THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. 20-0099

STATE OF WEST VIRGINIA,
PLAINTIFF BELOW, RESPONDENT

VS.

JOHN THOMAS CAMPBELL
DEFENDANT BELOW, PETITIONER

PETITIONER'S APPEAL BRIEF

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I.

ASSIGNMENT OF ERROR

The petitioner contends that the lower Court erred: (1) by not suppressing the statement made by the petitioner on November 29, 2011; (2) by not giving a jury instruction in the charge that dealt with the voluntariness of the statement; (3) the petitioner's trial counsel was ineffective in defending the petitioner before the lower Court; and (4) the cumulative error as mentioned above also requires this Court to set aside the jury verdict in this case.

II.

STATEMENT OF CASE

Now comes John Thomas Campbell, the petitioner herein, by counsel, Eric M. Francis, and respectfully submits unto this Honorable Court his Petition for Appeal Brief.

III.

SUMMARY OF ARGUMENT

1. The lower Court did not suppress the petitioner's November 29, 2011 statement.
2. The lower Court's failure to give a jury instruction on the voluntariness of the petitioner's November 29, 2011 statement after trial counsel requested it is in error and requires reversal.
3. The petitioner's trial counsel's inactions in the May 20, 2013 suppression hearing rises to the level of ineffective assistance of counsel which also requires reversal.
4. The errors stated above separately or combined put the lower Court's verdict in such doubt that it rises to the level of cumulative error which requires reversal.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The petitioner respectfully ***requests*** oral arguments in this matter and requests such under Rule 19 of Appellate Procedure or any other such Rule that would permit oral arguments in this case.

V.

JURISDICTION

This Petition is brought as a direct appeal from a lower Court, and as such, the West Virginia Supreme Court has the right to hear any appeal from any Circuit Court in West Virginia, as the Constitution of the State of West Virginia has granted original jurisdiction in such matters unto the West Virginia Supreme Court of Appeals and all Circuit Courts. The Petitioner now timely appeals that decision.

VI.

STATEMENT OF FACTS

On February 8, 2012, the Greenbrier County, West Virginia grand jury returned a true bill against the petitioner for violation of West Virginia Code §61-8D-5 (App. 507-508). The indictment was given the number 12-F-34 (App. 507). At the arraignment, the petitioner was appointed counsel from the Greenbrier County Public Defender's Office (App. 521-524) and entered a not guilty plea. The State filed a Motion to Determine the Admissibility of Defendant's Statement on April 11, 2012 (App. 526-529). In response, the Greenbrier County Public Defender's office filed a "Motion to Suppress the Defendant's Statement", on or about April 20, 2012 (App. 538-543).

However, the Greenbrier County Circuit Court entered a "Substitution of Counsel Order" dated December 17, 2012 (App. 565), at which time the petitioner was represented by E. Lavoyd Morgan, Jr.[1], [2]. On or about May 20, 2013, the Greenbrier County Circuit Court heard evidence on the matter as to the admissibility of the petitioner's statement (App. 97-134), at which time, the lower Court ruled the petitioner's statement was admissible at trial (App. 129). The two day trial began on May 21, 2013 (App. 35). The petitioner was convicted of violating West Virginia Code §61-8D-5 (App. 376). The record does ***not*** show when or if trial counsel filed a new trial motion or an appeal of the petitioner's case. However, trial counsel, at the first sentencing hearing, requested and received a psychological evaluation of the petitioner (App. 388-398). The petitioner was granted an alternative sentence (App. 434); at some point thereafter, the petitioner violated the terms of his alternative sentence and was incarcerated (App. 454-455).

While incarcerated, the petitioner, pro se, filed a habeas corpus petition. The lower Court[3], in response to said petition, ordered counsel be appointed[4] for the petitioner and directed said counsel to appeal said conviction. Petitioner's current counsel tried earlier and failed to appeal said conviction.[5] Once the final Order was entered, petitioner's current counsel timely appealed the petitioner's conviction on criminal action number 12-F-34 in Greenbrier County Circuit Court.

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[1] This attorney has been disbarred. See Office of Disciplinary Counsel v. E. Lavoyd Morgan, Jr., No. 19-0885 (2020).
[2] The trial counsel may have acted similarly to this defendant as he did to client's discussed in 19-0085(2020).
[3] At that, the lower Court judge was different than the trial court judge in this matter.
[4] Current counsel is Eric M. Francis.
[5] Current counsel tried to file an appeal earlier, but the final order in this matter had not been entered at that time.

