IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.: 22-0082

STATE OF WEST VIRGINIA,
Respondent,

v.

TAMMY GRAY
Petitioner.

(An appeal of the final order of the Circuit Court of Mineral County, Case No.: 19-F-78)

PETITIONER'S BRIEF

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1. The Petitioner and her counsel were not present during a critical stage of the proceedings when the Court ordered a severance of her trial from that of her co-defendant, resulting in structural error.
2. The Petitioner was improperly convicted of two counts of conspiracy stemming from the same agreement.
3. The Circuit Court erred by declining to order the suppression of the evidence derived by the search warrants following the suppression hearing.

STATEMENT OF THE CASE

The Petitioner was indicted by the Mineral County Grand Jury on September 3, 2019, for burglary, grand larceny, conspiracy to commit burglary, and conspiracy to commit grand larceny, as well as misdemeanor destruction of property, in case number 19-F-78. (Appendix Record ["A.R."], at 3-6).[1] The Petitioner's co-defendant and alleged co-conspirator, Clinton Knotts, was also indicted on the same set of allegation s in case number 19-F-79. The cases were initially joined, and a joint suppression hearing was held on June 11, 2020, relating to the fruits of several search warrants that had been executed during the investigation. (A.R., at 40-103). The Circuit Court denied suppression. (A.R., at 7-8).

On March 15, 2021, the Circuit Court set a trial date for the joint trial. The entire hearing is set forth as follows:

> (Monday, March 15, 2021, 10:57 a.m.)
> THE COURT: Are we having them together, or are we having them separate?
> MR. EASTON [Clinton Knotts' counsel]: Everything's together so far, Your Honor.

1 The Petitioner was separately charged in case number 19-F-80, which was listed on the notice of appeal, and included in the style of the order appointing counsel. However, that case was not tried and is still pending in Mineral County Circuit Court, and therefore is not the subject of this appeal.

THE COURT: Okay. We're doing Gray and Knotts. We're just picking a trial date. How many days are we going to need on each on?
MR. PANCAKE: I think –
THE COURT: How many days are we going to need?
MR. D'ATRI [Petitioner's trial counsel]: Two total.
MR. PANCAKE: How many did we have – two – last time?
THE COURT: When do you want it?
MR. D'ATRI: Wondered what you had in July, Your Honor, because we just set another jury trial of mine for June?
THE CLERK: Are we doing the jury trials together?
THE COURT: Yeah. How about the 29th and 30th of July?
MR. PANCAKE: That doesn't –
THE CLERK: Jay has –
MR. PANCAKE: – work for me.
THE CLERK: No, it doesn't. Jay has a motion day, as well, on the 30th.
MR. PANCAKE: Well, that's going to have to change, probably.
THE COURT: We can do it the 28th or 29th?
THE CLERK: Jay has a three day jury trial the 26th, 27th, and 28th.
THE COURT: Okay. That ain't going to work. Let's go to August. Let's start on Tuesday, the 3rd?
THE CLERK: That works.
MR. PANCAKE: How about – can we – how about Wednesday, start on Wednesday?
THE CORUT: Wednesday, all right. Wednesday and Thursday, the 4th and 5th. Is that all right?
THE CLERK: That works for the court.
MR. D'ATRI: It works for me.
THE COURT: Is that good for you, Brent?
MR. EASTON: That will be fine, Your Honor; thank you.
THE COURT: All right. Let's do that. If you need a pretrial, contact the Court – final pretrial – and we'll do it in July.
THE CLERK: Regular amount of jurors?
MR. D'ATRI. Yes.
THE COURT: Yes. All right. This hearing is closed.
(The hearing concluded at 11:00 a.m.)

(A.R., at 118-119.)

No further proceedings were held until August 4, 2021, at which time the following hearing took place, between the Court, the State, Mr. Knotts, and his counsel Mr. Easton:

(Wednesday, August 4, 2021, 8:18 a.m.)
THE COURT: We're on the record in the Circuit Court of Mineral

