

**In the Supreme Court of Appeals of West Virginia**

**DOCKET No. 12-1259**

**STATE OF WEST VIRGINIA, Plaintiff**  
Below, Respondent,

v.

Appeal from a Final Order  
of the Circuit Court of  
Wayne County (10-F-17)

**JAMES E. MARCUM, Defendant**  
Below, Petitioner.

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**Appellant's Brief**

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## **ASSIGNMENTS OF ERROR**

**I. THE CIRCUIT COURT ERRED IN THE MANNER IT CONDUCTED THE SUPPRESSION HEARING, SHIFTING THE BURDEN TO THE DEFENDANT REQUIRING HIM TO PUT ON EVIDENCE FIRST IN ORDER TO MAKE A SHOWING THAT WOULD TRIGGER THE STATE'S REBUTTAL OF THE DEFENDANT'S SUPPRESSION GROUNDS.**

**II. THE CIRCUIT COURT ERRED IN FINDING THAT THE DEFENDANT'S STATEMENT TO POLICE WAS VOLUNTARILY GIVEN, WHERE THE DEFENDANT WAS INTERVIEWED BY POLICE AFTER MIDNIGHT IN A HOSPITAL ROOM WHERE HE HAD UNDERGONE SURGERY THAT SAME DAY AND WAS ON AN INTERVANOUS PAIN MEDICATION DRIP AS WELL AS TAKING ORAL PAIN MEDICATION.**

## **STATEMENT OF THE CASE**

Only minutes after midnight, on December 10, 2009, James Everett Marcum was in a tremendous amount of pain. Marcum was in a hospital bed at Three Rivers Medical Center in Louisa, Kentucky, being treated for two stab wounds he had received the night before. A resident of Wayne County, Marcum had been transported by ambulance to the hospital, arriving at approximately 4:23 in the morning, on December 9, 2009. A few hours later, he underwent surgery, at approximately 6:30 a.m.

In an IV attached to the back of Marcum's left hand, a nearly constant flow of Demerol—every six to seven minutes—entered his body to try to staunch the pain, which the medical records chart as a 10 on a scale of 10. [Vol 1 - PTH1 - p 15] Marcum also was receiving Percocet every four hours, which had started at noon. [Vol 1 - PTH1 - p 14]

Now, just 12 hours later, Marcum found himself the primary suspect in a murder investigation and giving a videotape statement to two West Virginia State Troopers.

Marcum can be seen laying in his hospital bed, in his hospital gown, with the IV sticking out of the back of his hand. During the statement, with the officers still questioning him, a nurse comes into his room and obstructs the video camera's view of Marcum while she's apparently giving him some additional pain medication, according to the hospital chart, because he's still on the Demerol drip for pain. Just minutes after the video statement is over, at 12:15 a.m., Marcum again judged his pain as a 10 out of 10. [Vol. 1 - PTH1 - p 16]

The events which lead up to Marcum being charged with murder began on December 9, 2010, when he drove from his home in Wayne County on Jennie's Creek [Vol. 2 – JT4 - p 8] to the residence of his cousin, Jim Ward, who lived up Ward Hollow. Marcum and Ward were close, Marcum describing Ward as a "brother," and the two helped each other and socialized often, [Vol. 2 – JT4 - p 10 ]with much of their time together spent drinking alcohol. [Vol. 2 – JT4 - p 11] On this day, the two had planned purchase some tires for Marcum's Geo Tracker at Perry's Tire Shop in Genoa. [Vol. 2 – JT4 - p 16] Marcum had sold a trailer a day earlier for one thousand dollars and had cash on him. [Vol. 2 – JT4 - p 17]

On the way to Perry's, the two stopped and drank "a couple beers." After ordering the tires at Perry's, Marcum and Ward stopped and got a 12 pack of beer at the Marrowbone Junction. The two returned to Ward's house and drank the beer, and then got more beer. [Vol. 2 – JT4 - p 19] Finally, at about 7:00 or 7:30 p.m., the two ended up at Brewer's Sawmill. [Vol. 2 – JT4 - p 18] The two were drinking all afternoon before they got to the Sawmill, and continued to drink while they were there. [Vol. 2 –

JT4 - p 21] The two also drank moonshine out of a jar at the sawmill's guard shack.

