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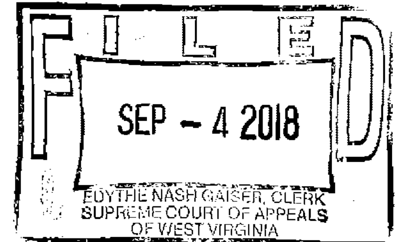
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 18-0406

(MARION COUNTY FELONY ACTION NO. 17-F-77)



State of West Virginia,

Plaintiff Below, Respondent

v.

Oscar Chapman,

Defendant Below, Petitioner

PETITIONER'S BRIEF

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I.

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' 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' 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.

II.

STATEMENT OF THE CASE

This is an appeal of criminal proceedings from a five (5) day jury trial before the Circuit Court of Marion County, West Virginia, Division I, Judge Patrick N. Wilson presiding, on January 29th, 30th, 31st, and February 1st and 2nd of 2018, involving a four (4) count Indictment (Appendix, hereinafter referred to as "App.", Pp. 11-13) charging Petitioner, Oscar Chapman, with the felony offenses of: "Murder In The First Degree", under West Virginia Code §§61-2-1 and 61-2-2; "Robbery In The First Degree (With A Firearm)", under West Virginia Code §61-2-12(a)(1); "Nighttime Burglary", under West Virginia Code §61-3-11(a); and "Conspiracy To Commit A Felony", under West Virginia Code §61-10-31. On February 2, 2018, the jury returned a verdict against Petitioner which found him guilty on all four (4) counts, with a recommendation for mercy on the offense of Murder in the First Degree (App. Pp. 483-487). Counsel for the Petitioner filed a Motion for a New Trial on February 12, 2018 (App. Pp. 471-478), and the State responded on February 15, 2018 (App. Pp. 479-482). On April 3, 2018, the Court denied Petitioner's Motion For a New Trial and sentenced Petitioner to imprisonment in the penitentiary for: not less than one (1) year nor more than five (5) years on the charge of "Conspiracy to Commit a Felony"; not less than one (1) year nor more than fifteen (15) years on the charge of "Nighttime Burglary"; a determinate term of fifteen (15) years on the charge of "Robbery in the First Degree (with a firearm)"; and life, with parole eligibility after fifteen (15) years on the charge of "Murder in the First Degree". The sentence for Nighttime Burglary was ordered to run consecutively to the sentence for Conspiracy to Commit a Felony, and the sentences for Robbery in the First Degree (with a firearm) and Murder in the First Degree were ordered to be served concurrently with each other, but consecutively to the sentences for Nighttime Burglary and Conspiracy to Commit a Felony, and with credit for time served of Three Hundred Twenty-one (321) days (App. Pp. 541-544).

On the evening of November 17, 2016, Malcomb Whitted was shot and killed at 232 Watson Avenue, in Fairmont, Marion County, West Virginia, by three (3) armed men who entered residence purportedly to rob the occupants of the house of drugs and money. The three (3) men alleged to have entered the residence were Timothy Lambert, John "Jay" Deahl, and Devon Stevens (App. Pp. 188-189). No evidence was presented at trial that the Petitioner, Oscar "Rico" Chapman was one (1) of the gunmen who entered or was present in the residence at the time of the shooting, and no physical evidence presented linked Petitioner to any of the weapons used in the crime. The State's entire case against Petitioner was based on the disputed witness testimony that Petitioner was involved in the planning of the robbery and went in the vehicle (with a gun) with the gunmen to the residence. The State's prosecution proceeded under the theory of "Felony Murder", alleging that Petitioner, Oscar "Rico" Chapman, was involved as an accessory before the fact or an aider and abettor (i.e. a principle in the second degree) as a planner and participant in the underlying enumerated felonies of Robbery or Nighttime Burglary, which resulted in the death of Malcomb Whitted during the perpetration of those crimes.

Prior to the trial, Defense Counsel made four (4) separate Motions for Discovery from the State, and counsel met and conducted two (2) separate discovery conferences. The issues regarding the State's failure to provide full and complete discovery primarily involve two (2) of the State's witnesses: 1) Robert Antwann Jarvis, the "confidential source"; and, 2) State witness Ronald Cook-Slayton, otherwise known as "Coby" or "Colby".

As part of the Petitioner's second battery of motions, Defense Counsel filed and served a "Motion for Disclosure of Confidential Informant" (App. Pp. 24-26) and a "Motion for Additional Discovery" on July 3, 2017 (App. Pp. 32-33). On July 6, 2017, Defense Counsel filed and served "Defendant's Second Motion for Additional Discovery" (App. Pp. 41-43) and "Defendant's Motion to

(NOTE - NO PAGE 4)

Compel the State to Produce a Final Witness and Exhibit List" (App. Pp. 44-47). The hearing on these motions was held before the Court on July 10, 2017. Defense Counsel indicated to the Court that after reviewing both the "written narrative of the statement" and the "audiotape" of the statement, the written statement "is a shortened version and only contains the information that implicates my client. Conversely, beginning about 18 minutes and 10 seconds into that recording the informant clarifies the information and indicates basically information that does not point to my client at all and contains potentially exculpatory evidence" (App. Pp. 61 & 62). The Court Ordered that both parties provide the other with their initial witness and exhibit list by July 31, 2017 (App. Pp. 66) and Ordered the parties exchange their Final Witness and Exhibit List thirty (30) days prior to trial (App. Pp. 67). The Court stated "when I say final, just so both sides know how I interpret that, if somebody else's name or some other exhibit comes after that time period passes, then whichever side is going to tender that to me probably should have a really good reason why they did not know about it in the five months prior to that" (App. Pp.67). At the hearing on July 10, 2017, when the Court Ordered the exchange of discovery by July 31, 2017, the Prosecuting Attorney represented that the State's initial witness and exhibit list would include "everything related to the confidential informant" (App. Pp. 73). The information requested to be disclosed by the Petitioner was "the address, telephone number and current location of the State's "confidential source". From the record of testimony in the trial, it is obvious the investigating officer Lt. Douglas Yost of the Fairmont Police Department had the requested information because the confidential source contacted him by telephone (App. Pp. 361), Lt. Yost then took the confidential informant's statement at the police department on the morning of November 18, 2017, and testified at trial that he had conversations with the confidential informant after that (App. Pp. 426). In the State's Proposed Witness and Exhibit List disclosed on July 31, 2017 (App. Pp. 76-85), without any reference to said witness as the "confidential source" the State simply listed the witness (App. Pp. 83) as:

