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 REPLY BRIEF

Counsel for the Petitioner, Tammy Gray

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ASSIGNMENTS OF ERROR

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 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

The Petitioner sets forth argument in reply to the Respondent's argument regarding the first two assignments of error. The Petitioner stands upon the Petitioner's Brief regarding the third assignment of error.

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 Respondent suggests that the severance hearing was not a critical stage because the relief available is "discretionary" in the trial court, and because the Petitioner had no constitutional right to a joint trial. Respondent's Brief, at 10. The Respondent cites *State v. Rueckert*, 221 Kan. 727, 561 P.2d 850 (Kan. 1977). In *Rueckert*, the appellant claimed structural

error when he was not present for a severance hearing requested by a co-defendant, while the appellant himself was undergoing a competency evaluation, in a circumstance in which the co-defendant's speedy trial rights were implicated. *Id.*, 561 P.2d at 885. This scenario does not bear upon one in which a post-eleventh-hour motion is made, with no notice, on not the eve of a joint trial, but the morning of it. *Rueckert,* in which the analysis of this issue is based on a completely different procedural posture, and which constitutes two paragraphs from another state in a case predating the bulk of this Court's structural error jurisprudence, should be all but irrelevant to this Court's determination of the issue.

There is no support for the proposition that a critical stage must concern matters of a constitutional scope. This Court's case law defines what constitutes a critical stage in the proceedings, and that is not in the definition. Instead, the definition is as follows: "[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). Even apart from the *Bruton* considerations, it strains credulity to suggest that a defendant whose counsel has prepared for a joint trial would not have the fairness of the proceeding be affected by showing up to jury selection and learning that a severance had been moved for and granted, on grounds that clearly implicate the availability of certain evidence to the State, with no notice, and no opportunity to respond, while counsel was driving to the courthouse and the defendant was sitting in lockup.

The Respondent posits that "Petitioner and her counsel were obviously notified of the trial court's decision to sever the co-defendant's trials, but the Appendix Record does not memorialize this conveyance of information." Respondent's Brief, at 10. The Respondent then states, "The record, as provided by Petitioner, however, is silent as to when and how she learned of the severance." Respondent's Brief, at 11. The Respondent blames the Petitioner for not

objecting to the severance, and for not including a record of trial counsel's reaction to learning of the severance in the Appendix Record. Yet, the Petitioner has included both the trial transcript, and the transcript of the severance hearing that preceded it. At no time is it ever indicated that the Court informed the Petitioner of its reasoning for granting the severance in a manner sufficient for the Petitioner to object to the Court's reasoning. The Court's reasoning is not memorialized anywhere in the Petitioner's court file.[1] The Circuit Court was derelict in failing to make any record on the manner in which it informed the Petitioner of its ruling (if it ever even explicitly did so, rather than allowing trial counsel to come to his own conclusions implicitly) between the end of the severance hearing and the beginning of jury selection. Syllabus Point One of *State v. Shafer*, 168 W.Va. 474, 284 S.E.2d 916 (1981) holds that:

> "The failure of the State to provide a transcript of a criminal proceeding for the purpose of appeal, absent extraordinary dereliction on the part of the State, will not result in the release of the defendant; however, the defendant will have the option of appealing on the basis of a reconstructed record or of receiving a new trial." Syl. pt. 2, State ex rel. *Kisner v. Fox*, W.Va., 267 S.E.2d 451 (1980).

To recount: for months, the State sat on its hands and failed to ask for a severance. Then, prior to Petitioner's trial counsel even arriving at the courthouse, the State made what amounts to an *ex parte* motion for a severance literally minutes before jury selection. The Circuit Court held a hearing on this motion in the absence of the Petitioner or her counsel. Then, at some point thereafter, trial counsel arrives, and events transpire that are uncertain due to the Circuit Court's failure to put them on the record, until jury selection commences for the severed trial. For all we know, the Petitioner did object upon learning of the severance. However, the State has not

1 In fact, had the undersigned counsel not had an existing professional rapport with the co-defendant's trial counsel, Brent Easton, Esq., it is likely that the undersigned never would have learned about the events that occurred prior to jury selection on the day of trial, because it was only Mr. Easton that alerted the undersigned to the events in the first place in the face of a silent record.

provided any transcript, nor ensured the memorialization of the sequence of events following which the Petitioner first learned of, and reacted to, the severance. It is wholly inequitable to try to pin the inadequacy of the record concerning the severance motion on the Petitioner, who was held completely in the dark about all of the events of the morning until they were already done. Even if it was not the intent of the State to sandbag the Petitioner with its dilatory motion practice, a sandbagging could not have been more flawlessly accomplished had it been premeditated.

