for the jury to see. Prior to the State using these statements, the State agreed upon request of the Defendant that it would not use any portion of the transcript where the Defendant had invoked his right to remain silent and his right to counsel pursuant to *Miranda*. However, the State did not have a properly redacted version of the transcript. In order to ensure that the jury did not view the impermissible portion of the transcript in which the Defendant requested counsel, the State had folded this portion of the transcript over

so that it could not be seen on the overhead projector. However, as the jury had their chairs turned to the projection screen, the State apparently allowed the transcript to become unfolded, resulting in Defendant's request for counsel pursuant to *Miranda* being projected upon the wall in large print with the jury facing the projection. Immediately thereafter, defense counsel requested a sidebar and moved for a mistrial.

Petitioner asserts that the State's publishing of his invocation of his Fifth Amendment right to remain silent and to counsel during his interview with the investigating officer, which was ruled inadmissible by the Circuit Court in pretrial proceedings, was reversible error that necessitates the granting of a new trial.

It is reversible error for a prosecutor to comment on an accused's invocation of his or her right to remain silent. "Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury." Syl. Pt. 1, *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977) (citing *Doyle v. Ohio*, 426 U.S. 610 (1976)); *see also State v. Mills*, 211 W. Va. 532, 542, 566 S.E.2d 891, 901 (2002);

It has long been the statutory policy of this State to prohibit the State from making any comment on the defendant's failure to testify at trial. W. Va. Code, 57-3-6. This right to silence at trial has been zealously guarded by this Court and is recognized to be linked to the right against self-incrimination found in Article III, Section 5 of the West Virginia Constitution.

Boyd, 160 W. Va. at 239, 233 S.E.2d at 715 (citations omitted). "A review of our case law reveals that this Court has been fairly stringent in finding prejudicial error when the prosecution has commented, either directly or indirectly, on the failure of the defendant to testify." *Mills*, 211

W. Va. at 542-43, 566 S.E.2d at 901-02 (quoting cases in which a comment on a defendant's decision not to testify was prejudicial error).

The basis for the rule prohibiting the use of the defendant's silence against him is that it runs counter to the presumption of innocence that follows the defendant throughout the trial. It is this presumption of innocence which blocks any attempt of the State to infer from the silence of the defendant that such silence is motivated by guilt rather than the innocence which the law presumes. *Pinkerton v. Farr, supra*, articulates this point and holds that under our law the presumption of innocence is an integral part of criminal due process and that such presumption is itself a constitutional guarantee embodied in Article III, Section 10 of the West Virginia Constitution.

We, therefore, hold that under Article III, Sections 5 and 10 of the West Virginia Constitution, it is reversible error for a trial court to permit cross-examination of a defendant as to his pre-trial silence. The constitutional right to remain silent also compels the State to remain silent about such silence.

Boyd, 160 W. Va. at 240, 233 S.E.2d at 716; *see also State v. Murray*, 220 W. Va. 735, 649

S.E.2d 509 (2007) (“Prosecutor's reference during closing argument to defendant's

“testimony-not the testimony, the statements-of the defendant” when defendant did not testify, constituted impermissible comment on defendant's failure to testify, even if comment was slip of tongue, in trial for failure to render aid at automobile accident involving death and failure to maintain control of vehicle.”).

Just as a comment on an accused's invocation of his or her right to remain silent is reversible error, commenting on an accused's request for counsel pursuant to *Miranda* is also reversible error. *See, e.g., State ex rel. Humphries v. McBride*, 220 W. Va. 362, 647 S.E.2d 798 (2007) (finding that the State violated the defendant's privilege against self-incrimination by eliciting testimony that made light of the fact that defendant consulted with his attorney and opted not to speak to investigators and that the defendant declined to answer certain of investigator's questions). In *Humphries*, this Court reasoned that the following violated the

defendant's privilege against self-incrimination:

Humphries' next argument is that Detch allowed Humphries' Fifth Amendment rights to be violated. Andrew McQueen, testifying at the omnibus hearing as an expert on effective assistance of counsel and the fairness of the criminal trial, pointed out that in its direct examinations of ATF Agent Jack Beck, the State, in reviewing the list of suspects the ATF investigated in 1976, elicited testimony which made light of the fact that Humphries consulted with his attorney and opted not to speak to investigators at the time of the initial investigation into Abshire's death. Later on, the State elicited testimony from former Assistant United States Attorney Morgan Scott regarding Humphries' choice to consult with his attorney before answering certain of Scott's questions. Detch did not object either time; although, the State had clearly crossed over into a line of questioning that was violative of Humphries' right to remain silent.

