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 REPLY BRIEF

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REPLY ARGUMENT

Petitioner respectfully reaffirms all of his arguments offered in his opening brief and replies to specific arguments of Respondent as follows:

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

Evidence of T.J. Cekada's drug addiction, extreme intoxication, and drug dealing was relevant to Mr. Hundley's self-defense case and the prohibition of the introduction such relevant evidence was an abuse of discretion. Respondent's argument that the evidence was not relevant is contrary to the facts of the case as well as common sense. As John Adams once said, "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." And Mr. Cekada's intoxication at the time of his confrontation with Mr. Hundley is a fact that was relevant to Mr. Cekada's state of mind, explaining why he was acting erratically in pointing a firearm at Mr. Hundley and recklessly chasing him in a vehicle, that Respondent cannot make disappear simply by calling it irrelevant.

In the Response Brief, Respondent completely fails to address the myriad of cases that although are not in West Virginia are directly on point for the issue of the erroneous exclusion of intoxication evidence of a decedent in self defense cases. *See* Petitioner's Brief (citing *Newell v. State*, 49 So.3d 66 (Miss. 2010); *Byrd v. State*, 154 Miss. 742, 123 So. 867 (1929); *Cromartie v. State*, 1 So.3d 340 (Fla.Dist.Ct.App. 2009); *State v. Baker*, 623 N.E.2d 672, 677 (Ohio. Ct.App. 1993); *State v. DeLeon*, 131 Hawai'i 463, 319 P.3d 382 (2014); *State v. David*, 149 Hawai'i 469, 494 P.3d 1202 (2021); *State v. Plew*, 155 Ariz. 44, 745 P.2d 102 (Ariz. 1987); *Harris v. Cotton*, 365 F.3d 552 (7th Cir. 2004)). Instead, Respondent relies upon *State v. Zuccaro*, 239 W.Va. 128,

799 S.E.2d 559 (2017)-- a case that was decided by this Court but that is completely inapplicable to the facts in the case at bar.

In *Zuccaro*, the defendant never raised a claim of self defense. Instead, the defendant's defense was that he was not the person that shot and killed the decedent. However, evidence was presented that placed the defendant and his vehicle at the decedent's home while in the possession of a firearm at the time of the decedent's death. The defendant presented an alibi that he was at a particular Starbucks at the time of the decedent's death, which was disproved by video footage. During pre-trial proceedings, the defendant filed notice that he intended to introduce evidence that the decedent had sold drugs and firearms, which could have exposed him to dangerous people that may have killed him. *Zuccaro*, 239 W.Va. at 136, 799 S.E.2d at 567. The trial court ruled the evidence inadmissible. The only evidence that the defendant intended to introduce that the decedent was a drug dealer was through the testimony of the defendant. *Zuccaro*, 239 W.Va. at 139, 799 S.E.2d at 570. However, the defendant refused to testify at the pretrial hearings on the issue, leading the court to determine that "no evidence was presented during the pre-trial hearings to establish the truth of the evidence the petitioner asked to have admitted pursuant to Rule 404(b). Moreover, none of the petitioner's proffered evidence pointed to any particular third party who might have had the means, opportunity, or motive to kill the victim. The petitioner merely speculated that being a drug dealer and selling firearms could have exposed the victim to bad people who might have decided to kill him." *Id*.

This Court found that the proffer of evidence offered by the defendant was "pure speculation on the petitioner's part that some unknown 'seedy character' might have had a reason to, and did in fact, kill Jason Pratz because of a fantastical drug or gun transaction." *Zuccaro*, 239 W.Va. at 142, 799 S.E.2d at 573. This Court further held,

> [E]ven if the circuit court had found sufficient evidence to prove the victim was a drug dealer and/or gun seller (or, contrary to *McGinnis*, had simply accepted the petitioner's unsupported proffer), the evidence was still properly excluded pursuant to Rule 401 and 403. The petitioner's theory was premised entirely upon speculation. There is no evidence in the appendix record to suggest the victim was killed during, or because of, a drug or gun transaction. There is nothing to connect this homicide to the proffered prior bad acts. Allowing the jury to hear about irrelevant, collateral conduct of this nature, even if true, would have been confusing to the jury and wasteful of judicial time and resources.

Zuccaro, 239 W.Va. at 144, 799 S.E.2d at 575.

