IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Appeal No. 22-901

STATE OF WEST VIRGINIA,

Respondent, Plaintiff-below

v.

SCOTT MICHAEL ANDREW HUNDLEY,

Petitioner, Defendant-below

Appeal from the Jefferson County Circuit Court

Case No. 22-F-16
The Honorable Debra McLaughlin

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. The circuit court abused its discretion and prejudiced Mr. Hundley's due process rights by precluding Mr. Hundley from introducing evidence of the decedent's addiction history, extreme intoxication at the time of the confrontation, and toxicology results where the evidence was relevant to Mr. Hundley's self defense case.

2. The circuit court abused its discretion and prejudiced Mr. Hundley's due process rights by allowing the State to sandbag previously-prohibited argument regarding self defense in its rebuttal closing argument, foreclosing an opportunity for Mr. Hundley to address the argument.

3. The State engaged in prejudicial prosecutorial misconduct when it arrested a critical defense witness as to Mr. Hundley's claim of self defense in front of the jury during the first day of trial, interfering with Mr. Hundley's constitutional right to compulsory process.

4. The State violated Mr. Hundley's right to due process by withholding exculpatory impeachment evidence related to its witness Rosanna Piper.

5. The circuit court abused its discretion in ruling that Mr. Cekada's phone records showing his drug activity were inadmissible when such records showing drug trafficking between Rosanna Piper and Mr. Cekada would have impeached Ms. Piper and provided context to the simmering grudge that Mr. Cekada held against Mr. Hundley.

6. The circuit court abused its discretion in failing to find a *Miranda* violation where Mr. Hundley repeatedly requested an attorney during questioning both at the Piper residence during his arrest and at the police station.

7. The circuit court abused its discretion in denying Mr. Hundley's attempt to enter certain parts of his statement to law enforcement that were consistent with self defense into evidence to contradict the State's claim that Mr. Hundley had falsely concocted his claim of self defense months after the confrontation with Mr. Cekada.

8. The circuit court's cumulative errors prejudiced Mr. Hundley by eroding his ability to be able to present his theory of defense.

STATEMENT OF THE CASE

A Jefferson County jury convicted Mr. Scott Hundley of the lesser-included offense of second degree murder following a two day jury trial on the charge of first degree murder. App. 902. Following a recidivist trial and sentencing, the circuit court sentenced Mr. Hundley to a cumulative sentence of forty-five (45) years in prison. App. 1140.

At trial, Mr. Hundley presented the affirmative defense of self-defense and presented evidence that he was in reasonable apprehension of immediate serious injury or death when he fatally stabbed T.J. Cekada with a pocket knife, after Mr. Cekada threatened him with a firearm, recklessly chased after him in a vehicle, crashed into him, and then threatened him with a firearm a second time. App. 681.

On the afternoon of August 7, 2021, Scott Hundley left his residence to go purchase a birthday present for his nephew. App. 687. Mr. Hundley's plan was to purchase the birthday present and then drive over to the residence of Rosanna and Roger Dale Piper, who had custody of his two biological children. *Id*.

On that same day, T.J. Cekada was attempting to purchase illegal narcotics to feed his

out-of-control addiction.[1] App. 47. A week or two earlier, Mr. Hundley had told Mr. Cekada that he was no longer welcome at the Piper residence, where Mr. Hundley's children lived, due to his drug dealing and addiction issue. App. 685-86. T.J. Cekada would often stay at the Piper residence and use drugs with Andrew Piper, Rosanna and Roger Dale's son, as well as sell drugs to Andrew Piper, and buy drugs from Rosanna. App. 37-62. The Piper residence was the only place that T.J. Cekada could stay after he was kicked out by his parents and by his wife due to his uncontrolled addiction. App. 45.

Mr. Hundley traveled to a local Charles Town store and purchased a toy for his nephew and then stopped at the 7-11 convenience store to purchase a drink. App. 688-89.

Mr. Cekada had scored his illegal narcotics, overdosed, and had to be administered narcan on August 7, 2021. App. 73-75. Following his purchasing and using of the narcotics, Mr. Cekada stopped at the 7-11 convenience store to put gas in his vehicle at around the same time that Mr. Hundley stopped at the store to purchase a drink. App. 689.

At the 7-11 convenience store, Mr. Hundley noticed Mr. Cekada's vehicle, but there was no interaction. App. 689. Mr. Hundley then traveled to the Dollar General store to purchase tissue paper to wrap the present that he just bought. *Id*.

After making his purchase, Mr. Hundley exited the Dollar General and walked to his vehicle. App. 690. He then noticed Mr. Cekada parked nearby. App. 690-91. Mr. Cekada was sitting in his vehicle lying in wait for Mr. Hundley to exit the Dollar General and pointed a handgun in Mr. Hundley's direction. App. 691-92 . Mr. Hundley was surprised by what he saw

[1] None of the evidence of Mr. Cekada's drug addiction and intoxication on August 7, 2021 was presented to the jury due to the circuit court's rulings.

and started to approach Mr. Cekada's vehicle, while yelling at him for pointing a firearm at him. App. 693-94.

Mr. Cekada then sped out of the Dollar General parking lot, turning right out of the parking lot and parked next to a local fast food restaurant to observe Mr. Hundley's movements out of the parking lot. App. 214, 694. Mr. Hundley exited the Dollar General parking lot making a left and heading in the direction of the Piper residence. App. 694-95. Mr. Cekada, again lying in wait, then sped off in pursuit of Mr. Hundley. App. 461-62. Mr. Cekada drove in a reckless and careless manner in pursuit, passing vehicles in no passing lanes, and apparently speeding upwards of 80 miles per hour. App. 444, 455-56,

Mr. Cekada then rear-ended Mr. Hundley's vehicle and both vehicles came to a stop along the roadway. App. 696. Mr. Hundley got out of his vehicle, and was only a few feet away from the driver's side of Mr. Cekada's vehicle when he saw Mr. Cekada pointing a firearm at him for the second time that day. App. 703-11. Fearing for his life, Mr. Hundley panicked and stabbed Mr. Cekada with a pocket knife. App. 709-11. Mr. Cekada then threw his vehicle into reverse and crashed into a passing motorist, while Mr. Hundley left the scene and traveled to the Piper's residence. App. 460.

Multiple witnesses report that Mr. Cekada then exited his vehicle with his hands near his neck area on the knife wound. Law enforcement arrived at the scene shortly thereafter, with Mr. Cekada uttering a dying declaration that Scott Hundley had stabbed him. Mr. Cekada succumbed to his wound, which hit his jugular, soon afterwards.

Scott Hundley's Statements to Law Enforcement

Within hours of Mr. Cekada's death, law enforcement located Scott Hundley at the

Piper's residence. An officer patted Mr. Hundley down and hat him sit in a lawn chair on the front lawn as they conducted their investigation. An officer started to ask Mr. Hundley questions, and Mr. Hundley told the officer that he would like a lawyer, causing the officer to stop questioning Mr. Hundley and inform the other officers that Mr. Hundley had invoked his right to counsel.

Following the investigation at the Piper residence, Mr. Hundley was placed under formal arrest and brought to the Jefferson County Sheriff's Department, where two officers began to question Mr. Hundley. Mr. Hundley again invoked his right to counsel, but the officers continued questioning him on the events of that day, telling him that he could decide whether to answer specific questions after they were asked. While asking him questions, officers were able to elicit Mr. Hundley's claim of self defense after Mr. Cekada had brandished a firearm at him.

The circuit court ruled that Mr. Hundley's statement to police officers both at the Piper residence and at the police station were admissible and were not elicited in violation of *Miranda*. However, the State did not seek to enter Mr. Hundley's statements to law enforcement into evidence at trial, instead relying upon a series of recorded jail phone calls to introduce Mr. Hundley's statements. In fact the State objected to, and the circuit court sustained, Mr. Hundley introducing any evidence of his statement to law enforcement.

During Mr. Hundley's trial counsel's opening statement, the State objected and requested a sidebar. .

> Mr. Zahradnik: "[W]hen Mr. Manford was going through the slides there was a slide with the defendant's statement to the police. The defendant cannot enter that statement at all and the State is not sure if it's going to enter it in its case in chief."
> The Court: Well, if he testifies it comes in.
> Mr. Zahradnik: Correct, Your Honor, but not through-- that statement to the police is

> not-- can't come in. He has to testify in his own words and he can't bolster his credibility with that statement.
> Mr. Manford: You're not going to use the statement at all?
> Mr. Zahradnik: I don't believe so. Possibly for impeachment if he takes the stand, but we're not going to enter it--
> Mr. Manford: This is why I brought this up in pretrial. Nothing personal to Neil, but the last trial I had, the Collins case, you were the prosecutor at that time. They wouldn't play-- they had the officer come in and say he told me this and he told me that, and any of the--
> The Court: Self-serving statement….
> At this point in time I'm going to tell you to refrain from discussing any statements made by the defendant to the police. If you want to delete that slide before you resume…
> The Court: You will be able to argue it at closing if he does [testify]. You don't get to put in the unknown at this point in time.

App. 396-98.

However, defense counsel then sought to introduce Mr. Hundley's statement to law enforcement again during the trial by arguing that the State had opened the door by introducing the jail calls of Mr. Hundley. App. 510. The court ruled that Mr. Hundley could not introduce the statement but that defense counsel could ask the law enforcement officer about whether Mr. Hundley's post-arrest statement was consistent with his claim of self defense. "I'm not allowing him to play the whole statement, but you're able to ask about the consistency." App. 512. Defense counsel again argued he should be able to introduce the statement due to the State playing a portion of the jail call that gave the jury the impression that Mr. Hundley falsely concocted a self defense claim.

> Your Honor, he played more than that. He played the following. 'Mom: Right, there is where you need-- that is where you need to say you got out of your car because that's that the law tells you to do is to get out and exchange insurance information. That is why you walked up to his vehicle, and then he pulled a gun on you, and you feared for your life and you just fucking reacted. West Virginia law says you can kill a person if you feel your life is in danger. You can read it.'

App. 518.

The court still would not allow Mr. Hundley's counsel to play the statement for the jury or to get into details about the statement. The court held, "So my ruling was that I'm not going to allow the State to totally mischaracterize things to say that he concocted a story just after talking to mom when he has given a statement to the police, and therefore, my ruling was is that you can ask the officer whether or not that was consistent with the statement that he gave to the police…. Going into details though about the incident that were not in that statement, I thought was going beyond the scope." App. 519-20.

Thus, instead of getting to play Mr. Hundley's statement for the jury or ask specific questions about Mr. Hundley's claim of self defense, Mr. Hundley's attorney was allowed to ask this one question:

> Q. Lt. Holz, yesterday we left off with the question…we gave you a chance over the night to review the defendant's statement and my question is isn't it true that the content of the phone call we heard yesterday is substantially the same as what the defendant provided in his statement?
> A. Yes, sir, for the most part.

App. 565-66.

> The Circuit Court's Exclusion of Intoxication and Addiction Evidence Related to the Decedent

On April 21, 2022, the State filed a motion to exclude introduction of the toxicology report of the Mr. Cekada as well as evidence of Mr. Cekada's drug use and drug trafficking. App. 63.

The toxicology analysis of Mr. Cekada's blood revealed the presence of eight (8) separate

substances-- Eutylone,[2] 4-ANPP,[3] Cotinine,[4] Naloxone,[5] Alprazolam,[6] Buprenorphine,[7] Norbuprenorphine,[8] and Fentanyl. App. 78-80.

The autopsy report further indicated that a Glock 43 9mm semi-automatic pistol and a large wad of foil with an unknown substance inside was recovered from Mr. Cekada's pants pockets. App. 81.