48. Robert Antoine Jarvis
Baltimore Street
Fairmont, WV 26554

No telephone number or street number was set forth and the witness' middle name was spelled incorrectly. From Jarvis' testimony at trial, both when he called Lt. Yost on the evening of November 17, 2017, and later when he was interviewed by Lt. Yost at the Fairmont Police Station, Jarvis was living in a hotel. Jarvis' testimony at the trial was "I was staying at the Avenue Motel" (App. Pg. 334), and later, "Probably about a month later. I moved back to Baltimore" (not Baltimore Street, Fairmont, WV 26554, but Baltimore, Maryland). Curiously, the State's Request for Subpoena for Jarvis fails to set forth any address for Jarvis (App. Pp. 38-40). It is clear from the record that Lt. Yost had contact with Jarvis after the interview, as Lt. Yost testified at trial "Again the report is not the interview. I've had conversations with him since then" (App. Pp. 426). Yet, no telephone number or proper address was ever provided to Defense Counsel despite repeated requests to be provided the same, despite the prosecuting attorney's prior statement on the record to provide "all" such information (App. Pp. 73), and despite Defense Counsel's specific requests for such information again in Defendant's Fourth Motion For Discovery filed on the December 29, 2017 (App. Pp. 90), all of which hampered Defense Counsel's ability to investigate and prepare the defendant's case.

The State's second failure regarding discovery was its failure to provide information for State witness Ronald Cook-Slayton, otherwise known as "Coby" or "Colby". Defense Counsel sought to be provided information regarding "Coby" or "Colby" as part of both the Defendant's Second Motion for Additional Discovery (App. Pp. 41) and the Defendant's Fourth Motion for Additional Discovery (App. Pp. 89). Specific reference to "Coby" was set forth by Defense Counsel in both discovery requests as follows "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) (App. Pp. 41 & 89). The State filed notice of

additional witness Ronald Cook-Slayton on January 19, 2017 (App. Pp. 153). Defense Counsel filed and served a written "Defendant's Objection to Additional Witnesses and Motion to Exclude" State Witness Ronald Cook-Slayton on January 19, 2017 (App. Pp. 158). The hearing on Defense Counsel's Motion to Exclude was held before the Court on January 26, 2017. Regarding State Witness Ronald Cook-Slayton, the Prosecuting Attorney represented at the motion hearing that "we were not able to determine who he was until we re-interviewed witnesses in jail..." (App. Pp. 134), noting to the Court that his testimony pertained to him being "the source for two of the firearms that they were utilized in this case and that they were returned to him afterwards (App. Pp. 135). This disclosure failed to include the most important and surprising part of Mr. Cook's testimony at trial that he had lent co-defendant, Vanny Jermaine Clay, only one (1) gun (a .9 millimeter Rock Army 1911) (App. Pp. 349) but had been returned an additional gun (a .40 caliber) allegedly the Petitioner's gun by co-defendant Michelle Belton (App. Pp. 351).

During the State's case-in-chief, it presented the testimony of co-defendant, Timothy Lambert. Lambert was one (1) of the three (3) individuals that entered 232 Watson Street with firearms on the evening of November 17, 2016. After Lambert was arrested, he entered into a plea agreement with the State pursuant to which he entered a plea of guilty to three (3) charges, Robbery in the First Degree, Conspiracy and Delivery of a Controlled Substance and was sentenced to a definite term of thirty (30) years (App. Pp. 167). As part of the plea agreement, Lambert agreed to provide testimony for the State. Prior to his arrest, Lambert made three (3) telephone calls to Fairmont Police Department Lt. Douglas Yost, all of which were recorded (Compact Disc entitled "Timothy Lambert phone calls D. Yost" with App. Pp. 465). After his arrest, Lambert provided a detailed statement to the police, which was also recorded (Compact Disc entitled "Interviews" with App. 465).

During trial, Lambert made several statements directly contradictory to the statements he

provided police. At trial Lambert testified, inter alia:

a) that prior to his incarceration, he lived "In Fairmont... in Bellview by the skating rink" (App. Pp. 164);

b) that immediately preceding the robbery, "He (meaning the Petitioner) was actually at my house using Michelle's cell phone to call people" (App. Pp. 171);

c) that prior to the robbery he had smoked "some weed" and "did a bit of coke" (App. Pp.176);

d) that he told the police the truth "from the beginning" (App Pp. 214 & 217);

e) that Petitioner was one of the occupants of the vehicle that took Lambert and the two other armed men and dropped them off at 232 Watson Street, and that when they pulled up, the Petitioner got out of the vehicle to "get in front" (App. Pp. 178);

f) that "two days prior to this incident—to the robbery, we went in the house, and I bought some drugs. There was already talk about us robbing them." And continued "So when we left the house, me and Rico (the Petitioner) actually got in a fight on the front porch" (App. Pp. 176 & 177);

g) that during the robbery, that when the victim was shot "he handed me the money and drugs" (App. Pp. 268 & 269);

h) that peer pressure made him leave town afterwards (App. Pp. 283); and,

i) that he could not remember if he told the police he went to Morgantown afterwards (App. Pp. 284).