County in the matter of State of West Virginia versus Clinton Knotts. It's 19-F-77. He's here with his counsel, Brent Easton. The State's present by its prosecutor, Mr. Pancake. The Court was advised last night that we have a problem with a Bruton[2] issue. So I understand we're going to --
MR. PANCAKE: Yes, Your Honor.
THE COURT: Mr. Pancake?
MR. PANCAKE: If I just may speak briefly on this. There's an issue, obviously, in the case with joint defendants. Miss Gray, who is also scheduled today, gave a statement in this case. Of course, you know, she holds that privilege on testimony in that respect. Nevertheless, the issue is we have a co-defendant; we have a statement out there by the other co-defendant. I don't believe that there's any way to resolve this issue, Your Honor, other than bifurcate this case at this matter. I wish this issue -- well, you know, we had thought about it, you know, a year ago. Honestly, I didn't -- I do want to give a lot of -- recognize Mr. Easton for this. He brought it to my attention yesterday morning, Your Honor; and he is exactly right on this.
THE COURT: I agree.
MR. PANCAKE: I do want to say, he's a very honorable man. He has done an excellent job in this case. I don't think it's anybody's fault, but I think the only way to resolve the issue at this point is just to bifurcate this case. That's the only clean --
THE COURT: I understand.
MR. PANCAKE: -- clear, constitutional way to do it.
THE COURT: Mr. Easton?
MR. EASTON: Your Honor, obviously, Mr. Knotts is prepared for trial today. The trial has been set for 14 months. His preference would be to go to trial today with the exclusion of the statement.
THE COURT: Right. Well, my understanding is the only way we could have done that is if we had two different juries and they stepped out while she gave her testimony -- or the testimony about Mr. Knotts was introduced, his jury would have to step out. So I am going to continue this. We'll do it August 26. We done it as quickly as we can. We've got to get notices out.
MR. EASTON: Note our objection for the record, Your Honor.
THE COURT: Yes, sir. Your exceptions are saved. I would prefer to have them today, too; but it's a legal problem that we're into. We'll just going to come back and do it again, so we might as well do it right. All right. We stand continued until we bring the jury in and Mr. D'Atri gets here.
(The hearing concluded at 8:21 a.m.)

2 Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)

(A.R., at 339-341).

The matter proceeded to trial solely on Ms. Gray's indictment, at which time she was convicted of all counts of the indictment. (A.R., at 9-11, 121-295). Notably, the Petitioner's statements were used against her in evidence. (A.R., at 198-199, 211-217). At sentencing, the Petitioner received consecutive sentences for Burglary, Conspiracy to Commit Burglary, and Conspiracy to Commit Grand Larceny, and concurrent sentences for Grand Larceny and destruction of property, for an effective sentence of 3-25 years of incarceration.[3] (A.R., at 13-15). It is from her judgment of sentence that the Petitioner now appeals.

SUMMARY OF ARGUMENT

The Circuit Court engaged in structural error when it held a hearing to sever the trials between her and her co-defendant on the morning of trial, with no notice, prior to the arrival of the Petitioner's counsel, and apparently out of her presence. A hearing is a critical stage of the proceedings, to which a right to be present, and right to be represented by counsel attaches, whenever a defense may be lost during the course of the hearing. In the Petitioner's case, she lost the advantage that she would have had under *Bruton* not to have her out of court statement used against her during the joint trial. Even though she is not required to show prejudice in an assertion of structural error, she was clearly prejudiced by the admission of evidence that would not have otherwise come in, absent the result of the severance hearing, concerning which she had no notice, no presence, and no representation by counsel. This error necessitates a new trial.

Additionally, the Petitioner has been prejudiced by a double jeopardy violation, because

3 During the sentencing hearing, there was some confusion over whether conspiracy sentences were determinate or indeterminate, and the Circuit Court apparently intended to give the Petitioner two 3-year determinate sentences for those charges, subject to the prosecutor verifying the correct sentencing provisions. (A.R., at 308-309). In the written order, she got a total of 2-10 years, which significantly exceeds a determinate 6 year sentence. (A.R., at 12-15). In light of, *inter alia*, this Court's recent ruling in *State v. Riffle*, No. 20-0765 (W.Va June 7, 2022), the Petitioner is not assigning error to this particular set of circumstances.

she has been convicted of two counts of conspiracy relating to the same agreement. The mere fact that a single agreement involves the commission of more than one offense does not allow an individual to be punished twice for a single agreement. Because trial counsel did not raise this issue, it must be asserted via plain error or in the context of a limited assertion of ineffective assistance of counsel. The Petitioner would have been entitled to relief if it had been asked for on her behalf, and this Court should grant her relief via one or both of the theories asserted in this appeal.