Humphries, 220 W. Va. at 369-70, 647 S.E.2d at 805-06.

“[I]t does not comport with due process to permit the prosecution during trial to call attention to [the defendant's] silence....” *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). Thus, an “[a]dmission of a defendant's statement requesting an attorney amounts to a comment on the defendant's right to remain silent.” *Elisha v. State*, 949 So.2d 271 (Fla. App. 2007); *see also West v. State*, 623 So.2d 380 (Ala. Crim. App. 1993) (“Prohibition that state must avoid all reference to, or use of, accused's assertion of his right to remain silent applies to assertion of right to counsel.”); *State v. Martin*, 797 S.W.2d 758 (Mo. App. 1990) (“Once defendant clearly indicates during questioning that he wishes to speak to attorney and that he wants all questioning to cease, all questioning is required to cease and prosecution is not allowed to comment during trial on request for attorney and refusal to submit to video taping of his confession.”).

Moreover, “[a]t a trial of a criminal accused, counsel for the prosecution must scrupulously avoid all reference to or use of an accused's assertion of his right to remain silent. *Houston v. State*, 354 So.2d 825 (Ala. Crim. App. 1977). The subjective intent of the prosecutor does not undo an improper reference to the defendant's silence and decision to retain counsel

because a jury could nevertheless have improperly drawn adverse inferences of guilt. *United States v. Kallin*, 50 F.3d 689, 694 (9th Cir. 1995).

Furthermore, pursuant to *Wainwright v. Greenfield*, 474 U.S. 284 (1986), the Supreme Court has held that it is fundamentally unfair and a violation of an accused's constitutional rights to use evidence of an accused's invocation of his *Miranda* rights to rebut a claim of insanity by the accused. The Supreme Court held "that it was fundamentally unfair for the Florida prosecutor to breach the officers' promise to respondent by using his postarrest, post-*Miranda* warnings silence as evidence of his sanity." *Wainwright v. Greenfield*, 474 U.S. 284 (1986). "What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized." *Id.*; *see also State v. Oglesby*, 585 A.2d 916 (N.J. 1991) ("Prosecutor was not entitled to suggest that defendant's invocation of his right to counsel and right to remain silent evidenced his sanity at time of homicide."); *State v. Rogers*, 512 N.E.2d 581 (Ohio 1987) ("Testimony of arresting police officers and repeated references by prosecuting attorney regarding specific responses made by murder defendant to *Miranda* warnings, including defendant's request for attorney by attorney's name, address, and telephone number, as well as defendant's silence after conversation with counsel, were not proper to refute defendant's insanity plea.").

Petitioner asserts that because the portion of the transcript of his statement where he requested an attorney and invoked his *Miranda* rights was projected onto a huge screen directly in front of the jury while the jurors were directing their attention at the projection, such a mistake, though inadvertent, severely prejudiced the Defendant, in violation of his constitutional rights as well as clear case law on the very issue. The fact that the State did not comment on

Defendant's invocation of his right to counsel is not dispositive of this issue. The fact that this impermissible portion of the transcript was projected to the jury is enough to establish prejudice. In *Elisha v. State*, 949 So.2d 271 (Fla. App. 2007) the invocation of right to counsel was accidentally presented to the jury by playing an audio tape that include the impermissible material.

The jury heard the following exchange, which occurred at the end of Elisha's lengthy taped statement:

Elisha: When is my lawyer going to show up?

Benito: You want a lawyer?

Elisha: Yes.

Benito: This is the first time you tell me you want a lawyer.

Elisha: No, because you are already accusing me and you are saying I am lying.

Benito: Fine, this is it. I am not going to ask you anything else without a lawyer present.