All these statements were inconsistent with statements which Lambert had provided to the police and which were recorded. During trial, Lambert's extensive history of drug usage was brought out (App. Pp. 224- 226), including doing crack cocaine, weed, and Xanax on the night of the robbery (App. Pp. 249 & 276), admitting that he was already high before entering the residence at 232 Watson

Street (App. Pp. 276). However, Lambert's trial testimony included several statements which were contrary to the statements he previously made to the police, and these prior inconsistent statements were important to the jury's consideration of his credibility and whether Lambert told the truth "from the beginning." (App. Pp. 214). These prior inconsistent statements were prohibited from the jury's consideration during defense counsel's cross-examination of the witness based on the Trial Court's ruling that Lambert "does need to deny it" (App. Pp. 294 & 299) to impeach him on prior inconsistent statements. Rather than "deny" that he made these statements, Lambert asserted over and over again that he "could not recall". Lambert could "not recall" whether he told the police that after he went to Morgantown after the incident (App. Pp. 284). Lambert stated, "I don't recall", when asked if he ever stated (to the police) that he was "forced" to go to Parkersburg after the robbery (App. Pp. 283-284). When asked if he remembered telling Lt. Yost in his statement to the police on December 1, 2012, that the "Petitioner" did not get out of the car, Lambert stated "I don't know" (App. Pp. 239 & 299). Regarding whether Lambert had previously stated he was not armed at the time, Lambert was asked, "In another call to Detective Yost, isn't it true that you told him that you weren't armed, but if you're saying I was armed that shit wasn't loaded" and Lambert stated, "I don't recall" (App. Pp. 245).

The Trial Court ruling was that the witness "does need to deny it" before a prior inconsistent statement could be used to impeach the witness (App. Pp. 294 and 299). The Prosecuting Attorney also believed that to utilize a prior inconsistent statement to impeach a witness the witness first had to deny making the statement, rather than simply state that they did not know or did not remember, to this point, the Prosecuting Attorney argued:

> "Your Honor, I think in order to play any of these excerpts there — and prove the prior inconsistent statement by extrinsic evidence, the witness would have to deny 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". (App. Pp. 292-293)

Additionally, the State presented the testimony of a "confidential source", namely, Robert Antwann Jarvis. Shortly after Lt. Douglas Yost of the Fairmont City Police Department arrived on the scene where Malcomb Whitted was shot and killed, Lt. Yost received a phone call from Jarvis. Jarvis expressed concern that he would be a suspect in the shooting and provided Lt. Yost information regarding the persons he thought were involved. Lt. Yost met with Jarvis at the Fairmont City Police Station and conducted an audio recorded interview of him at 1:55 a.m. on November 18, 2016. (Compact Disc entitled "November 18-16 c/s Statement Confidential Source" App. Pp. 465). The interview began with Mr. Jarvis stating, "Okay. I don't actually know what happened tonight" but went on to assert that the plan had been developed about one (1) week prior. Jarvis initially stated that Petitioner had called him to the residence on Benoni Avenue in Fairmont where Petitioner, Tim Lambert and "a couple other guys" discussed a "lick" (i.e. a robbery). Mr. Jarvis told Lt. Yost that the purported target of the robbery (i.e. "Tone") was "his people" and he "ain't down with it or whatever.", and that Jarvis left Benoni Avenue and went straight to inform him that "Rico and them are saying they going to ride up here and rob you all - Rico and that guy, Tim." Jarvis told Lt. Yost that "Tone" informed him that he had about fifteen (15) guns in the apartment and they'd be stupid if they came there. However, approximately eighteen (18) minutes into the audio recorded interview, Lt. Yost asks Jarvis to tell him again who brings up the robbery, and Jarvis replies, "Lambert—Tim Lambert called me. He's the one that called me. I might even have the actual date on there. Jarvis reiterates, "He's the one that called me. And he said come over here", and continues "So then I go over there, and then he's the one that actually brings it up to me". "So, actually Lambert was one that actually called me". Lt. Yost again asks, "Who brought up the target" and again Jarvis responded, "Okay, Timmy called me. I go over there, Timmy told me the plan." (Compact Disc entitled "November 18-16 c/s Statement Confidential Source" App. Pp. 465). Lt. Yost wrote a narrative of Jarvis' interview but failed to mention anything about

Jarvis' clarification that it was Tim Lambert, not Petitioner, Oscar "Rico" Chapman, who initially contacted him or brought up the plan.

At trial, Jarvis' testimony was inconsistent with the information he provided to the police during his audio taped interview with Lt. Yost. Jarvis testified on direct examination that he got a call from Rico and Lambert wanting him to come to Benoni and talk to him about hitting a lick. (App. Pp. 327), 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. Mr. Jarvis also testified at trial that he saw Rico, Lambert, DeShawn, Chantel and Jermaine at the house (App. Pp. 329) contradicting his recorded interview statement that "It was really just me, Lambert—me, Lambert, Twan and Ricco (SIC)." Jarvis's trial testimony was he gave Tim Lambert and Rico a ride to Spring Street and then "went to my son's mom's house", and, "Then I called Tone, and I said these niggers trying to rob you (App. Pp. 332)." This testimony was inconsistent with his audio taped statement to Lt. Yost that he left the house on Benoni and, "I went straight from 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" (App. Pp. 337) in response to whether he told Lt. Yost that Tim Lambert called him to the house on Benoni and "I could've" (App. Pp. 336) when questioned about his prior recorded statement that Tim Lambert being the person who brought up the robbery to him.

Lt. Yost testified at trial that he received a phone call from a "CS", Robert Antwann Jarvis, while standing over the body at the crime scene on November 17, 2016. (App. Pp. 361) Within several hours, Lt. Yost conducted the audio taped interviewed of Mr. Jarvis. Lt. Yost's written narrative report of his communications with Jarvis' set forth Jarvis' original declaration that "Rico" had called him and was the person that brought up the robbery but failed to include Jarvis' later clarification in the audio recorded interview that Jarvis said it was Tim Lambert that called him and that it was Tim Lambert that brought