Lastly, the Circuit Court erred by declining to suppress the admission of evidence obtained via three search warrants on the grounds of particularity. Numerous items were obtained and used against the Petitioner at trial on the basis of search warrants that did not describe the items, either at all, or with sufficient particularity. The Circuit Court's denial of the suppression of said items following an *in camera* hearing is reversible error.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner has raised three claims of a constitutional magnitude: denial of the Petitioner's presence at a critical stage of the proceedings; double jeopardy, and a Fourth Amendment violation. This Court should grant oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, and dispose of this matter by signed opinion.

ARGUMENT

1. The Petitioner and her counsel were not present during a critical stage of the proceedings when the Court ordered a severance of her trial from that of her co-defendant, resulting in structural error.

The assertion of the denial of a constitutional right is determined by the following standard: "'Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.' Syllabus point 5, *State ex rel.*

Grob v. Blair, W.Va., 214 S.E.2d 330 (1975)." Syl. Pt. 5, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

This Court has also held:

> A defendant is constitutionally guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome, if his or her presence would contribute to the fairness of the procedure. We held in Syllabus point 6 of *State v. Boyd*,160 W.Va. 234, 233 S.E.2d 710 (1977), that "[t]he defendant has a right under Article III, Section 14 of the West Virginia Constitution to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless." See also *Kentucky v. Stincer*,482 U.S. 730, 745, 107 S.Ct. 2658 2667, 96 L.Ed.2d 631 (1987). We also have held that "[a] critical stage of a criminal proceeding is where the defendant's right to a fair trial will be affected." Syl. pt. 2, *State v. Tiller*, 168 W.Va. 522, 285 S.E.2d 371 (1981).

State v. Tex B.S., 236 W.Va. 261, 778 S.E.2d 710, 713 (2015).

In addition to personal presence, a criminal defendant has a right to the assistance of counsel under "Section 14 of Article III of the West Virginia Constitution and the Sixth Amendment to the United States Constitution[.]" Syl. pt. 6, in part, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995).

> The United States Supreme Court has observed that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error[.]" *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827-28, 17 L.Ed.2d 705, 710 (1967) (footnote omitted). Thus, it has been held that "[a]ctual or constructive denial of the assistance of counsel ... is legally presumed to result in prejudice." *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052 2067, 80 L.Ed.2d 674, 696 (1984). The United States Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n. 25, 104 S.Ct. 2039, 2047 n. 25, 80 L.Ed.2d 657, 668 n. 25 (1984).

State v. Kirk N., 214 W.Va. 730, 591 S.E.2d 288 (2003).

> The [Supreme Court of the United States] has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. See, e.g., *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612-613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972); *Hamilton v. Alabama*, 368 U.S. 52, 55, 82 S.Ct. 157, 159, 7 L.Ed.2d 114 (1961); *White v. Maryland*, 373 U.S. 59, 60, 83 S.Ct. 1050, 1051, 10 L.Ed.2d 193 (1963) (per curiam); *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961); *Williams v. Kaiser*, 323 U.S. 471, 475-476, 65 S.Ct. 363, 366, 89 L.Ed. 398 (1945).

Van v. Jones, 475 F.3d 292, 305 n. 25 (6th Cir. 2007).

In cases of structural error under *Cronic*, prejudice is presumed, and the harmless error analysis is inappropriate. This is one such case. Under the facts of this case, structural error occurred, and that by itself is sufficient to require a new trial, entirely bypassing the harmless error analysis. In this case, there is no doubt that the severance of the Petitioner's trial from that of her co-defendant Mr. Knotts took place without her being there, and without her attorney Mr. D'Atri being there. The record is absolutely clear that Mr. D'Atri had not even arrived at the courthouse yet. (A.R., at 341). The docket sheet does not reflect that the Petitioner or her counsel were ever given notice that the Court was going to hold a hearing on the severance of the trials. (A.R., at 1-2). The only debatable question is whether or not the motion to sever the trials of the co-defendants was a critical stage, and the law is clear that it was.

