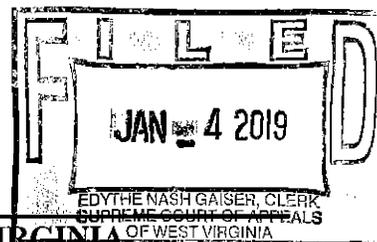


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 18-0406

STATE OF WEST VIRGINIA,

*Plaintiff below,  
Respondent,*

v.

OSCAR CHAPMAN,

*Defendant below,  
Petitioner.*

**RESPONDENT'S BRIEF**

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## **ASSIGNMENTS OF ERROR**

- A) The Trial Court erred at trial by prohibiting defense counsel from using audio taped statements and recordings made by key prosecution witnesses to the police to show prior inconsistent statements to impeach and discredit the witnesses' trial testimony and to assist the jury in determining the witnesses' credibility.
  
- B) The Trial Court erred in its' [sic] ruling denying the exclusion of State Witness Ronald Cook-Slayton from testifying at trial based on the Prosecution's failure to provide proper pre-trial notification when the identity of said witness was known, or should have become known, to the State by the exercise of due diligence.
  
- C) The Trial Court erred in its' [sic] ruling denying Petitioner's Motion for a New Trial based on the State's failure to provide the Petitioner with complete and prompt disclosure of discovery information.

## **STATEMENT OF THE CASE**

### **A. Procedural Background**

A Marion County, West Virginia Grand Jury indicted the Petitioner for First Degree Murder, First Degree Robbery (with a Firearm), Nighttime Burglary and Conspiracy to Commit a Felony. A.R. 11-13. A petit jury convicted him on all counts, recommending mercy on the Murder conviction. A.R. 484-485. Consequently, the circuit court sentenced the Petitioner to 1 to 5 years on the Conspiracy conviction, 1 to 15 years on the Burglary conviction, 15 years on the Robbery conviction, and a life with mercy sentence on the Murder conviction. A.R. 489-490. The circuit court ordered the Burglary conviction to run consecutively to the Conspiracy conviction, and the Robbery and Murder convictions to run concurrently with each other but consecutively to the Burglary and Conspiracy convictions. A.R. 490. The Petitioner received 321 days of credit for time served. A.R. 490. The circuit court imposed the costs of the proceedings and attorney fees upon the Petitioner along with restitution. A.R. 490-491.

## **B. Pre-Trial Proceedings**

Before trial, the Petitioner made a number of motions. Among these pretrial motions was a *Motion for Disclosure of Confidential Informant*. A.R. 24-26. In this Motion, the Petitioner sought the name, address, telephone number and current location of a confidential source interviewed by police detective Douglas Yost on November 18, 2016. A.R. 24. Specifically, the Petitioner alleged:

That the confidential unnamed source provided a statement to law enforcement officer Douglas Yost on or about November 18, 2016, alleging that [the Petitioner] personally called him the week prior to the robbery and that he personally went to a residence on Benoni Avenue and met with [the Petitioner], “Twan” and another co-defendant, Timothy Lambert, and that during that time the [Petitioner] provide information that he “had a .40 caliber but he did not see it” and other information alleging that the [Petitioner] had advance knowledge of the robbery alleged in Count II of the Indictment.

A.R. 24-25. The Petitioner subsequently filed a *Motion for Additional Discovery* where in the Petitioner sought, *inter alia*, “[t]he name, address, telephone number, current location, and criminal history of the State’s ‘confidential source’ interviewed by Detective Douglas Yost on November 18, 2016[.]” A.R. 32. Thereupon, the Petitioner filed *Defendant’s Second Motion for Additional Discovery*, A.R. 41-43 and *Defendant’s Motion to Compel the State to Produce a Final Witness and Exhibit List*. A.R. 44-45.

The circuit court heard these motions on July 10, 2017. A.R. 52. At that hearing, the Petitioner did not oppose the State’s motion to continue and the case was continued until the October 2017 Term of Court. A.R. 54-56. The circuit court directed both sides to exchange initial witness and exhibit lists by July 31, 2017, A.R. 66, with final lists to be exchanged thirty-days prior to trial. A.R. 67.

On July 31, 2017, the State disclosed its *Proposed Witness and Exhibit Lists*. A.R. 76-95. The witness list disclosed the confidential sources (albeit without so naming him) as:

48. Robert Antoine Jarvis

Baltimore Street  
Fairmont, WV 26554

A.R. 83.

In his *Second Motion for Additional Discovery*, the Petitioner sought information relating to “Cody,” specifically seeking:

The name, address, telephone number, current location, criminal history and statement of “Cody”, as referenced during the recorded NCRJ telephone call between Jo Ann Clay and Michelle Belton’s NCRJ on December 8, 2016 (phone call no. 19).

A.R. 41. The Petitioner’s *Fourth Motion for Additional Discovery* sought information relative to “Cody,” specifically requesting

The full name, address, telephone number, current location, criminal history and statement of “Cody”, as referenced during the recorded NCRJ telephone call between JoAnn Clay and Michelle Belton on 12/8/2016 (phone call no. 19).

A.R. 89.

The State furnished its response to the Petitioner’s discovery request on January 19, 2017, once it was able to determine who “Cody” was. A.R. 153. The Petitioner filed an *Objection to Additional Witnesses and Motion to Exclude* arguing that the disclosure was over the thirty-day time limit before trial as provided for by the circuit court in its bench order of July 10, 2017. A.R. 158.

A hearing on the Motion was held on January 26, 2018, the Prosecuting Attorney explained to the circuit court:

Mr. Cook-Slayton has been – actually I think he was one of the requests for additional discovery or motion to compel most recently filed by [defense counsel] whose street name has been intermentently [sic] used as either Colby or Kobe, and we were not able to determine who he was until we reinterviewed witnesses in jail who made reference to him being the father of some other person’s child in that setting and Detective Yost recognized if that is so and so’s – that’s the father of so and so’s child than that’s Ronald Cook – Ron Cook-Slayton, and we previously debriefed him in another case. I know where he is.

We spoke to him, confirmed he is in fact Colby, which I don't know where that come from Ron Cook-Slayton, but that is his nickname, and we disclosed that to [defense counsel] immediately upon determining that. And he is the source for the two fire arms that were utilized in this case and that they were returned to him afterwards.

A.R. 134-135.

The circuit court then pointed out, and defense counsel specifically agreed, that West Virginia law gives some leeway if there are witness identifications after the deadline for excusable reasons. A.R. 136.

The circuit court then offered the Petitioner a continuance of the trial. A.R. 140. The Petitioner rejected the circuit court's continuance offer, specifically telling the circuit court, "Your Honor, my client does not desire a continuance at this point. We can and will deal with any objections during the trial dealing with any testimony of the witnesses." A.R. 141. The circuit court ruled, "[a]ll right at this point, the witnesses are not excluded given the – give where were [sic] at. Certainly this Court will listen to any other objections to the particular testimony of any of those witnesses, Mr. Hamilton, at the time you need to take that up at trial." A.R. 142.