The Court should assess the Petitioner's first assignment of error on the merits, under the typical standard of review, and should not constrain it to plain error review, barring that the Court should simply order a new trial under *Shaffer*. To allow the State to profit by the manner in which the proceedings unfolded the morning of trial would be to encourage gamesmanship by the State and the impairment of the record by circuit courts.

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

The Petitioner agrees with the Respondent that the Petitioner's Brief contained no citation to where Petitioner's trial counsel raised the issue of multiple punishments for the same conspiracy. Trial counsel did not object pre-trial or post-trial, or even file post-trial motions of any sort. (A.R., at 2). Thus, there was nothing to cite. However, the Petitioner disagrees with the Respondent's contention that the assignment of error violated this Court's December 10, 2012 Administrative Order concerning "[b]riefs that lack citation of authority [or] fail to structure an argument applying applicable law" (Respondent's Brief, at 13-14) because the Petitioner's argument demonstrated that, by the face of the indictment (A.R., at 3-6), the conspiracy charges in this case fell within the scope of the controlling law, cited repeatedly in the second argument section in the Petitioner's Brief; i.e., *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988).

The failure of trial counsel to point out this obvious issue, in which there is case law directly on point requiring relief, at no conceivable strategic cost to the Petitioner, would almost certainly result in collateral relief in an ineffective assistance of counsel claim. However, it is not necessary for this Court to wait to take action. This is not a guilty plea, and the Petitioner made no knowing waiver of her double jeopardy rights, and hence her double jeopardy claim is merely forfeited, and not waived.

> Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right-the failure to make timely assertion of the right-does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious."

Syl. Pt. 8, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). See also, *State v. McGilton*, 229 W.Va. 554, 729 S.E.2d 876 (2012). The Petitioner is constrained to agree, on this assignment of error, that the Court's review must be under plain error analysis because of the dereliction of trial counsel, and because this issue was not implicated by the gross irregularity in the procedures the morning of trial.

This case contains the sort of clear and obvious error that necessitates relief. The facts of this case are functionally indistinguishable from those in *Johnson:*

> 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.

Johnson, 179 W.Va. at 630-31, 371 S.E.2d at 351-52 (1988).

The Respondent claims that there was insufficient factual development below for the Court to consider the totality of the circumstances test set forth in *Johnson* and described in both preceding briefs. This is not so. The face of the indictment describes one residence, one burglary, and a single criminal object of the burglary – the larceny of the items in the residence. (A.R., at 3-6). This is consistent with the facts put on by the State at trial. It is difficult to imagine what additional factual development could be necessary on collateral review beyond an entire trial record. The Respondent cites to *United States v. Thomas*, 759 F.2d 659 (8th Cir. 1985), a 37 year old 8th Circuit opinion, to suggest that there is more that is needed. The Respondent fails to explain that in that case, the question was whether a conspiracy alleged in a new indictment concerning corruption at one casino company fell within the scope of a previously-tried indictment about corruption in a different casino company, which is obviously not the scenario *sub judice*. *Id.*, at 660-61. This is a simple issue. It is regrettable that trial counsel did not make a record, but the violation of the Petitioner's rights is clear, her substantial rights are implicated by having to serve two consecutive conspiracy convictions, and the fairness of her trial is in serious question as a result of this set of events. Syl. Pt. 7, *Miller*.

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,

TAMMY GRAY, Petitioner, by counsel,

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com

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)

CERTIFICATE OF SERVICE

On this 29th day of July, 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.

Jeremy B. Cooper
WV State Bar ID 12319