A critical stage has been held to be when "[a]vailable defenses may be irretrievably lost, if not then and there asserted." *Hamilton*, 368 U.S. at 53 (1961). It has similarly been defined as one "where rights are preserved or lost." *White*, 373 U.S. at 60. It is a proceeding that has "significant consequences for the accused." *Bell*, 535 U.S. at 696. It is a stage where counsel's

presence is "necessary to mount a meaningful defence." *United States v. Wade*, 388 U.S. 218, 225 (1967). These definitions are consonant with this Court's definition in Syllabus. pt. 2 of *Tiller, supra.*

The Sixth Circuit assessed a similar fact pattern, though not entirely identical, in *Van v. Jones, supra.* In that case, structural error was asserted when counsel was not present for a hearing to consolidate defendants for trial (which contrasts with the instant case, which was to sever the defendants' trials), in a case it deemed to be the first case on that particular issue before a United States Court of Appeals. *Van*, at 293. The Sixth Circuit determined that, due to Michigan's rules of procedure, the appellant had no loss of advantage from the consolidation, because his counsel was free to later seek a continuance without any prejudice being caused by the earlier consolidation. *Van*, at 313-315. Furthermore, in that case, counsel had been notified of the hearing, and did not appear. The Sixth Circuit did not want to create a "get out of jail free card" to incentivize counsel to absent themselves from a consolidation hearing, which under Michigan rules had to be brought by the prosecution. *Van*, at 315.

These factors are not in play here. By the time the Petitioner's counsel even knew severance was being considered, the co-defendant's trial had already been called off, and the jury had arrived. There was no opportunity to get the Circuit Court to reconsider, and no opportunity for gamesmanship of the sort discussed in *Van.* Also importantly, the Petitioner lost a critical advantage from having the trials severed; as astutely noted by Mr. Easton, *and as expressly agreed by the Circuit Court as the basis for granting the severance*, (A.R., at 340), the Petitioner's inculpatory statements would not be able to come in before the single jury in a joint trial due to the holding of *Bruton.*[4] The statements did, however, come in at her own trial

4 *Bruton* was subsequently modified by *Richardson v. Marsh*, 481 U.S. 200 (1987). See also, *State v. Mullens*, 371 S.E.2d 64, 179 W.Va. 567 (1988).

against her. (A.R., at 198-199, 211-217). Under these circumstances, it is plain that the severance hearing was a critical stage, and the absence of the Court to ensure the presence of the Petitioner and Mr. D'Atri created structural error sufficient to justify a new trial.

2. The Petitioner was improperly convicted of two counts of conspiracy stemming from the same agreement.

A claim of double jeopardy is governed by the following standard of review: "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

This Court has held that:

> "'The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.' Syllabus Point 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977)." Syllabus point 2, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. Pt. 2, *State v. Kent*, 678 S.E.2d 26, 223 W.Va. 520 (2009).

In this case, the Defendant was convicted of both Count 2 and Count 4 of the Indictment. Count 2 is Conspiracy to Commit Burglary, and Count 4 is Conspiracy to Commit Grand Larceny. Notably, the text of the indictment of Count 1, the Burglary charge, asserts that it was undertaken "with the intent to steal items" from the "residence and outbuilding." Thus, the scope of the conspiracy to commit larceny is wholly subsumed within the conspiracy to commit burglary.

This Court has previously assessed a fact pattern such as this, in which there were separate convictions for larceny and breaking and entering:

> We, therefore, conclude that under our general conspiracy statute, W.Va.Code, 61-10-31, a conspiracy to commit one or more substantive crimes does not mean an accused may be charged with conspiracy to commit each separate crime. Under our general conspiracy statute, if it is determined that multiple conspiracy agreements were made to commit the several substantive crimes, then the accused may be charged with multiple conspiracies to commit each of these crimes. To determine whether single or multiple conspiracy agreements exist, the courts consider a number of factors under a totality of circumstances test.
>
> In the present case, we conclude as a matter of law that only one conspiracy case was shown by the evidence. Viewing the evidence in the light most favorable to the State, only one agreement was proven--an agreement to rob the store. The fact that the act of robbing the store constituted two distinct crimes, breaking and entering and larceny, cannot transform one agreement into two agreements under the conspiracy statute. The totality of circumstances test would show the time, persons acting as co-conspirators, and the place where the events alleged as a part of the conspiracy took place were substantially the same. The statutory substantive offenses charged were the same as the overt acts charged in the two conspiracy charges, i.e., (1) breaking and entering and (2) larceny. Consequently, the defendant's conviction of two conspiracy offenses constituted a violation of the foregoing established double jeopardy principles.

State v. Johnson, 179 W.Va. 619, 630-31, 371 S.E.2d 340, 351-52 (1988).

The totality of the circumstances test referenced above was adopted from the federal courts, and set forth as follows:

> "The following factors are normally considered in determining whether one or two conspiracies are involved: (1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government or any other description of the offenses charged which indicate the nature and the scope of the activity which the government sought to punish in each case; and (5) places where the events alleged as part of the conspiracy took place.... These factors are guidelines only. The essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement, each with a separate object."

