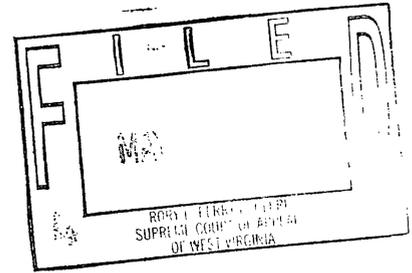


 COPY

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 REPLY 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

TABLE OF CONTENTS

I.	THE CIRCUIT COURT ERRED WHEN IT FAILED TO SUPPRESS ALL EVIDENCE THAT WAS ILLEGALLY SEIZED.....	1
A.	The Search Warrant Affidavit Supporting the Search of Defendant's Vehicle Was "Bare Bones".....	1
B.	No Exception to the Warrant Requirement Supports a Search of Defendant's Vehicle.....	3
C.	The Search Warrant For the Search of the Contents of Defendant's Cellular Phone Failed to Particularize the Place to Be Searched and Evidence to Be Seized.....	5
II.	THE CIRCUIT COURT ERRED WHEN IT FAILED TO SUPPRESS DEFENDANT'S STATEMENTS THAT WERE ELICITED IN VIOLATION OF HIS RIGHTS.....	6
A.	Statement to Captain Stevens at Southern States.....	6
B.	Statement to Corporal Norris in Police Cruiser.....	8
C.	Statement to Corporal Norris at Ranson Police Department.....	8
D.	Statement to Officer Henderson While Being Booked.....	9
E.	Statements Made by Defendant Following Arraignment Should Have Been Suppressed as Violations of His Sixth Amendment Right to Counsel.....	10
F.	<i>DeGraw</i> Issue.....	10
III.	THE CIRCUIT COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS MADE TO THE STATE'S PSYCHOLOGICAL EXPERT DR. DAVID CLAYMAN.....	10
IV.	THE CIRCUIT COURT ERRED IN REJECTING THE DEFENDANT'S MOTION TO HAVE THE STATE PRESENT ITS MEDICAL AND PSYCHOLOGICAL EVIDENCE AS TO THE DEFENDANT'S STATE OF MIND IN THE STATE'S CASE-IN-CHIEF.....	12
V.	THE STATE COMMITTED A <i>BRADY</i> VIOLATION WHICH REQUIRES THE GRANTING OF A NEW TRIAL.....	13
VI.	THE STATE'S PUBLISHING OF DEFENDANT'S INVOCATION OF HIS FIFTH	

AMENDMENT RIGHT TO REMAIN SILENT AND TO COUNSEL, PURSUANT TO <i>MIRANDA</i> , WAS REVERSIBLE ERROR NECESSITATING A NEW TRIAL BE GRANTED.....	16
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.....	18
VIII. ERRORS DURING THE MERCY PHASE OF THE TRIAL REQUIRE GRANTING OF A NEW TRIAL ON THE ISSUE OF MERCY.....	19

TABLE OF AUTHORITIES

CASES

<i>Arizona v. Gant</i> , 556 U.S. 332, 129 S.Ct. 1710 (2009).....	4
<i>State v. Barlow</i> , 181 W. Va. 565, 383 S.E.2d 530 (1989).....	1-2
<i>State v. DeGraw</i> , 196 W. Va. 26, 470 S.E.2d 215 (1996).....	10
<i>State v. George</i> , 185 W. Va. 539, 408 S.E.2d 291 (1991).....	6-7
<i>State v. Jackson</i> , 171 W. Va. 329, 298 S.E.2d 866 (1982).....	10
<i>State v. Jones</i> , 193 W. Va. 378, 456 S.E.2d 459 (1995).....	6
<i>State v. Julius</i> , 185 W. Va. 422, 408 S.E.2d 1 (1991).....	4
<i>State v. McLaughlin</i> , 226 W. Va. 229, 700 S.E.2d 289 (2010).....	19
<i>State v. Oglesby</i> , 585 A.2d 916 (N.J. 1991).....	17
<i>State v. Rogers</i> , 512 N.E.2d 581 (Ohio 1987).....	17
<i>State v. Welch</i> , 229 W. Va. 647, 734 S.E.2d 194 (2012).....	18
<i>State v. Worley</i> , 179 W. Va. 403, 369 S.E.2d 706 (1988).....	2
<i>State v. Youngblood</i> , 221 W. Va. 20, 625 S.E.2d 119 (2007).....	14
<i>Wainwright v. Greenfield</i> , 474 U.S. 284 (1986).....	17
<i>Whiteley v. Warden</i> , 401 U.S. 560, 91 S.Ct. 1031, 28 L.E.2d 306 (1971).....	2

CERTIFICATE OF SERVICE

I, Kevin D. Mills, do hereby certify that I caused a true copy of the foregoing Petitioner's Brief to be delivered by hand-delivery to the Prosecuting Attorney of Jefferson County, West Virginia on this 29th day of May, 2013.