VII.

ARGUMENT

1. The lower Court did not suppress the petitioner's November 29, 2011 statement.

The petitioner, by counsel, recognizes its burden to establish that the petitioner's statement was not voluntary is sizable, but not insurmountable. While many cases, such as State v. Farley, 452 S.E.2d 50, 192 W.Va. 247 (1994) state: "In circumstances where a trial court admits a confession without making specific findings as to the totality of the circumstances, the admission of the confession will nevertheless be upheld on appeal, but only if a reasonable review of the evidence clearly supports voluntariness." In this particular matter, the lower Court states, in part, the following:

"The Court: Well, the Court can only go on the evidence that's adduced at this hearing, and the evidence is that he was picked up. He was approached while at work, and he asked if he would come and talk with him.

He rode in the front seat, probably five or six miles from Davis Stewart to the Lewisburg Police Department, was taken into a room, which I guess is the interrogation room. It's a small room it appears. There's no window. There is a door there.

He was seated off to the kind of catty-cornered, at the corner of the desk, and that interview took place 45 minutes, and I would have to, I guess conceivably those circumstances could amount to a custodial-type situation of coercive-type interrogation, but there's been no testimony as to his level of sophistication, his intelligence, his demeanor, the impact it had on him or any of that.

For me to conclude that what it – it was custodial or he was coerced, I can't based on the testimony so the preponderance at this point is that it was not custodial. A preponderance is that

it was voluntarily given at this point, and so it may be admitted into evidence at trial..." (App. 127-128). But at the time, there were several unanswered questions that should have addressed then.

First of all, the standard used in determining the voluntariness is first the totality of the circumstances as expressed above with the added factor of was the petitioner's freedom restricted in any significant way. State v. Hardway, 385 S.E.2d 69, 182 W.Va. 1 (1989). At this point, it is clear when the officer picked the petitioner up at work and drove him five or six miles to the city police station, and not letting him drive his own car to the city police station. Similar situations in other jurisdictions have been enough to make a statement not voluntary. (People v. Altieri, 355 N.Y.S. 2d 722, 77 Mis. 2d 1038 (N.Y. City Ct.1974), where impounding a car constituted a denial; State v. Farris, 109 Ohio St. 3d 519, 849 N.E.2d 985, 2006 3255 (Ohio 2006) where taking someone's car keys constituted a denial; and State v. Werner, 117 N.M. 315, 871 P. 2d 971, 1994 NMSC 25 (N.M. 1994) where locked in a car for forty-five minutes constituted a denial.)[6],[7]

However, the most glaring omission in the May 20, 2013 suppression hearing is a meaningful discussion of the petitioner's mental capacity, or lack thereof. Once again, it bears repeating under the current case law such as State v. Farley, 452 S.E.2d 50, 192 W.Va. 247 (1994), the voluntariness of a statement is based on the totality of the circumstances. Also, this High Court has said previously that a petitioner's mental condition is a factor that must be considered in determining the totality of the circumstances. In fact, such cases as State v. Hamrick, 166 W.Va. 673, 236 S.E.2d 247 (1977), state the following: "Confessions cited by law

[6] It should be pointed out that 45 minutes is about the same amount of time Mr. Campbell spent in the interrogation room.

[7] Out of an abundance of caution, current counsel wishes to include arguments found in the Motion to Suppress the Defendant's Statement found on pages 538 – 543 in the appendix.

enforcement authorities from persons suspected of crimes who because of mental condition cannot knowledgeably and intelligently waive their right to counsel are inadmissible." However, after reviewing the cases in West Virginia concerning the mental condition of a defendant and the voluntariness of a statement, the most instructive case as it relates to the petitioner's situation may be State v. Parsons, 381 S.E.2d 246, 181 W.Va. 131 (1989). Briefly, in Parsons, 381 S.E.2d 246, 181 W.Va. 131 (1989), that defendant had a valid IQ of 75 and was told/shown three times of his Miranda warnings. In that case, this High Court said the statement was voluntary. If that is the case, then, as in this case, the petitioner has a valid IQ of 74 (App. 468), and was ***never*** read his Miranda warning, the statement cannot be ruled voluntary. For a more in dept and professional understanding of why said statement was not voluntary, petitioner's counsel points this Court to the report of Michael Sheridan at pages 476-477 of the appendix. In the report, Mr. Sheridan opines, in part:

> "There is no evidence that Mr. Campbell was read his *Miranda* rights prior to his interrogation, and it is my understanding that such notification was not legally required in the circumstances. However, he clearly possessed those rights, whether reminded of them or not, and the determination of "voluntariness" of his confession turns on whether he understood that he was waiving those rights, and did so in a knowing, intelligent, and voluntary way.
>
> As we have seen from results of the *Miranda* Rights Comprehension Instruments, Mr. Campbell's Comprehension of his *Miranda* rights, and particularly the vocabulary used in the typical *Miranda* notifications, is imperfect at best. However, that comprehension is largely consistent with that of others in the general population, and particularly those with limited intellectual functioning. He had particular difficulty comprehending and explaining the nature of the interrogation process when presented with various examples.
>
> Additionally, several of the officer's interrogation tactics would have had the effect of diminishing Mr. Campbell's comprehension of the situation, particularly taking into account his borderline intellectual functioning, and his knowledge of interrogation techniques which was limited to fictional television presentations. In particular, the officer appeared to overstate the strengths of the case against Mr. Campbell, and also implied that a confession would be helpful rather than harmful

to him, thus making it more difficult for Mr. Campbell to perceive the naturally adversarial nature of the interaction.

Taking these issues into account, and considering the totality of the situation, *it is highly unlikely that the defendant's behavior was "knowing" in the sense that he understood that he was waiving his rights.* To the contrary, it is highly unlikely that consideration of his rights entered into his decision-making process at that point.

It is equally difficult to conclude that his though process was intelligent, reflecting a rational reasoning process. Rather, it appears that his primary motivation was to reduce the stress he was experiencing at that time by ending the interrogation process quickly. A more self-protective behavior would have been to request an attorney or request an end to the interview rather than to confess in order to escape the situation.

Finally, there is no evidence that the interview situation was "so coercive that the defendant's will was overborne." Generally, courts have considered interrogations of six hours or more, or promises of either harsh consequences or significant leniency to be coercive; I see no evidence that anything occurred in this situation which remotely approaches that standard.

Finally, one must consider whether there are aspects of Mr. Campbell's functioning which are apt to make him especially vulnerable to influence by the police. The mere presence of borderline intellectual functioning does not support a constitutional claim that a confession was involuntarily made. Rather, there must be some evidence that the police took advantage of the defendant's condition. I am aware of no evidence that the police could have know Mr. Campbell's level of intellectual functioning, much less that they took undue advantage thereof. The results of the MISS indicate that Mr. Campbell's overall suggestibility is average compared to the norm reference group. Consequently, there is no reason to conclude that he was overly suggestible or more susceptible to standard police interrogation methods than the average suspect in a similar situation.

In summary, while Mr. Campbell is not unusually suggestible, and was not subjected to undue coercion, it would be difficult to argue that his confession was either "knowing" or "intelligent". Therefore, taking into account the totality of the situation, Mr. Campbell's competency to confess is highly questionable."

At this time, the petitioner's counsel would state that this High Court has the information as to the petitioner's mental condition and it ***must*** be considered in the "totality of the circumstances". Granted, the lower Court did not have said information at the time, so its

ruling was flawed, through no fault of its own. However, what is equally true is that the petitioner is low functioning mentally and it would be just as foolhardy to assess responsibility to him. Therefore, current counsel argues in another part of this memoranda that it was ineffective assistance of counsel of the trial counsel to proceed in this manner, but in doing so, it does not truly address this issue of the "voluntariness of the statement" in question. According to former Justice Cleckley in State v. Farley, 452 S.E.2d 50, 192 W.Va. 247 (1994), the West Virginia Supreme Court of Appeals is constitutionally obligated to make plenary, independent appellate determinations of whether a statement in question is or was voluntary under the law. As this memoranda is tendered to this High Court, that includes everything in the Appendix, such as the psychological examination (App. 458-477).

2. The lower Court's failure to give a jury instruction on the voluntariness of the petitioner's November 29, 2011 statement after trial counsel requested it is in error and requires reversal.

The petitioner's trial counsel offered at least two jury instructions on the issue of voluntariness in a broad sense. (Defendant's Proposed Jury Instruction No. 1 (App. 616) and Defendant's Proposed Jury Instruction No. 3 (App. 618). Defendant's Proposed Jury Instruction Number 1 states the following:

"You are instructed that, the burden is upon the State to prove by a preponderance of the evidence that any statements made by the Defendant were made voluntarily, and pursuant to the knowing and intelligent waiver of his fifth amendment right against self incrimination. If you find that the State has failed to meet this burden you must not consider the statement in your deliberations. **State v. Bradshaw**, 193 W.Va. 519, 457 S.E. 2d 456 (1995)."