### **C. Trial**

On November 17, 2016, Marion County Chief Medical Examiner Lloyd White was called to 232 Watson Avenue, Apartment 1, in Fairmont, West Virginia .S.A.R. 133.<sup>1</sup> Upon entering the apartment, Mr. White observed a dead body on the floor near the entrance to the kitchen. S.A.R. 133. The body had a bullet wound to the right side and one on the left leg just above the knee. S.A.R. 136. Mr. White, in consultation with the West Virginia Chief Medical Examiner, determined an autopsy would be performed. S.A.R. 135.

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<sup>1</sup>"S.A.R." refers the Supplemental Appendix Record that was filed by the Respondent contemporaneously with the filing of this Brief. The Supplemental Appendix Record was accompanied by a motion to supplement the record.

Fairmont City Police Sergeant Samuel Murray observed the autopsy and observed State Medical Examiner Allen Mock, M.D., remove three projectiles from the decedent, from the left leg, the torso, and the upper spinal column. S.A.R. 152. The projectiles removed from the neck and the rib were .22 caliber bullets, S.A.R. 154, 155, and the one removed from the knee was a .40 bullet. S.A.R. 156. Sergeant Murray spoke with Fairmont Police Sergeant Stewart who informed Sergeant Murray that there were cartridge casings recovered from the crime scene that were consistent with the projectiles removed from the decedent. S.A.R. 156.

Dr. Mock testified as an expert witness without objection. S.A.R. 163. Dr. Mock testified that by the use of fingerprints, he was able to identify the deceased as Malcolm Whitted. S.A.R. 168. Dr. Mock identified three gunshot wounds to Mr. Whitted. S.A.R. 169. Mr. Whitted had been shot in the right lower lip with the round sliding down the side of the tongue, into the back of the mouth, and coming to rest in the spine. S.A.R. 172. This would have been a fatal wound. S.A.R. 172. Mr. Whitted had also been shot in the chest, S.A.R. 173, which also would have been a fatal wound. S.A.R. 173. Finally, Dr. Mock identified a wound to Mr. Whitted's left leg, S.A.R. 173, which was also a potentially fatal injury. S.A.R. 190. The first two wounds were caused by .22 bullets, S.A.R. 189, and the leg wound was caused by a .40 caliber bullet. S.A.R. 190. Dr. Mock opined that Mr. Whitted's cause of death was multiple gunshot wounds to the face, torso and extremities and the manner of death was homicide. S.A.R. 174.

The State called Timothy Lambert to testify. S.A.R. 194. Mr. Lambert admitted his participation in the events that resulted in Malcolm Whitted's death. S.A.R. 198. He pled guilty to First Degree Robbery, Conspiracy, and Delivery of a Controlled Substance and received a definite thirty year sentence. S.A.R. 198.

Mr. Lambert testified he was at a Vanny Clay's house on Eighth Street in Fairmont, S.A.R. 206, with several others, including the Petitioner, Michelle Belton and a person named Jay (whose last name was unknown to Mr. Lambert),<sup>2</sup> where discussion turned to robbing the Watson Avenue location, S.A.R. 201, which was supposedly the location of money and drugs. S.A.R. 199. The Petitioner brought the robbery up initially. S.A.R. 201. No one in the group was armed, S.A.R. 202, so Vanny called someone to obtain firearms and Jay, the Petitioner, and Vanny left Vanny's house, later returning with a .22 caliber long rifle, an AK-47,<sup>3</sup> a .40 caliber pistol, and a 9mm pistol. S.A.R. 202. The Petitioner apparently admitted that the .40 pistol belonged to him. S.A.R. 202. When they returned with the firearms they were accompanied by someone named Devon. S.A.R. 203. Vanny Clay and the Petitioner then left again, this time to get bullets. S.A.R. 203. They later returned with two sandwich baggies of bullets. S.A.R. 204. All the participants in the robbery were to be armed, except for Vanny who was to be the driver of a black GMC Jimmy. A.R. 205.

Mr. Lambert then explained to the jury how the group was going to gain access to the Watson Avenue location. S.A.R. 206. A day or two before the robbery, Mr. Lambert, the Petitioner, and Vanny actually went to the Watson Avenue residence so Mr. Lambert could purchase drugs. S.A.R. 206. After purchasing drugs, Mr. Lambert wanted to renter the apartment, beat up the occupants, and steal whatever they had. S.A.R. 207. The Petitioner did not agree, claiming they needed guns to effect a robbery. S.A.R. 207. The Petitioner and Mr. Lambert fought over their respective robbery plans on the porch at the Watson Avenue location and Mr. Lambert lost his hat

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<sup>2</sup> Mr. Lambert testified that while he did not know last names, he "pretty much kn[e]w exactly who everyone [was] . . . without a doubt." S.A.R. 249.

<sup>3</sup> The AK-47 was technically a Norinco SKS. *See* S.A.R. 292; 393. "Both the SKS and AK-47 look alike[.]" *State v. Youngblood*, 48 So. 3d 1122, 1126 (La. Ct. App. 2010). *See also State v. Webb*, No. 10AP-289, 2010 WL 5141710, ¶ 7 (Oh. Ct. App. Dec. 14, 2010) (noting that the SKS resembles the AK-47).

and necklace. S.A.R. 207. Andrew Minger who was at the Watson Avenue location later told Mr. Lambert that Mr. Lambert's stuff was back at the Watson Avenue apartment. S.A.R. 207. Both Andrew and apparently Mr. Whitted informed Mr. Lambert he could return to collect the items Mr. Lambert lost. S.A.R. 208. Based on this, Mr. Lambert telephoned the Watson Avenue location and told the occupants he would be returning to retrieve his hat and necklace. S.A.R. 208. By this subterfuge, he hoped to obtain entry into the apartment for the robbery. S.A.R. 208.

One set of the group left in the black Jimmy. S.A.R. 208. Vanny drove and Mr. Lambert was in the passenger seat. S.A.R. 208. The Petitioner was immediately behind him, Devon rode in the middle, and Jay was behind Vanny. S.A.R. 208. Devon and Jay had handkerchiefs and gloves. S.A.R. 209. Mr. Lambert did not because he believed no one would be hurt. S.A.R. 209. Mr. Lambert had the SKS/AK-47, Devon had his .22 caliber rifle, Jay had the .40 caliber pistol, and the Petitioner had a 9mm pistol. S.A.R. 213.

When the group pulled up to 232 Watson Avenue, the group exited the Jimmy with Mr. Lambert in front, followed by Devon and the remainder. S.A.R. 215. The Petitioner got out to get in the front of the car and said something to Devon which Mr. Lambert could not overhear. S.A.R. 215. The Petitioner then reentered the Jimmy in the front passenger seat. S.A.R. 216. Vanny and the Petitioner were to circle the block and wait for the remaining trio to exit. S.A.R. 216-217.