Id. at 273-74. The Florida court ruled that the playing of this audio tape, even without comment by the prosecution, was prejudicial error necessitating a mistrial. *Id.* at 274.

In the instant case, the impermissible was presented to the jury visually rather than audibly, however the result must be the same. Such a publishing of the material to the jury is enough to establish prejudice.

Moreover, the fact that this portion of the transcript was "hidden" from the jury by being folded over when projected onto the overhead screen for most of its use does not mitigate the damage to the Defendant. In fact, Defendant would suggest that this portion being hidden by being folded over, until it was revealed, prejudiced even greater possibility of prejudice. After all, it is in human nature to want to know what is secret and hidden. The jury, having seen other

portions of the transcript, were likely left wondering why a portion of this page of the transcript was being hidden from their view. Their curiosity was satisfied when this hidden portion was revealed while their attention was still directed at the projection.

There is simply no way to know the true amount of prejudice that may have occurred from this impermissible material, Defendant's invocation of his constitutional rights, being published to the jury. It is safe to say that prosecutors around the country believe that an accused's invocation of his constitutional rights is extremely probative in rebutting a claim of insanity or mental illness. However, despite its probative nature, because the entering into evidence of such a statement constitutes a grave violation of an accused's constitutional rights, the invocation of right to counsel is not allowed to be used as evidence against an accused or be commented upon by the State. Here, Defendant's invocation of his constitutional right to counsel was clearly published to the jury when it was projected upon the overhead projector. The introduction of such evidence, though inadvertent, is prejudicial error and requires that this Court grant a new trial.

Furthermore, because of the way in which the material was published, the only proper remedy was a mistrial. Offering a curative instruction would have further prejudiced Petitioner by bringing more attention to his invocation of his right to counsel. Examining the jury further would also prejudice Petitioner by further bringing attention to his invocation to right to counsel. The only remedy for such a harm was giving the Petitioner a new trial.

Thus, the Circuit Court erred when it failed to grant Defendant's motion for a mistrial after the State published to the jury on an overhead projector a portion of the transcript of Defendant's statement to the investigating officer where Defendant had invoked his right to

counsel.

VII. DR. CLAYMAN'S REFERENCE TO DEFENDANT BEING IN JAIL CUSTODY AT THE TIME OF HIS INTERVIEW WAS REVERSIBLE ERROR NECESSITATING THE GRANTING OF A NEW TRIAL

Petitioner further suggests that Dr. Clayman's reference to Defendant being in custody at the time of his interview of the Defendant, conducted in April of 2012, was prejudicial error necessitating the granting of a new trial.

On June 14, 2012, Dr. Clayman testified,

Yeah. What happened was I think I said yesterday I wasn't supposed to do this evaluation, it was assigned to one of my colleagues, and I was going to supervise him to do this. Scheduling got screwed up, I took it over, so I had not read things, he was shipped down, I don't know if he was shipped down from the ERJ down to South Central but we held him so he could come to our office for two days.

June 14, 2012 Trial Tr. 56. Defense counsel immediately moved for a sidebar and made a motion for a mistrial. The Circuit Court denied the motion.

This Court has held that "a defendant has the right to be free of physical restraints in the court room and from any inferences that the jury may draw from such restraints." *See State v. Brewster*, 164 W. Va. 173, 179, 261 S.E.2d 77, 81 (1979). Petitioner suggests that based on this rule that it is also improper for the State to comment on or elicit testimony regarding the Defendant being in pretrial custody. *See, e.g., Bove v. State*, 514 A.2d 408 (Del. 1986).

While in the instant case the Circuit Court offered an instruction to the jury not to consider Defendant's pretrial incarceration, Petitioner suggests that such an instruction does not cure the prejudice once the cat was let out of the bag. Petitioner suggests to this Court that eliciting of such testimony is prejudicial error, particularly when combined cumulatively with the other improper reference to evidence in this case, and necessitates the granting of a new trial.