On April 28, 2022, Mr. Hundley filed a response opposing this motion, laying out the relevance of Mr. Cekada's intoxication to Mr. Hundley's theory of self defense. App. 113.

> These facts [of Mr. Cekada's behavior] show that [he] was exhibiting signs of paranoia, aggressive or violent behavior, agitation, possible anxiety, possible hallucinations or psychosis and impaired judgment, all side effects of the drugs he was abusing at the time as found in the toxicology report prepared by the medical examiner.
>
> Therefore, the toxicology report showing what drugs were in [Mr. Cekada's] system at the time of the incident are relevant and make it more probable that his actions were consistent with the drugs he was abusing at the time and clearly showing that he was the aggressor believing he had a score to settle with the Defendant.

App. 116.

The circuit court addressed the State's motion in limine at the pretrial hearing on April 28, 2022, and ruled that the intoxication of the alleged victim and the toxicology results were

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[2] Eutylone is a synthetic psychoactive bath salt.

[3] 4-ANPP is a byproduct of fentanyl analogue substances.

[4] Cotinine is a metabolite of nicotine.

[5] Naloxone, also known as Narcan, is a drug administered to reverse an opioid overdose.

[6] Alprazolam is known under the brand name Xanax.

[7] Buprenorphine is the active ingredient in the brand name Suboxone, an opioid replacement drug.

[8] Norbuprenorphine is a metabolite of Buprenorphine.

inadmissible. App. 118.

During the pre-trial hearing, the following exchange happened regarding Mr. Hundley's contention that the toxicology report was relevant evidence to his self defense claim:

> MR. MANFORD: I've never had a motion where they're -- bringing the toxicology in and medical examiner's autopsy report, but seriously, I do think it's relevant because they're saying that he's the aggressor and clearly the victim is displaying irrational behavior which would be consistent with drug use.
> THE COURT: So Mr. Manford's argument is is that the victim chased the defendant's vehicle. Pre-Trial Tr....
> MR. ZAHRADNIK: I don't think that comports with the victim acting irrational. To me that sounds like the victim was acting scared based off of that evidence. You can go through the list of the symptoms or side effects of any controlled substance and find something that comports with some part of behavior and try to explain it that way, Your Honor, but I really think that bringing drugs into the victim -- go back and try it again. I really think that bringing in drugs in the victim's system in this case is to besmirch the victim in the eyes of the jury. I don't think that it really adds anything -- there's no other evidence despite what his client would testify to that he was acting in any way under the influence of a controlled substance and, furthermore, that there was no evidence that would play into drug distribution being relevant into this particular case other than to besmirch the name of the victim from the State's standpoint.

App. 164-66.

The exchange continued,

> THE COURT: Well, the evidence shows he was sitting in his car. We don't know if he was waiting for this guy or not.
> MR. MANFORD: Unless my client testifies.
> THE COURT: Correct.
> MR. MANFORD: This is our whole theory of the case. We're not going to be allowed to present it?
> THE COURT: So your theory is what about the behavior is the irrational behavior?
> MR. MANFORD: Okay. Speeding, passing in no passing zone, reckless driving, tailgating one of these people, and trying to catch up with him.
> THE COURT: That's irrational behavior or it's your theory of the case as far as leading up to your self-defense?
> MR. MANFORD: So the State is trying to say he's the aggressor. I'm trying to say the victim is the aggressor, all right, because he didn't cowered down to him when he pointed the gun at him. He confronts him. When you're on these drugs, you don't act rationally, all right, and you have aggressive behavior, you're paranoid, so he goes down to that Panda

> Garden and he's thinking how can I get this guy back. Then he figures it out. I'm going to go and I'm going to confront him so he's driving like a bat out of hell, excuse me, and you should see that road if you don't already know it, it's like a slalom, all right. He's passing people. This is their own witnesses that say this.
> THE COURT: But you can do that and not be under the influence of drugs.

App. 169-70.

The circuit court ultimately ruled,

> So at this point in time based on what I'm hearing and what I've got I'm ruling that it's not relevant and I'm granting the State's motion in limine to suppress the drugs in his system. As far as your arguments about the altercation at the house two weeks ago, I understand that that is part of your case and that's going to come in.
>
> ... But the toxicology stuff I don't see how it's relevant to anything that I've heard. If we hear something during the course of the trial that you think, well, I wasn't expecting to hear that, Judge, I want to renew my motion, by all means, we can have a sidebar on it. You have the toxicology results. Figure out how you're going to handle that.

App. 185.

Because the fact of Mr. Cekada's drug intoxication was ruled to not be admissible, the State got evidence from a law enforcement officer that Mr. Cekada legally possessed the firearm. App. 566-67. The State also got to introduce the autopsy report, with the toxicology results redacted. App. 597. Defense counsel only asked the forensic pathologist two questions on cross-examination. App. 609-10.

Furthermore, without the introduction of the toxicology evidence, the State was able to argue that all of Mr. Cekada's behavior was normal.

> Ladies and gentlemen, the defendant confronted T.J. in that parking lot. T.J. pulled a gun. We know that much is true. I submit to you he pulled that gun because he was scared because he was confronted by the defendant.
>
> He went down there and he calmed down for a second. He had just been threatened. I'm sure his heart was racing, pounding. He's down there and he sees the defendant is not coming after him so he leaves. Where does he go? He goes back towards the direction of

> his home, his sanctuary, the place where we all go to feel safe after something traumatic, that's the direction he was headed.
>
> We did hear some testimony. We heard testimony that T.J. was driving quickly, fast, erratically. I'm sure he was. He was scared. He was trying to get home. We also heard testimony from Brittany. T.J. was not a good driver. That wasn't out of character for him, ladies and gentlemen, and I think we can all relate to the fact that on the roads and streets closest to our homes we get a little more careless. It is a road we drive every day, something we see every day, and T.J. was trying to get there and get there fast.

App. 752-54.

Testimony of Rosanna Piper

The State presented the testimony of Rosanna Piper at trial and elicted testimony from her that Mr. Hundley told her on the phone, "I'm going to fucking kill T.J. He pulled his gun on me." App. 571. Ms. Piper apparently did not tell police that Mr. Hundley had allegedly made this comment until her third or fourth interview with police.

When cross-examined by defense counsel, Ms. Piper would not say that Mr. Cekada sold drugs, only that Mr. Cekada and her son "participated in drug activity." App. 574. "He wasn't giving Andrew or selling Andrew anything. He was participating with Andrew…" App. 583. This testimony contradicted what defense counsel told the jury in the opening statement– that Mr. Cekada was selling drugs to Andrew, which was the reason that Mr. Hundley had kicked Mr. Cekada out of the Piper residence.

Defense counsel again tried to open up questioning about Mr. Cekada's drug trafficking in the questioning of the State's expert, Sgt. Boober, who examined Mr. Cekada's cellular phone. App. 598-90. However, the State objected, and the court ruled that defense counsel could not ask Sgt. Boober about drug selling because Rosanna Piper only testified that Mr. Cekada used drugs with her son. *Id*.

Defense counsel also tried to proffer testimony of a witness, Alexandra Saylor, who was on the scene of the traffic accident and told police that she knew Mr. Cekada because he sells drugs in her neighborhood. App. 590. The circuit court precluded defense counsel from eliciting any such testimony. "I don't find there to be any relevance. The fact of whether or not he sells drugs, or not or sells firearms or not, does not make it any more likely or less likely that he brandished that gun so I'm not going to find that to be relevant at this time and I will note your objection." App. 591.

Subsequent public searches on Rosanna Piper revealed that she had a criminal record related to narcotics trafficking and was under arrest for a felony drug offense at the time that she offered testimony, which ultimately was prosecuted in federal court and resulted in a thirty month sentence. App. 1144.

SUMMARY OF ARGUMENT

Mr. Hundley argues that the circuit court's erroneous rulings rendered him unable to be able to adequately present his theory of self defense to the first degree murder charge. Each of the erroneous rulings of the circuit court eroded a piece of his defense until he was left with none– rendering the trial fundamentally unfair and in violation of his due process rights. Mr. Hundley argues that each of these errors singularly and the errors cumulatively prejudiced his right to a fair trial and require that this Court vacate his conviction.

First, Mr. Hundley argues that the circuit court eroded his ability to present his case of self defense by prohibiting him from introducing evidence of the decedent's drug addiction history, intoxication at the time of the confrontation, and toxicology results contained in the autopsy report. There was substantial evidence in the State's discovery that Mr. Cekada was

suffering from an out-of-control addiction to controlled substances, that his behavior was erratic and violent on controlled substances, and that he was extremely intoxicated at the time of his confrontation with Mr. Hundley, including on bath salts, fentanyl, and several other controlled substances. This evidence was relevant to Mr. Cekada's state of mind in confronting Mr. Hundley and was corroborating of Mr. Hundley's testimony as to Mr. Cekada's erratic and threatening behavior in threatening him with a firearm on two separate occasions, lying in wait for Mr. Hundley, and recklessly pursuing Mr. Hundley while extremely intoxicated and in the possession of a firearm. The exclusion of such crucial evidence to self defense was prejudicial error requiring vacating the conviction.

Second, Mr. Hundley argues that the circuit court eroded his ability to present his case of self defense by leading him down the primrose path in believing that certain evidence and argument related to self defense could not be presented by the State and by then allowing the State to sandbag this previously-thought foreclosed argument in closing rebuttal, leaving defense counsel unable to respond.

Third, Mr. Hundley argues that the circuit court eroded his ability to present his case of self defense by arresting a critical trial witness during the trial and in front of the jury for alleged offense of false swearing at the pre-trial hearing, erroneously interfering with Mr. Hundley's right to compulsory process and to call witnesses on his own behalf. This witness, Timothy Williamson, would have offered testimony regarding Mr. Cekada's previous dangerous, threatening, and erratic behavior with a firearm while intoxicated, which Mr. Hundley was aware of.

Fourth, Mr. Hundley argues that the State eroded his ability to present his case of self

defense by withholding exculpatory impeachment evidence related to the State's witness, Rosanna Piper, which indicated that Ms. Piper had previously been convicted of drug trafficking offenses, that Ms. Piper was under arrest for a drug trafficking offense at the time that she testified at trial, and that Ms. Piper had a history of both buying drugs from and selling drugs to Mr. Cekada. Mr. Hundley further argues that the circuit court exacerbated this error by precluding introduction of Mr. Cekada's phone records, which contained evidence of his drug trafficking, including trafficking involving Ms. Piper.

Fifth, Mr. Hundley argues that the circuit court eroded his ability to present his case of self defense where it allowed the State to introduce a jail phone call between Mr. Hundley and his mother, which the State introduced for the inference that Mr. Hundley and his mother concocted a story of self defense but prohibited Mr. Hundley from introducing his previous statement to law enforcement, taken the day of his confrontation with Mr. Cekada, where Mr. Hundley claimed that he stabbed Mr. Cekada in self defense after Mr. Cekada threatened him with a firearm on two separate occasions and chased after him in his vehicle and crashed into him. The failure to allow Mr. Hundley's statement into evidence left the jury with the mistaken impression that Mr. Hundley concocted his claim of self defense falsely.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Mr. Hundley suggests that oral argument is necessary pursuant to Rule 18(a). The parties have not waived oral argument, the appeal is not frivolous, and the Court would be aided by oral argument.

Mr. Hundley requests that this case should be set for a Rule 20 argument. Mr. Hundley suggests that the issue raised in this appeal regarding the precluding of introduction of the

decedent's addiction, intoxication, and toxicology results in a self defense case is an issue of first impression for this Court and that lower courts would be aided by this Court's decision.

ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN PROHIBITING DEFENDANT FROM INTRODUCING EVIDENCE OF THE DECEDENT'S DRUG ADDICTION AND EXTREME INTOXICATION

As the first assignment of error, Mr. Hundley avers that the circuit court abused its discretion in prohibiting the introduction into evidence of the decedent's drug addiction and extreme intoxication. The evidence was relevant to Mr. Hundley's self defense case, and the exclusion of such evidence was reversible error in violation of Mr. Hundley's constitutional right to due process.

The decedent, T.J. Cekada encountered Mr. Hundley at a Seven Eleven gas station. Mr. Cekada then followed Mr. Hundley in his vehicle to the Dollar General store, and Mr. Cekada, unprovoked and while high on bath salts, fentanyl, synthetic fentanyl, and suboxone, brandished a firearm and threatened to shoot Mr. Hundley as Mr. Hundley was exiting the store after having bought some tissue paper to wrap a birthday present for a young family member. After Mr. Hundley did not cower in the face of a firearm pointed at him, Mr. Cekada fled the parking lot at a high rate of speed. However, Mr. Cekada parked at a fast food restaurant across the street from the Dollar General and as Mr. Hundley left the Dollar General to return to his family's residence, Mr. Cekada sped out of the fast food restaurant in a high speed chase of Mr. Hundley. Mr. Cekada, while high on bath salts, fentanyl, synthetic fentanyl, and suboxone and with a loaded firearm on his person, then recklessly after Mr. Hundley, passing vehicles in non-passing zones, on a windy mountainous stretch of road, endangering the public in a mad pursuit for Mr.

Hundley. In his pursuit of Mr. Hundley, Mr. Cekada then crashed into the back of Mr. Hundley's vehicle causing both Mr. Hundley and Mr. Cekada's vehicles to come to a stop. Mr. Hundley exited his vehicle, found Mr. Cekada to again be pointing a firearm at him and threatening him, and stabbed Mr. Cekada with a pocket knife. Mr. Cekada then tried to throw his vehicle into reverse and side swiped another vehicle that was passing on the road. Mr. Cekada succumbed to the wound shortly thereafter.

This was the evidence that was attempted to be presented by Mr. Hundley's defense counsel in support of his claim of self defense. However, the circuit court ruled that Mr. Cekada's poly-substance intoxication could not be entered into evidence. Thus, the jury was left with a sanitized and false version of events-- whereby the State could argue that Mr. Cekada's behavior, as laid out by defense counsel, was either made up by Mr. Hundley (i.e. the firearm was never pulled on Mr. Hundley) or that Mr. Cekada's driving was completely normal if a little fast. The fact is that the drug intoxication of Mr. Cekada was crucial in explaining to the jury his completely erratic, unpredictable, and threatening behavior, which put Mr. Hundley in fear of his life and led to the stabbing. The circuit court's failure to allow Mr. Hundley to present this crucial information to the jury led to a fundamentally unfair trial bereft of due process.

A. Standard of Review

This Court has held that "[t]he action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." *State v. Stewart*, 228 W.Va. 406, 412, 719 S.E.2d 876, 882 (2011) (quoting Syl. Pt. 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955)). As Justice Cleckley has held, "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." *Stewart*, 228 W.Va. at 412-13, 719 S.E.2d at 882-83 (quoting Syl. Pt. 4, *State v. Blake*, 197 W.Va. 700, 478 S.E.2d 550 (1996)).

B. Mr. Cekada's drug addiction, intoxication at the time of the confrontation, and toxicology results were relevant to Mr. Hundley's self-defense claim

In the instant case, Mr. Cekada's drug addiction, his intoxication while brandishing a firearm at Mr. Hundley, and his toxicology results showing poly-substance intoxication were all relevant to Mr. Hundley's presentation of his case of self defense. The state of mind of the decedent, Mr. Cekada, is crucial in establishing the claim of self defense. Without this evidence being presented before the jury, the jury was left with only half the picture of what occurred between Mr. Hundley and Mr. Cekada.

Mr. Cekada's history of drug addiction, his poly-substance intoxication at the time of the incident, and his toxicology results were relevant evidence in a multitude of different ways in this case.

First, Mr. Cekada's history of drug addiction was relevant in filling in for the jury the precipitating event that led Mr. Cekada to threaten Mr. Hundley with a firearm-- Mr. Hundley kicking Mr. Cekada out of the Piper residence. Rosanna and Roger Dale Piper resided at a residence with their two sons, including Andrew Piper, as well as two grandchildren who were born from a relationship between their daughter, Rebecca Piper, and Mr. Hundley. Mr. Cekada would often be at the Piper residence where Mr. Hundley's children were residing. Mr. Cekada would often be intoxicated and in possession of a firearm at the residence. Furthermore,

discovery in this case indicated that Mr. Cekada would buy drugs from Rosanna Piper and would use drugs and sell drugs to Andrew Piper. App. 37-57.

Moreover, discovery in this case indicated that the Piper residence was one of the last places that Mr. Cekada was welcome after his family and his wife had kicked him out due to his rampant drug abuse and drug selling. Thus, a full picture of Mr. Cekada's history with illegal narcotics was necessary to show the jury why Mr. Hundley had kicked Mr. Cekada out of the Piper residence and why Mr. Cekada would be so upset with Mr. Hundley for doing so, and why Mr. Cekada through a drug haze would have threatened Mr. Hundley with a firearm.

Second, the evidence of Mr. Cekada's history with drugs was also relevant and necessary to show the relationship between Mr. Cekada and Rosanna Piper for impeachment of Rosanna Piper. Rosanna Piper testified against Mr. Hundley and claimed that he said that he was going to kill Mr. Cekada after Mr. Cekada pulled a firearm on him. Ms. Piper also claimed that she was unaware of Mr. Cekada selling drugs and was unaware where Mr. Cekada had obtained drugs. However, evidence on Mr. Cekada's phone showed that he had sold drugs to and bought drugs from Ms. Piper. Such evidence was necessary to show Ms. Piper's bias and to impeach her for lying while under oath.

Third, Mr. Cekada's history of drug addiction and severe intoxication at the time of the incident was necessary to show the recklessness of Mr. Cekada possessing a firearm at all. Under West Virginia law, it is a misdemeanor offense for a person who "is an unlawful user of or habitually addicted to any controlled substance" to possess a firearm. W. Va. Code § 61-7-7(a)(3). Under federal law, it is a felony offense punishable by up to ten (10) years in prison for a person "who is an unlawful user of or addicted to any controlled substance" to

possess a firearm. 18 U.S.C. § 922(g)(3). The public policy behind both the state and the federal law prohibiting a user or addict from possessing a firearm is the recognition that a firearm in the hands of a user or an addict, whose mind is likely altered by the narcotics, is extremely dangerous. Thus, by possessing the firearm while being an addict and while under the influence of multiple illegal narcotics, Mr. Cekada was committing state and federal offenses. Evidence in Mr. Cekada's phone records would have also shown that he lied on his federal firearm application that he was not an illegal user of narcotics in order to obtain a firearm. Such evidence was crucial to show the jury as to why Mr. Cekada with a firearm was so dangerous. In fact, one of the juror's even responded to a voir dire question about the importance of the difference between illegally and legally possessing a firearm. App. 327-28 (juror indicating that he could be fair and impartial if evidence was that the decedent was legally carrying a firearm). And furthermore, the State brought out testimony from Sgt. Holz that Mr. Cekada's possession of the firearm was not illegal. App. 566-67. However, Mr. Hundley was prohibited from introducing the necessary evidence to demonstrate that Mr. Cekada's possession of the firearm was not only a misdemeanor and felony offense but also extremely dangerous due to his addiction and extreme intoxication.

Fourth, Mr. Cekada's extreme poly-substance intoxication was also necessary and relevant evidence to put his reckless driving in context. Mr. Cekada was driving under the influence and committing an offense under West Virginia law. Moreover, Mr. Cekada was driving in an extremely reckless manner as he was chasing down Mr. Hundley with a loaded firearm on his person. The State attempted to present Mr. Cekada's driving as normal if fast driving. However, Mr. Hundley was prevented from presenting evidence that Mr. Cekada's

driving was not only illegal but extremely reckless, endangering anyone that was on the road at the time as he drove over 80 miles per hour in a 45 mile per hour zone and passed multiple vehicles in no passing zones on a winding mountain road. Mr. Cekada's extreme intoxication puts the chase of Mr. Hundley into its full reckless and dangerous context. And again, just like the legality of the possession of the firearm, the jury was extremely concerned with the context of Mr. Cekada's driving, with one juror going so far as to do outside research on Google maps to determine whether he passed one vehicle in a passing or non-passing zone. App. 901.

Fifth, Mr. Cekada's extreme intoxication would put into context for the jury why he had threatened Mr. Hundley with a firearm. The State attempted to argue that Mr. Cekada was not the aggressor and that it did not make sense why Mr. Cekada would pull a firearm on Mr. Hundley without being threatened first. However, the evidence showed that Mr. Cekada followed Mr. Hundley. Mr. Cekada's extreme intoxication on mind altering substances was necessary to show the jury why Mr. Cekada was acting in such an aggressive manner. Following a person to the Dollar General and pulling a firearm on them as they were leaving may not make a lot of sense in the context of someone that is completely sober. However, add in the personality and mind altering effects of psychoactive narcotics and it puts this type of irrational behavior in context for the jury. Mr. Cekada's intoxication explains his threatening but irrational actions that ultimately led to his death. It explains why he would have irrationally followed Mr. Hundley. It explains why he would have pulled a firearm on Mr. Hundley. It explains why he would have engaged in a high speed chase of Mr. Hundley. The most instant connotation in most people's mind of the illicit narcotics known as "bath salts," which is the eutylone in Mr. Cekada's system, is the new story of the man who at another man's face while high on "bath

salts." See https://en.wikipedia.org/wiki/Miami_cannibal_attack. Thus, the fact that Mr. Cekada would act aggressively and irrationally while high on bath salts would be an easy inference for the jury to make.

And furthermore, Mr. Cekada's drug addiction and extreme intoxication puts into context Mr. Hundley's reasonable apprehension of fear of Mr. Cekada. While having a firearm pulled on you would put anyone in reasonable apprehension of death, having a firearm pulled on you by someone that you know is an addict and who appears under the influence would be all the more terrifying. And having that inebriated addict chase after you with the firearm and rear end you while pointing a firearm at you would certainly color a person's reaction. In the context of Mr. Hundley being aware of Mr. Cekada's drug addiction and lack of sobriety, this evidence demonstrates why Mr. Hundley would be in reasonable apprehension of death when an inebriated addict pulls a firearm at him and threatens him with it.

Sixth, Mr. Cekada's toxicology results were not only relevant for what they showed-- the presence of multiple illegal narcotics that would have affected his behavior-- but also for what they did not show. Mr. Cekada was bipolar and took Seroquel[9] to control his bipolar disorder. App. 52-53. There was no Seroquel in Mr. Cekada's system, suggesting that he was not taking his psychiatric medication and was prone to the violent mood swings characteristic of bipolar disorder. Again, the absence of his psychiatric medication could help the jury to understand (and believe Mr. Hundley's description of) Mr. Cekada's erratic, irrational, and threatening behavior.