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

REPLY ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT FAILED TO SUPPRESS ALL EVIDENCE THAT WAS ILLEGALLY SEIZED

Defendant again asserts that the Circuit Court erred when it failed to suppress evidence that was seized pursuant to illegal search and seizures, particularly the evidence seized from his vehicle and the evidence seized from his cellular phone. Defendant suggests that the search warrant affidavit supporting the search of his vehicle was “bare bones” and that there is no exception to the Fourth Amendment’s warrant requirement that would make a warrantless search acceptable. Furthermore, the search warrant that authorized the search of the contents of Defendant’s cellular phone failed to adequately particularize the place to be search and the evidence to be seized.

A. The Search Warrant Affidavit Supporting the Search of Defendant’s Vehicle Was “Bare Bones”

First, Defendant asserts that the search warrant affidavit for the search of the vehicle should be judged under the principal of *res ipsa loquitur*. This Court has seen myriad of contested search warrant affidavits. Defendant suggests that looking at the search warrant affidavit in the instant case, it should be plainly obvious, without additional argument, that the affidavit is insufficient and “bare bones.”

However, even though Defendant suggests that the insufficiency of the affidavit speaks for itself, Defendant will briefly respond to the State’s argument.

The State first argues that the search warrant is sufficient in particularizing the place to be searched and the evidence to be seized. This, however, is merely a straw man argument. Defendant claims that the search warrant affidavit is bare bones and fails to provide probable cause. The mere fact that the search warrant is sufficient in particularizing the place to be searched and things to be seized does not answer the question of whether the affidavit itself is “bare bones.”

Next, the State argues that the instant case is similar to the cases in *State v. Barlow*, 181 W.

Va. 565, 383 S.E.2d 530 (1989) and *Whiteley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.E.2d 306 (1971). In *Barlow*, the West Virginia Supreme Court upheld a search warrant affidavit as sufficient where a Trooper put information in the search warrant that was gained from a Deputy, without providing information about the Deputy's veracity. In *Whiteley*, the United States Supreme Court held that an officer in an affidavit for a search warrant may rely upon information received from other officers without verifying that information. These cases are simply inapposite to the instant case. Here, Officer Tharp never included in the affidavit that she gained the information in the affidavit from any other officer. There is no indication in the affidavit whatsoever where Officer Tharp attained her information.

The State attempts to explain this by stating that Officer Tharp based the information contained in the two sentence search warrant affidavit based upon information received from other police officers and based upon her own personal observation of the scene and the vehicle. However, this is the State suggesting these factual prerequisites after the fact. The search warrant affidavit itself contains no information to suggest that the conclusions reached in the affidavit were based upon information received from other officers (the affidavit does not mention any other officers at all) and contains no information to suggest that the conclusions were based upon Officer Tharp's personal observation.

Just as the State's supplemental factual assertions cannot fix an insufficient search warrant, neither can the testimony of Officer Tharp at the pre-trial hearing in this case. See State's Response Brief at 33. The analysis of whether a search warrant affidavit is sufficient or "bare bones" must be confined to the four corners of the affidavit. See *State v. Worley*, 179 W. Va. 403, 409, 369 S.E.2d 706, 712 (1988). The four corners of the affidavit do not contain any information concerning Officer Tharp's personal observation or information gained from other officers. As such, the search warrant affidavit is clearly "bare bones."

In its brief the State presents factual assertions that it wishes were included in the affidavit, but which simply were absent. Had the affidavit contained the following, it may have been sufficient:

[A] specific crime, murder in the first degree, was committed at a specific location, Southern States, where the victim's body and the Defendant himself were in close proximity to the commission of the crime, and where his car was also in close proximity to both the Defendant and the location of the commission of the crime....

Officer Tharp learned of the location of those items within the Defendant's car from police officers, then independently verified that information... based upon her own observation that a weapon, magazines, and holster were visible within the vehicle.

Officer Tharp... saw the weapon, magazine, and holster inside the Defendant's vehicle in plain view from outside the vehicle....

She... personal[ly] observe[d]... the probable murder weapon visible in plain view in the Defendant's automobile, following the Defendant's telephone call to 911 Emergency Headquarters of his location at Southern States and that he'd just shot Jenny Perrine, whom he acknowledged was dead at the time of his call.