Mr. Lambert put his rifle down and knocked on the front door of Apartment 1, and Mr. Whitted and Andrew opened the door. S.A.R. 217. Mr. Lambert told them he was there to get his stuff. S.A.R. 217. Mr. Lambert grabbed his rifle and entered the apartment. S.A.R. 217. Mr. Lambert told Mr. Whitted to give him the money and nothing would happen. S.A.R. 217. Devon and Jay were directly behind Mr. Lambert. S.A.R. 217. Mr. Whitted and Andrew took the situation as a joke, but realized its seriousness when Devon and Jay entered the apartment. S.A.R. 217-218.

Mr. Whitted went into the bedroom and closed the door behind him,. S.A.R. 218. Mr. Lambert hit the door and it swung open. S.A.R. 218. There were people in the bedroom that knew Mr. Lambert and again believed what was occurring was a joke. S.A.R. 218. Mr. Lambert informed them it was no joke and that the occupants should give Devon and Jay what they wanted to end the situation. S.A.R. 218. Andrew's father attempted to take the rifle from Mr. Lambert and Mr. Lambert jerked it back. S.A.R. 218. At that point, Mr. Whitted walked out of the bedroom. S.A.R. 218. As Mr. Lambert was walking out the door, he heard gunshots and saw Devon with his rifle up. S.A.R. 218. Mr. Lambert then heard the report of the .40 caliber pistol. S.A.R. 219.

Mr. Lambert dropped his rifle and dropped to the floor. S.A.R. 219. Devon and Jay then left. S.A.R. 219. Mr. Lambert apologized to Mr. Whitted, yelled for someone to call 911, picked up his rifle, and fled the apartment. S.A.R. 219-220. The Jimmy was gone along with Vanny, the Petitioner, Devon, and Jay. S.A.R. 220. Mr. Lambert threw his rifle up on a roof and then went to his friend Renee's house where he did drugs with her for about 20 minutes. S.A.R. 220. Mr. Lambert then called Vanny. S.A.R. 223. Vanny told Mr. Lambert he would send Michelle to pick him up. S.A.R. 224. Michelle picked Mr. Lambert up and drove him back to Vanny's residence. S.A.R. 224.

Mr. Lambert testified the plan to rob the Watson residence had its genesis even earlier than the fight between the Petitioner and himself on the porch. S.A.R. 225. Mr. Lambert testified it took root a couple weeks before it happened. S.A.R. 225. A group of Mr. Lambert's acquaintances, including the Petitioner, had a conversation that the Watson Avenue apartment was being used for drug activity and that there was a suitcase of money there. S.A.R. 225. The conversation turned to the belief the occupants of Watson Avenue were simply unprepared for someone to run into the apartment and take the money. S.A.R. 225. Mr. Lambert, who was high, was ready to go then and

there to rob the apartment. S.A.R. 225-226. During this planning, a person named “Twizzy” or “Twiz” was called by either the Petitioner or a Jones to participate in the robbery. S.A.R. 226. The Petitioner, Mr. Lambert and “Twizzy” left together. S.A.R. 226. The Petitioner wanted to get his gun. S.A.R. 226. The Petitioner got dropped off. S.A.R. 226. “Twizzy” was telling Mr. Lambert that he did not trust the Petitioner and did not think the Petitioner would really carry through with the robbery. S.A.R. 226. “Twizzy” then dropped Mr. Lambert off and Mr. Lambert “kind of knew he wasn’t coming back[,]” so Mr. Lambert went back to where the trio had started. S.A.R. 226.

Mr. Lambert then returned to testifying about the night of the actual robbery. When Mr. Lambert returned to Vanny’s residence after being picked up by Michelle Belton, the Petitioner told Mr. Lambert that they were leaving with several others to go to Parkersburg. S.A.R. 243. After dividing the money up, Mr. Lambert, Vanny, the Petitioner, Michelle Belton and Michelle’s father got into the green Cadillac to go to Parkersburg. S.A.R. 243. When the group reached Parkersburg, the Petitioner called Mark McGuire, who met them at a gas station and then led the group to a residence on Parkside. S.A.R. 244.

Mr. Lambert eventually posted on Facebook that he apologized for what happened which upset Vanny. S.A.R. 245. Vanny called the Petitioner which made the Petitioner upset. S.A.R. 245. When the Petitioner got off the telephone with Vanny, he looked at a guy named “Woody” who jumped up and put a knife to Mr. Lambert’s throat with the Petitioner saying that this had been the plan the whole time, that the Petitioner knew Mr. Lambert was the weakest link and that they would decide within 24 hours if Mr. Lambert was to be killed or not. S.A.R. 245-246. A fight broke out in the house which allowed Mr. Lambert to escape. S.A.R. 246. Mr. Lambert eventually decided to turn himself in to the police. S.A.R. 246.

Mr. Lambert also testified he gave audio-recorded statements to the Fairmont Police S.A.R. 247-248. He testified the statements he gave to the police were truthful. S.A.R. 249. He also testified that his trial testimony was truthful as well. S.A.R. 249. He testified that he had been telling the truth since the beginning. S.A.R. 249.

During the cross-examination of Mr. Lambert, the Petitioner's counsel wanted to play an excerpt of Mr. Lambert's taped statement to the Fairmont Police to impeach Mr. Lambert. S.A.R. 325. In response to the Petitioner's request, the State argued:

Your Honor, I think in order to play any of these excerpts – and prove the prior inconsistent statement by extrinsic evidence, the witness would have to deny actually saying it, and I think in each occasion Mr. Lambert has indicated he does not recall saying it or he doesn't recall the facts that way. I don't think he's ever denied, no, I didn't say that. So I don't – I think it's an improper use of the recorded statement at this point.

S.A.R. 326.

The Petitioner's counsel responded, "First of all, it would be, Number 1, a prior inconsistent statement. If he does not recall making that statement, he has testified under oath to something different, it is in fact a prior inconsistent statement we have the right to show." S.A.R. 326. The Petitioner's counsel further argued, "I can show him the statement and ask him the narrative. I'm just trying – all I'm trying to do is show that he said something that he is not asserting today. And they [sic] are going to be other instances where he has specifically said no when he has said yes or when he has said white when he has said black." S.A.R. 326. The following exchange then took place:

THE COURT: All right. Let me indicate that certainly if – and in response, first of all, to [the Prosecuting Attorney] there have been times when he said he didn't remember, there's been times he said probably yes, probably no, sometimes he said yes or no. He's been across the spectrum, quite frankly.

