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OF WEST VIRGINIA

Albright, Justice, concurring:

I fully agree with the outcome reached by the majority in this case as the defendant was denied a fair trial due to the State's failure to disclose information which was not only relevant to the preparation of the defense plan but is also required by the West Virginia Rules of Criminal Procedure¹ and ordered by the trial court.²

What is most disconcerting about this case is that the State refused to disclose *three* significant pieces of information which the defense had specifically and repeatedly requested by pretrial motion in order to adequately prepare a trial defense. As the majority opinion makes clear, the State failed not only to disclose the rebuttal witness, it withheld the statement the rebuttal witness had initially given to the police directly related to the defendant's alibi defense, and it apparently lied about any type of plea agreement offered to the witness in exchange for his rebuttal testimony. The dissent questions that manifest necessity for a mistrial exists because it examines each of these omissions separately and

¹See e.g. W.Va. R. Crim. P. 12.1(b) (requiring disclosure by the State of witnesses to be relied on to rebut defendant's alibi witnesses.)

²See *State v. Smith*, ____ W.Va. ____, ____, ____ S.E.2d ____, ____, 2007 WL 1729991 * n.3 (June 13, 2007).

therefore dilutes the cumulative significance of the State's improper actions. It is that cumulative effect of the State's willful or inadvertent suppression of this evidence that establishes such necessity which demands that a new trial be had. For some reason the dissent refuses to acknowledge that the State's actions created a less than level playing field by withholding information that could prove beneficial to the *development* of the defense. The dissent filed in the case compounds the willingness to require the effects of the State's intransigence by proceeding to divine what the jury might have done had the defense been given a level playing field. That is a flight of fantasy in which we should not participate.

Our system of justice, based on the rudimentary principle that a person is considered innocent until *fairly* proven guilty, was respected and preserved by the decision reached in the majority opinion. Accordingly, I concur.

I am authorized to state that Justice Starcher joins in this concurring opinion.