State's Response Brief 30-33. Had the affidavit contained these factual assertions, i.e. information from other officers that a weapon was seen in Defendant's vehicle, the personal observations of Officer Tharp of a firearm, the victim's body being found close to Defendant and Defendant's vehicle, Defendant being found close to the vehicle and the victim's body, Defendant's call to 911 reporting that he was at Southern States and had just shot Jenny Perrine, it may have been sufficient. However, these factual assertions are mere wishful thinking on the part of the State as they were not included in the search warrant affidavit. As is, the search warrant affidavit is clearly "bare bones."

B. No Exception to the Warrant Requirement Supports a Search of Defendant's Vehicle

Furthermore, Defendant objects to the State's position that an exception to the warrant requirement exists that would justify the warrantless search of Defendant's parked vehicle at the Southern States parking lot.

First and most importantly, the State cites the three prong plain view exception standard in *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991), but then completely fails to discuss the lynchpin prong in this case– the third prong. The State must prove 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.” Syl. Pt. 3, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1. While Defendant does not contest that the officers could view the items from a legal vantage point, they did not have a lawful right to access the items inside the vehicle. Nothing in the State’s response explain how the officers had such a right to enter Defendant’s vehicle which was lawfully parked at the Southern States parking lot and which no officer had seen Defendant driving or within.

Nor does *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710 (2009) support the State’s position. The *Gant* Court held,

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, 129 S.Ct. at 1723-24 (emphasis added). The police did not view Mr. Cook driving the vehicle, did not arrest Mr. Cook after a traffic stop, did not see Mr. Cook inside the vehicle, and arrested Mr. Cook in the middle of the Southern States parking lot. At the time of the search, the officers could not consider Mr. Cook to be a “recent occupant” of the vehicle.

As such, Defendant suggests that the State failed to carry its heavy burden of demonstrating that an exception to the warrant requirement existed to allow a warrantless search of Defendant’s vehicle. As such, any evidence that was seized pursuant to the illegal search of his vehicle should have been suppressed and it was prejudicial error when this evidence was introduced by the State at trial.

C. The Search Warrant For the Search of the Contents of Defendant's Cellular Phone Failed to Particularize the Place to Be Searched and Evidence to Be Seized

Defendant further asserts that the search warrant for the contents for his cellular phone failed to particularize the place to be searched (the cellular phone itself) and the items to be seized (the content of text messages and emails and the list of numbers that Defendant had called).

The State's response that "[t]he ordinary plain meaning of the warrant sought to search the cellular phone was to search the information contained within the cellular phone" stretches the limits of credulity. The search warrant clearly states that the place to be searched was the evidence room at the Ranson Police Department. Furthermore, the warrant clearly states that the evidence to be seized is "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" which "is concealed in Room 205 @ 700 North Preston St., Ranson, WV 25438." *See* Search Warrant for Cell Phone. Looking at the search warrant on its face, it cannot be argued with a straight face that the search warrant sought to "search the contents of the cellular phone." Defendant suggests that the plain text of the search warrant fails to adequately describe the place to be searched (the cellular phone) and the items to be seized (the content of the cellular phone).

Furthermore, Defendant suggests that even if the search warrant was ambiguous in its particularization, which is not allowed by the Fourth Amendment, then the Rule of Lenity would support a resolution of any ambiguity in Defendant's favor.

Moreover, the State argues that the search of Defendant's cellular phone is justified with or without a warrant because Defendant had voluntarily disclosed the contents of the cellular phone when he sent text messages to other individuals. Defendant suggests that such an argument is absurd. It leads to the *reductio ad absurdum* conclusion that text messages are not protected by the Fourth Amendment and the officers may always search cellular phones without a warrant

because text messages have been voluntarily disclosed to recipients. This is simply not the case. An officer may always talk to the recipient of the text messages to consensually obtain such information. However, the exchange of text messages does not authorize an officer to without consent and without a warrant seize a person's cellular phone to read the contents of the text messages.

Thus, the entry into evidence by the State of the content of Defendant's cellular phone, including the contents of text messages and call logs, violated Defendant's Fourth Amendment right. Again, the State relies upon a straw man argument— that it was permissible to allow Tara Myers, the recipient of one of Defendant's texts, to testify about the content of that text. That is not Defendant's argument. Defendant argues that it was the content of his cellular phone, which was entered into evidence independently, apart from the testimony of Tara Myers, which violated his Fourth Amendment right.

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

Defendant continues to contend that the Circuit Court erred when it failed to suppress Defendant's specific statements that were elicited in violation of his constitutional rights.

Defendant suggests that the State arguments to the contrary are not convincing.