If, Mr. Hamilton [defense counsel], you want to play excerpts to show a prior inconsistent statement, he does need to deny it, and then you can play the

statement or indicate that. If, for some other reason – I’m not going to get into what might or might not be. I mean, if you need to refresh his recollection, I don’t know, but just to – if he says he doesn’t know and you just want to play a tape to show him what was said, that’s not proper. There’s other witnesses you can call to do that.

MR. HAMILTON: If the court would beg my going into specifically the questions, does he deny making that statement to the police and if he doesn’t recall whether he made that statement to the police, then I should have the right to play the inconsistent statement, if he denies it or he does not recall it. If he says yes I said that –

MR. FREEMAN [Prosecuting Attorney]: And I think the appropriate time

THE COURT: Well, you can get it in –

MR. FREEMAN: We could have avoided all of this by – at the appropriate time if he actually denied the existence of the statement or said I didn’t say that would’ve been to play the inconsistency at that moment, not rehash it an hour and a half later.

S.A.R. 327-328. The Court then ruled against the Petitioner:

THE COURT: My ruling is what it is. If he indicates – let me be clear. If he indicates no, he didn’t say it, I think it’s perfectly appropriate for you to play whatever excerpts you want, Mr. Hamilton, to indicate that he did. If he indicates he doesn’t remember on the stand and you want to point out that he made statements that were whatever they were –

MR. HAMILTON: Can I refresh his recollection with the statement?

THE COURT: I will let you, as long as it’s done appropriately. I’m not going to let it be turned into – I’m going to try to give you as much liberty as I can, this is an important case, but I’m not going to let you turn refreshing recollection into impeachment improperly in this case. If you want to get that in, there’s ways, perhaps, you can get it in, but you’re going to do it the right way.

MR. HAMILTON: Well, I would indicate that it doesn’t seem like there’s a more appropriate time to address whether or not these statements were made than when you have the witness on the stand.

THE COURT: If he says no they weren’t, then you can play it, but he’s not – sometimes he’s saying no, sometimes he’s not. It’s going to depend on his answer.

So that's my ruling. I'll take it one question at a time. But you know exactly what I'm saying Mr. Hamilton.

S.A.R. 328-329. *See also* S.A.R. 332 (“THE COURT: And if he denies it, then I think it's perfect impeachment to play the tape of the interview.”).

After redirect and recross-examination, the questioning of Mr. Lambert ended and he was excused subject to recall. S.A.R. 356.

The State then called Robert Antwann Jarvis. S.A.R. 357. Mr. Jarvis's street name is “Twiz.” S.A.R. 359. Mr. Jarvis was from Baltimore but was in the Fairmont area in 2017. S.A.R. 358. Although unable to identify the Petitioner by name, he physically identified the Petitioner in the Courtroom. S.A.R. 358-359. Mr. Jarvis testified he knew the Petitioner for seven or eight years and Mr. Jarvis knew the Petitioner because the Petitioner's ex-wife used to be Jarvis's girlfriend before she and the Petitioner were together. S.A.R. 359. Mr. Jarvis also knew the Petitioner from the streets. S.A.R. 359.

One day Mr. Jarvis received a telephone call from the Petitioner and Mr. Lambert to talk about “hittin' a lick.” S.A.R. 360. Mr. Jarvis explained that hitting a lick meant to rob somebody. S.A.R. 361. The Petitioner and Mr. Lambert asked Mr. Jarvis to go over to Chantel and Rondell's house on Benoni Street in Fairmont. S.A.R. 361. When Mr. Jarvis arrived, several people were present, including the Petitioner, talking about robbing “Tone.” S.A.R. 326.<sup>4</sup> The Petitioner and Mr. Lambert did not realize that “Tone” was friends with Mr. Jarvis. S.A.R. 364. The Petitioner and Mr. Lambert wanted Mr. Jarvis to drive them to Spring Street so the Petitioner could get his .40 caliber gun. S.A.R. 364. The trio apparently got into Mr. Jarvis's car, but Mr. Jarvis made some

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<sup>4</sup>“Tone” was a relation to Mr. Whitted. S.A.R. 362. Mr. Jarvis knew “Tone” from the “same business on the street, you know, drugs and stuff like that.” S.A.R. 363.

excuse and got Mr. Lambert and the Petitioner to exit the vehicle and Mr. Jarvis left them. S.A.R. 364.

Mr. Jarvis then went to his son's mother's house. S.A.R. 365. Mr. Jarvis telephoned "Tone" about the planned robbery and Mr. Jarvis then went over to "Tone." S.A.R. 365. Mr. Jarvis again told "Tone" about the planned robbery. S.A.R. 365. "Tone" dismissed talk of the robbery and Mr. Jarvis left. S.A.R. 365.

Subsequently, Mr. Jarvis was staying at the Avenue Motel and saw the Petitioner near a Burger King restaurant. S.A.R. 367. The Petitioner told Mr. Jarvis that "we hittin' the lick tonight." S.A.R. 367. This conversation occurred the same day as the shooting at Watson Avenue. S.A.R. 367.

Later that same evening, Mr. Jarvis received a telephone call that somebody had been shot. S.A.R. 367. Fearing that rumors would begin to implicate him, Mr. Jarvis called Fairmont City Police Lieutenant Doug Yost. S.A.R. 367. Lt. Yost was at the scene of the crime and could not talk. S.A.R. 368. Subsequently, Mr. Jarvis spoke with Lt. Yost at the station and reiterated the story he told the jury. S.A.R. 368.

After several other State's witnesses were called, the Petitioner's counsel revisited the issue of prior inconsistent statements. S.A.R. 491. The Petitioner's counsel cited to Professor Cleckley's *Handbook on Evidence*, and asserted:

Mr. Cleckley indicates that the witness denies – the ruling of the Court that I recall is that if Mr. Lambert denied making the statement, I could use it to impeach him, but he did not deny the statement, he indicated that he couldn't remember whether or not he said it. And, basically, Mr. Cleckley says if the witness denies making the inconsistent statement or state he does not remember whether he made it or refuses to testify as to whether he made it, extrinsic evidence may be introduced if the subject matter of the statement is relevant. And, of course, the relevancy of the statement is that it is a prior inconsistent statement under rules of evidence and the witness is in fact present and testifying.

S.A.R. 491. The circuit court ruled it would relook at the issue before making a final ruling. S.A.R. 494. Trial then continued.

The State called Michelle Belton. S.A.R. 616. Ms. Belton had previously pled guilty in the case to conspiracy. S.A.R. 618. At trial MS. Belton testified the Petitioner came over to her house between 10:00 and 11:00 a.m. S.A.R. 633. The Petitioner was talking to Mr. Lambert. S.A.R. 633. The Petitioner said he had talked to Andy and Andy had put his (Lambert's) chain and hat from the previous night's fight on his (Andy's) porch. S.A.R. 633. Mr. Lambert asked if they said anything about his money and the Petitioner told him no. S.A.R. 634. The Petitioner started telling Mr. Lambert that the "Detroit boys" thought he was a "bitch," and "said that they didn't like him being up there, they thought he was a punk, said they wasn't going to pay him his money." S.A.R. 634. This angered Mr. Lambert. S.A.R. 634.