VIII. THE COURT'S FAILURE TO ALLOW THE DEFENDANT TO PRESENT A CASE IN SURREBUTTAL IMPROPERLY SHIFTED THE BURDEN OF PROOF

Petitioner suggests that the Circuit Court's ruling to limit Petitioner's case in surrebuttal to one witness on a limited point of entering Ms. Perrine's purse into evidence, prejudiced Petitioner's right to due process and a fair trial.

Petitioner suggests that the Circuit Court's ruling that Petitioner could not present a case in surrebuttal, impermissibly shifted the burden of proof and production onto the Defendant. Petitioner suggests to this Court that by allowing the State to call its expert witnesses in rebuttal and not in its case-in-chief, the burden of production and proof as to the specific intent of the Defendant in the shooting was impermissibly shifted to the Defendant. Though completely aware of defense counsel's intent to use expert testimony on the issue of Defendant's mental illness and the side effects of prescription medication, and despite this issue being raised on cross-examination of the State's case-in-chief witnesses, the State was allowed to save its expert testimony until its case in rebuttal. Yet after the State was able to present its expert testimony for the first time, Defendant was precluded from rebutting such testimony and was forced to rely upon his anticipation of what the State's experts would say during their two to three days of testimony. Petitioner suggests to this Court that in this situation, in order to make sure that the burden of production and proof remain with the State, the Defendant should have been permitted to present a case in surrebuttal. By denying Defendant's proffered case in surrebuttal, the burden of production and persuasion was improperly shifted to the Defendant. Based upon this error, Defendant would request that this Court grant a new trial.

"The admissibility of evidence as rebuttal is within the sound discretion of the trial court,

and the exercise of such discretion does not constitute ground for reversal unless it is prejudicial to the defendant.” Syl. Pt. 4, *State v. Massey*, 178 W. Va. 427, 359 S.E.2d 865 (1983). Where a witness is introduced by plaintiff for the first time in rebuttal, the defendant should be permitted to introduce evidence to impeach him. Syl. Pt. 7, *State v. Staley*, 45 W. Va. 792, 32 S.E. 198 (1899).

Because of the presentation of proof at the trial, Defendant was forced to guess at all the areas that would be testified to by the State’s experts. While Defendant was able to address many of these areas in his case-in-chief, there were other areas that Defendant was unable to adequately address. Here, Defendant suggests that not allowing surrebuttal would be prejudicial to him because of the State’s eliciting of new information from its experts during rebuttal. While Defendant did have the expert reports, a Defendant can never anticipate all of the areas in which multi-day expert testimony may lead. Not allowing surrebuttal prejudices the Defendant by making him guess, at his own peril, at which areas the State’s experts would testify to.

Thus, Petitioner suggests to this Court that because the Circuit Court ruled that the State need not call its medical and psychological experts in its case-in-chief, the Circuit Court should have allowed Petitioner to put on a full case in surrebuttal.

IX. ERRORS DURING THE MERCY PHASE OF THE TRIAL REQUIRE GRANTING OF A NEW TRIAL ON THE ISSUE OF MERCY

Finally, Petitioner suggests to this Court that the Circuit Court failed to provide him the due process required in a bifurcated mercy phase trial, as delineated in *State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010). Petitioner suggests that this Court should grant a new trial on the mercy portion of the proceedings.

In *McLaughlin*, this Court had the opportunity to outline certain procedures to be followed in a bifurcated mercy phase of a first degree murder trial. 226 W. Va. 229, 700 S.E.2d 289. In *McLaughlin*, this Court answered certified questions concerning the procedure to be employed in the retrial of a mercy phase of a defendant's first degree murder case. *McLaughlin*, 226 W. Va. at 231, 700 S.E.2d at 291.

The first question answered by this Court was which party had the burden of proof at the mercy phase. This Court held "that the provisions of West Virginia Code § 62-3-15 do not place a burden of proof on either the State or the defendant for the mercy phase of a first degree murder trial where that phase is bifurcated." *McLaughlin*, 226 W. Va. at 234, 700 S.E.2d at 294. Next, this Court answered the question of whether the jury's verdict in the mercy phase must be unanimous. *McLaughlin*, 226 W. Va. at 234, 700 S.E.2d at 294. This Court answered affirmative, that "a jury verdict in a bifurcated mercy phase of a first degree murder trial must be unanimous." *McLaughlin*, 226 W. Va. at 234, 700 S.E.2d at 294. As to the third certified question, whether the same jury that determines guilt must also determine the issue of mercy, this Court held

that the provisions of West Virginia Code § 62-3-15 do not require that the jury that decides the guilt phase of a first degree murder case must also be the same jury that decides the mercy phase of the case. While it should be a rarity that a different jury is used, it sometimes becomes a necessity in cases such as the instant one where there are no meritorious grounds to overturn the underlying conviction and the defendant is only entitled to a retrial on the mercy phase.