A. Statement to Captain Stevens at Southern States

First, Defendant suggests that the State has misconstrued the law in stating that “[i]t is well established that a person is not taken into custody for purposes of *Miranda* when he is detained under *Terry*.” State's Response Brief at 40. If a person is detained at all and believes that he is free to leave, the custody prong of *Miranda* has been satisfied. It is clear beyond per adventure that in the instant case there was no *Terry* stop. Defendant was detained by Captain Stevens and placed into handcuffs. A reasonable person would not feel that he was free to leave.

A *Terry* stop is transformed into the custodial equivalent of arrest based upon the following controlling factors which are “(1) the length, duration, and purpose of the detention; (2) the extent and nature of the questioning of the suspect; (3) the location of the detention and interrogation; (4) whether the suspect was advised that he was free to leave and was not required to answer questions; and (5) the use of force or other physical restraints during the stop.” *State v. Jones*, 193 W. Va. 378, 384 n.11, 456 S.E.2d 459, 465 n.11 (1995). The *Jones* Court stated, “Third, and perhaps most significant, in determining whether a *Terry* stop has converted into a custodial detention, courts should analyze the suspect's perception that he did not remain at liberty to disregard the police officer's request for information.” *Jones*, 193 W. Va. at 385, 456 S.E.2d at 466. Here, it is clear that a suspect in Defendant’s position would not feel that he was free to leave and could disregard Cpl. Stevens request for information. Therefore, the detention of Defendant in the instant case was not a mere *Terry* stop, but rather the functional equivalent of a formal arrest, necessitating the *Miranda* warnings before further questioning.

Moreover, *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) is not similar to the facts of the instant case. In *George*, this Court held, “[i]n resolving this issue where the custody question is not clear [t]he sole issue before a trial court ... is whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest.” *George*, 185 W. Va. at 545, 408 S.E.2d at 297. In *George*, this Court held that there was no custody where,

it is evident that the defendant was not held for any lengthy period of time, and the questions were investigatory in nature. While the defendant was asked to get into a police vehicle, the trooper testified that he was asked to do so only because “it was rather chilly”, and Sheriff Gaudet testified it was “pitch dark.” Furthermore, the defendant was not placed under arrest until some three months after this encounter.

George, 185 W. Va. at 545, 408 S.E.2d at 297. In the instant case, Defendant was instantly put into handcuffs and transferred to the police cruiser. He has not been released from custody since

he was placed into handcuffs at the Southern States parking lot. Any reasonable person would consider himself or herself to have “his or her freedom of action curtailed to a degree associated with a formal arrest.” *See George*, 185 W. Va. at 545, 408 S.E.2d at 297.

Furthermore, Defendant rejects that State’s argument that the public safety exception to *Miranda* justifies the admission of his non-*Mirandized* statements into evidence. Defendant suggests that any public safety issue was neutralized once he was placed in handcuffs and detained by Captain Stevens.

Therefore, Defendant suggests to this Court that the *non-Mirandized* statements made to Captain Stevens after he had been placed in handcuffs at the Southern States parking lot were admitted in violation of his constitutional rights.

B. Statement to Corporal Norris in Police Cruiser

Defendant further states that the statements that he made to Corporal Norris while in custody in the police cruiser were admitted in violation of Defendant’s *Miranda* rights. Defendant again suggests that even though there was no direct interrogation of Defendant by Corporal Norris, the colloquy that Corporal Norris had with Defendant was “reasonably likely to elicit an incriminating response” from the Defendant.

C. Statement to Corporal Norris at Ranson Police Department

Defendant suggests that all statements made to Corporal Norris in the interview room at the Ranson Police Department, not just the statements made after Defendant requested a lawyer, should have been suppressed. Here, it seems, the State again confuses the rule in determining whether questioning amounts to “interrogation” for the purpose of *Miranda*. The standard is not whether questions are “designed” to elicit an incriminating response, but rather whether questions are “reasonably likely to elicit an incriminating response.” The State argues, “The question about whether the defendant was on any medication before he was read his *Miranda* rights was not

designed to elicit an incriminating response....” State’s Response Brief at 47. Here, it is clear that questioning about Defendant’s intoxication and drug use were reasonably likely to elicit an incriminating response. Corporal Norris already knew that Defendant had claimed that the shooting was the result of him not taking his bipolar medication. Questions about his drug usage should have been asked after he was read his *Miranda* rights, not before. Thus, these statements made to Corporal Norris, along with the statements after invocation to right to counsel, should have been appropriately suppressed.

D. Statement to Officer Henderson While Being Booked

Defendant further suggests that any statements made to Officer Henderson while Defendant was being booked should have also been suppressed. These statements were also made following Defendant’s invocation of his right to counsel. Again, the standard is whether any questioning or statements are reasonably likely to elicit incriminating responses, not whether any questioning or statements are deliberately designed to elicit incriminating responses.