Defendant's Proposed Jury Instruction Number 3 states the following:

"You are instructed that there is a legal presumption against the waiver of ones right against self incrimination as set forth in ***Miranda* v. Arizona**, to overcome this the State must

prove by at least a preponderance of the evidence that the Defendant, John Campbell, made a knowing and voluntary waiver of his rights pursuant to ***Miranda* v. Arizona** to remain silent and not make a statement to Deputy Baker in this case. If you find that he did not so waive his rights, you must not consider any part of any statements made by him during your deliberations. **Brewer v. William**, 430 U.S. 387 (1977), **U.S. v. Grant**, 545 F.2d 942 (4th Cir.), cert denied, 432 U.S. 908 (1977).

Both instructions were offered by the defense (App. 325-326), but were denied by the trial Court (App. 327). The basic grounds for denial given by the trial Court were two. First, involved a non-custodial statement (App.327) and/or instructions were cumulative (App. 327). Petitioner's current counsel states said findings by the trial Court to be lacking and unsupported by West Virginia law.

To begin with, in State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996), it clearly states, as a general rule the refusal to give a requested jury instruction is review for an abuse of discretion standard. By contrast, a question of whether a jury was properly instructed is a question of law and the review is de novo. In this instance, the petitioner's current counsel would state that both types of review must take place. Since 1978, West Virginia has closely followed the Massachusetts rule as opposed to the orthodox rule when it comes to the voluntariness of statements and jury instructions. See State v. Vance, 162 W.Va. 467, 250 S.E.2d 148 (!978) and State v. Wilson, 190 W.Va. 583, 439 S.E.2d 448 (1993). Then, the next question is, were those instructions requested by petitioner's trial counsel. The answer is most definitely yes. (App. 325-326.) Case law on this matter states that once a jury instruction is requested, the jury instruction **must** be given. See State v. Wilson, 190 W.Va. 583, 439 S.E.2d 448 (1993). Petitioner's current counsel cannot find anywhere in the case law where the phrase "must" is limited by a non-custodial interrogation. Alternatively, to limit said jury instruction to only custodial interrogations would seem to take out the "humane" element of the so-called

Massachusetts rule as it is understood. And, to argue otherwise would also lessen the meaning of the word "must" as used by this Court.

Next, the prosecutor at trial argues that in some manner, defendant's proposed jury instruction one and three are cumulative in nature to the jury charge at trial. The part of the Court's jury charge covering the petitioner's statement can be found on pages 353-54 of the Appendix. That part of the jury charge reads as follows.

"The Court instructs the jury that under the law of this State, the "confession" or "statement" offered into evidence by the State may be considered by the jury in determining the guilt or innocence of the defendant of the crime charged in this case, only if the jury believes that the State has proven by a preponderance of the evidence that such statement was freely and voluntarily made without threat or coercion or a promise of reward, and that if you do not believe that the State has met this burden of proof, it is your duty to disregard such statement entirely."

If one compares either of the petitioner's proposed instructions and the jury charge given at trial, the jury charge is lacking in one critical area. The jury charge does not use language such as "his Fifth Amendment right against self-incrimination" or "his rights pursuant to Miranda v. Arizona , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), to remain silent and not make a statement. Petitioner's current counsel would argue that those phrases, or phrases like them, left out of the jury charge are important and critical. Phrases such as the ones left out imply at the very least a standard if not a duty that officers must employ. Without said language the jury charge is incomplete and if the jury charge is incomplete then it is not a correct statement of the law and must fail. That is to say, under West Virginia law, if a jury instruction is not complete and not covered by other instructions, it is reversible error. See State v. Hinkle, supra; State v. Woodrum, (W.Va. 2020); State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (W.Va. 1995); and State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994).

3. The petitioner's trial counsel's inactions in the May 20, 2013 suppression hearing rises to the level of ineffective assistance of counsel which also requires reversal.

A defendant in a criminal case is guaranteed the right to the effective assistance of counsel by both the Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution. Pursuant to the decision in State v. Clawson, 165 W.Va. 588, 270 S.E.2d 659 (1980), a Petition for a Writ of Habeas Corpus is the proper remedy for a lack of the effective assistance of counsel.