up the robbery. At trial, during Defense Counsel's cross-examination of Lt. Yost about his narrative report, counsel posited "Well, specifically after you were interviewing Mr. Jarvis, for about 18 minutes. You ask him to go over this, you wanted to clarify it, and isn't it true that at that point he told you that Tim Lambert was the one who called him to come over and that Tim Lambert was the one who actually brought it up to him, that is the robbery..." and continued "Now, I've got the recording. Do you remember"? Lt. Yost answered, "I really don't remember the context of it" (App. Pp. 427). Defense counsel continues, asking, "Would a recording of that help refresh your memory?" Lt. Yost responds, "Probably (App. Pp. 427)." Immediately following Lt. Yost's response, Defense Counsel asks to play a portion of the interview between Lt. Yost and Robert Antwann Jarvis, at which time the Prosecuting Attorney requests a Bench Conference (App. Pp. 427). The Trial Court states that his recollection was that this question was asked of the witness, Robert Antwann Jarvis and as Defense Counsel explained, the question was asked but Mr. Jarvis' response was that "it could have been Tim, it could have been Rico (Mr. Oscar Chapman, the defendant), he wasn't sure". (App. 428). Defense Counsel explained that the inconsistency was omitted from Lt. Yost's report and the omission was brought to the attention of the prosecution during the first Discovery Conference. Defense Counsel had requested to play actual recorded interviews with prior witnesses to show their prior inconsistent statements and was denied the ability to do so by the Court, Judge Wilson agreed to allow it on a very limited basis in this instant (App. Pp. 429). Judge Wilson excuses the Jury (App. Pp. 433) and requests that Defense Counsel play the portion of the recording between Lt. Yost and Jarvis where Jarvis clarifies that it was Tim Lambert, not the Petitioner who called him regarding the robbery (App. Pp. 434). Judge Wilson asks Defense Counsel, "Since Mr. Yost is here, and he's listened to it, and if that's what's on there, wouldn't solve your problem if he had heard the tape here?" (App. Pp. 434). However, after listening to the recording in camera, Lt. Yost confirms that "I heard it" (App. Pp. 435). Defense Counsel asks Lt. Yost, "Do you understand—I

mean, you heard it", and Lt. Yost responds, "Yes" (App. Pp. 435). Judge Wilson states, "All right. And just so the record is clear, you had no objection—have no objection then to Mr. Yost, now he's heard that, he can get back on the stand and you can ask him, correct? He's going to affirm what he—", and counsel responds, "Timmy called him. Timmy told me the plan" (App. Pp. 435). Lt. Yost states, "I can honestly answer you what I heard and what I remember" (App. Pp. 435). Yet, when the jury is brought back into the courtroom and Defense Counsel resumes cross-examination of Lt. Yost, he is asked again if it was true that 18 minutes into the interview, when he asked Jarvis to clarify that it was Timmy Lambert that called him, Lt. Yost responds, "...having listened to the recording again, I can't tell who he said. I heard the recording. I don't recall who he said. Having listened to it again, I can't tell what he said." (App. Pp. 437). The Court asks to see counsel at the bench, during which the Court states "The Court started down this path, and I'm going to finish it appropriately to protect everybody's rights, Mr. Chapman's and the State's. What that means is, is I am going to – we're going to do first of all one thing, because I've allowed him to listen to that, I'll let you play it as loud as you can play if, and if he indicates that it's indiscernible, then that's going to be his testimony." (App. Pp. 439). However, rather than allowing the audio recording to be played, the Court rules that a transcript provided by the prosecuting attorney's office will be used in lieu of the recording (App. Pp. 440 & 441).

Cross-examination of Det. Yost continues, and Defense Counsel starts to refer to specific transcript page and line numbers at which time the Court interrupts and asks to speak with the parties at the bench. Judge Wilson advises Defense Counsel, "Mr. Hamilton, I'm going to let you ask questions, but I'm not let you read the transcript to him (App. Pp. 448)." The Court continued, "If you want ask him questions now about what was said or not said, if he remembers, he can answer those questions, but I don't think it's appropriate for you to read the transcript to him. That's not what we talked about, is it?" Defense Counsel responds, "I just thought it was – I was trying to clarify when it occurred and

what was said at the very beginning and then what was clarified there." The Court responds, "Well, ask him questions. I mean, that transcript, in the limited fashion that we talked about can be used to refresh his recollection, but above and beyond that, that's what we – that's the ruling of the Court at this point, which quite frankly, Mr. Hamilton, you agreed to if I remember correctly." (App. Pp. 448). Defense Counsel states, "That's fine, Your Honor. I'll point him to it and have him read certain things himself and ask him whether or not he said that (App. Pp. 449)." After Det. Yost reviews the transcript he acknowledges that Mr. Jarvis "at one point" stated that he received a call from Timmy Lambert (App. Pp. 450), and that "At one point in the interview" he stated that Timmy Lambert was the person who brought up the robbery (App. Pp. 451)."

III

SUMMARY OF ARGUMENT

The Petitioner was denied his right to a fair trial because of the Trial Court's erroneous rulings. First, The Trial Court erred by prohibiting defense counsel from using audio taped statements and recordings made by key prosecution witnesses, specifically, Tim Lambert and Robert Antwann Jarvis, to the police to show prior inconsistent statements to impeach and discredit the witnesses' trial testimony and assist the jury in determining the witnesses' credibility. Secondly, the Trial Court erred in failing to exclude State Witnesses 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. Lastly, the Trial Court erred by 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.

IV

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Counsel for Petitioner asserts that oral argument is appropriate and necessary under the criteria established in Rule 18(a) of the West Virginia Rules of Appellate Procedure, and Counsel for Petitioner desires the opportunity to present oral argument before the Court as a Rule 19 argument. Counsel for Petitioner does not believe that this case is appropriate for a memorandum decision.

V

ARGUMENT

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

Prior to his arrest, Co-defendant and State Witness Timothy Lambert made three (3) telephone calls to Fairmont Police Department Lt. Douglas Yost, all of which were recorded (Compact Disc entitled "Timothy Lambert phone calls D. Yost" with App. Pp. 465). After his arrest, Lambert provided a detailed statement to the police which was recorded by Lt. Yost (Compact Disc entitled "Interviews" with App. 465). Lambert's testimony at the trial contained several statements of material fact which were directly contradictory to the statements Lambert previously provided police. These prior inconsistent statements were important to the jury's consideration of Lambert's credibility and whether Lambert was, as he professed, "truthful from the beginning". These prior inconsistent statements were prohibited from the jury's consideration during defense counsel's cross-examination of the witness based on the Trial Court's ruling that the witness needed to deny the statement: Lambert "does need to deny it" (App. Pp. 294 and 299) before Defense Counsel would be permitted impeach him on prior