First, the Court should look to the subsequent actions of Officer Henderson while transporting the Defendant to the Eastern Regional Jail. During that ride in the cruiser, Officer Henderson, despite Defendant’s invocation of his right to counsel, attempted to elicit an incriminating response from Defendant by telling Defendant that he needed to tell his mom about what he had done. This suggests that Officer Henderson did not have in mind the scrupulous protection of Defendant’s Fifth Amendment privilege or Sixth Amendment right to counsel.

Second, the State has a high burden to prove that any post-invocation of counsel statements were reinitiated by the Defendant and not the State. The State failed to do that in this case. Testimony at the pre-trial hearing indicated that the officers did not know whether anything was being said to Defendant or what was being said to Defendant at the time of his booking. Any ambiguity on this point should be resolved in Defendant’s favor, particularly in light of the State’s

heavy burden to prove that Defendant voluntarily relinquished his previous request for counsel. As such, Defendant suggests that his statements made to Officer Henderson while being booked should have been suppressed.

E. Statements Made by Defendant Following Arraignment Should Have Been Suppressed as Violations of His Sixth Amendment Right to Counsel

Furthermore, Defendant suggests that the statements that he made to Officer Henderson should have been suppressed as violating his Sixth Amendment right to counsel because Defendant had already been arraigned. Contrary to the State's argument, this is not a moot point. The Circuit Court correctly suppressed statements made by Defendant in the police cruiser following his arraignment. The Circuit Court should have also suppressed the statements made to Officer Henderson while he was being processed. This Sixth Amendment violation to the right to counsel is not dependent upon whether Defendant was being interrogated, but rather must be more zealously guarded than the pre-arraignment, Fifth Amendment right to counsel.

F. *DeGraw* Issue

Defendant further contests the State's assertion that the statements made by Defendant were properly admitted in rebuttal pursuant to *State v. DeGraw*, 196 W. Va. 26, 470 S.E.2d 215 (1996). Defendant suggests that the statements made by Defendant following his arrest did not contradict the testimony of the expert testimony of Dr. Lewis or Dr. Novello. Both Dr. Lewis and Dr. Novello testified that at the time of the shooting, Defendant was suffering from diminished capacity. There were not statements made by Defendant to the officers that suggest that Defendant was aware of what happened immediately preceding or during the shooting of Ms. Perrine. Thus, such statements should not have been introduced pursuant to *DeGraw* because they were not contradictory to statements that Defendant later made to psychological experts.

III. THE CIRCUIT COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS MADE TO THE STATE'S PSYCHOLOGICAL

EXPERT DR. DAVID CLAYMAN

Defendant also contends that the Circuit Court erred in failing to grant any relief based upon Dr. David Clayman's violation of the rules for psychological evaluations of a Defendant set out in *State v. Jackson*, 171 W. Va. 329, 298 S.E.2d 866 (1982). Defendant contends that Dr. Clayman's failure to tape the entire interview of the Defendant violated Defendant's right to counsel and privilege against self-incrimination.

First, Defendant rejects the State's factual description of the gaps in the interview as being momentary. *See* State's Response Brief at 53. It should be clear that neither Dr. Clayman nor Defendant knew how long these gaps were.

Nonetheless, whether these gaps lasted for ten minutes or for hours, the results should have been the same— suppression of Defendant's statement that he gave to Dr. Clayman during the interview. The State argues that this was a mere technical violation. However what the State fails to realize is that the protections put into place by *Jackson*, which includes the recording of the entire statement made by Defendant, were put into place to protect a Defendant's Sixth Amendment right to counsel and Fifth Amendment privilege against self-incrimination. Defendant was without counsel at the time of the interview being conducted by a State agent, Dr. Clayman. The solution offered by *Jackson* to attempt to remedy this issue was to ensure that the entire interview was recorded so that Defendant's counsel is aware of what occurred during the interview. That was not done here and so defense counsel had to rely upon Dr. Clayman's recollection about what occurred during these non-recorded segments of the interview, which is what the *Jackson* Court sought to prevent. This is not merely a technical violation, but instead is a violation of Defendant's Sixth Amendment right to counsel— counsel was not present at the interview and there were portions of the interview that were not recorded. Thus, Defendant's statement should have been suppressed.