First, firmly differentiating the case *sub judice* with *Zuccaro*, Mr. Hundley raised a prima facie case of self defense. Self defense was not at issue in *Zuccaro*. Rather, in *Zuccaro*, the defendant's defense was that he did not shoot the victim and was not present when the victim was killed. In a self defense case, evidence of the decedent's violent or turbulent nature is admissible, including prior violent or turbulent acts committed by the decedent that the defendant is aware of. *State v. Woodson*, 181 W.Va. 325, 329. 382 S.E.2d 519, 523 (1989). Moreover, in a self defense case, the intoxication of the decedent is intrinsic to the case and not other bad acts evidence. Intoxication goes to the state of mind of the decedent. Intoxication goes to the erratic behavior of the decedent. Intoxication goes to the violent behavior of the decedent. Evidence of intoxication of the decedent is intrinsic to the self defense claim and more importantly material, relevant, and exculpatory for Mr. Hundley's defense.

Nor is there any issue concerning the intoxication of the decedent in *Zuccaro*. In fact, in *Zuccaro* there was no evidence of the decedent's involvement with drugs. In this case, there was a toxicology report performed by the State that showed that there were eight (8) different controlled substances in Mr. Cekada's blood at the time of his death. In this case, there was a forensic analysis of Mr. Cekada's cell phone conclusively showing his involvement in selling and using drugs. *Zuccaro* was only about the defendant's unsubstantiated claim based solely upon

the proffered testimony of the defendant that the victim was into drugs that may have led to his murder, despite there being no evidence of drugs in the victim's house, drugs in the victim's system, phone communications regarding drug use, or witnesses regarding drug use.

Nor was the evidence of the decedent's drug dealing, drug use, and intoxication an attempt to besmirch the reputation of the decedent. First, the trial court had allowed introduction of evidence of Mr. Cekada's drug dealing to be admitted into evidence. Mr. Cekada's wife, the State's first witness, testified that Mr. Cekada had sold drugs for approximately four years. Thus, general evidence of Mr. Cekada's drug dealing was already introduced by the State. It stands to reason that Mr. Hundley should have been able to enter evidence of specific acts of drug dealing by Mr. Cekada which was intrinsic to the confrontation between him and Mr. Hundley.

Second, the State's case and Mr. Hundley's defense both rested on the fact that Mr. Cekada was a drug dealer and drug addict. There would have been no confrontation between Mr. Cekada and Mr. Hundley but for Mr. Cekada's drug dealing and drug usage. The entire precipitating event that led to Mr. Cekada pulling a firearm on Mr. Hundley was Mr. Hundley confronting Mr. Cekada about his involvement with drugs. Evidence from Mr. Cekada's phone indicated that around the time that Mr. Hundley kicked him out of the Piper residence, Mr. Cekada's drug addiction and drug selling in desperation to obtain more drugs was so bad that he had no place to live-- he was estranged from his wife and his own mother would not allow him to live with her. Thus, the Piper residence was a lifeline for Mr. Cekada-- not only a place to stay but also a place to obtain and sell drugs. Once Mr. Hundley, whose children resided at the residence, kicked Mr. Cekada out because he did not want his children around firearms or drugs, Mr. Cekada had no place to stay. Thus, evidence of Mr. Cekada's drug addiction and selling provides credibility to Mr. Hundley's testimony regarding his reasoning for telling Mr. Cekada to

leave the residence. This evidence further provides the necessary background to explain why Mr. Cekada would have been angry with Mr. Hundley and pointed a firearm at him several weeks later when he ran into him at the Dollar General store. In other words, this was intrinsic, material, and relevant evidence to Mr. Hundley's claim of self defense.

Third, evidence of Mr. Cekada's intoxication explained his erratic and violent nature on the date of the offense. Mr. Cekada's altered state of mind helps explain why he would point a firearm at Mr. Hundley in a public parking lot. Mr. Cekada's altered state of mind helps explain why he would chase after Mr. Hundley after Mr. Hundley departed the parking lot. Mr. Cekada's altered state of mind helps explain his reckless driving on a winding mountain road as he pursued Mr. Hundley. Mr. Cekada's altered state of mind helps explain why he would crash his vehicle into the back of Mr. Hundley's vehicle. Mr. Cekada's altered state of mind helps explain why he would for a second time point a firearm at Mr. Hundley.