McLaughlin, 226 W. Va. at 238, 700 S.E.2d at 298.

"The last certified question ask[ed] whether the prosecution is limited in the mercy stage of a bifurcated trial to the presentation of evidence introduced in the guilt phase of trial and

rebuttal of evidence presented by the defendant?" *McLaughlin*, 226 W. Va. at 238, 700 S.E.2d at

298. This Court held

that the type of evidence that is admissible in the mercy phase of a bifurcated first degree murder proceeding is much broader than the evidence admissible for purposes of determining a defendant's guilt or innocence. Admissible evidence necessarily encompasses evidence of the defendant's character, including evidence concerning the defendant's past, present and future, as well as evidence surrounding the nature of the crime committed by the defendant that warranted a jury finding the defendant guilty of first degree murder, so long as that evidence is found by the trial court to be relevant under Rule 401 of the West Virginia Rules of Evidence and not unduly prejudicial pursuant to Rule 403 of the West Virginia Rules of Evidence.

McLaughlin, 226 W. Va. at 240, 700 S.E.2d at 300. This Court further found that as a general rule, the Defendant should go first at the mercy phase of a trial.

Given that under the foregoing statute, the punishment of life imprisonment upon conviction for first degree murder is fixed unless the jury, in its discretion, recommends mercy, it logically follows that the defendant should generally go first in offering argument and evidence to the jury in his or her quest to show the jury why it should recommend mercy.

McLaughlin, 226 W. Va. at 241, 700 S.E.2d at 301.

Thereafter, the State would be allowed to offer any impeachment or rebuttal evidence as warranted by evidence offered by the defendant, including, but not limited to, evidence surrounding the nature of crime committed, as well as evidence of other bad acts. The defendant then would have the last opportunity to offer any evidence to refute that offered by the State, and have the last argument to the jury before it would make the mercy determination.

McLaughlin, 226 W. Va. at 241, 700 S.E.2d at 301.

When this Court adopted discretionary bifurcation of the penalty and mercy phases of murder trials in 1996, it adopted an idyllic academic dream into our jurisprudence. The problem is that, in reality, it created a procedural nightmare that allows the State to introduce egregious, formerly inadmissible, "bad character" evidence at the penalty phase of the trial.

The lofty, ivory tower theory behind bifurcation is that it would help defendants in their quest to introduce evidence of good character. What happens in reality is that prosecutors

encourage and seek bifurcation, and then use that bifurcated system to initiate the introduction of character evidence—before the defendant ever opens the door by introducing any character evidence. What I believe bifurcation has really done is assist West Virginia's prosecutors in their quest to bury defendants in irrelevant, misleading evidence of the defendant's bad character. Prosecutors proffer witnesses who know the defendant kicked a dog 20 years ago, or saw the defendant jaywalk on the way to the courthouse, or heard the defendant say an unkind word to his mother, and then argue to the jurors, “Is this the kind of person we ever want walking our streets?”

McLaughlin, 226 W. Va. at 241-42, 700 S.E.2d at 301-02 (Ketchum, J., dissenting).

Moreover, “the possibility of bifurcation of a mercy phase is not an open door to the expansion of the ambit of evidence that the prosecution may put on against a defendant, in the absence of the defendant opening that door to permit narrowly focused impeachment or rebuttal evidence from the prosecution.” *McLaughlin*, 226 W. Va. at 238 n. 19, 700 S.E.2d at 298 n. 19 (quoting and citing *State v. Rygh*, 206 W. Va. 295, 297 n.1, 524 S.E.2d 447, 449 n.1 (1999)).