Moreover, the State is correct that defense counsel entered Defendant's statement to Dr. Clayman into evidence through the testimony of defense experts, Dr. Lewis and Dr. Novello. However, this was done out of necessity based upon the Circuit Court's ruling on the presentation of evidence in this case. The State was allowed not to enter any psychological evidence in its case-in-chief, and Defendant was required to enter the psychological evidence first in the defense case. The State was then allowed to rebut the Defendant's psychological evidence with Dr. Clayman's testimony. By necessity, without any guarantee of being allowed a case in surrebuttal, Defendant had to introduce Defendant's interview with Dr. Clayman in anticipation that the State would be introducing it in its rebuttal case. The only way for Defendant to adequately respond to Dr. Clayman's testimony was by introducing Defendant's statement to Dr. Clayman first so that Defendant's experts could opine about it. This was truly putting the cart before the horse. Thus, Defendant was forced to admit Defendant's interview with Dr. Clayman into evidence based upon the need to anticipate the State's rebuttal case. Defendant should not be held to have waived any challenge to this interview based upon the necessity of having to explain the interview prior to the State entering the interview into evidence.

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

As argued above, the Circuit Court's ruling about the presentation of evidence impermissibly shifted the burden of proof and persuasion by mandating that Defendant present his expert testimony on state of mind first and mandating that Defendant anticipate the State's rebuttal to Defendant's expert testimony. Because of this ruling, Defendant was forced to introduce evidence such as his statement to Dr. Clayman in order to have his experts explain this statement prior to the State entering such evidence on its own. Because the Defendant was forced to

introduce unfavorable evidence before the State introduced such evidence, it produced in the eyes of the jury that Defendant was vouching for such evidence.

While the Court has discretion in determining the order of presentation of evidence, pursuant to Rule 611 of the West Virginia Rules of Evidence, it does not have the discretion to shift the burden of proof and production to the Defendant. By ordering that the State need not present its state-of-mind evidence in its case-in-chief, the Circuit Court impermissibly shifted the burden of production and persuasion to the Defendant. The only way to ensure that this did not occur would have been to allow the Defendant to have surrebuttal after the State's expert testified, which the Circuit Court did not allow save for the limited introduction of late disclosed evidence. Thus, Defendant argues that the failure to grant Defendant's motion for the State to present its expert evidence in its case-in-chief, combined with the Circuit Court's subsequent refusal to grant the Defendant a case in surrebuttal, *see* Appellant's Brief, Section VIII, prejudiced Defendant by improperly shifting the burden of production and persuasion.

V. THE STATE COMMITTED A *BRADY* VIOLATION WHICH REQUIRES THE GRANTING OF A NEW TRIAL

Defendant further argues that the State committed a *Brady* violation when it failed to disclose exculpatory evidence until the penultimate day of the trial.

The State argues that Defendant never actually moved for a mistrial based upon the *Brady* violation. The State is simply incorrect. On the last day of trial, Defendant filed a written motion moving for a mistrial based upon the *Brady* violation. *See* June 15, 2012 Trial Tr. at 1-4. The Circuit Court denied this motion. This was not just the "threat" of a motion, but an actual written motion that was filed and denied. Thus, this argument by the State has no merit.

As to the substance of the *Brady* violation, the State admits that the first prong of *Youngblood* has been satisfied but argues that the other two prongs of *Youngblood* have not been

satisfied. Under *Youngblood*, there are three prongs that must be satisfied:

- (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence;
- (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and
- (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

Syl. Pt. 2, *State v. Youngblood*, 221 W. Va. 20, 625 S.E.2d 119 (2007). As stated above, the State has conceded the first prong. The State writes, “Defense counsel asked questions of various witnesses, including expert witnesses, regarding Ms. Perrine’s Ativan prescription, thus it appears the evidence was deemed by the defense to possess either exculpatory or impeachment value.”

State’s Response Brief at 63.

The only questions then are whether the Ativan pills in Ms. Perrine’s purse were suppressed and whether the Ativan pills in Ms. Perrine’s purse were material. Defendant suggests that both questions must be answered in the affirmative.

First, as *Youngblood* states, the suppression of the evidence need not be willful, but can be inadvertent. Here, even though it seems to be inadvertent, the Ativan pills were suppressed. The State had Ms. Perrine’s purse in its possession for almost an entire year, from July of 2011 until the trial in June of 2012. At no time was the existence of these Ativan pills, contained on a keychain on Ms. Perrine’s purse, ever disclosed to defense counsel. The State argues that defense counsel should have found the pills himself during the inspection of the physical evidence. However, defense counsel had mere hours to inspect the evidence room full of physical evidence during the discovery review on May 17, 2012. The State had possession of the physical evidence for almost a year. Defendant should not be faulted for failing to find the exculpatory needle in the haystack when he had only moments to look for it. On the other hand, the State had possession of the evidence for a sufficient amount of time and should have been aware of the existence of the keychain containing the Ativan pills, either during the police officer’s initial seizure, inspection,

and inventory of the evidence or during the one year that this evidence remained in its possession. Thus, it is clear that this evidence was exculpatory and was suppressed.