inconsistent statements. Continuing on that point the Court stated "Mr. Hamilton can ask him did he or did he not say that. That is perfectly fine" ..."and if he denies it then I think it's perfect impeachment to play the tape of the interview". However, rather than "deny" that he made these statements, Lambert's answer over and over again that he "could not recall" making these prior statements. Lambert could "not recall" whether he told the police that after he went to Morgantown after the incident (App. Pp. 284). Lambert stated, "I don't recall", when asked if he ever stated (to the police) that he was "forced" to go to Parkersburg after the robbery (App. Pp. 283-284). When asked if he remembered telling Lt. Yost in his statement to the police on December 1, 2012, that the "Petitioner" did not get out of the car, Lambert stated "I don't know" (App. Pp. 239 & 299). Regarding whether Lambert had previously stated he was not armed at the time, Lambert was asked, "In another call to Detective Yost, isn't it true that you told him that you weren't armed, but if you're saying I was armed that shit wasn't loaded" and Lambert stated, "I don't recall" (App. Pp. 245). The Trial Court's ruling was that an affirmative "denial" was required before being able to utilize the tape to show Lambert's prior inconsistent statements, and that witness assertions that he "couldn't recall", "did not remember" or "didn't know" whether they previously said something else in their recorded statement to the police did not qualify to allow impeachment by use of a prior inconsistent statement.

Similarly, Jarvis' trial testimony was inconsistent with the information he provided to the police during his audio taped interview with Lt. Yost. Jarvis testified on direct examination that he got a call from Rico and Lambert wanting him to come to Benoni and talk to him about hitting a lick. (App. Pp. 327), 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 Rico, Lambert, DeShawn, Chantel and Jermaine at the house (App. Pp. 329) contradicting his recorded interview statement that "It was really just me, Lambert—me, Lambert, Twan and Ricco

(SIC)." (Compact Disc entitled "November 18-16 c/s Statement Confidential Source" App. Pp. 465). Jarvis's trial testimony was he gave Tim Lambert and Rico a ride to Spring Street and then "went to my son's mom's house.", and, "Then I called Tone, and I said these niggers trying to rob you (App. Pp. 332)." This testimony was inconsistent with his audio taped statement to Lt. Yost that he left the house on Benoni and, "I went straight from 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" (App. Pp. 337) in response to whether he told Lt. Yost that Tim Lambert called him to the house on Benoni and "I could've" (App. Pp. 336) when questioned about his prior recorded statement that Tim Lambert being the person who brought up the robbery to him. Defense Counsel, did not attempt to utilize the recorded statement to impeach Jarvis, based on the Court's previous ruling regarding State witness Timothy Lambert, that the witness first had to "deny" the statement to impeach by use a prior inconsistent statement. Counsel did however, address the issues of utilizing the tape recordings, during a bench conference (App. Pp. 340-343). Again, the Court indicated, "...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 the witness statement" (App Pp. 341-342. Defense counsel made as continuing objection to the Court's ruling (App. Pp. 342) and continued "Our reservation with this is simply because we are using the actual tapes that were provided by the State and we believe that there is no better evidence than the recordings themselves. As I said before, transcripts even by certified transcriptionists can sometimes contain many portions of inaudible testimony simply because they're not aware of the context that that testimony was given." (App. Pp. 342-343).

As recognized by this Court "[a] defendant on trial has the right to be accorded a full and fair opportunity to fully examine and cross-examine the witnesses". Syl. Pt. 1, State v. Crockett, 164 W.Va. 435, 265 S.E.2d 268 (1979).

In the per curiam decision of State v. Barnett, 226 W.Va. 422, 701 S.E.2d 460 (2010), this court reiterated the basic rules of cross-examination, in Syllabus Point 1, as follows:

> Several basic rules exist as to cross examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term "credibility" includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination. Citing Syllabus Point 4 of State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982).

In the present case, the Court's ruling that the witness must first "deny" making the statements before Defense Counsel could utilize prior inconsistent statements to impeach the witness was clearly erroneous. The foundation for impeachment by use of prior inconsistent statements was stated Syllabus Point 1 of the case of State v. Blake, 197 W.Va. 700, 478 S.E.2d 550 (1996), where this Court recognized:

> Three requirements must be satisfied before admission at trial of a prior inconsistent statement allegedly made by a witness: (1) The statement actually must be inconsistent, but there is no requirement that the statement be diametrically opposed; (2) if the statement comes in the form of extrinsic evidence as opposed to oral cross-examination of the witness to be impeached, the area of impeachment must pertain to a matter of sufficient relevancy and the explicit requirements of Rule 613(b) of the West Virginia Rules of Evidence-notice and an opportunity to explain or deny-must be met; and, finally, (3) the jury must be instructed that the evidence is admissible only to impeach the witness and not as evidence of a material fact.

In the case before the Court, the impeaching statements sought to be introduced are important not only to the credibility of the State's key witnesses, Tim Lambert and Robert Antwann Jarvis, for truthfulness, but also to important and specific aspects regarding what Petitioner did or did not do to allegedly plan and participate in the robbery and nighttime burglary, and would have been of tremendous value to the jury in assessing the credibility of those witnesses. As this Court has previously determined "Prior inconstant statements of prosecution witnesses in a criminal case are admissible for impeachment purposes without the need to lay any particular foundation for their admission". State v. Smoot, 167 W.Va. 707, 708 280 S.E.2d 286 (1981).

Rule 613(b) of the Rules of Criminal Procedure states:

> Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain of deny the statement and an adverse party is given an opportunity to examine the witness about it. This subdivision (b) does not apply to an opposing party's statement under rule 801(d)(2).

