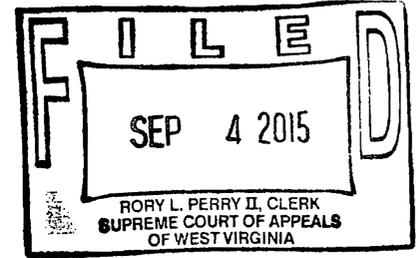


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKET NO. 15-0087**



**STATE OF WEST VIRGINIA,**

**Respondent,**

**v.**

**Appeal from a final order of the  
Circuit Court of Kanawha County  
(No. 13-F-707)**

**TYQUAN ANTONIO LIVERMON,**

**Petitioner.**

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**PETITIONER'S BRIEF**

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Counsel for Petitioner, Tyquan Antonio Livermon  
C. Joan Parker  
WV Bar No. 4360  
Assistant Public Defender  
Kanawha County Public Defender Office  
P.O. Box 2827  
Charleston, WV 25330-2827  
304-348-2323  
[c.joan.parker@wvdefender.com](mailto:c.joan.parker@wvdefender.com)

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## ASSIGNMENTS OF ERROR

I. The Kanawha Circuit Court erred when it did not grant Livermon's Motion to Suppress Statement After Arrest since the police obtained his statement in violation of his *Miranda* rights. Livermon did not make a knowing and voluntary waiver of his rights. He was not sufficiently informed by the police of his right to terminate questioning at any time. Livermon was not aware of the consequences of waiving his right to remain silent. Law enforcement officials misled Livermon into making an inculpatory statement by suggesting that it would be off the record.

II. Livermon's statement to the police was obtained in violation of his right to prompt presentment pursuant to W. Va. Code § 62-1-5.

III. The combined errors that occurred during Livermon's trial proceedings require reversal of his conviction of robbery in the first degree and wanton endangerment, and his sentence of forty years imprisonment.

## STATEMENT OF THE CASE

On August 8, 2013, an armed robbery occurred in South Charleston, West Virginia. A.R. 379-386, 682. On August 9, 2013 the South Charleston Police Department executed a search warrant at 5008 Inland Lane, Apartment F, South Charleston, WV, the residence of Shabazz Washington. A.R. 688-689. The warrant was sworn out by Detective Gordon. *Id.* The warrant named Shabazz Washington as the suspect in a first degree robbery and wanton endangerment. A.R. 34. The warrant was executed at approximately 6:30 p.m. A.R.

476. The Petitioner, Tyquan Livermon, was found inside the apartment. He was arrested around 6:00 or 6:30 p.m. on August 9, 2013 by the South Charleston Police for possession of marijuana. A.R. 675.

After being handcuffed and detained at the residence, police officers drove Livermon to the police station. A.R. 39-40, 675-76. Cameron Shaw testified that the police had already gone when he arrived at the residence around 8:00 p.m. A.R. 534.

Around 9:19 p.m. the police officers at the police station told Livermon that he had been arrested for possession of marijuana. A.R. 63. He signed a *Miranda* form and was then interviewed by police for over an hour; that interview was recorded. A.R. 63-64, 71, 767, 792. Despite the marijuana charge, the bulk of the interview centered on the robbery and shooting that had occurred. A.R. 16-170, 987, 988-1063. Following the first recorded statement, Livermon was detained in the holding cell for around two to three hours before being interviewed again. A.R. 792. He was not fingerprinted or otherwise processed. He was not presented to a magistrate on the charge of marijuana possession. *Id.* In fact, he was never formally charged with possession of marijuana. A.R. 98.

Around 1:05 a.m. on August 10, he was interrogated again. A.R. 86. The police again told him that he had been arrested for possession of marijuana. A.R. 100, 103. He signed another *Miranda* form. A.R. 85-86. The second interview lasted approximately 90 minutes. A.R. 105.

One hour into the second interview, Livermon was told by the police that he was going to be charged with wanton endangerment, robbery and "probably kidnapping". A.R. 796. Livermon immediately responded "Oh, my God!" several times. A.R. 797, 1038-39. He

stated that he couldn't believe he was being charged. A.R. 1041. After more than one hour and ten minutes into the statement, Livermon was told by an officer that he was not charged with possession of marijuana anymore, but was now charged with armed robbery and six counts of wanton endangerment. A.R. 1046. Livermon's first response was, "Are you serious?" Detective Paschal told him the charges could carry 115 years. A.R. 1053. He was not re-Mirandized. A.R. 798.

Although most of that second interview was recorded, the critical statement attributed to Livermon was not recorded. A.R. 92-94. The second officer who interviewed Livermon, Detective Paschal, testified that he intentionally turned off his handheld recorder to get Livermon to keep talking. A.R. 800. He testified that Livermon was focusing on the tape recorder. A.R. 114. Once Paschal had turned off the recorder, he stated that Livermon told him that he had stolen the gun that had been used in the commission of the crimes. A.R. 774.

The recorded version of Livermon's second interview ends as follows:

Q. [Detective Paschal] If somebody uses your gun and does something (inaudible) it is what it is. I think I'm going off record here unless you got something to tell me. Tell me about it now and we'll talk about it. I know you keep looking at it because you don't want to do it on record. Is that what you want me to do you want me to turn it off?

A. [Tyquan Livermon] I mean no, you probably, I mean yeah you can turn it off if you want to.

Q. Are you going to tell me anything? Do we turn this off?

A. Yeah.

A.R. 1061.