As to the last prong of *Youngblood*, Defendant submits that the keychain containing the Ativan pills was clearly material and that the late disclosure of this material, exculpatory evidence prejudiced Defendant's ability to present a defense. First, as a matter of appearance, defense counsel likely looked ill-prepared to the jury. Defense counsel had already closed his case and then had to reopen his case to enter Ms. Perrine's purse and the Ativan pills in the keychain into evidence. This should have been accomplished in either the State's case-in-chief, through the cross-examination of Corporal Norris or the defense's case. Instead, this had to be done after defense had rested and the State had rested its case in rebuttal, giving the jury the appearance that the defense team was bumbling and did not know what type of defense it wanted to present. That appearance alone, which was caused by the late disclosure of the exculpatory evidence, should be considered material and prejudicial to Defendant, particularly in a serious capital case.

Second, and more importantly, if such evidence had not been suppressed and had been disclosed in a timely manner, Defendant would have been able to make effective use of that evidence. The ways that those Ativan pills could have been employed by defense counsel are myriad. It is important to keep in mind that the central defense of Defendant was that he was suffering from diminished capacity at the time of the shooting, brought on by his underlying bipolar disorder, as well as the side effects of unprescribed Ativan pills and the withdrawal from his prescribed Seroquel pills. The side effects of the Ativan pills was a major theory of Defendant's case. Defendant's pharmacological expert, Rodney Richmond, as well as the State's pharmacological expert, Dr. Brasfield, agreed that some of the reported side effects of Ativan were uncontrollable rage and abnormal thinking. In fact, the State's expert, Dr. Brasfield, testified that the side effects of Ativan could have caused the homicide in the instant case. The missing piece of

the puzzle for the defense was proof that Ms. Perrine was giving Mr. Cook Ativan pills even though Mr. Cook had no prescription. Had the keychain with the Ativan pills been disclosed earlier, defense counsel could have made effective use of such evidence to fill in that missing piece of the puzzle. Defense counsel could have had his own pharmacological expert examine the Ativan pills, determine the dosage, and determine whether those pills were prescribed to Ms. Perrine. With the late disclosure, defense counsel's pharmacological expert was unable to examine this critical piece of evidence and opine about its meaning. Defense counsel could have subpoenaed Ms. Perrine's prescription history to compare against the pills that were found in the keychain. The late disclosure of such evidence prohibited defense counsel from conducting this important investigation. Defense counsel could have used the pills in the keychain to cross-examine the State's witnesses from the pharmacy. Late disclosure of the pills prohibited defense counsel from using the pills for cross-examination purposes. Of great importance, the timely disclosure of the Ativan pills may have changed Defendant's decision not to testify on his own behalf. Had the pills been disclosed timely, it would have been more likely that Defendant would have testified being that there was corroborating evidence, besides his own testimony, the Ms. Perrine was supplying him with unprescribed medication. In short, the late disclosure of the Ativan pills in the keychain on the penultimate day of trial prejudiced Defendant in innumerable ways, as outlined above, and in ways that have not even occurred to defense counsel yet. Without a doubt, had the pills been disclosed in a timely manner, the pills existence in the key chain would have become a lynchpin piece of evidence in Defendant's case, both for impeachment, exculpatory evidence, and as material for investigation that might lead to more exculpatory evidence.

Defendant submits that this late disclosure was a prejudicial *Brady* violation.

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

Defendant further submits that the State's publishing of Defendant's invocation of his right to counsel on the ELMO projector was reversible error necessitating a new trial.

First, it must be noted that Defendant does not argue that this was purposeful behavior on the part of the State. However, even though this was by all appearances a mistake by the State, the Defendant should not bear the prejudice that flows from the State's mistake. And Defendant submits that he was prejudiced by the publishing of his invocation of right to counsel during the interview with Corporal Norris.

The State argues that "the evidence of the defendant's guilt in this case was overwhelming," State's Response Brief at 73, and because the State did not have a weak case, there is no way that the publishing of Defendant's invocation of his right to counsel could have affected his case. *Id.* at 72. However, the State fails to grapple with the significance of this statement argued by the Defendant. While the publishing of his invocation of his right to counsel was not prejudicial as to the issue of guilt or innocence, it is extremely prejudicial as to the issue of diminished capacity. It would be very easy for the jurors to draw an inference that if Defendant had sufficient capacity to request counsel, then surely he had sufficient capacity to form the intent to commit the crime. In fact, courts that has addressed the issue have held that it is improper for a prosecutor to use an accused's invocation of his constitutional right to counsel or to remain silent as evidence of his or her sanity. *See Wainwright v. Greenfield*, 474 U.S. 284 (1986); *State v. Oglesby*, 585 A.2d 916 (N.J. 1991); *State v. Rogers*, 512 N.E.2d 581 (Ohio 1987). Thus, Defendant suggests that the publishing of his invocation of his right to counsel was extremely prejudicial to Defendant's ability to be able to present a diminished capacity defense.