[Vol. 2 – JT4 - p 24]

Marcum and Ward both became intoxicated at the sawmill, and several witnesses who were there said the two were becoming aggressive with each other, with Marcum making some 20 to 30 comments about “whipping [Ward's] ass, whipping his son Jamie's ass, whipping his dead momma's ass, and whipping his dead daddy's ass,” although Marcum said he would never say such things. [Vol. 2 – JT4 - p 25]

Several witnesses testified that Marcum seemed be getting rowdy, and at one point Marcum and Ward got in Marcum's Tracker to leave. [Vol. 2 – JT1 - p 166] Marcum apparently was accusing those at the saw mill, as well as Ward, of stealing money off of him. [Vol. 2 – JT1 - p 196] Marcum had apparently loaned Ward \$100, and then asked for it back. They two had started arguing and Ward crumpled the bill up and threw it at Marcum. [Vol. 2 – JT4 - p 32] Ward then got out of the Tracker and Boyd Marcum gave him a ride home. [Vol. 2 – JT1 - p 170]

When Boyd Marcum got Ward to his house, Ward was so drunk that he fell when he got out of the car, and Boyd had to help him up and into the house. At this point, it was about 1 a.m. As Boyd Marcum drove back to the saw mill, he passed James Marcum coming up the road near Mr. Eaves Church. [Vol. 2 – JT1 - p 183]

Marcum went to Ward's house, and Ward invited him in, and the two started drinking more and watching television. At some point, the two started arguing again, and Ward suddenly grabbed a “sword like weapon.” [Vol. 2 – JT4 - p 42] The weapon was actually a bayonet. Ward pointed the bayonet at Marcum and when Marcum stood

up, Ward “plunged” it at him, stabbing Marcum in the right side. [Vol. 2 – JT4 - p 44] Marcum said he tried to leave and Ward came at him again, telling Marcum that Ward was going to kill him. [Vol. 2 – JT4 - pp 49, 50] Marcum then said he struck Ward several times in the face, and wrestling the bayonet off of him. [Vol. 2 – JT4 - p 56] However Ward kept coming at him, lowering his head and trying to push Marcum back, hugging him. [Vol. 2 – JT4 - p 56, 57]

When Ward pinned Marcum to the door leading outside of his trailer, Marcum responded by stabbing Ward in the top of his back at least three times. [Vol. 2 – JT4 - p 58] Marcum thought Ward was going to kill him. [Vol. 2 – JT4 - p 68] At that point, Ward staggered back, laid down and Marcum realized that Ward was badly hurt, so he grabbed a sheet from the bed and tried to stop the bleeding. [Vol. 2 – JT4 - p 59] Ward said he was in shock, and hurting from the stab wound in his side, and, after four or five minutes of trying to get Ward’s bleeding to stop, Marcum fled out the back door to the home of Albert Dillon, an uncle who lived nearby. [Vol. 2 – JT4 - p 60] Dillon called an ambulance for Marcum, and Wayne “Wayne Bug” Williamson, a “first responder” for the Kermit Volunteer Fire Department, [Vol. 2 – JT1 - p 224] who transported Marcum to the hospital.

Dr. David Fowler testified at trial in support of the Defendant’s self-defense theory.

Dr. Fowler who is board certified in forensic pathology in both the United States and in South Africa, [Vol. 2 – JT4 - p 110] has performed in excess of 6,000 autopsies. [Vol. 2 – JT4 - p 113] and had investigated between 800 and 1,000 stab wound cases.