Although the forms Livermon signed had the traditional *Miranda* rights listed, neither the warning nor the waiver portion advised that he could terminate the interview at any time. A.R. 108-09.

Livermon's trial counsel unsuccessfully sought to suppress the unrecorded statement attributed to Livermon. A.R. 189, 195. At trial, Paschal was permitted to testify that after he turned off the recorder Livermon stated that he had stolen the rifle used in the armed robbery. A.R. 774.

After a jury trial on May 6-9, 2014, Livermon was found guilty by jury verdict of the felony offenses of first degree robbery and six counts of wanton endangerment. A.R. 1093. At a hearing on July 24, 2014, for the felony offenses of first degree robbery he was sentenced to the penitentiary of this State for a determinate term of ten (10) years, with credit for time spent in jail awaiting trial and conviction. For the six counts of wanton endangerment he was sentenced to the penitentiary for a determinate term of five (5) years. All sentences were ordered to run consecutively. A.R. 1019.

An amended sentencing order was entered on August 11, 2014 to correct errors in the original order. A.R. 1122. Livermon was resentenced once again on January 2, 2015, to renew the time period to allow him to perfect his appeal. A.R. 1126. This appeal was filed on February 2, 2015.

## SUMMARY OF ARGUMENT

The Kanawha County Circuit Court erred by allowing the jury to hear the purported confession Livermon made off the record following two intensive police interrogations. Law enforcement obtained Livermon's inculpatory statement in violation of his *Miranda* rights by not sufficiently informing him of his right to terminate questioning at any time. Further, he was not aware of the consequences of waiving his right to remain silent. Livermon did not make a knowing and voluntary waiver of his rights. The South Charleston Police form did not clearly warn Livermon that he had a right to terminate questioning at any time, nor did the officers interrogating him mention this during either of the lengthy interviews. Livermon expressly did **not** know the nature of the charges against him. Despite the nature of the questioning, the officers repeatedly told him that he'd been arrested for possession of marijuana.

Law enforcement officials misled Livermon into making an inculpatory statement by suggesting that it would be off the record. This unrecorded statement should have been excluded from evidence.

Under the totality of the circumstances, including the manner in which Livermon was initially informed of his rights and the charge against him, the officers' decision not to re-Mirandize him, and the intended effect of their tactics on Livermon, the State has failed to meet its burden of proof regarding Livermon's *Miranda* rights.

Livermon's statement to the police was obtained in violation of his statutory right to prompt presentment to a magistrate. Livermon was transported to the South Charleston Police Department sometime before 8:00 p.m. The first recorded statement began at

around 9:19 p.m. and lasted approximately seventy minutes. A magistrate was on duty in the Kanawha County Judicial Annex. There was a delay of approximately two and a half hours before the second recorded statement after 1:00 a.m. Livermon was placed in a holding cell during that time. Livermon was not formally processed or fingerprinted during the delay before the second statement. Such a delay cannot be used to extract a confession through prolonged interrogation, prolonged confinement, or a combination thereof.

These combined errors made it impossible for Livermon to have a fair trial.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The undersigned believes that oral argument is necessary to protect Livermon's rights. Specifically, there is no clear law on the issue of the legal consequences of going off the record during a police interrogation, and using any subsequent "off-the-record" statement against a defendant at trial.

This case involves a narrow issue of law. Thus, this case is appropriate for a Rule 19 argument.

#### ARGUMENT

I. LIVERMON WAS NOT SUFFICIENTLY INFORMED BY THE POLICE OF HIS RIGHT TO TERMINATE QUESTIONING AT ANY TIME AND WAS NOT AWARE OF THE CONSEQUENCES OF WAIVING HIS RIGHT TO REMAIN SILENT. LIVERMON DID NOT MAKE A KNOWING AND VOLUNTARY WAIVER OF HIS RIGHTS. LIVERMON'S STATEMENT TO THE POLICE WAS OBTAINED IN VIOLATION OF *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966).

Made famous by police officers on law enforcement shows all over television, every American knows about *Miranda* warnings. Upon arrest, law enforcement officers must

inform a defendant of certain rights. If they fail to do so, any confession obtained should be excluded from evidence in the case.

Specifically, although there is no required script, police must advise an arrestee or someone in custody that: s/he has the right to remain silent; that anything said will be used against her or him in court; that the s/he has the right to consult with a lawyer and to have a lawyer present during any questioning; and that if the person cannot afford a lawyer one will be appointed to represent her or him.

Designed to secure the constitutional protection against self-incrimination, the United States Supreme Court wrote:

We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

*Miranda v. Arizona*, 384 U.S. 436, 467(1966).

The Due Process clause of the Fourteenth Amendment of the United States Constitution prohibits the use of involuntary confessions against a criminal defendant. "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, *Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760, and even though there is ample evidence aside from the confession to support the conviction. *Malinski v. New York*, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029; *Stroble v.*

*California*, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872; *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975." *Jackson v. Denno*, 378 U.S. 368, 376 (1964).

The United States Supreme Court has further opined that a confession is involuntary if it is not "the product of a rational intellect and a free will". *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). "A heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

Another factor important to the validity of a waiver of *Miranda* rights is police misconduct or misrepresentation toward a defendant. "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Id.* at 476.

An involuntary confession violates constitutional protections, and a confession is such compelling evidence, trial courts must be careful to exclude involuntary confessions from the jury. As the United Supreme Court has stated:

A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

*Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

A. Standard of Review

“This Court is constitutionally obligated to give plenary, independent, and de novo review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions.” Syl. Pt. 2, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

“A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.” Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998).