The next day, Mr. Lambert used the Petitioner's telephone to call Andy. S.A.R. 642. After Mr. Lambert got off the telephone, he said that he could go up to their house after 1:30 to speak to Andy's father about the \$300 for his chainsaw. S.A.R. 642. After that, Mr. Lambert started talking about if the Detroit boys didn't either give him his chainsaw or his money, he would rob them of whatever they had. S.A.R. 643.

Subsequently, Jay came to the house. S.A.R. 643. Mr. Lambert started telling Jay about the robbery plan. S.A.R. 644. Jay contacted a friend by telephone. S.A.R. 644. After the call, while Ms. Belton and her father were leaving, a red jeep showed and a dark skinned man got out with a Graco bag. S.A.R. 646. Out of the end of the bag, Ms. Belton saw two gun barrels. S.A.R. 646. Because the gun barrels caught Ms. Belton's attention, she reentered the house. S.A.R. 647. The man with the guns was introduced as Jay's friend Devon. S.A.R. 647. Jay, the Petitioner, and

Vanny then left. S.A.R. 649. After the trio left, Ms. Belton, Ms. Belton's father, Mr. Lambert and Devon remained in the house. S.A.R. 650.

While the trio were gone, Mr. Lambert and Devon were going over the set up of the Watson apartment. S.A.R. 650. They were also discussing how they would enter the house, and how to go through the rooms. S.A.R. 650.

Vanny, the Petitioner and Jay returned to Belton's house with three pistols, S.A.R. 651, along with a bag containing ammunition. S.A.R. 652. Vanny, Jay, the Petitioner, and Devon left to "sightsee the area." S.A.R. 652. They returned and there was a comment made that they would wait until dark. S.A.R. 653. Subsequently, they were getting ready to leave and Ms. Belton asked if she could accompany them. S.A.R. 659. Vanny said no, but Ms. Belton persisted. S.A.R. 659. Vanny relented telling her not to go exactly where he was going to go. S.A.R. 659. According to Ms. Belton, Vanny was driving the Jimmy, with Mr. Lambert in the front passenger seat and the Petitioner, Devon, and Jay in the back seat. S.A.R. 659. Ms. Belton took a green Cadillac. S.A.R. 560. Ms. Belton lost sight of the Jimmy and pulled off Watson Avenue between the first and second house on the corner. S.A.R. 665. Ms. Belton heard three gunshots. S.A.R. 665-666. Vanny called Ms. Belton telling her to circle the block three times and look for Mr. Lambert. S.A.R. 666. Ms. Belton circled the block as instructed but could not find Mr. Lambert. S.A.R. 668. She then returned to her house. S.A.R. 668. Vanny and the Petitioner were there and Vanny was telling the Petitioner to put his gun in a red bag sitting on the table. S.A.R. 670. The Petitioner put the gun in the bag. S.A.R. 670.

Vanny's phone rang with Mr. Lambert calling from Renee's. S.A.R. 670. Ms. Belton said she would pick Mr. Lambert up. S.A.R. 670. Vanny handed Ms. Belton the red bag and told her to take the red bag to "Colby" who would be waiting for it. S.A.R. 670. Ms. Belton assumed the bag's

contents were the handguns from the robbery, but she could only confirm the pistol the Petitioner was carrying went into the bag. S.A.R. 671.

Ms. Belton drove to Colby's S.A.R. 673. Ms. Belton handed him the bag and he handed her some "weed." S.A.R. 673. Nothing was said. S.A.R. 673. Ms. Belton picked up Mr. Lambert and returned to her house. S.A.R. 675.

The Petitioner then asked Ms. Belton that if he gave her gas money would she drive him to Parkersburg and she agreed. S.A.R. 677. The group then went to Parkersburg, where they stopped at a 7-11 gas station. S.A.R. 680. The met up with people that the Petitioner knew. S.A.R. 680-681. Ms. Belton followed the people about five minutes to their home. S.A.R. 681. Mr. Lambert asked Ms. Belton if she could pick him up in a couple of days and she agreed to do so if she had gas money. S.A.R. 681. Ms. Belton then returned home. S.A.R. 681.

Subsequently, Ms. Belton met with Detectives Yost and Neville. S.A.R. 693. Ms. Belton explained that she was not truly forthcoming with the police, "I told them enough that would kind of help with the case, give them some ideas and what I thought was getting them off of my back, but not enough to get myself in trouble or get my family in trouble." S.A.R. 694. Ms. Belton went a second time to speak with Det. Yost who knew she had not previously been honest. S.A.R. 713. Ms. Belton then testified that the trial testimony had been truthful. S.A.R. 728.

The circuit court then revisited the issue of prior inconsistent statements before the Petitioner began his cross-examination of Ms. Belton. S.A.R. 728. The circuit court indicated that it had reviewed the authority cited to it by the Petitioner's counsel. S.A.R. 729. The circuit court ruled:

It's this Court's opinion that, first of all, quite honestly, if there had been a certified transcript made, that would've been probably the appropriate way, and even what Mr. Hamilton referred to today earlier in Cleckley's book that, you know, a certified transcript of the testimony would be probably the most

approximate way to impeach. Obviously, Mr. Hamilton doesn't have that, but what I would indicate is, is that if this witness or any other witness that gave a recorded statement testifies differently than what's in the statement, I believe Mr. Hamilton, if he can pinpoint the particular place where there is a difference where they testified differently and only pinpoint that particular point, that would be appropriate, which is consistent with what I indicated yesterday.

S.A.R. 729. The circuit court continued:

However, I do not believe that if he references a question, for example, you know, Mr. Witness did you tell Detective so and so something and repeat what it is, if the witness indicates I don't remember, that is not an appropriate use of that witness statement. It's a blurring of refreshing recollection and impeachment that's not appropriate, in this Court's opinion. And, quite frankly, even reading a little bit further into the authority that Mr. Hamilton was using from Cleckley, Cleckley reiterates that, as a matter of fact.

I believe it is appropriate to use those recordings for impeachment if the witness does give a different answer. Again, I think that's consistent with what I indicted yesterday, and that's going to be the continued ruling of the Court with this witness or if you call any other witness.

S.A.R. 730.