The importance of the prior inconsistent statements of Timothy Lambert cannot be overstated. The jury was entitled to know that Lambert had previously stated that Petitioner did not get out of the car at the scene, and that his prior statement omitted his assertion at trial that Petitioner said something in secret to another of the actual perpetrators. The jury was entitled to know that Lambert had previously alleged that he had gone to Morgantown after the crime, and that Lambert had previously stated that he had been "forced" to go to Parkersburg after the crime by the Petitioner. The jury was entitled to know that Lambert had previously stated to the police that he was homeless at the time when he claimed at trial that he had a house in Bellview. The jury was entitled to hear that, contrary to Lambert's testimony at trial that the victim "handed" him the money and drugs after he was shot, his prior statement was that the drugs and money fell on the floor and he took some of the drugs out of the victim's pocket. The jury was entitled to hear that Lambert had previously stated that the shooters "just showed up" at the house. The jury was entitled to consider that, despite Lambert's admission of an extensive history of drug usage, including his ingesting Xanax and smoking crack cocaine and marihuana on the night of the robbery and being high before entering the residence at 232 Watson Street, he made a prior statement relating the extent to which he consumed several drugs, both before and after the crime, which would be crucial to his memory and perception of events on the evening of November 17, 2016. Especially, when the Court ruled, over the objection of Defense Counsel, that Lambert could answer the question "Is your memory today free of those substances that you were using prior to turning yourself in" (App. Pp. 305), to which Lambert responded "Yes, sir". (App. Pp. 306). Certainly, the witness' ability to correctly perceive and remember events, and the jury's determination

of the credibility of Lambert's perception and memories, would be affected by knowing that Lambert consumed a large quantity of drugs both before and after the robbery, rather than being able to consider that he just smoked "some weed" and "did a bit of coke" (App. Pp. 176).

However, the most important aspect of all of Lambert's prior inconsistent statements is that they are critical to the jury's ability to assess Lambert's credibility and undermine Lambert's testimonial assertion at trial that he told the police the truth "from the beginning" (App. Pp. 214 & 233). The issue of witness credibility is often the most important issue in a trial. In the case at bar, considering that there was no physical evidence which implicated the Petitioner, and that Petitioner's conviction of "Felony Murder" was based solely on the testimonial evidence of co-conspirators and a confidential source, it is imperative to keep in mind that "for the purpose of assessing the weight of the verdict against the magnitude of the error, the magnitude of this error measured against the weight of this verdict suggests that a reasonable doubt might well have been created by even insubstantial additional impeachment of this vital witness". State v. Hall, 172 W.Va. 138, 304 S.E.2d 43, 48 (1983).

In the case of State v. Schoolcraft, 183 W.Va. 579, 396 S.E.2d 760 (1990), the Court's ruled:

> Syllabus Point 3: Where 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 4: Where the witness cannot recall the prior statement or denies making it, then under W.Va.R.Evid. 613(b), extrinsic evidence as to the out-of-court statement may be shown—that is, the out-of-court statement itself may be introduced or, if oral, through the third party to whom it was made. However, the impeached witness must be afforded an opportunity to explain the inconsistency.

If "[cross-examination is the engine of truth", cross-examination in the interest of substantial justice seeking to elicit relevant truths should not be narrowly construed. State v. Blake, 197 W.Va. 700, 710, 478 S.E.2d 550, 560, citing State v. Thomas, 187 W.Va. 686, 691, 421 S.E.2d 227, 232 (1992).

Additional confusion about using the prior inconsistent statements occurred because they were contained on the actual audio recordings to the police themselves, not transcribed in a written format

by a certified court reporter. In the case at bar, Defense Counsel asserts that the actual audio recorded statements provide the best evidence of the actual statement. The prosecution has access to every one of these recordings because they were provided by the State to Defense Counsel as part of discovery. Furthermore, using the time signatures on the recordings allows specific parts of the recorded statements to be found easily and played. Transcriptions however, by their very nature, impart the possibility of human error in the transcript. In the case at bar, many pages of the transcript needed to be corrected because of errors in the transcription process (App. Pp. 107-108, 110-111, 116-117, 146-147, 167-168, 185-186, 236-237, 239-240, 437-438 & 451-452).

This court has previously held that "[a] videotaped interview, as a recorded form of a defense witness's prior inconsistent statement, was extrinsic evidence" State v. King, 183 W.Va. 440, 396 S.E.2d 402 (1990), and the point regarding the accuracy of recordings to written transcriptions are the corrections which occurred in the transcription of the testimony of Lt. Doug Yost in this case. The original version of the transcript before it was corrected (uncorrected original – App. Pp. 438) stated:

Q. Detective Yost, you've **not** listened to the portion of that interview of Mr. Jarvis; correct?

A. Yes, sir.

Q. And having listened to that is it - - isn't it true that about 18 minutes into this when you want Mr. Jarvis to clarify he indicated that Timmy Lambert was the one who called him?

A. I don't what period in the recording it is, but **haven't** listened to the recording again, I can't tell who he said. I heard the recording. I don't recall who he said. Having listened to it again, I can't tell what he said. (Bold added)

However, after the court reporter's review of the recording of the trial testimony, the corrected version (App. Pp. 437) clarifies what the witness said:

Q. Detective Yost, you've **now** listened to the portion of that interview of Mr. Jarvis; correct?

A. Yes, sir.

Q. And having listened to that is it - - isn't it true that about 18 minutes into this when you want Mr. Jarvis to clarify he indicated that Timmy Lambert was the one who called him?

A. I don't **know** what period in the recording it is, but **having** listened to the recording again, I can't tell who he said. I heard the recording. I don't recall who he said. Having listened to it again, I can't tell what he said. (Bold added)

Often the only way that one can know what was said in a statement is to reference the same to an audio or video recording of the statement, if the same is available. Courts have, from time to time, found material omissions or errors by comparing the written transcript to the actual recording. See Helfer v. Helfer, 224 W.Va. 413, 686 S.E.2d 64 (2009) and United States v. Mageno, 786 F.3d 768 (2015)

In this era of continuing technological advances, the use of video and audio recordings to impeach will only become more common. This Court has previously recognized recordings as a proper avenue for impeachment through prior inconsistent statements: "In the present case, the witness had testified about some of the events covered in the videotape. Thus, it was error for the Court to reject any consideration as to the impeachment of the witness by the videotape merely because the witness stated that she had no recollection of making the videotape." State v. Collins, 186 W.Va. 1, 409 S.E.2d 181 (1991).

The erroneous ruling of the Trial Court which denied using the prior inconsistent statements of the prosecution's key witnesses on the basis that the witness first had to "deny" making the statement, rather than not remember making the statement is a violation of the Petitioner's right to confrontation under the Sixth Amendment of the United States Constitution and Section 14, Article III of the West Virginia Constitution.