Further, 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.” Syl. Pt. 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975).

Regarding a motion to suppress, the circuit court's factual findings are reviewed for clear error. Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719, 722 (1996).

B. Livermon did not make a knowing and voluntary waiver of his *Miranda* rights, neither was he sufficiently informed by the police of his right to terminate questioning at any time.

Having been informed that he was arrested for possession of marijuana, Livermon's waiver of his *Miranda* rights was not knowing and voluntary. The State is required to demonstrate by a preponderance of the evidence that a suspect in custody was properly

informed of his rights under *Miranda* and made a knowing and voluntary waiver of these rights.

Echoing the standard first articulated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), *Miranda* holds that “[t]he defendant may waive effectuation” of the rights conveyed in the warnings “provided the waiver is made voluntarily, knowingly and intelligently.” 384 U.S., at 444, 475, 86 S.Ct., at 1612, 1628. The inquiry has two distinct dimensions. *Edwards v. Arizona, supra*, 451 U.S., at 482, 101 S.Ct., at 1883; *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977). First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979). See also *North Carolina v. Butler*, 441 U.S. 369, 374–375, 99 S.Ct. 1755, 1758, 60 L.Ed.2d 286 (1979).

*Moran v. Burbine*, 475 U.S. 412, 421 (1986)

Although the forms Livermon signed had the traditional *Miranda* rights listed, neither the warning nor the waiver portion advised that he could terminate the interview at any time. A.R. 108-09. The right to terminate questioning is an important tenet of *Miranda*. *Michigan v. Mosley*, 423 U.S. 96 (1975); *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994). The South Charleston Police form did not clearly warn Livermon that he had a right to terminate questioning at any time, neither did Paschal mention this to him during his interrogation of Livermon. A.R. 987-1063.

C. Livermon was not aware of the consequences of waiving his right to remain silent.

The West Virginia Supreme Court has stated that one of the factors courts have considered to determine whether a statement is voluntary is “whether the defendant was ever advised initially of the nature of the charge against him.” *State v. Goff*, 169 W. Va. 778, 785 n. 8, 289 S.E.2d 473, 477 n. 8 (1982). Moreover, this Court has given credence to the belief “that some information should be given to the defendant as to the nature of the charge in order that he can determine whether to intelligently and voluntarily exercise or waive his *Miranda* rights.” *Id.*; see also *State v. McDonough*, 178 W.Va. 1, 3, 357 S.E.2d 34, 36 (1987).

In *State v. Moore*, 193 W.Va. 642, 457 S.E.2d 801 (1995), one of the factors upon which the Court focused was whether the defendant was aware of the nature of the charge against him. Although the police may not have expressly told Moore the nature of the charges against him, within minutes of the crime having occurred they detained him at the scene of the crime where his personal belongings still were, and took him into custody therefrom. The court held that under the circumstances there could be no confusion about what he was being charged with. *Id.* at 648, at 807.

By contrast, Livermon expressly did **not** know the nature of the charges against him. Despite the nature of the questioning, the officers repeatedly told him that he’d been arrested for possession of marijuana. And the only *Miranda* forms he signed waiving his rights only listed possession of marijuana. Once he was charged with armed robbery and wanton endangerment, he was not re-Mirandized despite the seriousness of the charges.

Thus, at the time Livermon waived his *Miranda* rights he was only under the impression that his statements could be used against him in relation to the marijuana charge.

Under the totality of the circumstances, including the manner in which Livermon was initially informed of his rights and the charge against him, the officers' decision not to re-Mirandize him, and the intended effect of their tactics on Livermon, the State has failed to meet its burden of proof regarding Livermon's *Miranda* rights.

The State has the burden of demonstrating by a preponderance of the evidence that the statement by the defendant was voluntary.

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.

In examining the totality of the circumstances, a court must consider a myriad of factors, including the defendant's age, intelligence, background and experience with the criminal justice system, the purpose and flagrancy of any police misconduct, and the length of the interview. *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995). The totality of the circumstances includes moral and psychological pressures to confess emanating from official sources. *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); *State v. Honaker*, 193 W.Va. 51, 454 S.E.2d 96 (1994).

*State v. Bradshaw*, 193 W. Va. 519, 527, 457 S.E.2d 456, 464 (1995).

D. Law enforcement officials misled Livermon into making an inculpatory statement by suggesting that it would be off the record. This unrecorded statement should have been excluded from evidence.

When charged with determining whether a confession was voluntary, the United States Supreme Court adopted the following test:

*Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897), held that the admissibility of a confession depended upon whether it was compelled within the meaning of the Fifth Amendment. To be admissible, a confession must be “free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.” 168 U.S., at 542-543, 18 S.Ct., at 187. More recently, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), carried forward the *Bram* definition of compulsion in the course of holding applicable to the States the Fifth Amendment privilege against compelled self-incrimination.

*Brady v. United States*, 397 U.S. 742, 753, 90 S. Ct. 1463, 1471-72 (1970). *See also Hutto v. Ross*, 429 U.S. 28, 30 (1976).

Further, when determining whether a confession was voluntary under the due process clause, courts look at the totality of circumstances including: “the crucial element of police coercion”, the location of the interview and its length, whether the interrogation is continuous, the defendant's maturity, education, physical condition, and mental health. The circumstances “also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation.” *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993) (citations omitted).