The State called Ron Anthony Cook Slayton. S.A.R. 798. Mr. Slayton went by the name "Colby." S.A.R. 798. Mr. Slayton was familiar with Vanny Clay. S.A.R. 799. Mr. Slayton would at times buy, sell and trade firearms with Vanny. S.A.R. 801. Prior to the day of the shooting, Vanny called Mr. Slayton and asked to borrow Mr. Slayton's gun. S.A.R. 802. Vanny said the reason he needed the gun was somebody had expressed interest in purchasing it, or that he was interested in the gun. S.A.R. 803. Mr. Slayton testified that Vanny borrowed a .9 mm, Rock Army 1911. S.A.R. 803. Vanny picked the gun up between 3:00 p.m. and 4:00 p.m. S.A.R. 804. Michelle Belton returned the gun late in the evening, between 11:00 p.m. and 1:00 a.m.. S.A.R. 805. Michelle returned the gun in a bag with another firearm, a .40 caliber. S.A.R. 805. Vanny had previously tried to sell the .40 caliber to Mr. Slayton but Mr. Slayton thought the price was too high. S.A.R. 806. Vanny then tried to sell him the .40 caliber at a lower price which Mr. Slayton

refused. S.A.R. 806. Mr. Slayton was aware that something had occurred and did not want the gun. S.A.R. 806. Mr. Slayton left the gun in the bag, wrapped it up, and stuck it under his couch. S.A.R. 806. Mr. Slayton called Vanny and told him that he had to come and get it. S.A.R. 806.

Also testifying for the State was Fairmont Police Lieutenant Douglas Yost. S.A.R. 856. Lt. Yost confirmed that 232 Watson Avenue, apartment 1 was “trap house,” slang for a drug house. S.A.R. 871. Det. Yost admitted on cross-examination that no videotape places the Petitioner in any vehicles allegedly involved in the murder, nor was there any fingerprinting or DNA that placed the Petitioner at the scene of the crime. S.A.R. 917.

Ultimately, the jury found the Petitioner guilty on all counts and recommended mercy on the murder count. S.A.R. 1082.

#### **D. Post-trial proceedings**

The Petitioner filed a Motion for a New Trial. A.R. 471. The Petitioner argued, *inter alia*, the State had failed to timely disclose information related to “Twiz.” A.R. 473. The Petitioner requested to be provided, *inter alia*, the telephone number and current location of “Twiz.” A.R. 473. “Twiz” was the person referenced in the recorded statement taken by Lt. Yost on November 18, 2016. A.R. 473. The State disclosed the confidential source was Robert Antoine Jarvis, that this was “Twiz,” and disclosed the address and criminal history of “Twiz.” A.R. 473. The State did not disclose a telephone number. A.R. 473. The defense contended that the failure to disclose a telephone number was crucial information because such information could have been correlated with known cell phone information provided by the State to corroborate or refute whether:

- a) It was the Petitioner or Timothy Lambert that contacted the confidential source as alluded to in his testimony to meet at Rondell’s the week prior to the robbery to discuss a plan to rob “Twan” at 232 Watson Avenue; and,

b) The Confidential Source, i.e., "Twiz," contacted "Twan" to warn him that he was the target of an upcoming robbery. A.R. 474.

The Petitioner also complained of the failure to disclose information related to "Colby." A.R. 474. The Petitioner alleged the failure to disclose this information until only a few days before trial deprived him of a meaningful opportunity to discover the details of his testimony surrounding the handguns at issue in the case. A.R. 474-475.

The Petitioner also argued that the circuit court erred in not allowing him to use audiotapes in order to impeach witnesses Lambert, Belton, and Jarvis. A.R. 476.

In response, the State asserted that "The State of West Virginia fully and timely produced all discovery material. Counsel for [the Petitioner] was provided information related to Robert Antoine Jarvis, Ron Cook-Slayton, and others not even utilized at trial, within hours of the State discovering same." A.R. 481. The State also asserted that the circuit court did not err in declining to permit the Petitioner to use audio statements to impeach witness asserting that the Petitioner confused prior inconsistent statement impeachment and refreshing recollection. A.R. 481-482.

The circuit court ruled against the Petitioner. The circuit court first ruled that:

The Court recognized that discovery issues did arise as a result of the State first discovering additional information and potential witnesses near the trial. However, the State did, in each instance, make full and prompt disclosures to [the Petitioner]. [The Petitioner] was afforded the opportunity to continue the trial to provide additional time to investigate the disclosures and [the Petitioner] made a strategic decision to proceed to trial as scheduled. The Court further concluded that no evidence has been presented to indicate additional time would have produced any exculpatory evidence or impacted the trial or verdict in any way.

A.R. 543. As to the Petitioner's other pertinent ground, the Court

finally determined that the issue of [the Petitioner's] attempted use of excerpts from recorded witness statements was fully argued and considered and correctly ruled upon during the trial. The attempts were not proper for either impeachment or for refreshing of a witness' recollection.

### SUMMARY OF ARGUMENT

The Petitioner contends that the circuit court erred in precluding his use of prior inconsistent statements by Mr. Lambert and Mr. Jarvis. The circuit court concluded that in order for these witnesses' prior inconsistent statements to be admissible, Mr. Lambert and Mr. Jarvis would have at first had to deny making them. The circuit court ruled that a failure of memory was not sufficient to allow the Petitioner to impeach these witnesses with their prior inconsistent statements. However, this ruling is squarely against the holding of this Court in Syllabus Point 3 of *State v. Schoolcraft*, 183 W. Va. 579, 396 S.E.2d 760 (1990), which provides, "[w]here a witness testifies about events which are covered in a prior out-of-court statement and the witness denies making the out-of-court statement or indicates no present recollection of its contents, then impeachment by a prior statement is permissible." After serious consideration by the Office of the Attorney General, the Office of the Attorney General confesses error in precluding cross-examination.

The Petitioner also contends that there were discovery violations in this case. To the extent the State's confession of error on ground one does not otherwise moot the remaining claims, the remaining claims do not entitle the Petitioner to relief. The Petitioner contends that State failed to produce information relating to its witness Ronald Cook-Slayton and Robert Antwann Jarvis. The circuit court offered to continue the case due to the belated discovery of these witnesses. The Petitioner refused. The refusal of a criminal defendant to accept a continuance waives any error. As such, the Petitioner is not entitled to relief on these grounds.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

### ARGUMENT

**A. The State of West Virginia agrees with the Petitioner that the circuit court abused its discretion in not permitting the Petitioner to use audio tapes to impeach State's witnesses Lambert and Jarvis.**

The Attorney General “has standing to exercise judgment in the role of a party litigant when he appears in this Court as counsel for the state in criminal appeals and other actions to which the State of West Virginia is a party.” *Manchin v. Browning*, 170 W. Va. 779, 789, 296 S.E.2d 909, 919 (1982), *overruled on other grounds by State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W. Va. 227, 744 S.E.2d 625 (2013). As such, “the Attorney General has the power and discretion to confess reversible error in criminal appeals before this Court.” *Id.*, 296 S.E.2d at 919. While “[c]onfessions of error are, of course, entitled to and given great weight,” *Sibron v. New York*, 392 U.S. 40, 58 (1968), “[t]his Court is not obligated to accept the State’s confession of error in a criminal case[.]” but “will do so when, after a proper analysis, [it] believe[s] error occurred.” Syl. Pt. 8, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991).