Id., 179 W.Va. at 630, 371 S.E.2d at 351, quoting *United States v. Thomas*, 759 F.2d 659, 662

(8th Cir.1985).

Under these factors, the burglary and larceny were alleged to have taken place contemporaneously. The same co-conspirators were alleged for each conspiracy. Although there are two different statutory charges, the larceny charge was clearly within the scope of the mental state asserted in the burglary charge. The allegations involve a single target property and the moving of goods from that property to a single nearby property. This case presents a classic instance of the principle set forth in *Johnson*.[5] The Petitioner has been subject to consecutive conspiracy sentences in violation of federal and state constitutional principles, and this Court should vacate the conviction on Count 4, because the agreement in that count is wholly within the scope of the agreement in Count 2.

3. The Circuit Court erred by declining to order the suppression of the evidence derived by the search warrants following the suppression hearing.

"When reviewing a ruling on a motion to suppress, we take the facts in the light most favorable to the State, review the circuit court's factual findings for clear error, and conduct a de novo review of the determination of whether the search or seizure violated the Fourth Amendment." *State v. Deem*, 849 S.E.2d 918, 923 (W. Va. 2020).

The 4th Amendment to the U.S. Constitution reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See also § 6 of Article III of the W.Va. Constitution.

Marron v. United States, 275 U.S. 192 (1927), established an analytic framework grounded against exploratory searches through the general proposition that "no item can

5 See also, *State v. Judy*, 372 S.E.2d 796, 179 W.Va. 734 (1988).

be seized unless it is described in the search warrant. Further protection against exploratory searches is provided by the principle that a warrant must particularly describe the place to be searched and the things or persons to be seized." *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (W. Va. 1996); *State v. Greer*, 130 W.Va. 159, 164-65, 42 S.E.2d 719, 722-23 (1947).

> In determining whether a specific search warrant meets the particularity requirement, a circuit court must inquire whether an executing officer reading the description in the warrant would reasonably know what items are to be seized. In circumstances where detailed particularity is impossible, generic language is permissible if it particularizes the types of items to be seized. When a warrant is the authority for the search, the executing officer must act within the confines of the warrant. More pertinent to this case, the police may not use an initially lawful search as a pretext and means to conduct a broad warrantless search. *State v. Clements*, 175 W.Va. 463, 470, 334 S.E.2d 600, 607, cert. denied, 474 U.S. 857, 106 S.Ct. 165, 88 L.Ed.2d 137 (1985). To be sure, blatant disregard by the executing officer of the language of a search warrant can transform an otherwise valid search into a general one and, thus, mandate suppression of all or at least those items seized outside the scope of the warrant. The execution of a search warrant must be directed in good faith toward the objects specified in the warrant.

Lacy, 196 W.Va. at 111, 468 S.E.2d at 726.

Three warrants were obtained by law enforcement prior to the search. (A.R., at 311-331). The first warrant was 19SW16. This warrant describes thirty (30) items of "property to be seized" in "Attachment A." (A.R., at 313). The property receipt to this warrant lists five (5) items: (1) Front door with frame; (2) white kitchen cabinet; (3) ceiling fan with light; (4) white base board strip; and (5) yellow garden hose. (A.R., at 317). Of these five items, the only ones described even vaguely in the warrant are the front door with frame, the kitchen cabinet, and the ceiling fan with light, however, they are not described with any degree of particularity or detail.

The second warrant was 19SW17. This warrant describes sixteen (16) items of "property to be seized" in "Attachment A." (A.R., at 322). The property receipt to this warrant lists twenty-seven (27) items: (1) Stihl weed eater; (2) Greenworks pressure washer; (3) Dewalt drill and case; (4) Porter Cable nail gun; (5) TNT Tools n Tasks nail gun; (6) Hitachi air staple gun; (7) 26 gallon air compressor; (8) Chicago Electric power tool; (9) Hitachi 1 1/2" 18 ga. Finish nails; (10) Bostitch 1 3/4" 18 ga. finish nails; (11) Hitachi 2" 18 ga. finish nails; (12) Skil grinder; (13) Skil saw; (14) MVP jack stand; (15) another MVP jack stand; (16) MVP super lift; (17) Shakespeare Ugly Line; (18) ratchet strap; (19) red vise; (20) Chicago Electric sander; (21) blue tote box; (22) yellow extension cord; (23) blue dolly; (24) green and grey chest; (25) Skil vibration saw; (26) Craftsman tool bag with miscellaneous tools; and (27) Craftsman socket wrench set. (A.R., at 320-321). Of the items seized under this warrant, the only ones even vaguely described in the warrant are the Stihl weed eater, the Greenworks pressure washer; the Dewalt drill and case, the 26 gallon air compressor, the blue tote, the blue dolly, and the red vise. Most of these items are not described with any detail.