[Vol. 2 – JT4 - p 114] Dr. Fowler testified that the wounds inflicted by Marcum on Ward could only have happened in the manner Marcum described, if he was receiving a “bear hug” at the time, or some other closely wrapped scenario, or if Ward were running away from Marcum. [Vol. 2 – JT4 - p 143] Dr. Fowler testified that “nobody could know beyond a reasonable doubt.” [Vol. 2 – JT4 - p 144]

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### **SUMMARY OF ARGUMENT**

On July 29, 2011, a Wayne County jury convicted James Everette Marcum of Second Degree Murder in the stabbing death of James Ward. The Defendant was sentenced to a determinate term of 40 years in the State Penitentiary on August 26, 2011. The Defendant was resentenced for the purpose of appealing his conviction on September 14, 2012. The Defendant appeals this conviction contending that the Court erred in allowing his pretrial statement to the State Police to be admitted because it was not voluntary due to the circumstances surrounding the taking of the statement, which occurred after midnight while Marcum was hospitalized and under sedation with pain medication.

Further, the Trial Judge admitted he was mistaken regarding the manner in which to hold a suppression hearing, and employed a procedure for the suppression hearing which shifted the burden to the Defendant to first “make a showing” that his statement was not voluntary and then permitting the State to rebut that showing after the Defendant had first testified.

Finally, the State Police incorrectly advised the heavily medicated Defendant that

the "Statement Form" the Defendant was signing was not a waiver of his Constitutional right against self-incrimination, but rather merely an "acknowledgement" that he had been advised of his Miranda Rights.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioner believes that this case is suitable to be heard by the Court for oral argument under Rule 19 of the Rules of Appellate Procedure in that Rule 19(a)(2) it involves error by the Court in an area of settled law (admitting the Defendant's statement to police taken while he was on medication in the hospital following surgery and using an unsustainable exercise of discretion (failing to properly conduct a voluntariness hearing regarding the defendant's statement).

## **ARGUMENT**

### **I. THE CIRCUIT COURT ERRED IN THE MANNER IT CONDUCTED THE SUPPRESSION HEARING, SHIFTING THE BURDEN TO THE DEFENDANT REQUIRING HIM TO PUT ON EVIDENCE FIRST IN ORDER TO MAKE A SHOWING THAT WOULD TRIGGER THE STATE'S REBUTTAL OF THE DEFENDANT'S SUPPRESSION GROUNDS.**

At the outset, it should be noted that the Court later admitted it was incorrect in the manner in which it conducted the pretrial suppression hearing. [Vol 2 - JT4 - p188, 189] However, this admission did not come until after trial, when the Court and counsel were compiling jury instructions. The pretrial suppression procedure, in which the Court required the Defendant to put on evidence first, thus clearly shifting the burden of proof, was prejudicial to the Defendant and violated his due process rights.

At issue in the pretrial suppression hearing on October 4, 2010, was the Defendant's statement to police. The Statement was taken by W.Va. State Police

Troopers while the Defendant was under sedation following surgery at Three Rivers Medical Center in Louisa, Kentucky.

At the hearing, Defense counsel opened his argument by advising the Court it was the state's burden to show a "knowing and voluntary waiver of [the Defendant's] constitutional rights." [Vol 1 - PTH1 - p 13] The Defendant previously had filed his motion to suppress before trial, bringing him in compliance with Rule 12(b)(3) of the West Virginia Rules of Criminal Procedure, which provides:

(b) Pretrial Motions. Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(3) Motions to suppress evidence unless the grounds are not known to the defendant prior to trial

In his written "Defendant's Motion to Suppress His Videotaped Statement," the Defendant advised the Court of specific grounds, requesting the court to:

" ... suppress his videotaped statement, which he gave shortly after surgery at Three Rivers Medical Center. Admittedly, Mr. Marcum was not under arrest at the time he made the statement, and he signed a "Statement of Rights' and waiver form. However, the defendant contends that he was under the influence of medications which rendered him incapable of voluntarily and knowingly waiving his constitutional right to remain silent and to be represented by an attorney at this critical state of the criminal investigation against him." [Vol 1 – AR 89]