Finally, Mr. Cekada's addiction history, intoxication, and toxicology results was a

[9] Quetiapine, which is marketed under the brand name Seroquel, is used for the treatment of schizophrenia and bipolar disorder. *See* en.wikipedia.org/wiki/Quetiapine.

necessary predicate to describe how he would often act in a violent and threatening manner while he was under the influence of narcotics. Evidence from Mr. Cekada's phone showed how he would turn into a completely different person while high on narcotics. Mr. Cekada's own mother was victim to his threats with Mr. Cekada threatening to pump his own mother full of lead. Mr. Hundley's stepfather, Timothy Williamson, who was kept off the witness stand through the State executing an arrest warrant on him during the trial in front of the jury, would have testified to Mr. Cekada's threatening behavior with a firearm while intoxicated. Thus, Mr. Cekada's intoxication at the time that he threatened Mr. Hundley was extremely relevant to the issue of who was the aggressor in the encounter and the jury was left blind to Mr. Cekada's history of intoxication, resulting in violent behavior with a firearm.

The circuit court's prohibition on introduction of this critical evidence neutered Mr. Hundley's defense. This evidence was extremely relevant to Mr. Hundley's self defense claim and the exclusion of such evidence rendered the trial fundamentally unfair.

C. The Overwhelming Majority of Cases that Have Addressed Similar Issues Should Persuade this Court that Preclusion of the Introduction of the Intoxication of the Decedent in Self Defense Cases is Reversible Error

While the issue of the admissibility of the intoxication of the decedent in a criminal case where the defendant claims self defense is seemingly an issue of first impression in West Virginia, case law from other states overwhelmingly supports a finding that exclusion of this evidence is reversible error.

1. Mississippi

In *Newell v. State*, the Mississippi supreme court found that a "trial court's exclusion of a shooting victim's blood toxicology results was reversible error." *Newell v. State*, 49 So.3d 66

(Miss. 2010). In *Newell*, defense counsel attempted to cross-examine the expert who performed the autopsy of the decedent regarding the decedent's blood toxicology, and the trial court excluded it. *Id*. at 72. The Mississippi supreme court ruled that "[i]ntoxication evidence offered for this reason is admissible so long as its relevance has been established by the time the evidence is offered." *Id*. at 73 (citing *Farmer v. State*, 770 So.2d 953, 958 (Miss. 2000) and 9 Am.Jur.2d Evidence § 307 (2010)). The court reasoned that at the time that the forensic pathologist had testified, "the relevance of [the decedent's] toxicology results had been established. The jury obviously knew that [defendant] was on trial for fatally shooting [the decedent], and it already had heard that the shooting had occurred soon after [decedent's] allegedly aggressive and violent behavior[.]" The court continued, the decedent's "toxicology results were relevant to show 'all the circumstances under which the fatal difficulty occurred, and which would in any manner ... indicate the mental state of the deceased.'" *Id.* at *73* (quoting *Byrd v. State*, 154 Miss. 742, 123 So. 867, 869 (1929)). "Therefore, the exclusion of [the decedent's] toxicology results was an abuse of discretion, because the relevance of that evidence had been established at the time [the forensic pathologist] took the stand." *Id*. at 73 (quoting *Farmer*, 770 So.2d at 958).

Furthermore, the Mississippi court found that the exclusion of the toxicology of the decedent adversely affected the substantial right of the defendant. "Here, [defendant's] theory of the case was self-defense, and evidence of [the decedent's] toxicology could have affected the jury's understanding of [the decedent's] motive or intention and [the defendant's] belief in the imminence of his danger. So the exclusion of the evidence prevented [defendant] from fully presenting his theory of the case to the jury and thus adversely affected his right to a fair trial.

Therefore, the exclusion of the toxicology evidence is reversible error." *Id*. at 73 (citations omitted).

Moreover, the Mississippi court did not rule in the manner in which such evidence would be admissible, just that the decedent's impairment was relevant and admissible. "In finding that, under the facts before us, the state of [the decedent's] blood toxicology and resultant impairment is relevant, we do not say that the toxicology report is admissible or that [the forensic pathologist] is competent to offer testimony in this area. Those matters are left for determination in further proceedings on remand." *Id*. at 73.

The Mississippi supreme court in *Newell* based it's holding on an older Mississippi case--*Byrd v. State*, 154 Miss. 742, 123 So. 867 (1929). In that case, the court recognized that "[i]n determining whether the defendant acted in self–defense, it is competent to show all the circumstances under which the fatal difficulty occurred, and which would in any manner have affected the defendant's motives and apprehensions, or indicate the mental state of the deceased. The defendant may show the deceased's intoxication as bearing upon his motive or intention and the defendant's belief in the imminence of his danger." *Byrd*, 154 Miss. at 744, 123 So. at 869. "The fact of deceased's intoxication has an added element of relevancy when the testimony has shown, as was amply shown and that without dispute in this case, that the general reputation of the deceased for violence was bad, for it is a matter of common observation that intoxication excites or emphasizes the ordinary characteristics of the person and makes a quarrelsome or dangerous man more so, and much the more likely when thus afflicted to indulge, without restraint, his unfortunate propensity to engage in criminal altercations, which when sober he is able to hold measurably within his control." *Id*. at 869.

2. Florida

The Florida appellate court arrived at a similar decision to the Mississippi court. In *Cromartie v. State*, 1 So.3d 340 (Fla.Dist.Ct.App. 2009), the Florida appellate court found that "[w]hen a defendant has competent evidence to support his theory of defense, the trial court denies the defendant his due process rights guaranteed by the constitution when he is prohibited from presenting that defense to the jury." *Id*. at 342 (quoting *Sluyter v. State*, 941 So.2d 1178, 1181 (Fla. 2d Dist.Ct.App. 2006). The Florida court found that "[t]he trial court abused its discretion by failing to reverse its earlier ruling excluding the toxicology of the decedent in light of [the defendant's] testimony about [the decedent's] aggression, which the jury might well have concluded did indicate the victim was acting in a particular way as if he were under the influence of alcohol...." *Id*. at 342.

In *Cromartie*, the defendant's theory of defense was that the decedent "was acting in an aggressive, threatening manner, under the influence of alcohol, and that he was only defending himself when he punched the victim a single time. *Id*. at 342-43. The court ruled that the defendant "was entitled to present evidence tending to prove that he acted in self-defense against a drunken aggressor. Inebriation, the jury could reasonably have concluded, might have led to aggressiveness of the kind [the defendant] recounted. Particularly because [defendant's] testimony-and his statement to [law enforcement]-were not corroborated by other witnesses, evidence of the victim's intoxication could have been critical in bolstering his theory of defense." *Id*. at 343. Thus, "[t]he trial court denie[d] [defendant] his due process rights guaranteed by the constitution when ... [it] prohibited [him] from presenting [possibly critical evidence in support

of his] defense to the jury." *Id*. at 343. "A party is entitled to present evidence upon the facts that are relevant to his theory of the case, so long as that theory has support in the law. Evidence that the victim was intoxicated would tend to show that [the defendant] reasonably believed he faced a threat of great bodily harm and so acted reasonably in defending himself[.] *Id*. at 343.

3. Ohio

An Ohio appellate court came to the same conclusion-- that exclusion of evidence of a decedent's intoxication in a self defense case was reversible error. The Ohio appellate court held that evidence of the decedent being under the influence was important to the issue of self defense and "relevant specifically to the issue of who was more likely the aggressor in the incident." *State v. Baker*, 623 N.E.2d 672, 677 (Ohio. Ct.App. 1993). Thus, the Ohio appellate court held that the trial court erred in precluding introduction of the decedent's toxicology report that would have shown that decedent was under the influence of alcohol and cocaine at the time of his death. *Id*.

4. Hawaii

Hawaiian courts have come to the same conclusion as Mississippi, Florida, and Ohio. In Hawaii, the exclusion of evidence of a decedent's drug and alcohol use in a self defense case is constitutional error.

In *State v. DeLeon*, 131 Hawai'i 463, 319 P.3d 382 (2014), the Hawaii supreme court ruled that the "[e]rroneous exclusion of an expert opinion on the effect of the victim's cocaine use violated the murder defendant's right to present defense." The *DeLeon* Court held, "[t]he due process guarantee of the ... Hawaii constitution [ ] serves to protect the right of an accused in a criminal case to a fundamentally fair trial." *DeLeon*, 131 Hawai'i at 485, 319 P.3d at 405

(citations omitted). "Central to the protections of due process is the right to be accorded a meaningful opportunity to present a complete defense." 131 Hawai'i at 486, 319 P.3d at 406. The *DeLeon* court held that the preclusion of allowing expert testimony "with regard to the probable effects of cocaine on [the decedent] at the time of the shooting, [defendant] was not able to present a complete defense. [Defendant's] self-defense argument relied largely on [decedent's] actions immediately before the shooting. Although [the expert] was able to present testimony at trial as to [the decedent's] 'high degree of alcohol intoxication,' the jury was precluded from receiving information regarding Powell's cocaine use and the combined effects of cocaine and alcohol." *Id*. (citations omitted). "Because [defendant's] defense depended heavily on [the decedent's] behavior immediately before [defendant] shot him, there is a reasonable possibility that the exclusion of this testimony affected the outcome of the trial." As such, the *DeLeon* court vacated the conviction for second-degree murder. *Id*.

In *State v. David*, 149 Hawai'i 469, 494 P.3d 1202 (2021), the Hawaii supreme court ruled that the exclusion of intoxication evidence, even absent an expert to explain the intoxication to the jury, was reversible error in a self defense case. In *David*, "[p]rotecting himself against his heavily intoxicated and violent cousin formed the nucleus of [defendant's] defense." *David*, 149 Hawai'i at 474, 494 P.3d at 1207. The court ruled that "[b]y showing [the decedent's] violent, drunken behavior, [defendant] provided a sufficient basis to admit the BAC evidence." *Id*.

> The BAC evidence provided an objective, scientific basis for the jury to evaluate the extent and degree of [the decedent's] intoxication. The evidence certified [the decedent's] highly inebriated condition. It had a tendency to prove consequential facts central to [defendant's] defense: It would have (1) aided the jury's determination as to who was more likely the aggressor; (2) assisted the jury in understanding [defendant's] state of

> mind and his perception of imminent harm; and (3) helped corroborate [defendant's] view that [the decedent] was acting violently and erratically while intoxicated, causing [defendant] to believe lethal force was necessary to protect himself.

David, 149 Hawai'i at 474-75, 494 P.3d at 1207-08 (citing *Durrett v. Commonwealth*, No. 2014-SC-000177-MR, 2015 WL 4979723 at *5 (Ky. Aug. 20, 2015) (memorandum opinion) ("Anytime someone is killed and the killer claims that he did so to protect himself, the behavior of the victim is obviously going to be of principal importance. And evidence that the deceased was intoxicated when he died can be relevant to assessing who was the aggressor by allowing for a fuller understanding of the victim's behavior and the killer's perception of imminent harm.")).

The *David* court continued that the association between alcohol and drugs and violent or aggressive behavior are within jurors' common understanding and do not require the testimony of an expert. *David*, 149 Hawai'i at 475, 494 P.3d at 1208.

The court further explicated that the ability for a defendant to present a complete defense case is required by due process:

> A defendant's right to present a complete defense is vital to due process. An accused has the constitutional right to present any and all competent evidence to support a defense. Where the accused asserts a defense sanctioned by law to justify or to excuse the criminal conduct charged, and there is some credible evidence to support it, the issue is one of fact that must be submitted to the jury, and it is reversible error for the court to reject evidence which, if admitted, would present an essential factual issue for the trier of fact.

Id. (citations and quotations omitted).