Defense counsel suggests that the focus should be on the prejudice to the Defendant, not whether the State's publishing of his invocation of his right to counsel was purposeful or

inadvertent. Even if the publishing was a mistake, it prejudiced Defendant's ability to have a fair trial and a new trial should be granted.

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

First, the State argues that this issue should be reviewed under the plain error doctrine, citing *State v. Welch*, 229 W. Va. 647, 734 S.E.2d 194 (2012). The State is wrong. The *Welch* Court reviewed the issue in that case under the plain error doctrine because the appellant "failed to move for a mistrial and failed to ask the court to instruct the jury to disregard the statement" and therefore asked "this Court [to] review the issue under the plain error doctrine." *Id.* The plain error doctrine is only applicable if Defendant did not object to the reference to his pre-trial incarceration during the trial. In this case, Defendant did object and moved for a mistrial. Therefore, the plain error doctrine is inapplicable.

Furthermore, the State argues that any error on the part of the State's expert in mentioning Defendant's pre-trial incarceration was obviated by references made by defense counsel to Defendant's incarceration. However, Defendant suggests that these references were qualitatively different. Dr. Lewis testified that Defendant only realized that Ms. Perrine was dead after he was taken to the Eastern Regional Jail. Of course, it was impossible to not present to the jury that Mr. Cook was arrested and transported to jail following his apprehension at the Southern States parking lot. Moreover, any references by defense counsel to the medication log at the Eastern Regional Jail revealed that the medication was inventoried by the jail immediately following his arrest. On the other hand, Dr. Clayman's reference to Defendant being in jail was that Mr. Cook was in jail eight or nine months after his arrest, during the time of Dr. Clayman's interview of Defendant. Such reference suggests to the jury that Defendant was not released on bail and that Defendant was too dangerous to be released on bail. Such an inference based upon Dr. Clayman's

reference to the incarceration of Mr. Cook is impermissible and prejudicial.

Defendant suggests that this error alone, but particularly combined with the reference to Defendant's invocation of his right to counsel and the State's *Brady* violation, necessitates the granting of a new trial.

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

Defendant again suggests that the mercy phase of the trial conducted by the Circuit Court failed to grant him the due process of law.

First, Defendant asserts that a bifurcated mercy phase of a first degree murder trial should presumably have more due process than the mine run of sentencing hearings conducted for burglary and drug cases. In a typical sentencing, a pre-sentence investigation is completed, usually taking sixty days or more, before a defendant appears to be sentenced. In the instant case, the mercy phase started immediately after the guilty verdict, after 5:00 p.m. on a Friday. It seems absurd that a jury deciding on mercy has less of an opportunity for an investigation into a Defendant's background than a judge deciding on whether a convicted burglar deserves probation.

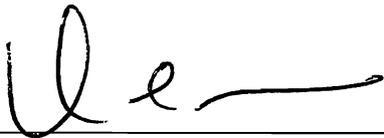
Nonetheless, a jury's decision whether to grant mercy or not is provided by the West Virginia Code. Despite the seeming inequity of a mercy phase, there are certain protections that a Defendant is afforded during the mercy phase of the proceedings. According to *State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010), two of these protections were not followed in the instant case. First, a defendant, like in a normal sentencing, should be given the opportunity to go first and then rebut the State's case. Second, and most importantly, unlike a normal sentencing, the West Virginia Rules of Evidence still apply and the Court must exercise a gate keeping function as to what evidence to allow during the mercy phase. As the *McLaughlin* Court noted, "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.

In the instant case, the State used the mercy phase to introduce the myriad of Rule 404(b) evidence that was not introduced in the case-in-chief. This included evidence of Mr. Cook’s past battery conviction as well as other bad acts allegedly committed against Ms. Perrine. However, the Defendant never opened the door to allow this evidence to come in by not presenting any evidence of Defendant’s good character. As such, the introduction of such impermissible character and 404(b) evidence is clear error necessitating the granting of a new mercy phase. There can be no argument, and none is offered by the State, that this is not clearly against the holding in *McLaughlin* that such evidence can only be presented if Defendant opens the door, which he did not do in this case. As such, Defendant suggests that this Court should order that Defendant be granted a new mercy phase of his trial to be held in accordance with the rules of *McLaughlin*.

Respectfully Submitted,

RAY COOK, 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