

NO. 32290

**IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA**

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CHARLESTON, WEST VIRGINIA

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**STATE OF WEST VIRGINIA,**  
Plaintiff Below - Respondent,

VS.

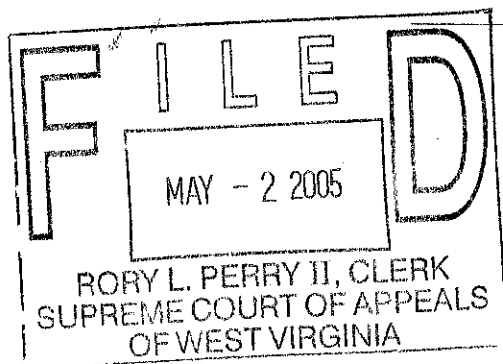
CIRCUIT COURT OF ROANE COUNTY  
CASE # 03-F-21

**MATTHEW S. FLANDERS,**  
Defendant Below - Appellant.

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**BRIEF OF APPELLANT**

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## TABLE OF AUTHORITIES

### **UNITED STATES SUPREME COURT CASES:**

1. Brady v. Maryland 373 U.S. 83, 83 S.Ct. 1194 (1963)
2. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995)
3. Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936 (1999)

### **WEST VIRGINIA SUPREME COURT CASES:**

1. State ex rel Day v. Silver, 556 S.E. 2d 820, 210 W.Va. 175 (2001)
2. State v. Criss, 23 S.E.2d 813, 125 W.Va. 225 (1942)
3. State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)

### **VIRGINIA CASES CITED:**

1. Currie v. Commonwealth, 30 Va. App. 58, 515 S.E.2d 335 (1999)
2. James v. Commonwealth, 8 Va. App. 98, 379 S.E.2d 378 (1989)

**APPELLANT'S BRIEF**

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

**KIND OF PROCEEDING AND NATURE OF RULINGS BELOW**

This appeal results from a jury trial in the Circuit Court of Roane County and the following hearings were held:

On January 31, 2003, the Appellant/Defendant appeared for Return of Indictment in the Court of Circuit Judge David W. Nibert. He was appointed counsel. Counsel moved for disclosure, which was granted. The case was then re-assigned to Circuit Judge Thomas C. Evans, III. The case was continued to February 14, 2003 for arraignment.

On February 13, 2003, the Appellant/Defendant appeared with counsel for pre-plea motions and arraignment. Defense Counsel argued her previously filed pre-plea motions. The Court denied the Appellant/Defendant's pre-plea motions and the Appellant/Defendant entered a plea of "not guilty." The Appellant/Defendant moved the trial of his case to the next term of court which was granted by the Court. The Appellant/Defendant moved for bond and the Court took that motion into consideration due to the fact that the Appellant/Defendant was at the time placed at the Davis Center. The case was continued to May 29, 2003 for pre-trial conference and suppression hearing.

On May 29, 2004, the Appellant/Defendant was not transported from the Davis Center and the case was continued to July 28, 2003 for pre-trial motions and suppression hearing.

On July 28, 2003 a suppression hearing was held on the Appellant/Defendant's Motion to Suppress Evidence Seized. The State put on witnesses and after argument of counsels, the motion was denied. The case was continued to August 19, 2003 for trial.

On August 18, 2003 a bond hearing was held. Bond was set for the Appellant/Defendant at \$10,000. by surety approved by the Court. The case was continued to August 19, 2003.

On August 19, 2003, the Appellant/Defendant appeared with counsel for trial. The State announced that it was not ready for trial. The Appellant/Defendant did not object to a continuance of the trial and moved the Court to continue the trial to the next term of court. The trial was continued to November 12, 2003.

On November 12 and 13, 2003 the trial was held. The jury was selected and impaneled on November 12, 2003. The rest of the trial was held on November 13, 2003. One count of Conspiracy to Commit a Felony as charged in Count was dismissed by the Court after the State's case-in-chief. The jury found the Appellant/Defendant guilty of three counts of Breaking and Entering a Building Other Than A Building, one count of Grand Larceny, one count of Petit Larceny, one count of Possession With Intent to Deliver a Controlled Substance, one count of Possession of a Controlled Substance, five counts of Conspiracy to commit a Felony and one count of Conspiracy to commit a Misdemeanor. Bond was raised to \$25,000. The case was continued to Dec. 22, 2003 for post trial motions.

On December 22, 2003, the Appellant/Defendant and Counsel appeared for a hearing on post trial motions. The Court denied the Appellant/Defendant's Motion for a

New Trial. The case was continued to January 12, 2004 for filing of brief on certain post-trial issues.

On January 12, 2004, a hearing was held. The Court denied the Appellant/Defendant's Motion for a New Trial. The Court granted the Appellant/Defendant's Motion to Dismiss Counts 7 and 13 by double jeopardy. The case was continued to March 12, 2004 for sentencing.