The Petitioner claims he was denied the opportunity to impeach the testimony of witnesses Lambert and Jarvis by the use of prior inconsistent statements. Pet’r Br. at 14. After long and serious consideration by the Office of the Attorney General, the Office of the Attorney General agrees that the circuit court abused its discretion in finding that the Petitioner was not entitled to cross-examine Lambert and Jarvis with their prior inconsistent statements. As such the Attorney General’s Office confesses error on this point.

During trial, Mr. Lambert made several statements under oath that were contradictory to statements he had made to the police. *See* Pet'r Br. at 8. Likewise, Mr. Jarvis made several statements to the police that were contradictory to testimony he gave at trial. 16-17.<sup>5</sup>

The circuit court would not permit the Petitioner to use the Petitioner's audiotaped statements to the police to impeach him because the circuit court concluded that only an affirmative denial would trigger the right to invoke a prior inconsistent statement to impeach a witness. *See, e.g.,*

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<sup>5</sup>At trial Mr. Lambert made the following statements which were contradicted by statements he gave to the police:

- Lambert testified he could not recall if he told police he went to Morgantown after the killing;
- Lambert testified he could not recall when asked if he ever stated to the police that he was forced to go to Parkersburg after the robbery/murder;
- When asked if he (Lambert) remembered telling Lt. Yost in his statement to the police that the Petitioner never exited the get away car, Lambert testified he did not recall;
- Lambert also was asked at trial about his statements to Lieutenant Yost concerning whether he (Lambert) was armed at the time of the robbery and responded he could not recall.

Additionally, the State also adduced testimony from Robert Antwann Jarvis, a confidential informant. According to the Petitioner's Brief:

Jarvis testified on direct examination that he got a call from [the Petitioner] and Lambert wanting him to come to Benoni [Avenue] and talk to him about hitting a lick [i.e., carrying out a robbery], clearly contradictory to his clarification in the audio taped statement that it was Tim Lambert that called him over to the house and Tim Lambert that brought up the plan. Jarvis also testified at trial that he saw [the Petitioner] Lambert [and others] at the house[,] contradicting his recorded interview statement that "it was really just me, Lambert—me, Lambert Twan and [the Petitioner]. Jarvis's trial testimony was he gave Tim Lambert and [the Petitioner] a ride to Spring Street and then "went to my son's mom's house.", [sic] and, "Then I called Tone, and I said these n\*ggers trying to rob you." This testimony was inconsistent with his audio taped statement to Lt. Yost that he left the house on Benoni and, "I went straight there to Tony's." When Jarvis was cross-examined by defense counsel regarding his interview and his testimony at trial he stated, "I don't know" in response to whether he told Lt. Yost that Tim Lambert called him to the house on Benoni and "I could've" when questioned about his prior recorded statement that Tim Lambert being the person who brought up the robbery to him.

Pet'r Br. at 11 (internal citations omitted).

S.A.R. 327 (“THE COURT: . . . If, Mr. Hamilton, you want to play excerpts to show a prior inconsistent statement, he does need to deny it, and then you can play that statement to indicate that.”); S.A.R. 332 (“THE COURT: And if he denies it, then I think it’s perfect impeachment to play the tape of the interview.”); S.A.R. 730 (“THE COURT: . . . I believe it is appropriate to use those recordings for impeachment if the witness does give a different answer. Again, I think that’s consistent with what I indicted yesterday, and that’s going to be the continued ruling of the Court with this witness or if you call any other witness.”). The circuit court’s ruling is erroneous.

In Syllabus Point 3 of *State v. Schoolcraft*, 183 W. Va. 579, 396 S.E.2d 760 (1990) (emphasis added), the West Virginia Supreme Court held that “[w]here a witness testifies about events which are covered in a prior out-of-court statement and the witness denies making the out-of-court statement *or indicates no present recollection of its contents*, then impeachment by a prior statement is permissible.” Syllabus Point 3 of *Schoolcraft* is consistent with prior West Virginia law, *see, e.g.,* Syl. Pt. 1, *State v. Worley*, 82 W. Va. 350, 96 S.E. 56 (1918) (“After the foundation therefor is properly laid by calling his attention to prior statements inconsistent with his testimony, a witness may be impeached by proving such statements, and whether the witness denies or fails to recollect them is not material. Point 1 of the syllabus in *Robinson v. Pitzer*, 3 W. Va. 335, disapproved.”), as well as other jurisdiction’s case law. *See, e.g., United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (“Although an inconsistency is logically essential for this method of impeachment, whether testimony is inconsistent with a prior statement is not limited to diametrically opposed answers but may be found as well in . . . inability to recall . . . “); *United States v. Dennis*, 625 F.2d 782, 796 (8th Cir. 1980) (“Where a witness denies or cannot recall a prior inconsistent statement, that statement may be read to the jury for impeachment.”); *Williamson v. United States*, 310 F.2d 192, 199 (9th Cir.1962) (“[T]he answer of a witness that he does not

remember having made a prior inconsistent statement is as adequate a foundation as a flat denial.”); *Ner-Tamid Congregation of N. Town v. Krivoruchko*, No. 08 C 1261, 2009 WL 152587, at \*2 n.4 (N.D. Ill. Jan. 22, 2009) (“a witness may not preclude impeachment with a prior inconsistent statement by claiming he does not recall whether he made the statement.”); *State v. Robinson*, 796 P.2d 853, 860 (1990) (“That Dixon claimed failure of memory rather than outright denying having made the earlier statements did not preclude impeachment.”).

Admittedly, *Schoolcraft* also provides that “[i]t is also recognized that the trial court has the discretion to make the determination on admissibility.” 183 W. Va. at 584, 396 S.E.2d at 765. However, a circuit court always abuses its discretion when the circuit court commits an error of law. *See State ex rel. Hoover v. Berger*, 199 W. Va. 12, 17, 483 S.E.2d 12, 17 (1996) (“a circuit court by definition abuses its discretion when it makes an error of law.”). *See also Koon v. United States*, 518 U.S. 81, 100 (1996) (“A district court by definition abuses its discretion when it makes an error of law.”). The circuit court here ruled that unless a witness specifically denies making a statement then impeachment by prior inconsistent statement is impermissible. S.A.R. 327; S.A.R. 332; S.A.R. 730. Such a blanket ruling is inconsistent with *Schoolcraft*.<sup>6</sup>

Furthermore, the error does not appear to be harmless. “The harmless error inquiry involves an assessment of the likelihood that the error affected the outcome of the trial.” Syl. Pt. 13, in part, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995).