In holding why the evidence of the decedent's intoxication was vital to due process, the court explained:

> [Defendant] said he acted in self-defense. [Defendant's] jury was instructed on his defense. Presenting a rational explanation for his conduct underpinned [defendant's] defense…. Evidence of [the decedent's] BAC could have affected the jury's understanding of [the decedent's] motive or intention. It could have similarly influenced

> the jury's understanding of [defendant's] state of mind and his belief that danger was imminent. It also corroborated his testimony concerning [decedent's] aggressive behavior. The evidence would have helped explain [defendant's] perception that [the decedent] was volatile due to being excessively intoxicated. [Defendant's] defense hinged on his credibility – the believability of his testimony about [the decedent's] violent, irrational behavior and how it influenced [defendant's] conduct. The BAC evidence was instrumental to bolstering [defendant's] credibility. Because [defendant's] defense depended on his account of [the decedent's] behavior before the fatal altercation and, by extension, on his credibility, we hold that there is a reasonable possibility that excluding the BAC evidence affected the trial's outcome.

David, 149 Hawai'i at 481, 494, P.3d at 1214.

"Given [the decedent's] erratic and belligerent conduct toward [defendant] before the fatal incident, the degree of his intoxication mattered. [The decedent's] BAC was the only evidence that provided a reliable measurement of his inebriation. It was critical to bolstering [defendant's] credibility. *David*, 149 Hawai'i at 481-82, 494, P.3d at 1214-15. As such, the *David* court held that "the circuit court's error in excluding the BAC evidence affected [defendant's] right to a fair trial. The right to due process entitled [defendant] to present any and all competent evidence tending to show that he acted in self-defense. Because the trial court rejected admissible evidence that was probative to consequential factual issues connected to [defendant's] defense, we hold that it violated [defendant's] right to present a complete defense." *David*, 149 Hawai'i at 482, 494, P.3d at 1215.

5. Arizona

The Arizona supreme court has reached a similar opinion as to the aforementioned cases--it is reversible error to preclude introduction of drug intoxication which is relevant to a victim's conduct and a defendant's theory of self defense. *State v. Plew*, 155 Ariz. 44, 745 P.2d 102 (Ariz. 1987).

> It is our opinion as well that the effect of cocaine intoxication on mental and physical behavior is a proper subject for expert testimony in an appropriate case. We believe this is such a case. An addict is accused of attempting to murder his supplier, also an addict. The defendant claims self-defense—alleging he was trying to protect himself from the attack of an angry, intoxicated "pusher" acting under a cocaine-induced frenzy. One hopes that the behavioral characteristics of such people are not within the experience of the average juror…. [B]ehavioral and medical testimony on the subject could be especially useful to the jury in evaluating the evidence, thus hopefully ensuring an informed and dispassionate jury verdict.

Plew, 155 Ariz. at 48, 745 P.2d at 106.

> [E]xpert testimony on cocaine intoxication would be a relevant, proper subject conforming to a generally accepted explanatory theory if presented by a qualified individual. The state argues, however, that defendant's expert should not have been permitted to testify about the effects of cocaine intoxication because the doctor could not state with "reasonable medical certainty" that the victim in fact was intoxicated with cocaine at the time of the shooting. We disagree. Assuming compliance with the basic foundational predicates in this area, an expert may explain by way of general testimony or hypothetical discourse the recognized behavioral impact of the predicate events. This explication needs to be made with the requisite degree of scientific and medical rigor, but the expert may and often should properly refrain from specifically stating that this particular person must have acted in this precise manner at this exact point.

Plew, 155 Ariz. at 49, 745 P.2d at 107.

The Arizona court continued,

> While defendant's testimony in the case before us is not the most credible story that has passed before our eyes, a jury could believe it, particularly if the story were reinforced with [the expert's] explication of the effect of cocaine intoxication. In the final analysis, neither defendant, the abuser, nor [the decedent], the supplier, is such a sterling and unimpeachable character that it could be said as a matter of law that only one version of the affair should go to the jury. If both versions are to be submitted to the jury, then defendant is entitled to the corroborating evidence from [the expert].... The evidence in question is not collateral but goes to the very heart of the only defense presented by [the defendant]. Without the expert evidence, [defendant's] explanation for the shooting could easily be seen as preposterous and contradicted by the uncontroverted facts…. Under such circumstances, we view the refusal to admit this evidence as an error of law.

Plew, 155 Ariz. at 50, 745 P.2d at 108.

The Arizona court further found that this error was prejudicial to the defendant. "The

case was close in the sense that only the defendant and victim were witnesses to the actual shooting. The defendant's claim of self-defense hinged on giving some rational explanation of how the victim could have absorbed five shots while maintaining his aggressive assault. There was evidence that the victim was an addict, had used cocaine before the shooting, and was intoxicated with cocaine at that point. An explanation of the effects of cocaine intoxication may have persuaded the jury to decide that guilt was not proved beyond a reasonable doubt. The defendant should have an opportunity to present that testimony to a jury." *Id*.

6. Seventh Circuit Court of Appeals

The Seventh Circuit Court of Appeals has also adopted a similar holding to the previously-cited state cases. The Seventh Circuit found that a defense counsel's failure to present evidence of a victim's intoxication in a self defense case was ineffective assistance of counsel. *Harris v. Cotton*, 365 F.3d 552 (7th Cir. 2004).

> Harris was charged with murder and his defense was self-defense. The behavior of the victim was therefore extremely important to Harris's case. From the perspective of a defense attorney, an affirmative defense of self-defense against a drunk and cocaine-high victim stands a better chance than the same defense against a stone-cold-sober victim. Common sense tells us that an individual under the influence of cocaine and alcohol may look and act in a strange manner—an observation supported by expert testimony in the post-conviction proceedings. Harris's attorney was aware that [the victim] had been drinking and was further aware that a toxicology report had been requested…. Therefore, it is clear that Harris's attorney should have the toxicology report for use at trial. Because his failure to obtain and present the report was a mistake, and not a calculated strategic decision, we find that his performance fell below the objective standard of reasonableness[.]

Id. at 556.

> The state court decision points out that evidence of Jones's behavior prior to the shooting was admitted into evidence; "[h]owever, with the exception of Harris' claim that Jones was pulling a gun on him, there was no dispute as to the behavior of Jones." That court further stated, "[t]he presence or absence of alcohol and drugs in Jones' system does not

> change the testimony concerning Jones' behavior that evening." While it is true that the evidence does nothing to change the substance of the testimony regarding Jones's behavior, it creates, in the words of the dissenting state court judge, a " 'reasonable probability' that [the jurors'] collective perception regarding Harris' conduct would have changed." The state court majority said it slightly differently when it said, "[h]ad the jurors known of Jones' blood alcohol level and his use of cocaine, they may have credited Harris' claim of Jones' hostile and erratic behavior." Finally, as Harris states in his brief to this court, "[t]he fact that Jones had been drinking and using cocaine is evidence that his behavior at the time was altered and erratic. That evidence directly corroborates Harris's contentions about how he perceived Jones's behavior at the time."

Id. at 556-57.

> We recognize, as did the state court, that there is little or no evidence which goes to show that Harris knew that Jones was under the influence of cocaine and alcohol. We do not however find such a distinction dispositive. In fact, the lack of evidence admitted regarding Jones's state of intoxication leads to the opposite conclusion than the one arrived at by the state court. When defense counsel tried to question the coroner as to whether Jones's body smelled of alcohol, his line of questioning was disallowed. Therefore, the jury was left with the impression that the decedent was not intoxicated when, in fact, he was quite inebriated. If the jury believed that Jones was sober, there is a reasonable probability that they would not have believed Harris's version of events as it related to Jones's behavior.

Id. at 556.

This vast line of case law from different jurisdictions all leads to one conclusion-- the exclusion of evidence of Mr. Cekada's drug addiction and extreme intoxication at the time of his confrontation with Mr. Hundley was prejudicial error. Such evidence was relevant to Mr. Hundley's claim of self defense and the only evidence that would have put Mr. Cekada's behavior of following Mr. Hundley to the dollar general, pulling a gun on him, chasing him in a vehicle, crashing into Mr. Hundley, and again pulling a gun on him into context. Such behavior is irrational, but the jury was left with the impression that Mr. Cekada was stone-cold sober at the time of his death. Mr. Cekada's extreme intoxication would have put Mr. Cekada's behavior into context and would have added credibility to Mr. Hundley's report to police and testimony at

trial at his reasonable apprehension of fear from Mr. Cekada. The exclusion of such evidence impaired Mr. Hundley's ability to present a case of self defense and there is a reasonable probability that if such evidence had been correctly allowed to be entered into evidence, the jury's verdict would have been different.

D. The Right of a Defendant to be Able to Present His Self-Defense Case in Full

More generally, the United States Supreme Court has recognized that the prosecution has a right to fully present its case with all of its evidentiary weight. *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). A defendant presenting an affirmative defense has a similar right. A defendant should be entitled to raise a case of self defense by admissible "evidence of [his] own choice" and the court should not limit "the full evidentiary force of the case." *Old Chief*, 519 U.S. at 186-87, 117 S.Ct. at 653.

> The "fair and legitimate weight" of conventional evidence showing individual thoughts and acts… reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an [affirmative defense], but tells a colorful story with descriptive richness. Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal. When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment. Thus, the [defendant] may fairly seek to place [his] evidence before the jurors, as much to tell a story of [innocence] as to support an inference of [innocence], to convince the jurors that a guilty verdict would be

> morally reasonable[.]

Old Chief, 519 U.S. at 187, 117 S.Ct. at 653-54.

> A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

Old Chief, 519 U.S. at 187, 117 S.Ct. at 654.

Here, Mr. Hundley's story of self defense was left wanting for the necessary details to satisfy the jurors as to what had actually occurred between Mr. Hundley and Mr. Cekada. Specificity is the soul of narrative, and the jury was left with a narrative vacuum by the circuit court's exclusion of the details of Mr. Cekada's state of mind at the time of his death. Mr. Cekada was left as a blank slate for the jury-- an everyman whose actions would not make sense in the context of being an everyman. Mr. Cekada's actions only made sense-- his erratic behavior and his aggressiveness-- in the context of his drug addiction and extreme intoxication, and the white washing of Mr. Cekada by the preclusion of such evidence violated Mr. Hundley's fundamental due process rights.

II. THE STATE'S SANDBAGGING OF CLOSING ARGUMENT VIOLATED MR. HUNDLEY'S DUE PROCESS RIGHTS

Mr. Hundley further argues that the circuit court erred where it allowed the State to sandbag its argument regarding self defense in closing, saving argument regarding the proclaimed lack of self defense and related evidence until rebuttal, which precluded counsel for Mr. Hundley from responding.

A court is generally "afforded broad discretion in controlling closing arguments and is only to be reversed when there is a clear abuse of its discretion. But such discretion, while broad, is not limitless. Rule 29.1 is clear as to how closing arguments shall proceed, and it thus cabins the district court's latitude in a discrete but important way." *United States v. Smith*, 962 F.3d 755, 769-70 (4th Cir. 2020) (citing *United States v. Baptiste*, 596 F.3d 214, 226 (4th Cir. 2010) and *United States v. Cardascia*, 951 F.2d 474, 485 (2d Cir. 1991)).