On March 12, 2004, the Appellant/Defendant appeared for sentencing. The Appellant/Defendant moved to continue the hearing which motion was denied. The Appellant/Defendant was sentenced to 1 to 10 years on each of three Breaking and Entering charges to be served concurrently. The Appellant/Defendant was sentenced to 1 to 10 years on the Grand larceny to run consecutively with the Breaking and Entering charges. The Appellant/Defendant was sentenced to 1 to 5 years for Possession With Intent to Deliver to run consecutive to the Breaking and Entering charges and Grand Larceny. The Appellant/Defendant was sentenced to 1 to 5 years on the Conspiracy to Commit Felonies which run concurrent to each other and concurrent with the other sentence. Time served was credited to the misdemeanor. Ultimately, the Appellant/Defendant is serving 3 to 25 years in prison. Restitution to one victim was assessed. The case was continued to March 29, 2004 for continuation of sentencing on restitution.

On March 29, 2004, the Court held a final sentencing hearing and assessed restitution for the other victim. That order was filed in the clerk's office on April 9, 2004. It is from this final order that appeal is taken.

On August 3, 2004, the appeal time was extended to six months by order of the Circuit Judge.

### **STATEMENT OF FACTS**

The evidence at trial showed that in the early hours on July 5, 2002, the Appellant/Defendant and a few other juveniles/young adults broke into a few Spencer businesses to steal certain items. The Appellant/Defendant and another young man first broke into Cain's Veterinary Clinic. The two young men stole vials of Ketamine, a small animal tranquilizer which can be "cooked" down into powder which can be inhaled creating a "high" effect. The two young men then went into an adjoining building housing Spencer Lanes, a bowling establishment. After finding no money at the bowling lanes, the Appellant/Defendant and his friend left and broke into a building on a car lot. The pair then met a friend at the car lot and stole the keys to three vehicles from the lot. Each young man took a vehicle and went "joyriding" with the vehicles. Two of the vehicles were destroyed. The young men then took the Ketamine to the Appellant/Defendant's house and boiled the substance down into the drug "Special K."

### ASSIGNMENTS OF ERROR

1. **The Trial Court erred and abused its discretion by refusing to dismiss faulty counts of the indictment returned against the Appellant/Defendant in this case.**
2. **The Trial Court erred and abused its discretion by allowing the State to read a witness's out-of-court statement to the jury, when the witness was in court to testify and did not clearly claim the statement as his own.**
3. **The Trial Court erred and abused its discretion by denying the Appellant/Defendant's Motion for A New Trial.**

## POINTS AND AUTHORITIES RELIED UPON

### UNITED STATES SUPREME COURT CASES:

1. Brady v. Maryland 373 U.S. 83, 83 S.Ct. 1194 (1963)
2. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995)
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4. State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998)

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## STANDARD OF REVIEW

The Appellant asserts that the standard of review for this appellate court is a standard of clear error or abuse of discretion. Syllabus Pt 4 in State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998).

## ARGUMENT AND DISCUSSION OF LAW

- 1. The Trial Court erred and abused its discretion by refusing to dismiss faulty counts of the indictment returned against the Appellant/Defendant in this case.**

The Appellant/Defendant, at the time of pre-plea motions, moved to dismiss Count 4 and Count 11 of the indictment. Count 4 refers to “Grand Larceny” and does not aver a specific value of the property described. The indictment alleges the value as “approximately” and this Court has stated that items and values listed in an indictment for a larceny must be specific. This Court has stated that an indictment must fairly put a Defendant on notice of the charges which are alleged, all allegations must be included in the indictment and the allegations must be described so that the Defendant can defend against double jeopardy. State ex rel Day v. Silver, 556 S.E. 2d 820, 210 W.Va. 175 (2001)

An indictment alleging a larceny must particularly describe the item alleged to have been taken. State ex rel Day v. Silver, 556 S.E. 2d 820, 210 W.Va. 175 (2001) An indictment alleging Grand Larceny must allege the value of the property taken in definitive terms. The descriptive phrase “approximate value” is insufficient and not definite. State v. Criss, 23 S.E.2d 813, 125 W.Va.

225 (1942) The Criss case, which has not been overturned, particularly states that the exact words used in this indictment are not sufficient. The State drafts indictments and have been historically held responsible for the language that is used in the indictment.

This fatal defect invalidates these counts and thus should be dismissed. As counsel points out in her motion, re-indictment was an option for the State at the time the errors were reported to the Court.

Count 11 is the "Conspiracy to Commit Grand Larceny" and it references the faulty Count 4. Count 4 does not fully inform the Appellant/Defendant of the charge against him and therefore by incorporating the elements of Grand Larceny by only referencing the deficient count and not particularly describing the Grand Larceny separately, the mistake carries forward. The Appellant/Defendant is not completely and accurately informed of what crime he has supposedly conspired to commit.

- 2. The Trial Court erred and abused its discretion by allowing the State to read a witness's out-of-court statement to the jury, when the witness was in court to testify and did not clearly claim the statement as his own.**

At trial, the State put on a witness named Robert Shaffer, Jr. The State intended to call him to introduce an incriminating statement the Appellant/Defendant allegedly made to Robert. Mr. Shaffer, Jr. at trial testified that he could not remember the conversation that the Prosecutor was asking about. When confronted with the written statement purportedly given by him, Mr.