In other words, a conviction should not be reversed if we conclude the error was harmless or “unimportant in relation to everything else the jury considered on the issue in question.” *Yates v. Evatt*, 500 U.S. 391, 403, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432, 449 (1991). Instead, this Court will only overturn a conviction on

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<sup>6</sup>Importantly, this Court is not presented with a situation where the circuit court concluded that it had allowed sufficient cross-examination and that the Petitioner was not entitled to more. The right to cross-examination is not unlimited or unfettered. Trial court’s retain wide latitude to impose “reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

evidentiary grounds if the error had a substantial influence over the jury. This reasoning suggests that when the evidence of guilt is overwhelming and a defendant is allowed to put on a defense, even if not quite so complete a defense as he or she might reasonably desire, usually this Court will find the error harmless. If, however, the error precludes or impairs the presentation of a defendant's best means of a defense, we will usually find the error had a substantial and injurious effect on the jury. When the harmlessness of the error is in grave doubt, relief must be granted. *O'Neal v. McAninch*, 513 U.S. 432, —, 115 S.Ct. 992, 996, 130 L.Ed.2d 947, 955 (1995); *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

*State v. Blake*, 197 W.Va. 700, 705, 478 S.E.2d 550, 555 (1996).

In the instant case, the State's chief witnesses against the Petitioner were Lambert and Jarvis. As testified to by Det. Yost, no physical evidence linked the Petitioner to the crime scene, no specific fingerprint or DNA evidence placed the Petitioner at 232 Watson Avenue, no videotape identified the Petitioner as an occupant of the Black Jimmy or any other vehicle involved in the crime, nor were the Petitioner's fingerprints on any item of the State's evidence. S.A.R. 916-917.

This Court has said, "[a] criminal defendant has a broad right to impeach prosecution witnesses on cross-examination with prior inconsistent statements." *State v. Foster*, 171 W. Va. 479, 482, 300 S.E.2d 291, 294 (1983). "A person in jeopardy of losing his liberty should be afforded, within the rules of evidence, the opportunity to challenge the State's evidence with his best means of defense." *State v. Scarbro*, 229 W. Va. 164, 170, 727 S.E.2d 840, 846 (2012). Given the importance of the testimony from Lambert and Jarvis and the lack of physical evidence against the Petitioner, the error in this case is not harmless. *See Scarbro*, 229 W. Va. at 171, 727 S.E.2d at 847 ("Based on the importance of Mr. Reid's testimony and the less than overwhelming nature of evidence against the petitioner, this Court believes that the improper exclusion of Mr. Reid's prior inconsistent statement places the fairness of the petitioner's trial in doubt. Therefore, we conclude that the petitioner's conviction must be reversed and this case remanded for a new trial.").

Therefore, it appearing that the Petitioner is correct, the State respectfully requests that this Court accept its confession of error on this point.

**B. The circuit court did not err in refusing to exclude State's witness Ronald Cook Slayton from testifying at trial.**

The Petitioner also contends that the State erred in failing to produce the name of State witness Ronald Cook Slayton until January 19, 2018, several days before trial. A.R. 153. "When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." Syl. Pt. 2, *State v. Grimm*, 165 W. Va. 547, 270 S.E.2d 173 (1980). In this case, the disclosure was not prejudicial.

At a hearing on the Motion was held on January 26, 2018, the Prosecuting Attorney explained to the circuit court:

Mr. Cook-Slayton has been – actually I think he was one of the requests for additional discovery or motion to compel most recently filed by [defense counsel] whose street name has been intermentently [sic] used as either Colby or Kobe, and we were not able to determine who he was until we reinterviewed witnesses in jail who made reference to him being the father of some other person's child in that setting and Detective Yost recognized if that is so and so's – that's the father of so and so's child than that's Ronald Cook – Ron Cook-Slayton, and we previously debriefed him in another case. I know where he is.

We spoke to him, confirmed he is in fact Colby, which I don't know where that come from Ron Cook-Slayton, but that is his nickname, and we disclosed that to [defense counsel] immediately upon determining that. And he is the source for the two fire arms that were utilized in this case and that they were returned to him afterwards.

A.R. 134-135.

The circuit court then identified, and defense counsel specifically agreed, that West Virginia law gives some leeway if there are witness identifications after the deadline for excusable reasons. A.R. 136.

To remedy any possible prejudice, the circuit court then offered the Petitioner a continuance of the trial. A.R. 140. However, the Petitioner rejected the circuit court's continuance offer, specifically telling the circuit court, "Your Honor, my client does not desire a continuance at this point. We can and will deal with any objections during the trial dealing with any testimony of the witnesses." A.R. 141. The circuit court ruled that "[a]ll right at this point, the witnesses are not excluded given the – give where were [sic] at. Certainly this Court will listen to any other objections to the particular testimony of any of those witnesses, Mr. Hamilton, at the time you need to take that up at trial." A.R. 142.

During post-trial motions, the Petitioner raised this same discovery issue despite having refused the opportunity to cure any possible prejudice by continuing the trial. The circuit court ruled against the Petitioner. The circuit court first ruled that:

The Court recognized that discovery issues did arise as a result of the State first discovering additional information and potential witnesses near the trial. However, the State did, in each instance, make full and prompt disclosures to [the Petitioner]. [The Petitioner] was afforded the opportunity to continue the trial to provide additional time to investigate the disclosures and [the Petitioner] made a strategic decision to proceed to trial as scheduled. The Court further concluded that no evidence has been presented to indicate additional time would have produced any exculpatory evidence or impacted the trial or verdict in any way.

A.R. 543.

In both the pretrial and posttrial discussion of this issue, the circuit court accepted the State's position that it did not discover the identity of Cook-Slayton until late in the proceedings and made a prompt disclosure thereof. Further, when given the opportunity of continuing the case, the Petitioner refused. The Petitioner's refusal to accept a continuance and to proceed to trial is

sufficient to waive any prejudice claimed by the Petitioner. *See, e.g., State v. Soto*, 659 N.W.2d 1, 11 (Neb. Ct. App. 2003) (“In Nebraska criminal law, when a continuance will cure the prejudice caused by belated disclosure of evidence, a continuance should be requested by counsel and granted by the trial court.”); *Mullins v. State*, 599 S.E.2d 340, 345 (Ga. Ct. App. 2004) (“By failing to seek a continuance, Mullins waived this allegation of error on appeal.”); *McGowen v. State*, 859 So. 2d 320, 338 (Miss. 2003) (“Failure to request a continuance constitutes a waiver of the discovery violation issue.”).

The circuit court did not abuse its discretion.

**C. The circuit court did not abuse its discretion in permitting the State to call Robert Antwann Jarvis.**

The Petitioner contends that the State failed to produce full information regarding Robert Antwann Jarvis. As noted above, the circuit court specifically offered the Petitioner a continuance of the case, which the Petitioner expressly refused. As such, the Petitioner has waived any error in this regard.

**CONCLUSION**

For the foregoing reasons, the judgment of the Circuit Court of Marion County, should be reversed

Respectfully submitted,

State of West Virginia,  
Respondent,

By counsel,

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ATTORNEY GENERAL**

  
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