In general, the standard of review applicable to this issue is whether the trial court abused its discretion: "[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." State v. Louk, 171 W.Va. 639,

301 S.E.2d 596, 599 (1983) Syl. Pt. 2, State v. Peyatt, 173 W.Va. 317, 315 S.E.2d 574 (1983). However, since the issue raised in this case is challenged on constitutional ground, the issue presents a question of law, which the Court has held is to be determined by a different standard: "[w]e review questions of law *de novo.*" May v. May, 212 W.Va. 394, 398, 589 S.E.2d 536, 540 (2003); State v. Whitt, 220 W.Va. 685, 690, 649 S.E.2d 258, 263 (2007).

THE TRIAL COURT ERRED IN ITS' 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

The State's second failure regarding discovery involves the failure to provide information for State witness Ronald Cook-Slayton, otherwise known as "Cody", "Coby" or "Colby". Defense Counsel sought to be provided information regarding "Cody" as part of both the Defendant's Second Motion for Additional Discovery (App. Pp. 41) and the Defendant's Fourth Motion for Additional Discovery (App. Pp. 89). Specific reference to "Cody" was set forth by Defense Counsel in both discovery requests as follows "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) (App. Pp. 41 & 89). Yet, the State filed notice of additional witness Ronald Cook-Slayton on January 19, 2017 (App. Pp. 153) only days before the trial began. Defense Counsel filed and served a written "Defendant's Objection to Additional Witnesses and Motion to Exclude" (App. Pp. 158) to exclude State Witness Ronald Cook-Slayton on the day notice of the previously undisclosed witness was provided (i.e. January 19, 2017), and the hearing on Defense Counsel's Motion held before the Court on January 26, 2017. Specifically, in reference to State Witness Ronald Cook-Slayton, the Prosecuting Attorney stated at the motion hearing that "we were not able to

determine who he was until we re-interviewed witnesses in jail..." (App. Pg. 134), noting to the Court that his testimony pertained to him being "the source for two of the firearms that they were utilized in this case and that they were returned to him afterwards (App. Pp. 135). This disclosure failed to include the most important and surprising part of Mr. Cook's testimony at trial that he had lent co-defendant, Vanny Jermaine Clay, only one (1) gun (a .9 millimeter Rock Army 1911) (App. Pp. 349) but had been returned an additional gun (a .40 caliber) allegedly the Petitioner's gun by co-defendant Michelle Belton (App. Pp. 351).

It is argued that the State's failure to provide proper pre-trial notification regarding Ronald Cook-Slayton (a/k/a "Cody", "Coby" or "Colby") on the basis that the identity of that witness was not known because the State could not determine his identity until the re-interview of witnesses in jail is disingenuous, and that that information would easily have become known to the State by the exercise of due diligence. Defense Counsel had supplied the specific identifying information to the State as set forth in its' discovery request. The State witnesses that were not re-interviewed were in jail and had already made a plea deal to supply testimony to the state. The discovery deadlines and trial date was set and known by the parties, and the exercise of due diligence would merely have required that the re-interviewing of the witnesses in jail occur in the months prior to trial rather than days before the trial.

As this Court has previously held:

> 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 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. Thompson, 176 W.Va. 300, 342 S.E.2d 268 (1986); **Syl.** Pt. 2, State v. Grimm, 165 W.Va. 547, 270 S.E.2d 173 (1980). Also, see State v. Hager, 176 W.Va. 313, 342 S.E.2d 281 (1986).

This Court has consistently held that where a failure to make disclosure hampers the preparation and presentation of the defendant's case, such nondisclosure is fatal to the prosecution's case." Syl. Pt. 2, State v. Grimm, 165 W.Va. 547, 270 S.E.2d 173 (1980); State v. Ellis, 176 W.Va. 316, 342 S.E.2d 285 (1986).

The representations of the Prosecuting attorney in the hearing on the Defendant's Motion to Exclude Witnesses, held on January 26, 2018, that Ronald Cook-Slayton's testimony would be that he was "the source for two of the firearms that they were utilized in this case and that they were returned to him afterwards (App. Pp. 57), failed to include the most important, surprising and damaging part of Mr. Cook's testimony at trial. That testimony was that he had lent co-defendant, Vanny Jermaine Clay, only one (1) gun (a .9 millimeter Rock Army 1911) (App. Pp. 803) but had been returned an additional gun (a .40 caliber) allegedly imputed to be Petitioner's weapon by co-defendant Michelle Belton (App. Pp. 805).

THE TRIAL COURT ERRED IN ITS' RULING DENYING PETITIONER'S MOTION FOR A NEW TRIAL BASED ON THE STATE'S FAILURE TO PROVIDE COMPLETE AND PROMPT DISCLOSURE OF DISCOVERY INFORMATION

The Issue regarding the State's failure to provide full and complete discovery involve two (2) of the State's witnesses: 1) Robert Antwann Jarvis, the "confidential source"; and, 2) State witness Ronald Cook-Slayton, otherwise known as "Coby" or "Colby". As part of the Petitioner's second battery of motions, Defense Counsel filed and served a "Motion for Disclosure of Confidential Informant" (App. 24-26) and a "Motion for Additional Discovery" on July 3, 2017 (App. Pp. 41-43). On July 6, 2017, Defense Counsel filed and served "Defendant's Second Motion for Discovery" and "Defendant's Motion to Compel the State to Produce a Final Witness and Exhibit List" (App. Pp. 44-47). The hearing on these motions was held before the Court on July 10, 2017, at which time Defense Counsel indicated to the Court that after reviewing both the "written narrative of the statement" and the "audiotape" of Lt. Yost's written narrative report regarding the interviews with the "confidential source" (now known to be