In *United States v. Shears*, 762 F.2d 397, 402 (4th Cir. 1985), the court examined the circumstances to determine what the defendant reasonably perceived based on the statements and representations of law enforcement officials at the time of the interview. In *U.S. v. Walton*, 10 F.3d 1024 (3d Cir. 1993), one day after having been Mirandized, the defendant met with law enforcement officials at a park bench to discuss the crime further. “Early in the conversation, [ATF Agent] Montford told Walton, ‘I’ve known you for a long time. If you want, you can tell us what happened off the cuff.’” *Id.* at 1027. The court noted:

Examining the totality of the circumstances in this case requires us first to determine whether Montford's statement to Walton that Walton could tell the agents what had happened "off the cuff" induced Walton's confession because it led him to believe that whatever he said would not be used against him. *Cf. Miller*, 796 F.2d at 609 n. 10 (indicating that the key issue is "whether, under the totality of the circumstances, the statement induced the confession, not whether it was, on its face, a promise").

*Id.* at 1028-29.

The court concluded, "Given the circumstances, there was no reason for Walton to disbelieve Montford that nothing he said would be used against him...." *Id.* at 1030. The court went on to note that since the agent's reference to off the cuff statements was inconsistent with the previous day's *Miranda* warnings, "A person without prior exposure to the criminal justice system, even one with Walton's intelligence and education [Walton had attended college.], could easily be taken in and induced to speak under these circumstances." *Id.*

The New Jersey Superior Court relied on the *Walton* analysis when determining the voluntariness of a confession in *State v. Pillar*, 820 A.2d 1 (N.J. Super. 2003). Noting the similarities, the *Pillar* court wrote:

The same reasoning applies in the present case. Indeed, the infirmity here runs deeper. A police officer cannot directly contradict, out of one side of his mouth, the *Miranda* warnings just given out of the other. An acquiescence to hear an "off-the-record" statement from a suspect, which the officer ought to know cannot be "off-the-record," totally undermines and eviscerates the *Miranda* warnings, at least with respect to a statement made, as here, in immediate and direct response to the misleading assurance.

*Id.* at 11-12.

Citing a Pennsylvania Supreme Court case, the court continued:

Even if we accept the trial judge's conclusion that the officer did not know what defendant meant by "off-the-record," a conclusion we consider implausible in light of the common usage of the expression, it was the officer's obligation to clarify what the statement did mean, especially in light

of the officer's acknowledgment that in his mind there was no such thing as an "off-the-record" conversation.

*Id.*, citing *Commonwealth v. Gibbs*, 553 A.2d 409, 411(Pa.), *cert. denied*, 493 U.S. 963 (1989).

Livermon signed two *Miranda* waiver forms at 9:19 p.m. and 1:00 a.m. A.R. 63-64, 85-86. He was questioned extensively regarding the robbery and wanton endangerment which occurred on August 8, 2013, but he was not informed that he was being charged with those crimes until after 2:00 a.m., over seven hours after having been arrested. A.R. 16-170, 987, 988-1063. The taped statement indicates that he was surprised and shocked that he was being charged with these crimes. A.R. 1038-41. He was told that he was no longer under arrest for possession of marijuana, but was now under arrest for first degree robbery and wanton endangerment. A.R. 1046. He was not newly informed of his *Miranda* rights and a new waiver of rights was not obtained for the new charges. A.R. 798.

An hour into the second interrogation, Paschal told Livermon for the first time that he was being charged with armed robbery. A.R. 796. Up to that point, they were just going around and around, getting nowhere. A.R. 797.

Q. [Defense Counsel] And the tension then was ramped up, all of a sudden Tyquan's whole demeanor changed, am I right?

A. [Detective Paschal] Yes, you could say that.

Q. When he said, "Oh, my God. Oh, my God. I can't believe this." And things like that?

A. Like I said, I thought it was pretty clear about it the whole time, but that was his response. Yes, sir.

Q. And at that point you didn't tell him, okay, now that you know that you are charged with robbery, and wanton endangerment, now you have to know that you have the right to remain silent, all of your other rights. You didn't do that at that point?

A. I didn't refresh his rights. Yes, sir. That's correct.

Q. One of the last things you said to him on the tape yesterday, we all got to hear it again, was, "I know you keep looking at it because you don't want to do it on the record." Those were your words to him. Right?

A. Correct.

Q. And by looking at it, you are talking about the [handheld] tape recorder. Correct?

A. Right.

Q. You said to him, "Is that what you want me to do, do you want me to turn it off? Are you going to tell me anything now?" Those were also your words?

A. Yes.

A.R. 797-98.

Officer Paschal further testified, "I know you keep looking at it because you don't want to do it on the record." "Is that what you want me to do, do you want me to turn it off? Are you going to tell me anything now? Do you want me to turn this off?". A.R. 798.

Paschal purposely turned the tape recording device off in order to induce Livermon to make an incriminating admission. A.R. 800. He testified that Livermon was focusing on the tape recorder. A.R. 114. Paschal testified that Livermon then stated that he had stolen the SKS rifle. A.R. 774.

At the trial, Paschal testified on cross examination about his decision to turn off the recorder.

Q. [Defense Counsel] So what you said to him holding the tape recorder, him looking at the tape recorder was "because you don't want to do it on the record", those were your words. Right?

A. [Detective Paschal] You know, I heard myself say on the record a couple of times, yes, sir.

Q. And you had told him well over an hour before that anything that he said could be used against him in a court of law. Right?

A. Yes, sir.

A.R. 799-800.