[T]he evidentiary opportunities that a defendant may have in a mercy phase, as a result of bifurcation, may in turn affect the evidentiary limitations of the prosecution in rebuttal or impeachment. However, the opportunity for prosecution rebuttal or impeachment in a bifurcated mercy phase is not authorization for the prosecution to use unfairly prejudicial, extraneous, remote, or inflammatory evidence—even in rebuttal or impeachment.

McLaughlin, 226 W. Va. at 238 n. 19, 700 S.E.2d at 298 n. 19 (quoting and citing *Rygh*, 206 W. Va. at 297 n.1, 524 S.E.2d at 449 n.1).

In a case subsequent to *McLaughlin*, this Court held, “[O]ur current law on this issue is set forth in Syllabus Point 7 of *McLaughlin*, and circuit courts determining whether evidence is admissible during the penalty phase of a bifurcated first degree murder proceeding should conduct their analysis pursuant to *McLaughlin*.” *State v. Skidmore*, 228 W. Va. 166, 175 n. 10, 718 S.E.2d 516, 525 n.10 (2011).

In the instant case, the mercy phase of the first degree murder trial of the Defendant began

immediately after the jury returned a verdict after 5:00 p.m. on Friday, June 15, 2012, after a two-week long trial. Defendant objected to the State being able to offer evidence without Defendant first opening the door to such evidence first. The Circuit Court allowed the State to present its case first. The State introduced highly emotional testimony and statements from the decedent's family and also introduced other bad acts evidence that was not allowed to be entered in the guilt phase of the trial. The Defendant then offered argument as to mercy but did not present any evidence of his own.

Petitioner suggests that the order of the mercy phase, the State's presentation of other bad acts evidence during the mercy phase, despite the Defendant not opening the door, and the Circuit Court's failure to determine whether the State's evidence was admissible under Rule 401 and 403 of the West Virginia Rules of Evidence necessitates that a new trial be held as to the mercy phase. As indicated by the *McLaughlin* Court, Petitioner suggests that it would not be improper to impanel a new jury for the new mercy phase.

CONCLUSION

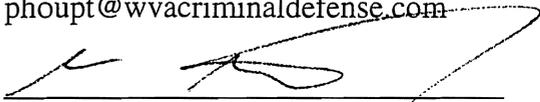
Based on the foregoing submission of error, individually and cumulatively prejudicing Petitioner's due process rights to a fair trial, Petitioner suggests that this Honorable Court should reverse his conviction and order a new trial. Alternatively, assuming *arguendo* that this Court finds no reversible error in the guilt phase of trial, Petitioner suggests that this Honorable Court should reverse the finding of "no mercy" and order a new mercy phase of the trial to be held.

Respectfully Submitted,

RAY COOK, PETITIONER-DEFENDANT
By Counsel



KEVIN D. MILLS
WV Bar No. 2572
Kevin D. Mills & Associates, PLLC
1800 West King Street
Martinsburg, West Virginia, 25401
Phone: (304) 262-9300
Fax: (304) 262-9310
phoupt@wvacriminaldefense.com



SHAWN R. MCDERMOTT
WV Bar No. 11264
Kevin D. Mills & Associates, PLLC
1800 West King Street
Martinsburg, West Virginia, 25401
Phone: (304) 262-9300
Fax: (304) 262-9310
smcdermott@wvacriminaldefense.com

CERTIFICATE OF SERVICE

We, Kevin D. Mills and Shawn R. McDermott of Kevin D. Mills & Associates do hereby certify that we have served an original and ten (10) copies of the attached PETITIONER'S BRIEF upon Rory L. Perry, II, Clerk of Court, Supreme Court of Appeals at his address of State Capitol, Room E-317, 1900 Kanawha Blvd., East, Charleston, West Virginia 25305 by overnighting same this 21st day of January 2013 by Federal Express and one (1) upon Laurence Crofford, Hassan Rasheed and Brandon Sims, Assistant Prosecuting Attorneys of Jefferson County by hand-delivery this 22nd day of January, 2013.



KEVIN D. MILLS, ESQUIRE



SHAWN R. MCDERMOTT, ESQUIRE