Rule 29.1 of the West Virginia Rules of Criminal Procedure, which is modeled off of its federal counterpart, provides the procedure for closing argument in criminal cases. "After the closing of evidence and the instructions of the court to the jury, the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal." W. Va. R. Crim. Pro. 29.1. In the advisory notes of Federal Rule of Criminal Procedure 29.1, it states that "[t]he rule is drafted in the view that fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply. Fed. R. Crim. Pro. 29.1 (advisory committee notes). With that rule flows a further inference that the prosecution may not sandbag its arguments and save new argument for rebuttal so that the defense does not have an opportunity to respond. *See United States v. Smith*, 962 F.3d 755, 769 (4th Cir. 2020) (quoting *United States v. Taylor*, 728 F.2d 930, 937 (7th Cir. 1984) (recognizing that "a prosecutor cannot use rebuttal to put forth new arguments, but is restricted to responding to the points made by the defense counsel in closing argument"); *United States v. Wood*, 175 F.3d 1018 (4th Cir. 1999) ("district court abused its discretion by permitting the government to 'simply end-run Rule 29.1' by presenting a key

argument for the first time in rebuttal.").

"Adhering to the prescribed sequence of closing arguments is not just a matter of good housekeeping. Doing so provides each side in a criminal case a meaningful opportunity to rebut the other, much as with the orderly progression of arguments in appellate briefing…. Moreover, no aspect of such advocacy could be more important than" what is at issue here—'the opportunity finally to marshal the evidence for each side before submission of the case to judgment.'" *Smith*, 962 F.3d at 770 (quoting *Herring v. New York*, 422 U.S. 853, 962, 95 S.Ct. 2550 (1975)). "Rule 29.1 tracks these core principles. As Smith points out, its purpose is to preserve a defendant's final opportunity to respond to the prosecution's case in an informed manner." *Smith*, 962 F.3d at 770 (citing *United States v. Fields*, 429 F. App'x 343, 345 (4th Cir. 2011).

Thus, the *Smith* court found that it was an abuse of discretion to allow the prosecution to waive initial closing argument but retain rebuttal closing because it "undermined that vital function. To permit the prosecution to waive its initial closing, yet retain the opportunity to rebut, upsets the fundamental structuring of the Rule and leaves defendants like Smith with no opportunity (in the absence of a sur-rebuttal) to meaningfully respond to what the government has said." *Id*. at 770. "Intentional or not, when the government waives its initial argument, it has the effect of 'sandbag[ging] the defendant by setting him up to avoid a subject in his closing argument, only to learn that it is too late to reply to the prosecution's side of the story.'" *Id*. at 770-71 (quoting *Waters v. State*, 974 A.2d 858 (Del. 2009)).

At trial, the State moved the introduction of State's exhibits 18 and 19, which were close up photographs of the bloody hands of the decedent, and trial counsel objected to the

introduction, arguing relevance and undue prejudice. App. 599-600.

> MR. MANFORD: Well, I think it's -- Your Honor, here is what I think they're doing. They're going to argue that he never pulled the gun out to begin with, it was always in his pocket because if he did it would be blood on it.
> THE COURT: But I don't think this makes it any more likely or less likely, does it?
> MR. WARD: At the end of the day it does corroborate the witness' statement. It does explain what the victim was doing, he had his hands to his throat and it's relevant --
> MR. MANFORD: It's not in contest.
> THE COURT: It's not, but it is relevant to confirm her statements.
> MR. MANFORD: Why don't we have all of the clothing and all the bloody stuff? I mean, I objected to that, that's why, and I object to this too. Okay, you're going to rule. I made my record and that's it.
> THE COURT: I will allow it for that limited purpose.

App. 599-600.

Trial counsel then requested a cautionary instruction. While the court did not give the cautionary instruction that the pictures of the decedent's hands were for the limited purpose of showing that the decedent had his hands on his neck, the court ruled that the state was not to argue any other inference from the pictures.

> MR. MANFORD: Can we give a cautionary instruction? I'm sorry. I'm doing my job.
> THE COURT: Draft me one up. It would be what?
> MR. MANFORD: The jury be advised this is admitted for limited purpose to show that the victim has his hands on his neck.
> MR. WARD: I don't think a cautionary instruction is appropriate. We're not going to go any further. We're just asking if there was blood on the hands.
> MR. MANFORD: You can bet in closing they're going to argue it.
> THE COURT: You can object if they do.
> MR. MANFORD: I will. Thanks, Judge.

App. 601-02.

Despite the Court's admonition that the State could not argue any further inference from the photographs of the decedent's bloody hands, the State asked the court prior to its closing argument whether it could argue the "lack of blood on the firearm based off the injury based off

the condition of his hands" and court seemingly went back on its prior ruling, allowing the State to make the argument. App. 733. However, in its closing argument, the State did not argue any inference that could be drawn from the photographs of the decedent's bloody hands. App. 750-62.

Prior to addressing it in his closing argument, defense counsel inquired of the court whether the rule of full and fair closing for the State applied since the State did not argue the photographs. "Full and fair closing? Full and fair closing? Okay. I won't go there then." App. 776.

However, the State then brought up the inference from the photographs in its closing rebuttal argument, with defense counsel promptly objecting. The State argued, "The next thing that we know, ladies and gentlemen, is there was no blood on that firearm." App. 780.

> MR. MANFORD: Objection. Full and fair closing. That's why I asked you, Your Honor. I didn't go there at all. It wasn't brought up in closing. That's why I asked.
> THE COURT: I understand you asked, but it's still in response to a self-defense argument, isn't it?
> MR. MANFORD: I didn't address it because of that. That's why I --
> THE COURT: Let's come here to sidebar.
> THE COURT: So, yes, full and fair closing means that you can only respond to that which Mr. Manford raises in his arguments. So, Mr. Manford, your argument is that you didn't go where?
> MR. MANFORD: Anything about blood being on the gun. I had a whole argument because there's no blood on the -- the search warrant pictures in the Cekada -- because there's no blood on the stick shift and there's not blood on the steering wheel right side so he did everything with the other hand. So I was bringing up rebuttal or trying to and so that's why I turned and said full and fair closing because he didn't bring it up at all. I'm not going to bring it up if he didn't bring it up.
> THE COURT: You don't have that. It's him that has the full and fair closing. I mean, you can go anywhere you want in yours. He needs to argue what he's arguing because you're raising self-defense arguing that he held up a gun and pointed it.
> MR. MANFORD: Okay.
> THE COURT: His arguments about blood have to go with whether or not he had the gun in his hand. You argued that the gun is in his hand. He's allowed to rebut that with

anything he chooses.
MR. MANFORD: I get that, Your Honor. May I still vouch the record?
THE COURT: Go ahead.
MR. MANFORD: Thank you. So I'm prepared to do that, but my understanding of full and fair closing is you've got to lay your cards on the table, whatever it is, in the beginning, and since he didn't raise it and we knew it was going to be an issue, we knew it the whole time with the blood on the hands, when he didn't raise it, that's why I turned to the Court and said full and fair closing. That was my understanding that I'm going to have to -- he can't comment on it, that he didn't raise in direct. Now the Court is saying, well, that's rebutting what you said, but can I do surrebuttal and bring that up?
THE COURT: No.
MR. MANFORD: I think -- I think we're being -- I'm sorry. Anyway, I made my record. I object to that, and that's why I didn't go there. At least I got it on the record.

App. 780-83.

Thus, the State continued its argument, which defense counsel did not have an opportunity to address:

> MR. ZAHRADNIK: There was no blood on that firearm other than on the muzzle of the firearm, ladies and gentlemen, so let's think about this. We heard testimony that T.J. was holding the wound with both hands so if he had the firearm out and pointed when he got stabbed, which we already know he couldn't have gotten stabbed in the particular place if he was positioned like this, his first reaction would have been to take both of his hands to that wound which is what he was doing at every other point that a witness viewed him after that stabbing occurred. There's no blood on that firearm other than on the muzzle. Why is that important? Because if a gun were in his pocket, and you can look at these exhibits and see in the car seat of T.J. Cekada's vehicle, there was a pool of blood on the right portion of that car seat where the muzzle of the gun would have been pointed if it were in the pocket of his trousers -- of his basketball shorts just where it was when the defendant stabbed him.

App. 783-84.

First, it was error for the court to allow the State to not argue the lack of self defense in their closing argument but instead save it for rebuttal where Mr. Hundley's counsel could not respond. Mr. Hundley raised a prima facie case of self defense at trial. Therefore, the burden was on the State to prove the absence of self defense beyond a reasonable doubt. Proving no self

defense was the State's burden and allowing the State to not argue regarding the self defense claim in its closing argument and instead allowing the State to save it for rebuttal, insidiously switched the burden from the State to Mr. Hundley. This type of sandbagging, which resulted in a shifting of the burden, was constitutionally erroneous. *See*, *e.g.*, *State v. Jenkins*, 191 W.Va. 87, 92, 443 S.E.2d 244, 249 (1994).

Moreover, the State's tactics in saving the argument regarding the pictures of the decedent's bloody hands and the lack of blood on the firearm until rebuttal completely shut down the defense from cross-examining such evidence through the State's witnesses, presenting independent evidence and testimony regarding such evidence, and offering any argument regarding such evidence. Importantly, when defense counsel objected to the introduction of the photographs of the decedent's bloody hands, the trial court only allowed their introduction for the limited purpose of corroborating other eyewitnesses' testimony that the decedent's hands were on his neck. Defense counsel relied upon the court's ruling and did not cross-examine any of the State's witnesses about the connection between the lack of blood on the firearm and the decedent's bloody hands. Defense counsel further relied upon the court's ruling that he would be able to object to the State attempting to make any such inference in closing argument. However, at closing argument, the court essentially performed a u-turn on her previous ruling and allowed the State to make the previously-prohibited argument, putting defense counsel at an insurmountable disadvantage. And then when defense counsel recognized that the State did not raise the issue during its initial closing, he even inquired from the court about the "full and fair closing" rule and elided making any argument when the court seemingly confirmed that the State would not be able to argue the evidence not brought up in their initial closing on rebuttal.

The court allowing the State to sandbag its argument by saving it for rebuttal was an abuse of discretion. The court's initial evidentiary ruling regarding the disputed evidence exacerbated the prejudice suffered by Mr. Hundley, whose counsel was unable to cross-examine the evidence or attack the evidence in any way because he thought that the State was precluded from arguing the evidence. This prejudice was compounded when the State did not offer any argument on the disputed evidence in its closing and when the court seemingly approved that they would not be able to bring up argument on the disputed evidence in closing. In summary, trial counsel was prevented from cross-examining the evidence regarding the decedent's bloody hands and the lack of blood on the firearm, foreclosed from presenting any evidence on the issue, and then precluded from offering argument on the issue because the State saved its argument on the issue until its rebuttal. This rendered the trial process fundamentally unfair and neutered the ability of defense counsel to carry out his Sixth Amendment duties to Mr. Hundley.

III. THE ARREST OF TIMOTHY WILLIAMSON, A DEFENSE WITNESS, BEFORE HE COULD TESTIFY, WAS PROSECUTORIAL MISCONDUCT AND A VIOLATION OF MR. HUNDLEY'S RIGHT TO COMPULSORY PROCESS

Mr. Hundley further argues that it was prosecutorial misconduct when the State of West Virginia had law enforcement arrest Timothy Williamson-- Mr. Hundley's stepfather and a trial witness-- in front of the jury. The arrest of Mr. Williamson was a violation of Mr. Hundley's constitutional right to compulsory process as it precluded defense counsel from calling Mr. Williamson as a witness and unduly prejudiced the jury against Mr. Hundley.

In West Virginia, the seminal case on the issue of a prosecutor's interference with the right to compulsory process is *State v. Goad*, 177 W.Va. 582, 355 S.E.2d 371 (1987). In *Goad*, this Court held that "admonitions by the prosecutor to a potential defense witness to refrain from

lying, combined with threats of prosecution as an accomplice and for perjury, which resulted in witness' assertion of right against self-incrimination, effectively deprived defendant of due process." *Goad*, 177 W.Va. at 583, 355 S.E.2d at 372.