Upon further cross examination, Paschal admitted that he had turned the recorder off to get Livermon "to keep talking". The following colloquy occurred:

Q. And you chose the words off -- on-the-record and you asked him do you want me to turn it off?

A. Yes, sir.

Q. And he had been with you for an hour and a half at that time?

A. About that. Yes, sir.

A.R. 800-01.

The West Virginia Supreme Court has found that *Miranda* warnings must be renewed or repeated in certain situations to ensure that defendants understand their rights and that statements are voluntary. "Where police have given *Miranda* warnings outside the context of custodial interrogation, these warnings must be repeated once custodial interrogation begins. Absent an effective waiver of these rights, interrogation must cease." Syl. Pt. 4, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E. 2d. 456 (1995).

Unlike the defendant in *Bradshaw*, Livermon was in custody during the entire time he was interrogated by the police. The circumstances in this case, however, make repeated *Miranda* warnings necessary. Livermon had been arrested, informed that he was under arrest for misdemeanor possession of marijuana, questioned extensively, detained in a holding cell for two and a half hours, then questioned a second time between 1:00 a.m. and 2:00 a.m. He was then informed that he was being charged with first degree robbery and wanton endangerment.

Livermon's signed *Miranda* waivers referred only to the marijuana possession charges. A.R. 63-65, 115. The delay in informing him of the more serious charges was clearly a tactical decision on the part of the police. The manner in which he was informed of the charges and his reaction to this information demonstrate that Livermon was not aware of the consequences of waiving his right to remain silent. His statements after that time were not the result of a knowing and voluntary waiver of his rights.

Paschal testified that after he had turned the tape recorder off, Livermon admitted stealing a rifle from a nearby apartment. A.R. 774.

Paschal testified to his understanding that a video and audio recording was running in the processing room. A.R. 94. He later learned that the audio did not record at the time Livermon was in the room. The West Virginia Supreme Court has held that there is no Constitutional requirement that creates a duty that police electronically record the custodial interrogation of an accused. Syl. Pt. 10, *State v. Kilmer*, 190 W.Va. 617, 439 S.E.2d. 881 (1993); Syl. Pt. 7, *State v. Williams*, 190 W.Va. 538, 438 S.E.2d. 881 (1993). The issue of the admissibility of his statement is not controlled by the lack of a tape recording thereof. The determining factor is whether the officer's statements and actions led Livermon to believe that his unrecorded statement would not be used against him, contradicting and vitiating his earlier waiver.

A number of jurisdictions have found *Miranda* violations where the police promised or implied that a defendant's statement would be confidential even after he had waived his *Miranda* rights. *Lee v. State*, 12 A.3d 1238, 1247-48 (Md. 2011); *Hopkins v. Cockrell*, 325 F.3d 579 (5<sup>th</sup> Cir. 2003); *Spence v. State*, 642 S.E.2d 856 (Ga. 2007); *State v. Pillar*, 820 A.2d 1 (N.J. Super. 2003); *State v. Stanga*, 617 N.W.2d 486 (S.D. 2000).

The rule was set forth most clearly by the Maryland Supreme Court in *Lee v. State*, 12 A.3d 1238, 1247-48 (2011).

Since *Miranda* was decided, courts have applied the principles of that case and its progeny to hold that, after proper warnings and a knowing intelligent, and voluntary waiver, the interrogator may not say or do something during the ensuing interrogation that subverts those warnings and thereby vitiates the suspects earlier waiver by rendering it unknowing, involuntary, or both. Such action on the part of the police violates *Miranda* and, as a consequence, requires suppression of any statements the suspect makes thereafter during the interrogation."

In *Lee*, after about an hour into the interrogation, in response to the detective's question, Lee stated, "Yeah, this is being recorded." The detective responded, "This is between you and me, bud. Only me and you are here, all right? All right?" *Id.* at 1243. Defense counsel had unsuccessfully argued that any statement thereafter should have been excluded from evidence in violation of Lee's *Miranda* rights. The court agreed and granted Lee a new trial.

The court further noted:

Since *Miranda* was decided, courts have applied the principles of that case and its progeny to hold that, after proper warnings and a knowing, intelligent, and voluntary waiver, the interrogator may not say or do something during the ensuing interrogation that subverts those warnings and thereby vitiates the suspect's earlier waiver by rendering it unknowing, involuntary, or both. Such action on the part of the police violates *Miranda* and, as a consequence, requires suppression of any statements the suspect makes thereafter during the interrogation.

*Id.* at 1247-48. The court further stated, "Moreover, even if we were to assume that Detective Schrott did not intend his words to imply a promise of confidentiality (an assumption about which we have serious doubt), our focus is not what the detective intended, but rather on what a layperson in Petitioner's position would have understood those words to mean." *Id.* at 1250.

In *State v. Stanga*, 617 N.W.2d 486, 491 (S.D.2000), the South Dakota Supreme Court stated:

Although trickery is sometimes a legitimate interrogation technique, *Miranda* warnings are a "concrete" prerequisite to custodial interrogation and may not be manipulated through deception. These warnings would be senseless if interrogating officers can deceive suspects into believing their admissions will not go beyond the interrogation room. As the warnings are constitutionally required, interrogation techniques designed to mislead suspects about those warnings are impermissible.

The unrecorded statement in this case follows the same pattern which is found in the cases quoted above. Paschal stated to Livermon that he knew that he did not want to make a statement on the record and asked him several times whether he wanted the tape recorder turned off. Paschal took these actions for the purpose of convincing Livermon to make a further statement.