In the decision of State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974), the Court held that, in determining whether or not an accused had be prejudiced by the ineffective assistance of counsel, the Court should compare the performance of the counsel in question and the normal and customary skill possessed by attorneys who have a reasonable knowledge of criminal law. The Court continued that the burden of proof to show that the assistance of counsel was ineffective was upon the petitioner, and that the petitioner must show such ineffective assistance of counsel by a preponderance of the evidence. The Court further held that the error of counsel must be such as would have changed the outcome of the trial.

The petitioner recognizes that the effective assistance of counsel is not necessarily the successful assistance of counsel. An attorney may provide effective assistance and the case still be lost. The petitioner also realizes that part of his burden is to demonstrate that the errors of counsel were more than just failed tactics or trial strategies, and must instead rise to the level of being both prejudicial and flagrant.

In the case at hand, the trial counsel failed to explore the petitioner's mental state prior to the sentencing stage of the proceeding, even though it has been well established that the voluntariness of a statement is to be determined on the "totality of the circumstances". (State v. Farley, 452 S.E.2d 50, 192 W.Va. 247 (1994)). And, it has been established that a defendant's mental state can or should be a factor considered by the West Virginia Supreme Court of

Appeals (State v. Adkins, 289 S.E.2d 720, 170 W.Va. 46 (1982); State v. Boyd, 280 S.E.2d 669, 167 W.Va. 385 (1981); and State v. Parsons, 381 S.E.2d 246, 181 W.Va. 131 (1989)). Here, the trial court made it part of the record (App.458-477). But, did so after the knowledge of such facts as the petitioner's impaired mental state could not assist the judge or jury at trial. As stated in part one of the analysis section of this memorandum: if the presiding trial judge had access to information contained in Michael C. Sheridan's psychological report, including but not limited to the petitioner's IQ score of 74 and the testing psychologist expert's opinion about the voluntariness of petitioner's statement.[8] The trial court could have easily ruled the petitioner's statement inadmissible. Even if the lower Court still found the petitioner's statement voluntary under the "Massachusetts" rule, which the State of West Virginia follows, the defense could have made a stronger argument against voluntariness to the jury.

It is common practice to bring all relevant information to the Court at the suppression hearing. See cases such as State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981); State v. Adkins, 170 W.Va. 46, 289 S.E. 720 (1982); and State v. Parson, 381 S.E.2d 246, 181 W.Va. 131 (1989); all of which had expert testimony at the suppression hearing if not also testimony from the defendant. In this particular case, this was not done, why it was not done is pure speculation. But, surely it is customary for an attorney practicing in criminal law to do this?

"In the seminal case of Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515, 93 L.Ed. 2d 473 (1986), the requirement of police involvement was constitutionalized. The police Mirandized the defendant on two separate occasions. It was later determined via a psychiatric evaluation that the defendant suffered from a form of psychosis that interfered with his ability to make free and rational choices. The lower courts held that the defendant's mental condition

[8] This report was more fully discussed in a previous section in this memoranda.

precluded him from making a valid waiver of his Miranda rights. The United States Supreme Court, however, reversed the case holding that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Cause of the Fourteenth Amendment." Colorado v. Connelly, 479 U.S. at 167, 107 S.Ct. at 522, 93 L.Ed.2d at 484."

"The appellant relies on the established principle that "[c]onfessions elicited by law enforcement authorities from persons suspected of crimes who because of mental condition cannot knowledgeably and intelligently waive their right to counsel are inadmissible." Syllabus point 1, State v. Hamrick, 160 W.Va. 673, 236 S.E.2d 247 (1977); accord State v. Wyant, 174 W.Va. 567, 328 S.E.2d 174 (1985); syllabus point 1, State v. Jackson, 171 W.Va. 329, 298 S.E.2d 866 (1982); syllabus point 4, State v. Adkins, 170 W.Va. 46, 289 S.E.2d 720 (1982); syllabus point 5 State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981); syllabus point 5, State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981). "We expounded on this holding in State v. Adkins, 179 W.Va. at 53, 289 S.E.2d at 727;

"Where a person of less than normal intelligence does not have the capacity to understand the meaning and effect of his confession, and such lack of capacity is shown by evidence at the suppression hearing, it is error for the trial judge not to suppress the confession. However, where the defendant's lower than normal intelligence is not shown clearly to be such as would impair his capacity to understanding the meaning and effect of his confession, said lower than normal intelligence is but one factor to be considered by the trial judge in weighing the totality of the circumstances surrounding the challenged confession."