Robert Antwann Jarvis), Yost's written narrative was "a shortened version and only contains the information that implicates my client. Conversely, beginning about 18 minutes and 10 seconds into that recording the informant clarifies the information and indicates basically information that does not point to my client at all and contains potentially exculpatory evidence" (App. Pp. 61-62)". The Court Ordered that both parties provide the other with their initial witness and exhibit list by July 31, 2017 (App. Pp. 66) and that the parties exchange their Final Witness and Exhibit List thirty (30) days prior to trial (App. Pp. 67). At the hearing, the Court stated "when I say final, just so both sides know how I interpret that, if somebody else's name or some other exhibit comes after that time period passes, then whichever side is going to tender that to me probably should have a really good reason why they did not know about it in the five months prior to that" (App. 67). At that hearing, when the Court Ordered the exchange of discovery by July 31, 2017, the Prosecuting Attorney represented that the State's initial witness and exhibit list would include "everything related to the confidential informant" (App Pp. 73). The information requested to be disclosed by the Petitioner was "the address, telephone number and current location of the State's "confidential source". From the record of testimony in the trial, it is obvious the investigating officer Lt. Douglas Yost of the Fairmont Police Department had the requested information because the confidential source contacted him by telephone (App. Pp. 361), he then took the confidential informant's statement at the police department and testified at trial that he had conversations with the confidential informant after that (App. Pp. 426). In the State's Proposed Witness and Exhibit List disclosed on July 31, 2018 (App. Pp. 83), without any reference to said witness as the "confidential source" the State simply listed the witness as:

48. Robert Antoine Jarvis
Baltimore Street
Fairmont, WV 26554

No telephone number or street number was set forth and the witness' middle name was spelled

incorrectly. However, it is clear from Jarvis' testimony at trial that at the time he called Lt. Yost on the evening of November 17, 2017, and later when he was interviewed by Lt. Yost at the Fairmont Police Station on the morning of November 18, 2017, Jarvis was living in a hotel. Jarvis' testimony at the trial was "I was staying at the Avenue Motel" (App. Pg. 334), and later, "Probably about a month later. I moved back to Baltimore" (not Baltimore Street, Fairmont, WV 26554, but Baltimore, Maryland). Curiously, the State's Request for Subpoena for Mr. Jarvis fails to set forth any address for Jarvis (App. Pp. 38-40). It is clear from the record that Lt. Yost had contact with Jarvis after the interview, as Lt. Yost testified at trial "Again the report is not the interview. I've had conversations with him since then" (App. Pp.426). Yet, no telephone number or proper address was ever provided to Defense Counsel despite repeated requests to be provided the same, despite the prosecuting attorney's prior statement on the record to provide "all" such information (App. Pp. 73), and despite Defense Counsel's specific requests for such information again in Defendant's Fourth Motion For Discovery filed on the December 29, 2017 (App. Pp. 90), all of which hampered Defense Counsel's ability to investigate and prepare the defendant's case.

It is impossible that Lt. Yost, having been called on his cell phone by the "confidential source" while at the crime scene on November 17, 2017, then later interviewing him at the police station on the morning of November 18, 2017, and then, according to Lt. Yost's own testimony, "had conversations with him again" (App. Pp. 426) did not know the telephone number and current address contact information of Robert Antwann Jarvis. Moreover, the State had to know the current address of Robert Antwann Jarvis, as the subpoena to secure his attendance did not contain a street address (App. Pp. 39) and although no return of service appeared in the record, he appeared as a witness for the prosecution at trial.

The failure of the officer to provide this information to the Prosecuting Attorney so that it could

be disclosed must be imputed to the Prosecuting Attorney. To hold otherwise, would allow the police to fail to provide information to the Prosecuting Attorney in every case, and, in turn, the Prosecuting Attorney would not be liable for non-disclosure of the withheld information. This Court has previously held:

> "A police investigator's knowledge of evidence in a criminal case is imputed to the prosecutor. Therefore, a prosecutor's disclosure duty under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982) includes disclosure of evidence that is known only to a police investigator and not to the prosecutor." Syl. Pt. 1, State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119 (2007)

Syllabus Point 2, of Youngblood, supra, continues:

> "There are three components of a constitutional due process violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial." ." Syl. Pt. 2, State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119 (2007).

For purposes of both this argument, and the argument set forth above in regard to not being able to identify Ronald Cook-Slayton (a/k/a "Cody", "Coby" or "Colby" this Court recites the second component of the analysis of willful or inadvertent suppression in Youngblood, supra, in the case of State v. Peterson, 799 S.E.2d 98 (W.Va. 2017), where it restates:

> [E]vidence is considered suppressed when "the existence of the evidence is known, or reasonably should have been known, to the government, the evidence was not otherwise available to the defendant through the exercise of reasonable diligence, and the government either willfully or inadvertently withheld the evidence until it was too late for the defense to make use of it. State v. Peterson, 799 S.E.2d 98 (W.Va. 2017), citing State v. Youngblood, 221 W.Va. 20, 31, 650 S.E.2d 119, 130 (2017).

The issues regarding the discovery information regarding State's witness, Ronald Cook-Slayton (a/k/a "Cody", "Coby" or "Colby" have been addressed in the previous section.

All of these errors substantially deprived Petitioner of a fair trial, and "[w]here the record of a

criminal trial shows that the cumulative effect of numerous errors committed during trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error" Syl. Pt. 5, State v. Walker, 188 W.Va. 661, 425 S.E.2d 616 (1992); Syl. Pt. 5, State v. Smith, 156 W.Va. 385, 193 S.E.2d 550 (1972).

As set forth in Syllabus Point 4 of State v. Blake, 197 W.Va. 700, 478 S.E.2d 550 (1996):

> Assessments of harmless error are necessarily content-specific. Although erroneous evidentiary rulings alone do not lead to automatic reversal, a reviewing court is obligated to reverse where the improper exclusion of evidence places the underlying fairness of the entire trial in doubt or where the exclusion affected the substantial rights of a criminal defendant.

In reviewing challenges to findings and rulings made by a Circuit Court, this Court should apply a two-pronged deferential standard of review. That standard of review requires this Court to "review the rulings of the Circuit Court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the Circuit Court's underlying factual findings under a clearly erroneous standard." State v. Fitzsimmons, 231 W.Va. 33, 743 S.E.2d 341; State v. Vance, Syl. Pt. 3, 207 W.Va. 640, 535 S.E.2d 484 (2000).

VI

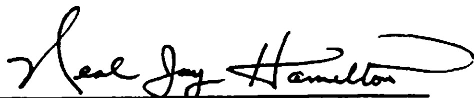
CONCLUSION

Wherefore, the Petitioner respectfully moves this Honorable Court to reverse his conviction and remand this case to the Circuit Court for a new trial on the merits.

RESPECTFULLY SUBMITTED:

Oscar Chapman, Petitioner

By Counsel



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