In another New Jersey Supreme Court case, the court opined, “Moreover, a misrepresentation by police does not render a confession or waiver involuntary **unless the misrepresentation actually induced the confession.**” *State v. Cooper*, 700 A.2d 306, 320 (1997), *cert. denied*, 528 U.S. 1084 (2000) (emphasis supplied).

Under the facts of the instant case, Livermon would have believed that statements made after the recorder was turned off were “off the record,” and would not be used against him in a court of law. Therefore, they were not made in compliance with the requirements of *Miranda*. “These warnings would be senseless if interrogating officers can deceive suspects into believing their admissions will not go beyond the interrogation room.” *Stanga, supra*. Therefore, these statements should have been excluded from evidence at the trial.

This Court should find that the unrecorded statements are involuntary. Livermon believed he was giving an “off the record” statement based on the deliberate words and actions of the interrogating officer. In *State v. Pillar, supra*, the New Jersey court found that such conduct amounts to an assurance by the police that the statement would not be used against him, basically a false promise. Livermon’s statement in response to this false promise was not the product of a free and unconstrained choice. Therefore, this Court

should rule that the unrecorded portion of Livermon's statement is involuntary and therefore should have been excluded.

## II. LIVERMON'S STATEMENT TO THE POLICE WAS OBTAINED IN VIOLATION OF HIS RIGHT TO PROMPT PRESENTMENT PURSUANT TO W. VA. CODE § 62-1-5.

### A. Standard of Review

The standard of review regarding whether an involuntary confession obtained as a result of delay in presentment before a magistrate should be excluded from evidence is the same as that set forth in the foregoing section (I. A.) regarding the motion to suppress. It is hereby incorporated by reference.

### B. Prompt Presentment Requirement

W.Va. Code § 62-1-5 requires that a defendant must take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made. Failure to promptly present the defendant before a magistrate may result in the suppression of statements obtained in violation of the rule.

The delay in taking a defendant to a magistrate may be a critical factor in the totality of circumstances making a confession involuntary and hence inadmissible where it appears that the primary purpose of the delay was to obtain a confession from the defendant. Syllabus Point 6, *State v. Persinger*, 169 W.Va. 121 (1982) Syl. Pt. 1, *State v. Guthrie*, 173 W.Va. 290 (1984); *State v. Whitt*, 184 W.Va. 340, (1990).

Additionally, we have stated that "one of the primary purposes of a prompt presentment statute is to ensure that the police do not use the delay to extract a confession from a defendant through prolonged interrogation." *State v. Hutcheson*, 177 W.Va. 391, 394 (1986). Thus, the focus is generally on the delay which precedes, and can therefore be used to induce, the confession. *State v. Judy*, 179 W.Va. 734 (1988) As we stated in Syllabus Point

8 of *State v. Worley*, 179 W.Va. 403 *cert. denied*, 488 U.S. 895 (1988):  
“Ordinarily the delay in taking an accused who is under arrest to a magistrate after a confession has been obtained from him does not vitiate the confession under our prompt presentment rule.” Syllabus Point 4, *State v. Humphrey*, 177 W.Va. 264 (1986).

*State v. Fortner*, 182 W.Va. 345, 352, 387 S.E.2D 812, 819 (1989).

“Our prompt presentment rule contained in W. Va. Code § 62–1–5, and Rule 5(a) of the West Virginia Rules of Criminal Procedure, is triggered when an accused is placed under arrest.” Syl. Pt. 4, *State v. Rogers*, 231 W.Va. 205, 744 S.E.2d 315 (2013).

“When a statement is obtained from an accused in violation of the prompt presentment rule, neither the statement nor matters learned directly from the statement may be introduced against the accused at trial.” Syl. Pt. 1, *State v. DeWeese*, 213 W.Va. 339, 582 S.E.2d 786 (2003).

The rule enunciated in Syl. Pt. 1, *State v. DeWeese*, 213 W. Va. 339, 582 S. E. 2d 786 (2003) is that a statement obtained from the accused in violation of the prompt presentment rule cannot be introduced against the accused at trial. The crucial and determinative fact in *DeWeese* is that he was not taken before a magistrate because the police wanted to obtain a statement from him.

Assuming that adequate probable cause existed to make an arrest, Livermon still should have been promptly presented to a magistrate. *See* Syl. Pt. 2, *State v. Humphrey*, 177 W. Va. 264, 351 S.E.2d 613 (1986) and Syl. Pt. 4, *State v. Rush*, 219 W. Va. 717, 639 S. E. 2d. 809 (2006). In two recent cases decided by this Court, there were delays between confession and presentment. The Court correctly held that those delays were not occasioned by the desire to get a confession because the confessions had been made

already. *State v. McCartney*, 228 W. Va. 315, 719 S. E. 2d 785 (2011) and *State v. Holcomb*, 223 W. Va. 843, 679 S.E.2d 675 (2009). Livermon, however, does not complain about the delay between confession and presentment, but the opposite. The delay was a direct cause of his inculpatory statement.

The reason for the delay could not be clearer. It was occasioned by the desire to extract a confession. Livermon had already been detained and questioned for hours before the police allegedly obtained an inculpatory statement. The circuit court abused its discretion by allowing the jury to hear the police officer's testimony about Livermon's purported confession.

“The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant.’ Syllabus Point 6, *State v. Persinger*, W.Va., 286 S.E.2d 261 (1982), as amended.” Syllabus Point 1, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984).

Syl. Pt. 1, *State v. Humphrey*, 177 W.Va. 264, 315 S.E.2d 397(1984).