Although the Defendant was precise in his grounds for wanting to suppress the statement, the Court seemed to misapprehend that it was the Defendant's burden to "raise the issue," even beyond his filing of the specific suppression motion. The Court

correctly advised defense counsel that it didn't believe the Defendant had the "burden," obviously referring to the burden of proof:

" 'The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.' Syllabus Point 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975)." Syl. pt. 1, *State v. Woods*, 169 W.Va. 767, 289 S.E.2d 500 (1982). As quoted in Syl. Pt. 4, *State v. Bunda*, 187 W.Va. 389, 419 S.E.2d 457 (1992).

The burden is on the State to prove by a preponderance of the evidence that extrajudicial inculpatory statements were made voluntarily before the statements can be admitted into evidence against one charged with or suspected of the commission of a crime. Syl. Pt. 1, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995).

However, the Court then employed a procedure for the suppression hearing that was the mirror of that required by law, actually transferring the burden of proof to the Defendant by requiring him to make a "showing," by putting on "testimony," prior to the prosecuting attorney doing anything to establish the "voluntariness" of Defendant Marcum's statement. The correct procedure in a voluntariness hearing, is set forth by Professor Cleckley:

In West Virginia, there need be no objection by the accused in order to require the prosecution to show voluntariness because the prosecution must always make a preliminary showing of voluntariness before offering a confession.

This collateral issue is tried, procedurally, like any other. The proponent puts in his evidence and the opponent has the right of cross-examination of the prosecution witnesses. The proponent "offers" the confession into evidence. The opponent has his case in reply on the collateral issue, at which time the opponent has a right to introduce any evidence he might have on the issue of voluntariness, with the proponent having the right of

cross-examination of the opponent's witnesses. The proponent may offer evidence in rebuttal, and the opponent may rebut until all evidence on the issue has been produced. 1 Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure, I-513 (2<sup>d</sup> Ed.1993)

Although the colloquy below is lengthy, it bears examination in full, because it reveals not only the Court's misconception about how the suppression hearing should be conducted, but the prosecuting attorney's apparent misconception as well. [Vol 1 - PTH1 - p 13-19] (emphasis will be added throughout). In addition, this exchange provides a factual basis for the following section of this brief, and providing it now will eliminate the need for reciting it again later:

THE COURT: Okay. You may proceed, then, Mr. Rosinsky.

MR. ROSINSKY: Your Honor, it's the state's burden to establish that the statement in this case, which was given by Mr. Marcum in his hospital room after his surgery, was a knowing and voluntary waiver of his constitutional rights. As Your Honor is aware, and I think the case law is fairly clear, the defendant does not have a burden to establish a knowing and voluntary waiver. In this case, what happened was -

THE COURT: I mean, I think you have to raise the issue, what it is. **I think you have to put something on**, whether it's -- you have to make the issue -- raise the issue. I don't think you have the burden, but I do think you have to raise which issues we're talking about. Is it knowing? Is it voluntary? Is it both? Those issues. [Vol 1 - PTH1 - p 13]

MR. ROSINSKY: Okay. That's fair. And factually what happened in this case was that Mr. Marcum was stabbed twice, or he sustained two stab wounds. And that, I think, factually the record speaks for itself. He was transported by ambulance to the hospital, Three Rivers Hospital. He arrived there at approximately 4:00 in the morning, 3:00, 4:00 in the

morning on December 9th. And he underwent surgery that morning at approximately 6:30. And he was on pain killers, according to the hospital records, he was on Demerol, and he was on also a -- I wrote it down -- Demerol drip, 70 milligrams was the max, he had a 25 -- oh, I'm sorry, he got hit every six to seven minutes for pain. That's what he was taking at the hospital. He also was given Percocets beginning at noon on that day, and it says "5/325," and he was given that Percocet about once every four hours, it looks like, according to hospital records.