Nor should Respondent' argument that there was "absolutely no evidence" that Mr. Cekada was intoxicated be given any weight. *See* Respondent's Brief at 21. There was a toxicology report that was completed by the State that showed that Mr. Cekada had eight (8) separate controlled substances in his blood at the time of his death, including fentanyl, bath salts, and Narcan. While the level of Mr. Cekada's intoxication could have been a disputed issue at trial, it is clear that because Mr. Cekada had these substances in his blood that these substances were having an effect on him. The toxicology test was performed on his blood, not his urine or hair which could be argued only shows history of past drug use. These substances in his blood proved that he was under the influence of these substances at the time of his death. The only issue is how under the influence he was, which should have been left to the jury. To say that the toxicology results is no evidence of intoxication is to invalidate the 1,000's of driving under the

influence of drugs cases that are prosecuted in this State every year where toxicology results are sufficient evidence to support an arrest, an indictment, and a conviction.

Mr. Hundley suggests that the toxicology results showing eight different controlled substances in his blood are in and of themselves strong evidence of Mr. Cekada's intoxication. *Res ipsa loquitor* should apply. One can infer intoxication from the toxicology results.[1]

Furthermore, though, the toxicology results were not the only evidence of Mr. Cekada's intoxication at the time of the offense. Mr. Cekada's behavior as relayed both by Mr. Hundley and other witnesses was indicative of intoxication. Mr. Cekada's phone records which showed him desperate to obtain drugs were indicative of intoxication (and the time of the ingestion of the drugs). Mr. Cekada's history of violent behavior while intoxicated, which was seen in his phone records where he threatened to shoot his mother while intoxicated, was again indicative of intoxication at the time of the offense. Mr. Cekada's toxicology report along with his reckless and erratic driving would have been sufficient for the State to prosecute him for driving under the influence. In short, the toxicology report standing alone was strong evidence of Mr. Cekada's intoxication, but there was also substantial evidence concerning Mr. Cekada's behavior and driving that would have substantiated the toxicology report regarding Mr. Cekada's intoxication. To suggest that there was no evidence of intoxication in this case flies in the face of the facts on the record.

In this case, the confrontation between Mr. Cekada and Mr. Hundley was directly related to Mr. Cekada's drug addiction and drug dealing activities. Mr. Cekada's drug addiction, drug dealing, and firearm carrying gives reason to why Mr. Hundley would have confronted Mr. Cekada and made him leave the Piper residence where Mr. Hundley's children were staying. Mr.

[1] That is not to say that Mr. Hundley would not have had to call the necessary witnesses or cross-examined the State's witnesses regarding the interpretation of the toxicology results. However, the court's ruling effectively prevented Mr. Hundley from doing so.

Cekada being kicked out of the Piper residence, his last refuge from the street and sanctuary for drugs, gives Mr. Cekada motivation to be angry at Mr. Hundley and to threaten him with a firearm. Mr. Cekada's intoxication at the time of the offense and history of violence while intoxicated helps to explain why he was acting erratically and aggressively when he pulled a firearm on Mr. Hundley in a public parking lot, pursued Mr. Hundley in a reckless manner at a high rate of speed, crashed into Mr. Hundley, and again pointed a firearm at Mr. Hundley. The exclusion of Mr. Cekada's intoxication, drug dealing, drug addiction, and violence while intoxicated deprived the jury of material and exculpatory evidence that would have been supportive of Mr. Hundley's claim of self defense. Thus, the exclusion of such evidence was prejudicial error.[2]

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

Mr. Hundley avers 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.

Contrary to Respondent's claim that "Petitioner has presented no authority in support of his claim that the prosecution cannot make a strategic choice to argue certain pieces of evidence during its rebuttal closing rather than its first closing," *see* Respondent's Brief at 27, Mr. Hundley cited Rule 29.1 of the West Virginia Rules of Criminal Procedure and several Fourth

[2] As outlined in the opening brief and not discussed by the Respondent in the Response Brief, Mr. Cekada's intoxication was also important to demonstrate that Mr. Cekada was committing a violent felony offense at the time of the confrontation. It is both a state and federal felony offense for a person who is addicted to controlled substances or who uses controlled substances to possess a firearm. Thus, Mr. Cekada's possession of the firearm was illegal and considered a violent felony. Moreover, Mr. Cekada's intoxication also paints his reckless driving and speeding in chasing after Mr. Hundley in a different light. This was not just the ordinary driving habits of Mr. Cekada, but in and of itself a dangerous and violent criminal offense done with reckless disregard for the safety of other drivers.