Explaining the prompt presentment requirement, this Court looked to other jurisdictions, and wrote:

The Rhode Island Supreme Court in *Johnson*, 119 R.I. at 756–57, 383 A.2d at 1017, after discussing its prompt presentment rule, gave the following summary: “In short, delay, if it is to render a confession inadmissible, must have been operative in inducing the confession, and obviously only the detention that precedes a confession can have that effect. See *United States v. Mitchell*, 322 U.S. 65, 70, 64 S.Ct. 896, 898, 88 L.Ed. 1140, 1143 (1944); *United States v. Seohnlein*, 423 F.2d 1051, 1053 (4th Cir. 1970); *Bailey v. United States*, 117 U.S.App.D.C. 241, 243–45, 328 F.2d 542, 544–46 (1964); *State v. Traub*, 151 Conn. 246, 249–50, 196 A.2d 755, 757 (1963).”

*Id.* at 270, at 618.

Livermon was transported to the South Charleston Police Department sometime before 8:00 p.m. A.R. 534, 675-76. The first recorded statement began at around 9:19 p.m. and lasted approximately seventy minutes. A.R. 63-64, 71, 767, 792. A magistrate was on duty in the Kanawha County Judicial Annex. A.R. 102. There was a delay of approximately two and a half hours before the second recorded statement at 1:00 a.m. Livermon was placed in a holding cell during that time. A.R. 792. Livermon was not formally processed or fingerprinted during the delay before the second statement. *Id.* Such a delay cannot be used to extract a confession through prolonged interrogation or prolonged confinement. Considering the totality of the circumstances, this Court should find that Livermon's statement should have been suppressed as it was obtained in violation of his right to prompt presentment pursuant to West Virginia Code § 62-1-5.

West Virginia Code § 62-1-5(a)(1) provides, in relevant part, that "any person making an arrest without a warrant for an offense committed in his presence or as otherwise authorized by law, shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made." In *United States v. Claridy*, the Fourth Circuit held that "a confession must be suppressed if (1) it was made prior to the arrestee's presentment to a magistrate judge; (2) the presentment to a magistrate judge was unreasonably or unnecessarily delayed; and (3) the confession was made more than six hours after the arrest or detention." *United States v. Claridy*, 601 F.3d 276, 284-5 (4th Cir. 2010). The West Virginia Supreme Court of Appeals has repeatedly recognized that prompt presentment rules are designed to avoid prolonged interrogation in order to coerce a confession. *See State v. McCartney*, 228 W.Va. 315, 326, 719 S.E.2d 785, 796 (W. Va. 2011);

*see also State v. Rogers*, 231 W.Va. 205, 211, 744 S.E.2d 315, 321 (W. Va. 2013); *see also State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982).

West Virginia has recognized that the analysis of an unreasonable delay in prompt presentment is not constrained to a specific time period. *State v. Persinger*, 169 W.Va. 121, 130, 286 S.E.2d 261, 270 (1982). In fact, an “unjustifiable and unreasonable delay in taking the accused before a magistrate after his initial arrest may in itself be sufficient to render a confession involuntary.” *Id.* at 138, at 271. An emphasis on the unreasonableness of the delay will tend to show that the purpose of the delay was to obtain a confession, making such a statement involuntary. In *State v. Persinger*, the West Virginia Supreme Court of Appeals looked at other courts and the frequency with which other jurisdictions “have viewed the delay in taking the defendant before a magistrate to be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant.” *Id.* at 137, at 270. The court held that “the focus is not so much on the length of the detention but whether the police were primarily using the delay in bringing the defendant before a magistrate to obtain a confession from him.” *Id.*

Despite the existence of probable cause for Livermon’s misdemeanor crime of possession of marijuana, the officers delayed prompt presentment of the felony charges—the only ones ultimately lodged against Livermon—to question him about separate felony offenses. *State v. Milburn*, 204 W.Va. 203, 511 S.E.2d 828 (1998) is distinguishable. There, the defendant was arrested for arson and questioned for a separate crime—murder—for which the officers had no probable cause to arrest. *Id.* The Court held that this was not a violation of prompt presentment. *Id.* at 212, at 837. In fact, the officers in *Milburn* had no

reason to suspect that the defendant was involved in the latter crime. Rather, the officers “merely believed that [the defendant] knew the identity of the perpetrator[,]” as evidenced “by the police officers’ testimony.” *Id.* Thus the defendant had confessed to a crime, arson, and was questioned for a separate crime by the police who had no intention of obtaining a confession.

The facts of the two cases are not even remotely similar. In the instant case, the questioning, which took place in two separate interrogations by at least three officers and during a time span of five to six hours, revolved almost entirely around the robbery and wanton endangerment. A.R. 65, 162. In fact, Paschal testified in the suppression hearing before the circuit court that he “immediately” explained to Livermon that he suspected Livermon of the robbery and wanton endangerment. A.R. 88. Thus, the officers’ purpose was, admittedly, to question Livermon about a separate crime for which he was a suspect. Furthermore, the only inculpatory statement that was allegedly made took place after Paschal turned his audio recorder off. A.R. 114. Something Paschal “just” did “to see if he would say something.” *Id.*

During the suppression hearing, the following exchange took place between the State and Paschal:

Q. [Prosecuting Attorney] Okay. Is it common practice and procedure, we have been talking about common practices and procedures, is it common for you to detain someone on what you believe you can prove and probe with further questioning?