Now, his BAC when he arrived at the hospital was .226, according to the lab results. I don't think his blood alcohol would have been a major issue when he gave the statement, which was approximately at 12:06 on the 10th. In other words, the following, that evening -- so he had the surgery at 6:30'ish in the morning. He was on the Demerol drip and he was getting Percocets.

And then [Vol 1 - PTH1 - p 14] at approximately 12 o'clock, approximately midnight, the troopers came in and took a videotape statement from him. Now, the videotape statement, you can see that he's laying in his hospital bed, in his hospital gown, he has an IV in him, in his arm. And, in fact, during the statement that the officers took, a nurse comes in and she obstructs the view of him while she's apparently giving him some additional -- it looks like she's giving him additional pain medication, according to the chart, because he's still on the Demerol drip for pain.

According to the hospital records, Mr. Marcum has judged his pain as a 10 out of 10 at 11:30 that night, a half hour before he gave his statement. And at approximately 12:15, he's judged his pain as a 10 out of 10.

If you look at the statement itself -- and I don't know if you've seen it, Your Honor -- but Mr. Marcum is extremely -- he's very soft spoken, he appears to be confused. It just -- and maybe we can look at the statement and you can see.

But I will admit that he was Mirandized, he was given the standard Miranda instructions. There is an indication that he signed something, a Miranda form.

We don't have that, Tom, by the way. I don't know if the [Vol 1 - PTH1 - p 15] troopers have it, but it has not been provided to us. Apparently it's now walking across the table.

(Mr. Plymale hands the document to Mr. Rosinsky.)

MR. ROSINSKY: Okay. The Interview and Miranda Rights Form, which I'm seeing for the first time, at 12:10, 12:06, it confirms the time of the statement. And it appears that the initials "JM" are across everything, and it appears that he has signed this. I haven't had a chance to go over it with my client, but it appears he signed this at 12:08.

But our position, Your Honor, is he had just undergone a trauma, he was in the hospital. And when the troopers appeared and asked him to provide a statement--I'm not saying there was any coercion. I'm not saying the troopers did anything wrong, because there is case law that talks about coercion. So, there were no threats or any allegations that there were any threats. I think the officers were there to take a statement from him and didn't do anything necessarily wrong. It's just that under the circumstances, with his hospital condition, having just gone through surgery, having been on pain medication for the entire day, we feel that that raises an issue as to whether his statement was knowing, whether he knew the rights that he was waiving in light of all [Vol 1 - PTH1 - p 16] the medication that he was under, undergoing at the time.

***In that regard, I would like to take some testimony from the troopers to ask him about his demeanor and --***

THE COURT: It's not for you to -- I mean, ***I think I have to first determine have you raised the issues.***

MR. ROSINSKY: Okay.

THE COURT: I think you're stating that you think he didn't know of his rights, that's basically your--you're not denying that he signed the waiver form?

MR. ROSINSKY: I'm not denying that.

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THE COURT: It's a knowing issue?

MR. ROSINSKY: I believe it's a knowing issue and understanding issue.

THE COURT: Okay. Any argument? [Vol 1 - PTH1 - p 17]

MR. PLYMALE: ***I think he's still got to establish that.***

THE COURT: I think he has to say, I think, that, "I don't" -- "I didn't know what those rights were," ***from testimony.*** I mean, I can take some of the things you've said as proffer. I don't think he has to go through his medical information, ***but I agree with the state that I think he has to testify and say*** -- and agree with this, "Yes, nobody coerced me, and I did not know what I was signing," or, "I do not recall giving the statement." I think those are the issues that -- I mean, based on your proffer. I mean, there would be other issues if it were other things, but I think what you're saying is either his medical state made him in such a position that he did not understand, know what he was signing or know the statement that he was giving.