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Goad, 177 W.Va. at 583, 355 S.E.2d at 372 (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967)).

The *Goad* Court looked to the United States Supreme Court case of *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), where the Supreme Court ruled that a judge's remarks to a witness to refrain from lying and threatening the witness with a prosecution for perjury, resulting in the witness not testifying, "effectively drove the witness off the stand and deprived the defendant of due process of law. *Goad*, 177 W.Va. at 583, 355 S.E.2d at 372 (quoting *Webb*, 409 U.S. at 98, 93 S.Ct. at 353). The Goad Court found that where the prosecutor made similar admonitions to a witness as the judge did in Webb, "which result[ed] in a potential witness's assertion of his right against self-incrimination effectively deprive a criminal defendant of due process of law by denying him the opportunity to present witnesses in his own defense." *Goad*, 177 W.Va. at 585, 355 S.E.2d at 374.

The California Supreme Court had an opportunity to apply this standard of interference with compulsory process to a prosecution's arrest of a defense witness immediately after he testified and in the presence of the press and other defense witnesses, finding that this violated

the defendant's right to compulsory process.. *In re Martin*, 44 Cal.3d 1, 744 P.2d 374, 241 Cal.Rptr. 263 (Cal. 1987) (en banc). The court held that "[a] defendant's constitutional right to compulsory process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf. Governmental interference violative of a defendant's compulsory-process right includes, of course, the intimidation of defense witnesses by the prosecution." *In re Martin*, 44 Cal.3d at 30, 744 P.2d at 392, 241 Cal.Rptr. at 281. "The forms that such prosecutorial misconduct may take are many and varied. They include, for example, statements to defense witnesses to the effect that they would be prosecuted for any crimes they reveal or commit in the course of their testimony…. [T]hey include arresting a defense witness before he or other defense witnesses have given their testimony. *In re Martin*, 44 Cal.3d at 30-31, 744 P.2d at 392-93, 241 Cal.Rptr. at 281-82 (citing *Bray v. Peyton*, 429 F.2d 500, 501 (4th Cir.1970)). The court set out a three part test to determine whether there was a violation of a defendant's right to compulsory conduct-- 1) establishing misconduct, though it need not be bad faith or improper motive; 2) showing interference or a causal link between the misconduct and the inability to present witnesses; and 3) demonstrating materiality-- a plausible showing of how the witness testimony would have both been material and favorable to the defense. *In re Martin*, 44 Cal.3d at 31, 744 P.2d at 393, 241 Cal.Rptr. at 282.

In *Bray*, the Fourth Circuit case cited by the Martin court, the Fourth Circuit found a violation of compulsory process where the prosecution arrested a defense witness prior to the witness testifying on an old charge. *Bray*, 429 F.2d at 501. The facts in *Bray* were as follows:

> Bray's trial counsel testified that the defense stratagem was to expose the 15-year-old child prosecutrix as a consenting lewd female and thus reduce the offense to a misdemeanor. To this end, he was prepared to introduce four young men as witnesses to

> testify to their illicit relations with the complainant. All of them were in the courtroom for the trial.
>
> About the same time Bray was indicted, one of these witnesses had been charged with a like assault upon the girl. After he joined the Army, the accusation was dropped. He attended Bray's trial pursuant to a summons sent to the commanding officer at Fort Bragg, North Carolina. However, before Bray's defense was begun, the prosecuting attorney directed the arrest and incarceration of this witness on the old charge. The warrant was immediately executed, although such interference with an out-of-state witness is in direct violation of the Virginia Code.

Bray, 429 F.2d at 500-01.

In the instant case, Timothy Williamson had been listed as a defense witness on each of the proposed witness lists filed by Mr. Hundley's trial counsel. App. 104, 237. Mr. Williamson was going to offer crucial testimony regarding his first hand observation of Mr. Cekada's threatening and erratic behavior in the past, which his stepson, Mr. Hundley was aware of, including an incident where Mr. Cekada threatened Mr. Williamson and Mr. Hundley's mother with a firearm while Mr. Cekada was observably intoxicated. Thus, Mr. Williamson was a material and favorable witness as to the issue of self defense.

Mr. Williamson's arrest on the first day of trial stemmed from the *McGinnis* hearing in this case where Mr. Williamson testified for Mr. Hundley. App. 199. The State was attempting to introduce Mr. Hundley's prior conviction for unlawful wounding resulting from a domestic incident between Mr. Hundley and Mr. Williamson. Mr. Williamson testified at the hearing that the confrontation between him and Mr. Hundley was more akin to a mutual affray and that he did not want to see Mr. Hundley prosecuted for unlawful wounding, though the State had moved forward with the prosecution anyway. App. 199-207. Mr. Hundley had subsequently entered an *Alford* plea to the offense. At the *McGinnis* hearing, the State used the police report from the

unlawful wounding case, which had notations regarding a statement that Mr. Williamson had made to police while in the hospital and on narcotic pain medication. App. 205. There was no prior testimony of Mr. Williamson in the unlawful wounding case or even any written or recorded statement produced by the State.

Subsequent to the *McGinnis* hearing and immediately preceding the first day of trial, the State filed a misdemeanor information against Mr. Williamson for false swearing. App. 1153-54. The State had law enforcement execute the warrant on the information during the first day of trial in the presence of the jury and other witnesses. Ultimately, the case against Mr. Williamson was resolved with a pre-trial diversion and dismissal. App. 1157.

However, the State achieved what they were seeking. The arrest of Mr. Williamson made him unavailable as a witness for Mr. Hundley.

Not only did the arrest of Mr. Hundley in the courtroom during the first day of trial make him unavailable as a witness, it was also done in the presence of the entire courthouse, including the jury. While the jury may have been unaware of specifically Mr. Williamson's relationship to Mr. Hundley, the jury was aware that Mr. Williamson was a party associated with Mr. Hundley. Arresting Mr. Williamson before he could testify at trial was a violation of Mr. Hundley's due process right to compulsory process. Arresting Mr. Williamson in open court in front of the jury unduly prejudiced the jury against Mr. Hundley.

IV. THE STATE VIOLATED MR. HUNDLEY'S RIGHT TO DUE PROCESS BY WITHHOLDING EXCULPATORY EVIDENCE AND THE TRIAL COURT ERRED IN PRECLUDING INTRODUCTION OF EVIDENCE OF MR. CEKADA'S DRUG TRAFFICKING ACTIVITY

Mr. Hundley further argues that the State violated his due process rights by withholding

exculpatory evidence related to its witness, Rosanna Piper, and by the circuit court prohibiting him from introducing evidence of Mr. Cekada's drug trafficking and drug addiction behavior evidenced on the analysis of his cellular phone.

The West Virginia Supreme Court has held that "[t]here are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83 (1963), and *State v. Hatfield*, 286 S.E.2d 402 (W. Va. 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 wilfully 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). "[E]vidence is considered suppressed when 'the existence of the evidence was 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.'" *Youngblood*, 221 W. Va. at 31 n. 21, 650 S.E.2d at 130 n. 21. Thus, even if the failure to disclose material exculpatory evidence is inadvertent, it can still be a *Brady* violation. *See*, *e.g.*, *State v. Farris*, 221 W.Va. 676, 682, 656 S.E.2d 121, 127 (2007)

Furthermore, the circuit court erred in precluding Mr. Hundley from presenting evidence of Mr. Cekada's drug dealing contained on the analysis of his cellular phone, which implicated Rosanna Piper in being both a customer of Mr. Cekada's as well as a dealer to Mr. Cekada. Rosanna Piper is the mother Rebecca Piper, Mr. Hundley's former girlfriend. Mr. Hundley has two children with Rebecca Piper, but both of those children reside at the residence of Rosanna and Roger Dale Piper. Mr. Hundley was arrested following the incident with Mr. Cekada at

Rosanna and Roger Dale Piper's residence. The police interviewed Rosanna Piper on at least four separate occasions. During the last interview, Rosanna Piper told the police what she alleges that Mr. Hundley said to her on the phone after Mr. Cekada had brandished a firearm on him. The State presented the testimony of Rosanna Piper at trial, where she testified that Mr. Hundley told her, "I'm going to fucking kill T.J. He pulled his gun on me." App. 571. Thus, Ms. Piper was a critical witness for the State on the issue of Mr. Hundley's intent.

However, the State failed to disclose evidence that Ms. Piper was working as a confidential informant for the State at the time of Mr. Cekada's death, that Ms. Piper had a criminal history related to the possession and distribution of controlled substances, and that Ms. Piper was under arrest for controlled substances offenses at the time that she testified at trial. This evidence was relevant impeachment evidence, and the failure to disclose by the State was a violation of *Brady/Youngblood*.

The impeachment of Ms. Piper was critical for Mr. Hundley not only because of her testimony about the phone conversation, but also because she undermined Mr. Hundley's theory of defense– that Mr. Cekada was angry with him because he was kicked out of the Piper residence for selling drugs. Ms. Piper testified only that Mr. Cekada and her son had used drugs together. Thus, evidence that Ms. Piper was involved in drug trafficking to impeach her credibility was crucial. However, the State never disclosed this information.

Moreover, Mr. Cekada's phone contained evidence of his drug trafficking and his involvement in drug trafficking with Ms. Piper. However, the circuit court denied defense counsel's attempt to elicit this information from the State's forensic phone examiner. App. 37-57. As seen in the excerpts from the forensic phone examination, Mr. Cekada's phone had

extensive evidence of his drug addiction, his drug trafficking, and Ms. Piper's drug trafficking, as well as evidence of Mr. Cekada's violence when high on drugs, such as threatening to shoot his own mother. App. 37-57. As such, the circuit court abused its discretion and prejudiced Mr. Hundley's presentation of a defense by prohibiting the introduction of such evidence.

V. THE CIRCUIT COURT ERRED IN FAILING TO SUPPRESS DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT

Mr. Hundley avers that the circuit court erred in failing to suppress statements that he made to law enforcement while he was in custody and after he invoked his right to counsel.

"Absent a knowing and intelligent waiver of the Fifth Amendment right against self-incrimination, a statement made by a suspect during in-custody interrogation is inadmissible." *State v. Bradshaw*, 193 W.Va. 519, 527, 457 S.E.2d 456, 464 (1995) (citing *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 1628 (1966)). The State bears the burden of proving a knowing and intelligent waiver of *Miranda* by a preponderance of the evidence. *Bradshaw*, 193 W.Va. at 527 n.3, 457 S.E.2d at 464 n.3

Furthermore, once a suspect invokes his right to counsel, "the State's burden to show a subsequent waiver in the face of defendant's acknowledged assertion of his right becomes exceedingly heavy. This burden is much more onerous than in the case where the initial issue is whether, after receiving his *Miranda* warning, the defendant voluntarily and intelligently waived his right." *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982)).

"The Supreme Court added another layer to that protection in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and its progeny, by holding that once a defendant invokes his right to an attorney under *Miranda*, the defendant must reinitiate contact in

order for the authorities to resume interrogation." *Bradshaw*, 193 W.Va. at 528, 457 S.E.2d at 465.

In *Edwards*, the Supreme Court held,

> [A]dditional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversation with the police.

Edwards, 451 U.S. at 484–85, 101 S.Ct. at 1884–85, 68 L.Ed.2d at 386.

The United States Supreme Court in *Davis v. United States*, 512 U.S. at 458, 114 S.Ct. at 2355, 129 L.Ed.2d at 371, after reviewing the various approaches… set[] a "threshold" requirement of clarity:

> Invocation of the Miranda right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' ... But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning."