A. [Detective Paschal] Yes. We have done that before.

Q. What's the reason for that?

A. Well, the reasoning for this was when we pick up somebody, we arrest them, we get the opportunity to talk with him, we develop details on other incidents. And if the details are developed from either the person we're talking to or during that time span if there's details developed by somebody else, somebody else is talking to leads us to believe that the [sic] this other crime occurred, then we will charge with the other crime instead of the first one.

A.R. 115-16.

The State asked Paschal if it was common to question a suspect further about what he or she has been detained on—here, that crime was possession of marijuana. Yet, the questioning, and Paschal's testimony as to the questioning process, deals with the crimes of robbery and wanton endangerment. In addition, by the time Detective Gordon, the officer who first interrogated Livermon, began to question Livermon around 9:00 p.m., he had two statements from other individuals which allegedly implicated Livermon. A.R. 65, 70.

Indeed, at the trial, Paschal testified that "I thought I was clear about talking about the shooting the entire time." A.R. 795. If Paschal's testimony is an accurate representation of a common practice amongst police officers, then these officers had "developed" "details" about "the other crime" and could have charged Livermon. Instead, Livermon was questioned for about an hour by Detective Gordon, then he was questioned for another hour or more by Paschal, until approximately 2:30 in the morning when he allegedly made an unrecorded inculpatory statement. A.R. 112-13. According to Detective Gordon's

testimony, the officers had statements which implicated Livermon by 9:00 p.m. That leaves one reason to hold Livermon another five hours: obtaining a confession.

Paschal's decision to turn off the recorder allowed him to achieve that goal. He testified at the suppression hearing that he turned off the recorder "to see if [Livermon] would say something". A.R. 114.

Q. [Defense Counsel] And why did you think he would say something if you turned it off?

A. [Detective Paschal] Because he was staring at it. He was staring at the recorder the whole time like he didn't want to say something on the recorder.

*Id.*

Again, the West Virginia Supreme Court of Appeals has repeatedly recognized that prompt presentment rules are designed to avoid prolonged interrogation aimed at coercing a confession. *See State v. McCartney*, 228 W.Va. 315, 326, 719 S.E.2d 785, 796 (W. Va. 2011); *see also State v. Rogers*, 231 W.Va. 205, 211, 744 S.E.2d 315, 321 (W. Va. 2013); *see also State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982) In *State v. Persinger*, this Court considered that "the delay in taking the defendant before a magistrate to be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant." The court held that "the focus is not so much on the length of the detention but whether the police were primarily using the delay in bringing the defendant before a magistrate to obtain a confession from him." *Id.* at 137, at 270.

Here, the police deliberately delayed presenting Livermon to the magistrate specifically to get him to confess.

III. THE COMBINED ERRORS THAT OCCURRED DURING LIVERMON'S TRIAL PROCEEDINGS REQUIRE REVERSAL OF HIS CONVICTION OF ROBBERY IN THE FIRST DEGREE AND WANTON ENDANGERMENT, AND HIS SENTENCE OF FORTY YEARS IMPRISONMENT.

As set forth in sections I and II hereinabove, the State committed two significant errors that prevented Livermon from receiving a fair trial:

1. Violation of Livermon's *Miranda* rights; and
2. Violation of Prompt Presentment Requirements.

This Court has previously addressed the effect of an accumulation of error that would constitute a denial of the right to receive a fair trial. "Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." Syl. Pt. 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

Neither of the errors set forth above constitute harmless error. In fact, either of these errors alone should justify a reversal of the Livermon's conviction and sentence. Livermon had a constitutional right to all the benefits afforded by *Miranda v. Arizona*, as well as West Virginia's Prompt Presentment statute. As a result, it was incumbent upon the State and the circuit court to ensure that he was afforded a fair trial and due process of law.

### CONCLUSION

Tyquan Livermon's *Miranda* rights were violated by law enforcement deliberately to obtain his confession. By the word and deed the police officers misled Livermon into

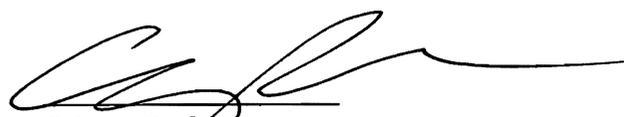
believing that his unrecorded statement would be off the record and therefore would not be used against him.

Tyquan Livermon was not presented to a magistrate after he was arrested because the police wanted to get his confession first. After having been in custody over seven hours, being incommunicado, kept up past midnight without being presented to a magistrate, and interrogated twice about circumstances unrelated to the misdemeanor charge for which he was arrested, Livermon allegedly confessed to his interrogator that he had stolen a weapon.

Under such circumstances the confession should not have been admitted as evidence. Livermon likely would have been acquitted had the purported confession properly been suppressed. The effect was that Livermon failed to receive a fair trial. Thus, his conviction should be set aside and a new trial should be ordered.

**RESPECTFULLY SUBMITTED,  
TYQUAN ANTONIO LIVERMON,**

By Counsel



C. Joan Parker  
W.Va. Bar No. 4360  
Assistant Public Defender  
Kanawha County Public Defender Office  
P.O. Box 2827  
Charleston, WV 25330-2827  
304-348-2323  
[c.joan.parker@wvdefender.com](mailto:c.joan.parker@wvdefender.com)

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, C. Joan Parker, certify that on September 4, 2015, I mailed the Petitioner's Brief and Appendix to Benjamin F. Yancey, Assistant Attorney General, State Capitol Building 1, Room W. 435, Charleston, WV 25305.



C. Joan Parker  
Counsel for Petitioner