MR. ROSINSKY: Right. And can we take --

THE COURT: ***Yes. I think you have to do it on that issue.*** I don't think you have to give -- the medical stuff, I think, is fine. I'll take that as proffer, unless the state has some objection.

MR. PLYMALE: No.

THE COURT: Okay. Yeah.

MR. ROSINSKY: Then let's swear Mr. Maynard -- or [Vol 1 - PTH1 - p 18] Mr. Marcum.  
(The defendant was sworn by the Court.) [Vol 1 - PTH1 - p 19]

The hearing continues with the Defendant's testimony about the taking of his statement at the hospital, followed by the prosecuting attorney's cross-examination. Then the state presents its evidence, followed by defense cross-examination. Again, it is the mirror of the procedure known to all West Virginia trial lawyers who try criminal cases as outlined by Professor Cleckley.

Following the close of testimony, during the discussion between the Court and counsel regarding jury instructions, defense counsel argued for an instruction on the prosecution's burden of proof regarding voluntariness. In discussing defendant's instruction no. 5, defense counsel argued to the Court that the instruction should be given regarding voluntariness and the State's burden:

MR. ROSINSKY: Okay. Now, I went back and looked at this, Farley and Bradshaw. I have added a sentence that I think may ameliorate Tom's concerns but probably not. It says, "The State's burden in this regard is to establish the voluntariness of the Defendant's statement by a preponderance of the evidence." That's the law. But it's kind of a statement in the case, Your Honor, in terms of his hospitalization. If you read those cases, I'm dead on. This is the law. And, in fact, in one of these cases where they didn't give this instruction, it was reversed on this point. And I think it was the Farley case, but I'm not -- I can't say that for sure. I gave you that -

THE COURT: Well -

MR. ROSINSKY: I gave it to you a couple of days [Vol 2 - JT4 - p187] ago. Yeah. This is the difference between the Massachusetts -- excuse me, the Wigmore, or orthodox, rule, which is what you, Your Honor, and Tom thought or think the law is.

THE COURT: **No. I thought that the standard was you had to raise it.** (emphasis added)

MR. PLYMALE: Yeah.

THE COURT: And if you raised it by evidence at the time, so -- because I was saying that at the time I didn't think he was going to testify.

MR. ROSINSKY: Oh, now that he's testified -

THE COURT: Now that he's testified and said, "I was taking medicine and in pain and" -

MR. ROSINSKY: And scared.

THE COURT: (Continuing) -- "and scared." But -

MR. PLYMALE: But, at this point, I think you strike "over defense counsel's objection" in line one.

THE COURT: Yeah. I don't know that -- I mean, that's just your legal basis to get it there. If you don't object, you don't -

MR. ROSINSKY: Okay. I've got it. I'll take it out.

THE COURT: **Now, I agree with you my understanding of the law was wrong.** I don't know that you would have [Vol 2 - JT4 - p188] had to put him on, and I would have given this instruction whether you would have put him on or not. [Vol 2 - JT4 - p189] (emphasis added)

Under Rule 12(b)(3), a defendant can waive his right to have a suppression hearing by failing to raise the issue prior to trial. If that procedural condition is applied to the Defendant to prohibit an objection to whether the state has lawfully obtained evidence against him, then the same procedural safeguards should work to protect the defendant. In this case, the defendant was required to shoulder the burden to obtain

the right to have a suppression hearing, and, the State thereby gained the advantage of being able to cross-examine the defendant without showing his statement was voluntary. The Defendant suffered a loss of his due process right to a fair trial by the conduct of this suppression hearing, which the Court admits was because its “understanding of the law was wrong.” Because of this, the Defendant’s conviction should be reversed.