Circuit cases to suggest that the prosecution cannot present novel arguments of guilt in their rebuttal argument.

However, it should also be clear that it was prejudicial error to allow the State to save its argument regarding self-defense to rebuttal based upon the burden of proof in West Virginia in self defense cases. When a defendant raises a prima facie claim of self defense, which occurred in this case following Mr. Hundley's testimony, the burden turns to the State to prove beyond a reasonable doubt that the killing was not based upon self defense. *See State v. Bates*, 181 W.Va. 36, 39, 380 S.E.2d 203, 206 (1989) ("Once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense."). Thus, the State's decision to reserve arguing that Mr. Hundley did not act in self defense until rebuttal was error. It failed to allow Mr. Hundley's counsel an opportunity to respond, and it failed to coordinate the argument with the actual burden of proof.

Moreover, contrary to Respondent's assertions, Mr. Hundley's counsel was not aware of the State's intention to address evidence concerning blood or lack thereof on the firearm in rebuttal. During his closing argument, counsel for Mr. Hundley specifically asked the court whether the State would be able to bring up this evidence in its rebuttal argument with the court giving an answer to suggest that the State would be precluded from making such an argument. As such, counsel did not argue this evidentiary issue. However, on rebuttal, the State was allowed to argue this piece of evidence, effectively preventing Mr. Hundley from offering any argument. Mr. Hundley's counsel did not simply take "a risk that did not yield him any benefits," Respondent's Brief at 28, he was lead down the primrose path by both the court and

the State believing that the State would not be able to argue this evidence in rebuttal since it was not raised in its initial closing argument.

Such an error could have been ameliorated by allowing trial counsel to have surrebuttal on this limited issue. However, the trial court precluded trial counsel from even this prophylactic measure, rendering the presentation of closing argument fundamentally unfair 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 avers that the arrest of Timothy Williamson, his step father and trial witness, before he could testify and in front of the jury was prosecutorial misconduct.

Respondent is correct that there is no objection to Timothy Williamson's arrest made by trial counsel on the record. As such, any error analysis would be required to be done under a plain error analysis. Moreover, because Mr. Williamson was arrested by the State, he was unable to testify at trial and as such the nature of his testimony cannot be judged by this Court other than through a proffer.

However, it should be a bright line rule that arresting a defense witness and the defendant's family member in front of the jury during the trial on a charge that does not present any exigent circumstances is misconduct by the State.

First, even though Mr. Williamson's testimony is not part of the record due to him having been arrested before being able to testify, Mr. Williamson was listed as a defense witness in each and every witness list that was filed by Mr. Hundley's counsel. App. 104, 237. Thus, it should be presumed that Mr. Williamson was an important witness for Mr. Hundley.

Second, Mr. Williamson does not have a criminal history. The arrest warrant for Mr. Williamson was for the misdemeanor offense of false swearing, based upon Mr. Williamson's

testimony at the Rule 404(b) hearing for Mr. Hundley where the State alleged that Mr. Williamson testified inconsistently with a prior statement given to law enforcement. There was no need to arrest Mr. Williamson in the courtroom during the trial on this type of allegation. An inference can be made that the State used the arrest warrant to interfere with Mr. Hundley's ability to call witnesses and present evidence.

Moreover, while Mr. Williamson's arrest is not directly addressed in the jury trial transcript on May 18, 2022, it is referenced on the docket sheet for his case in the Jefferson County Circuit Court in case number 22-M-5, which provides that the arrest warrant, which was obtained on May 5, 2022, was executed "in court" on May 18, 2022. *See* Supplemental Appendix, 22-M-5 docket sheet.

Mr. Hundley avers that the State's arrest of Mr. Williamson interfered with his constitutional right to compulsory process and to due process. It was prosecutorial misconduct to arrest a defense witness where there were no exigent circumstances during the jury trial.

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 avers that he was prejudiced by the State's withholding of exculpatory evidence related to Rosana Piper's record of illegal drug distribution and drug distribution involvement with the decedent.

While Mr. Hundley would concede that this issue is often best addressed through a habeas proceeding where evidence of the exculpatory evidence can be put upon the record, Mr. Hundley further suggests that it is important to at least raise this issue in the context of the direct appeal as it demonstrates the throughline of governmental misconduct that was rife in this case.