The third warrant was 19SW18. This warrant describes nothing with particularity, but merely lists five groups of items which could be located in most homes throughout West Virginia: (1) jewelry; (2) hunting equipment; (3) items used for the assembly or manufacture of a garden pond; (4) landscaping supplies; and (5) hose and "any other item that was stolen from the residence." (A.R., at 326-327). The property receipt lists twenty-eight (28) items. (A.R., at 328-329). The only items which might arguably fit into any of the categories include two tree stands, a piece of plastic pond liner, and a submersible pump, none of which being described with any degree of particularity in the warrant.

The search conducted here was largely general in nature, given the few items described in

the warrants with any particularity. Some items were listed in purely generic terms, including a "front door with frame, white kitchen cabinet, ceiling fan with light, white base board strip, and yellow garden hose, jewelry, hunting equipment, items used for the assembly or manufacture of a garden pond, landscaping supplies, a hose and 'any other item that was stolen from the residence.'" These are items common found in any home. The vague descriptions allowed an expansive seizure in the nature of a general search.

The Petitioner contends that the Circuit Court's decision to allow in all of the seized items, instead of just those asserted with particularity and seized in conformity with the properly particularized scope of the respective warrants as described above, constitutes a violation of the Petitioner's rights under the Fourth Amendment, due to the Circuit Court's failure to enforce the exclusionary rule. The Circuit Court's written order merely stated, in a conclusory fashion, that "the search warrants were properly issued and executed." (A.R., at 7). In the hearing transcript, the Circuit Court stated:

> THE COURT: [...] there's only so many ways I can describe a blue box, a blue tote, or a green garden hose. I mean, there's only some ways you can describe that."
> MR. EASTON: Well, but there were items in excess of what was described seized pursuant to at least one of those.
> THE COURT: Okay. But my understanding is if a police officer has the right to be your house [sic], and he goes in and he finds something that is illegal contraband, he can take it.
> MR. EASTON: Perhaps, if it's in plain view, I guess.
> THE COURT: Yeah, but there's often times that you get in there. I can look for A, B, and C; and then I see D, which is in plain view. Right? I mean, they weren't asked about that. All right. We will come back here on July 7th, nine o'clock.

(A.R., at 102).

The Circuit Court's explanation for its reasoning on the record, regarding the particularity

issue, is insufficient to justify the admission of every single item brought forth at trial.[6] (A.R., at 101-102). If the plain view exception, rather than the scope of the warrant as ratified by the magistrate's signature, would justify the seizure of non-specified items, then the State, not the Petitioner, had the burden of proof in the suppression hearing to establish that. *See*, *State v. York*, 506 S.E.2d 358, 203 W.Va. 103 (1998). As noted by the Court, the officers "weren't asked about that." (A.R., at 102). A significant portion of the State's case, including valuation necessary to support a grand larceny conviction, rested upon each iterative item it was able to enter into evidence. The Petitioner requests that the judgment below be vacated and remanded for a new trial, subject to suppression of the property seized without adherence to the particularity requirements of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests the following relief: that the conviction and sentence be vacated for a new trial on all counts; or that the conviction and sentence on Count 4 be vacated and the matter remanded for re-sentencing; or any other relief the Court deems just and proper.

Respectfully submitted,

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6 The Circuit Court noted the parties' objections to its rulings at the conclusion of the hearing: "The exceptions are saved." (A.R., at 101).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.: 22-0082

STATE OF WEST VIRGINIA,
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(An appeal of the final order of the Circuit Court of Mineral County, Case No.: 19-F-78)

CERTIFICATE OF SERVICE

On this 10th day of June, 2022, I, Jeremy Cooper, hereby certify to this Court that I have delivered a copy of the Petitioner's Brief to Mary Beth Niday, by US Mail to 1900 Kanawha Blvd E, Bldg 6 Ste 406, Charleston, WV 25305, or by email with permission.

Jeremy B. Cooper
WV State Bar ID 12319