**II. THE CIRCUIT COURT ERRED IN FINDING THAT THE DEFENDANT’S STATEMENT TO POLICE WAS VOLUNTARILY GIVEN, WHERE THE DEFENDANT WAS INTERVIEWED BY POLICE AFTER MIDNIGHT IN A HOSPITAL ROOM WHERE HE HAD UNDERGONE SURGERY THAT SAME DAY AND WAS ON AN INTERVANOUS PAIN MEDICATION DRIP AS WELL AS TAKING ORAL PAIN MEDICATION.**

At the suppression hearing on October 14, 2010, Marcum’s lawyer provided the Court with the summary of the circumstances surrounding the taking of the Defendant’s statement that is laid out in this brief at [Vol 1 - PTH1 - p 14], *supra*. It is not again repeated here for the sake of the 40 page brief limitation.

These facts are uncontroverted, and, in fact, State Police Trooper R. J. Drake, who took Marcum’s statement at the hospital, with Trooper First Class J.D. Lucas. [Vol 1-PTH1 – p 38] acknowledged he was there with Kentucky State Police Troopers, although they weren’t present in the room. [Vol 1-PTH1 – p 39]

Drake verified that while Marcum seemed coherent to him while being interviewed at the hospital, that it was apparent that Marcum was in pain, moaning when he moved and grasping his sides where the knife wounds were. Trooper Drake said this was consistent with the way people react when they are in pain. Marcum

advised Tpr. Drake that he had had surgery. [Vol 1-PTH1 – pp 39, 40]

Drake admitted at trial that when the two troopers took Marcum's video statement at around midnight, that they had no idea of the effects of Marcum's medication, nor did they ask the medical staff about it. [Vol 2-JT2 – p 15]

At the suppression hearing Marcum verified that he was in so much pain during the interview with the State Police that he was a 10 on a scale of 10, and that whenever he moved any little bit, yeah, he was in pain. Marcum testified he felt "dreary," during the interview, "like just here or not there," almost like he wasn't all there. Marcum knew he was under the influence of the pain medication while the troopers were there. [Vol 1-PTH1 - p 21]

Marcum admitted that he did not read the form handed to him by the troopers, which effectively waived his Miranda rights, but just signed it. [PTH1 - p 22] Marcum said he "just went along," but didn't understand the interview form and wasn't aware of his rights, but just signed it. [PTH1 - p 22] He acknowledged that the troopers advised him that he could stop the interview, but said he didn't realize the "severity of it. I just didn't," and that he didn't know he was waiving his Constitutional rights by signing his name. [PTH1 - p 23]

Marcum said if he wasn't on the medication, he might not have agreed to give a statement to the troopers. Marcum testified he didn't remember the nurse coming into the room during the statement and giving him more medication. [PTH1 - p 24] Marcum said he just felt "drowsy."

Under cross-examination by the prosecuting attorney, Marcum admitted that he was told that he could stop the statement at any time he wanted to. [PTH1 - pp 29-30]

Marcum expressed surprise at the suppression hearing that the interview form under the section titled, pre-interview, advised "You are under arrest for the crime of, murder," the word "murder" being written into a blank space on the form. He said he clearly did not remember that from the night of the interview. [PTH1 – p 32]

It is clear that the voluntariness of a statement by the Defendant hinges upon whether it is knowingly and intelligently waived:

When evaluating the voluntariness of a confession, a determination must be made as to whether the defendant knowingly and intelligently waived his constitutional rights and whether the confession was the product of an essentially free and unconstrained choice by its maker. Syl. Pt. 7, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995).

Such a waiver cannot occur if the the statement made by defendant in a hospital, while in great pain, or encumbered by tubes, needles, and on awareness altering medication because it isn't "voluntary." As the United States Supreme Court held in Syl. Pt. 2 of *Mincey v. Arizona*, 98 S.Ct. 2408, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)

Due process requires that the statements obtained from petitioner in the hospital not be used in any way against him at his trial, where it is apparent from the record that they were not "the product of his free and rational choice," *Greenwald v. Wisconsin*, 390 U.S. 519, 521, 88 S.Ct. 1152, 1153, 20 L.Ed.2d 77, but to the contrary that he wanted *not* to answer his interrogator, and that while he was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, his will was simply overborne. While statements made by a defendant in circumstances violating the strictures of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, are admissible for impeachment if their "trustworthiness . . . satisfies legal standards," *Harris v. New York*, 401 U.S. 222, 224, 91 S.Ct. 643, 645, 28 L.Ed.2d 1; *Oregon*

v. Hass, 420 U.S. 714, 722, 95 S.Ct. 1215, 1220, 43 L.Ed.2d 570, any criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law. Pp. 2415–2419.