One must now ask if the information on the defendant/petitioner's limited mental capacity could change the jury verdict. Or, in the alternative, if the jury did not know about the

petitioner's statement, would that have somehow affected the jury verdict positively for the defense. If the statement to the jury was omitted or explained, it could be considered "tactical" or "trial strategy" which would be out of the realm of ineffective assistance of counsel. Petitioner's current counsel believes with such alternatives available to the defense at trial, said outcome to the defendant at trial would have been much greater to his favor.

The petitioner's trial counsel then compounded the issue of "voluntariness" by not properly objecting at the May 20, 2013 suppression hearing. At least one time, the trial counsel should have objected on the grounds of speculation. The State's attorney asked the officer about the petitioner's cell phone (App. 107). In response, the officer stated, "Yes, sir. I believe he had a cell phone." Once again, that is pure speculation. For an attorney not to object, or question further, to show it was speculation seems to run counter to the general principle of an attorney competent to practice in the area of criminal law. It could be suggested that the above example is minor or not worthy of mentioning; however, if one does that it is like conceding a race before it begins. In that same view, the trial attorney's argument at the May 20, 2013 suppression hearing was not as exact as the motion to suppress compiled by Josh Edwards, yet another attorney on point handling the petitioner's case (App.521-524).

Another area where the petitioner's trial counsel was ineffective to warrant the application of said doctrine, is when trial counsel argued the suppression motion (App. 97-134). Said argument for suppression was weak to say the least. If trial counsel would have followed the motion to suppress the defendant's statement, (App. 538-543), the presentation of said argument would have been more effective and may have led to a different outcome. What makes this particular omission by trial counsel so egregious is the work on the suppression of the statement was already done for him by prior appointed counsel, and was in the Court file. Once

again, if the statement was suppressed, current counsel believes that the defendant had a greater chance at a different verdict.[9]

4. The errors stated above separately or combined put the lower Court's verdict in such doubt that it rises to the level of cumulative error which requires reversal.

In West Virginia, this Court has recognized the doctrine of cumulative error since at least 1976. See State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976). Cumulative error has been defined as "the combination of individual harmless errors that were so prejudicial as to render the verdict fundamentally unfair." United State v. Warman, 578 F.3d 320, 349 (6th Cir. 2009).

In this particular instance, all errors, whether committed by the trial Court in allowing the petitioner's statement to be held admissible, or denial of jury instructions proffered by the defendant at trial. Alternatively, the ineffective assistance of petitioner's trial counsel for not bringing the petitioner's I.Q. level to the trial Court's attention at a more relevant time - - - all these issues revolve around the sole issue of the voluntariness of the petitioner's statement.

Therefore, while current counsel would argue any sole error presented is sufficient to warrant reversal of the verdict, if this High Court disagrees, then current counsel asks the High Court to look at the transcript as a whole and find that the petitioner's trial was fundamentally unfair brought on by a "thousand little cuts" of injustice.

[9] Current counsel states that there were other factors that could have been addressed in the suppression hearing of May 20, 2012 that were not. For instance, Officer Baker saw the defendant as a suspect. See State v. Stanley, 284 S.E.2d 367, 168 W.Va. 294 (1981). Under some cases, that is a factor to consider in the "totality of the circumstances".

VIII.

CONCLUSION

In this particular case, all stated errors revolve around admission of a statement by the trial court. Under current case law, as previously cited, said determination was in error. Frankly, it does not matter where this High Court finds fault, except to say it cannot lie with an individual with an IQ of 74. To argue that is to say that our legal system is inflexible and unjust.

Two other issues are not addressed in this memorandum. First, fully why did the trial counsel not address the issue of the defendant's mental capacity sooner? Current counsel does not know. And to speculate on said answer does not move the discussion of admissibility of the statement forward. Second, if the statement is suppressed, how would trial counsel move forward? This is speculation, but what can be argued is that the petitioner's chances for a more favorable outcome would have been greatly enhanced -thus, a probability of a not guilty verdict.

For the above stated reasons, this case must be reversed and remanded to the lower Court.

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CERTIFICATE OF SERVICE

I, Eric M. Francis, counsel for the Petitioner named herein, do hereby certify that a true copy of the Petition for Appeal, has been previously mailed to the following persons at their last known addresses on this the 20th day of October, 2020.

Eric M Francis

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