Bradshaw, 193 W.Va. at 529, 457 S.E.2d at 466.

In *State v. Green*, the West Virginia Supreme Court stated the general rule concerning interrogation after a suspect has expressed a desire to be represented by counsel:

> Once a suspect in custody has expressed his clear, unequivocal desire to be represented by counsel, the police must deal with him as if he is thus represented. Thereafter, it is improper for the police to initiate any communication with the suspect other than through his legal representative, even for the limited purpose of seeking to persuade him to reconsider his decision on the presence of counsel."

172 W.Va. 727, 729 310 S.E.2d 488, 490 (1983).

In *Green*, the defendant had told officers after they read him his Miranda rights that "I think I should contact my attorney."

> The appellant's statement concerning his desire to speak to his attorney was made at both a logical and a critical juncture in the interrogation process. He had just finished reading a form which contained language referring to the waiver of certain constitutional rights, including the right to counsel. He was contemplating the effect of his signature on those constitutional rights, as well as on his subsequent questioning. At this crucial point, the appellant said, in effect, "I think I should contact my attorney." Despite contentions by the State to the contrary, we find nothing ambiguous in this request, particularly given the context within which it was made.

Green, 172 W.Va. at 729-30, 310 S.E.2d at 491. Despite that unambiguous request for counsel, an admission was coaxed from the defendant and the Green Court ruled that the statement was inadmissible based upon the denial of counsel, reversed Green's conviction, and remanded for a new trial. *Green*, 172 W.Va. at 30, 310 S.E.2d at 491.

First, in the instant case, it is clear that Mr. Hundley was in custody for purposes of Miranda both at the time that law enforcement encountered him at his family's residence and then later on back at the police station. When Mr. Hundley was encountered by law enforcement in the front lawn of the residence, while he was not yet under arrest, he was clearly not free to leave. He was made to sit in a lawn chair, was not allowed to go inside the residence to use the bathroom, had been searched for weapons, and was under the supervision of an officer. During that time, despite the circuit court's interpretation of a higher pitch at the end of his statement, Mr. Hundley told Sgt. Lupis, "Before I give any statements to the police, I think I may need a lawyer." App. 147. This led Sgt. Lupis to cease questioning him and informing the other officers that he had invoked his right to counsel.

Nor was Mr. Hundley's statement to Sgt. Lupis equivocal. While Mr. Hundley made this

statement meekly, in acquiescence to the many law enforcement officers that were swarming the residence and surrounding him, Mr. Hundley's meekness in invoking his right to counsel should not be interpreted to mean that he did not invoke his right to counsel.

Furthermore, Mr. Hundley's invocation of his right to counsel is further affirmed by his many invocations of this right during questioning back at the police department. App. 90. Over and over again, Mr. Hundley said that he did not want to answer questions without counsel present and that he thought that anything he said would be twisted and used against him. Yet, the officers continued to interrogate Mr. Hundley about the confrontation between him and Mr. Cekada. Mr. Hundley continuously and repeatedly invoked his right to counsel, yet the questioning and the attempt to persuade Mr. Hundley to talk continued. This was a clear violation of his Miranda rights and his constitutional rights to counsel and to remain silent.

VI. THE CIRCUIT COURT ERRED IN RULING THAT DEFENDANT COULD NOT INTRODUCE CONTENT OF HIS STATEMENT TO POLICE TO REBUT CERTAIN EVIDENCE OFFERED BY THE STATE

Conversely, the circuit court erred when it prohibited Defendant from entering portions of his statement to police into evidence to rebut evidence offered by the State that he allegedly concocted his self defense claim with a family member.

"[T]he defendant ordinarily cannot introduce his own extrajudicial exculpatory statements. They are generally thought to be too self-serving." *State v. Frazier*, 162 W.Va. 602, 614-15, 252 S.E.2d 39, 46 (1979) (citations omitted). However, there are exceptions to that ordinary rule where the statement is sought to be admitted for other reasons, such as in showing the state of mind of the defendant. *See State v. Stewart*, 228 W.Va. 406, 419 n.13, 719 S.E.2d 876, 889 n.13 (2011) ("The prosecution sought to bar the video-taped confession on the grounds

that it was self-serving, even though it was requested and taken by the police. Our review of the video shows that it is relevant to the defendant's state of mind regardless of the content of the defendant's statement—the defendant is very emotional in the video and the video was made shortly after the shooting—and is admissible by the defendant for that purpose.").

"A defendant's exculpatory statement may be admitted as a matter of fundamental fairness, which applies when reliable evidence is excluded due to "arbitrary" state evidentiary rules." *Wagner v. State*, 213 Md.App. 419, 466, 74 A.3d 765, 792 (2013) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326, 126 S.Ct. 1727 (2006)).

Furthermore, a defendant's exculpatory statement to police is admissible when the State opens the door to the introduction of the statement. *See Walters v. State*, 247 S.W.3d 204, 220 (Tex.Crim.App. 2007) ("Trial court abused its discretion when it precluded the admission of defendant's second telephone call to emergency operator, in which defendant admitted that he shot the victim and asserted that he shot victim in self defense, in prosecution for murder; the State opened the door to the admission of the second call when it created the impression, through the testimony of two other witnesses, that defendant had not given any explanation of the shooting immediately after the event, and that defendant was calm after the shooting.").

And, of course, a defendant's exculpatory statement that he acted in self defense is admissible at trial when the defendant takes the witness stand. *See Parker v. State*, 276 Ga. 598, 598, 581 S.E.2d 7, 8-9 (2003).

While the State did not seek to introduce Defendant's statement to law enforcement, it instead introduced statements from Defendant recorded on phone calls from the Eastern Regional Jail. In one of those phone call which was a conversation between Defendant and his mother, the

State introduced a conversation that left the jury with the impression that his mother and him were concocting a self-defense story. However, Defendant's previous statements to police would have conclusively disproved this allegation. The jail called happened many months after the altercation between Mr. Cekada and Mr. Hundley. Immediately after the altercation, Mr. Hundley had told police that Mr. Cekada had first pulled a handgun on him at the Dollar General store, Mr. Cekada had recklessly chased him and crashed into him after leaving the Dollar General, and that Mr. Cekada had again pulled a firearm on him at the scene of the accident. Yet, Defendant was precluded from introducing this evidence, instead only being allowed to ask whether the jail call was consistent with the previous statements. However, in asking the question of consistency, the jury was likely confused as there was no context as to what parts of the statement of self defense were consistent. Instead, the jury was left with the impression that perhaps Mr. Hundley attempting to concoct a self-defense story was consistent, not the fact that Mr. Hundley had already told the officers in detail about the things that his mother had subsequently told him to say.

Importantly, the jail call between Defendant and his mother should not have been entered at all into evidence. It mischaracterized what had actually happened in the case and allowed the State to circumvent Mr. Hundley's exculpatory statement about self-defense that he gave to the officers. Principles of fundamental fairness and due process required that after the State introduced this jail call, Defendant should have been able to introduce the portions of his prior statement to police that conclusively demonstrate that there was no plan between Mr. Hundley and his mother to concoct a claim of self defense when none existed. Mr. Cekada had brandished a firearm and threatened Mr. Hundley at the Dollar General. Mr. Cekada had

recklessly pursued Mr. Hundley in his vehicle while extremely intoxicated, putting the general public as well as Mr. Hundley in danger. Mr. Cekada had crashed his vehicle into Mr. Hundley's vehicle. And when Mr. Hundley had exited his vehicle, Mr. Cekada had again brandished his firearm at Mr. Hundley. All of these actions of Mr. Cekada, which the State was attempting to allege were the made up, self-serving statements concocted by Mr. Hundley and his mother after investigating the West Virginia self-defense law, was actually told by Mr. Hundley to law enforcement immediately after the confrontation and before Mr. Hundley had either talked to his mother or had an opportunity to research any law. Introduction of Mr. Hundley's prior statement would have laid bare the State's attempt to misrepresent the state of evidence to the jury. Yet, Mr. Hundley's counsel was prohibited from doing so, leaving with the jury the false impression that any claim of self defense had been fabricated by Mr. Hundley. While the trial court has discretion in determining the admissibility of evidence, the preclusion of Mr. Hundley from introducing his statement rendered the trial fundamentally unfair in violation of his constitutional rights and was a prejudicial abuse of discretion.

VII. THE CUMULATIVE CONSTITUTIONAL ERRORS PREVENTED MR. HUNDLEY FROM RECEIVING A FAIR TRIAL

Cumulative error occurs "where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his convictions should be set aside, even though any one of such errors standing alone would be harmless error." Syl. Pt. 6, *State v. Schermerhorn*, 211 W.Va. 376, 566 S.E.2d 263 (2002) (quoting Syl. Pt. 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972)).

Mr. Hundley avers that the multiple errors committed by the circuit court prevented him

from presenting his case of self-defense and violated his constitutional right to due process. Mr. Hundley's entire defense case rested upon his claim of self-defense. Every one of the trial court's erroneous rulings served to chip away at Mr. Hundley's ability to present his claim of self-defense, leaving the jury with only the State's skewed version of events and calling into question the credibility of Mr. Hundley's own testimony. The State's playing of the jail call to the jury, without allowing Mr. Hundley to enter his previous statement to law enforcement claiming self-defense into the record, left the jury with the impression that Mr. Hundley had fabricated his version of the events while sitting in jail. The State's sandbagging of its closing argument and addressing certain novel arguments about the supposed lack of self-defense in rebuttal, along with the court's previous rulings leading defense counsel to believe he did not need to address these arguments, prevented Mr. Hundley from being able to adequately address the State's contentions. The State's arrest of Timothy Williamson during the trial left Mr. Hundley without a crucial trial witness for the claim of self defense who would have testified about Mr. Cekada's previous violent, threatening behavior with a firearm while under the influence. The court's ruling that Mr. Hundley could not enter Mr. Cekada's phone records into evidence demonstrating his addiction and drug trafficking left Mr. Hundley unable to impeach an important State's witness in Rosanna Piper and prevented the jury from viewing evidence of Mr. Cekada's previous erratic and violent behavior while intoxicated. The court's ruling keeping out evidence of Mr. Cekada's addiction, intoxication at the time of the confrontation, and toxicology results kept the jury from crucial evidence of Mr. Cekada's state of mind and corroboration of Mr. Hundley's testimony regarding Mr. Cekada's erratic and violent behavior. The prohibition on evidence relating to the intoxication of Mr. Cekada's severe intoxication hampered Mr.

Hundley's ability to show that Mr. Cekada was the unprovoked aggressor in the situation.

When viewed together, even if the Court finds that some of these errors were harmless, the cumulative effect of these errors denied Mr. Hundley the right to a fair trial and due process of law. The errors rendered Mr. Hundley impotent in being able to present his self defense case to the jury. The errors foreclosed Mr. Hundley from presenting his theory of defense except in all but the most pro forma of fashions.

Had the circuit court not committed the aforementioned errors, the jury would have been presented with a full, fair, and detailed case of self defense, and there is a reasonable likelihood that the result of the trial would have been different. As such, Mr. Hundley submits that his conviction must be vacated based upon the cumulative constitutional error of the circuit court's rulings.

CONCLUSION

Based on the foregoing, Mr. Hundley respectfully requests that this Honorable Court vacate his conviction and sentence and remand for a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Shawn R. McDermott, do hereby certify that I have caused a true and correct copy of the foregoing Petitioner's Brief to be served upon Assistant Attorney General William Edward Longwell through the File&Serve Express electronic filing system on this 13th day of March, 2023.

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