Ms. Piper was a crucial witness for the State. She testified both regarding the statement that Mr. Hundley had made stating that he was going to kill Mr. Cekada for pulling a gun on him and further testified that she was unaware of Mr. Cekada selling any drugs. However, discovery that was disclosed by the State-- Mr. Cekada's cell phone records-- disproved that second part. In the cell phone were communications between Mr. Cekada and Ms. Piper in which Mr. Cekada was selling Ms. Piper drugs and also buying drugs from Ms. Piper. However, Mr. Hundley was prohibited from introducing these cell phone records into evidence.

Moreover, following trial it came to light that Ms. Piper was working as a confidential informant and under prosecution for the distribution of methamphetamine at the time of her testimony. The State did not disclose any criminal history of Ms. Piper nor disclose any information as *Giglio* evidence. This withholding of exculpatory evidence was par for the course in the prosecution of Mr. Hundley, where the actions of the State and erroneous rulings of the trial court served to prevent him from having a fair trial.

V. 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

Mr. Hundley reiterates that the circuit court erred when it precluded him from introducing his statement to law enforcement to rebut evidence offered by the State to suggest that Mr. Hundley had made up his self defense claim with the help of his mother.

To be clear, Mr. Hundley did not want to have his statement to law enforcement introduced into evidence in this case. For one, it was involuntary as Mr. Hundley had invoked his *Miranda* right to counsel.[3] Secondly, Mr. Hundley's invocation to his right to counsel was

[3] Mr. Hundley continues to aver that it was error for the circuit court to rule that his statement to law enforcement was admissible and not taken in violation of his *Miranda* rights. Mr. Hundley suggests that the circuit court's ruling in respect to his statement shows the bias of the trial court. When the State sought to use the statement, the trial court found the statement to be admissible. Yet, when Mr. Hundley sought to use the statement to rebut a mischaracterization of the evidence by the State, the court ruled the statement inadmissible.

interspersed throughout his statement, which may have led the jury to infer guilt from his invocation of his constitutional rights.

However, when the State decided not to introduce his statement to law enforcement at trial but instead introduce jail calls between Mr. Hundley and his mother, it became imperative for Mr. Hundley to introduce portions of his statement to law enforcement. The State introduced the jail calls between Mr. Hundley and his mother in an attempt to get the jury to infer that Mr. Hundley and his mother concocted a self defense claim. The introduction of the jail calls was a complete misrepresentation by the State of the evidence to the jury. Mr. Hundley's statement to law enforcement at a time right after the confrontation with Mr. Cekada was proof that the State was attempting to mischaracterize the jail calls because Mr. Hundley had told law enforcement the same narrative regarding what happened between him and Mr. Cekada and how the stabbing was self defense. As such, introduction into evidence of portions of Mr. Hundley's statement to law enforcement was critical for Mr. Hundley to rebut the State's malicious mischaracterization of the jail calls in an attempt to show that his self defense claim was not credible.

However, the circuit court would not allow Mr. Hundley to introduce portions of his statement to law enforcement, instead only allowing Mr. Hundley to ask a single question of the law enforcement-- a question and answer which was in no way clear enough or powerful enough as the actual statement of Mr. Hundley to rebut the State's mischaracterization.

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.

Mr. Hundley suggests that the State's introduction and mischaracterization of the jail calls was sufficient for the court to declare a mistrial. However, trial counsel did not object to introduction of the jail calls and instead attempted to rebut the State's malicious mischaracterization. However, his attempt to rebut the mischaracterization was rendered impotent by the trial court as he was prevented from entering the actual statement and instead limited to the one question asked above. This was not "the precise information he sought to present through playing his recorded statement" as suggested in Respondent's Brief. To comply with due process, Mr. Hundley should have been permitted to introduce the actual statement, which would have cleared up this evidentiary issue for the jury, which would have cast the State's blatant mischaracterization for what it was, and which standing alone could have been the basis for the jury to find that the State did not prove its case beyond a reasonable doubt.

CONCLUSION

Based upon the arguments presented in the opening brief and this reply brief, Petitioner would respectfully request that this Honorable Court vacate his conviction and remand the case for a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Shawn R. McDermott, do hereby certify that I have filed the foregoing Petitioner's Reply Brief with the Clerk of the Supreme Court of Appeals of West Virginia using the File&Serve Express e-filing system which will serve Assistant Attorney General William L. Longwell on this 20th day of June, 2023.

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