Shaffer could not vouch the statement as his own nor as to its accuracy. Counsel for the Appellant/Defendant objected and the Trial Court allowed the State to read the entire written statement into the record before the jury as a “recorded recollection” exception. (See pp.230-2243 Volume II of the Trial Transcript)

West Virginia has very little case law on recorded recollection.

The only case found was State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998). In Rodoussakis, the defense wanted to use a tape as a past recorded recollection, but this not very applicable in this case. Next, we looked at Virginia law knowing that although this law is not binding upon this West Virginia appellate court but also looking to the fact the West Virginia law is derived from the law of Virginia. Virginia courts have decided that there is a four part test to decide if the recorded statement is actually recollection recorded. First, the witness must have first hand knowledge of the event. Second, a written statement must be original and made at or near the time of the event (when witness had clear memory). The third requirement is that the witness must lack personal recollection of the event. Finally, the witness must vouch for the accuracy of the written statement. James v. Commonwealth, 8 Va. App. 98, 379 S.E.2d 378 (1989) and Currie v. Commonwealth, 30 Va. App. 58, 515 S.E.2d 335 (1999)

In the case at bar, the witness refused to vouch for the accuracy of the written statement. Under the Virginia analysis, introduction of the statement under this exception would be impermissible.

- 3. The Trial Court erred and abused it’s discretion by denying the Defendant’s Motion for A New Trial.**

At the beginning of the case, the Appellant/Defendant filed an "Omnibus Discovery Motion" requesting all inculpatory and exculpatory evidence and expressly listed the evidence requested. One week before trial, the Appellant/Defendant received a report from the West Virginia Crime Lab through disclosure by the Roane County Prosecutor. The report stated that the fingerprint card submitted was not of quality needed to compare the Appellant/Defendant's fingerprints with those fingerprints at the scene. (The co-defendant's fingerprints conclusively did not match the lifted prints.) On the day of trial, believing that the State was going to abandon the idea that the fingerprints were those of the Appellant/Defendant (the fingerprints and cards were submitted and retained by the crime lab for over one year on the initial request), the Defense announced that it was ready for trial.

At trial, the State tried to use a letter supposedly sent to Defense Counsel, against the Appellant/Defendant. Defense Counsel had never seen the letter prior to trial and did not receive a copy of the letter. The State also indicated to the jury that the Appellant/Defendant had not cooperated with a request for a new submission of fingerprints (the request in the letter). The State violated the principles of Brady v. Maryland 373 U.S. 83, 83 S.Ct. 1194 (1963) by not informing the Appellant/Defendant that new fingerprints were needed to complete the fingerprint analysis at the scene. In Brady, the Court held that suppression of evidence, by the prosecution, that is favorable to an accused upon request violates due process where the evidence is material to guilt or punishment whether suppressed in good or bad faith by the prosecutor.

Later, in Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995), the Court further defined the principles of the Brady rules by broadening the rule to encompass situations in which the prosecution suppresses exculpatory evidence which the Appellant/Defendant did not request.

Finally, in Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936 (1999), the Court broadened the Brady principles even more to encompass situations in which a state agency must provide exculpatory evidence to a defendant even though the prosecutor may not know it exists. The Court found that through due diligence the prosecutor has access to this type of evidence that the defendant has no access to acquire.

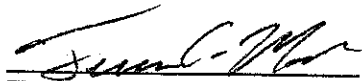
In this case, the Appellant/Defendant filed an "Omnibus Discovery Motion" requesting all inculpatory and exculpatory evidence. The State had the fingerprint evidence at the crime lab for over a year. The Appellant/Defendant had the results only one week prior to trial. There was no indication on the crime lab report that the Appellant/Defendant would need to resubmit to fingerprinting to get a print of quality to compare. The report stated that the card that it had was not suitable.

Although the State contends that a letter was hand-delivered to Defense Counsel requesting that the Appellant/Defendant submit fingerprint evidence, Counsel did not receive this letter and does not even have a copy to reference herein. The Appellant/Defendant and counsel never knew of a pre-trial opportunity to retest fingerprints when the announcement was made about trial readiness.

**PRAYER FOR RELIEF**

The Appellant/Defendant prays that this Honorable Court grant his petition, grant him a new trial, and remand the case back to the Circuit Court with instructions to correct and any other relief deemed proper.

**MATTHEW S. FLANDERS,  
By Counsel**



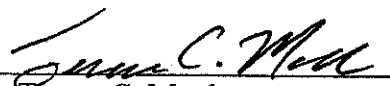
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**CERTIFICATE OF SERVICE**

Pursuant to the Rules for Appeal in West Virginia, the undersigned counsel for the Appellant hereby certifies that she did on the 2nd day of May, 2005, deliver the original and nine copies of this document to the Clerk of the West Virginia Court of Appeals and serve the foregoing and hereto appended paper entitled "Brief of Respondents" by first-class mail of a true copy thereof to the following counsels of record:

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