In effect, while not appearing improper, the police in the instant case used similar tactics, which due to Marcum's medical condition, were just as coercive. Marcum was not advised that the form he was signing was a waiver, or giving up his Miranda rights. Instead, he was told his signature and initials were to acknowledge that Sr. Trooper Drake had merely "read" the rights to him:

Sr. Tpr. Drake: I need you to sign and initial ***here that I read these rights to you.*** [Vol 2-JM1 - p 2] (emphasis added)

The Court may recall that Defendant Marcum's Miranda waiver may not have been filed with the Court because it was presented during the suppression hearing on October 14, 2010, to defense counsel who said he hadn't seen it before. [Vol 1 - PTH1 - p 15, 16] However, the "Statement Forms," used by the State Police in other interviews, such as the one with Albert Dillion, end the recitation of rights with this acknowledgement:

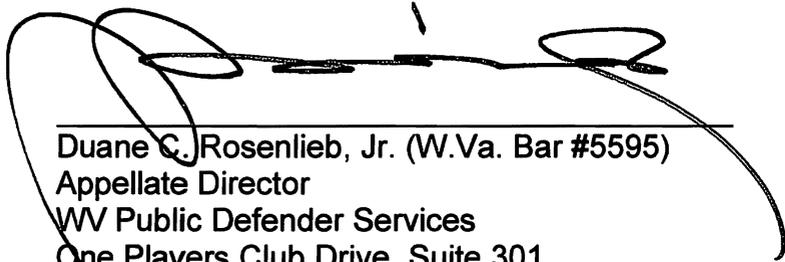
"I have had this statement of my rights read to me and I understand them. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me, and no coercion of any kind has been used against me in connection with this interview. I agree to be interviewed, answer questions and make a statement." [Vol 2- AD- p 1, 2]

## CONCLUSION

Based upon the mistakes made by the Circuit Court in shifting the burden to the Defendant during the suppression hearing, as well as the inadequate Miranda Waiver

taken from the Defendant while hospitalized and on medication, the Appellant's conviction should be reversed, and this matter should be remanded for a new trial.

James E. Marcum,  
By Counsel



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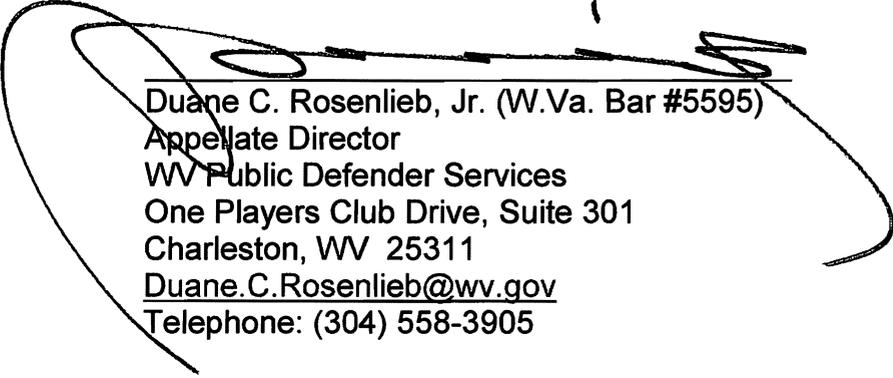
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## CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2013, true and accurate copies of the foregoing **Appellant's Brief** was served on the parties below in the manner as indicated:

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