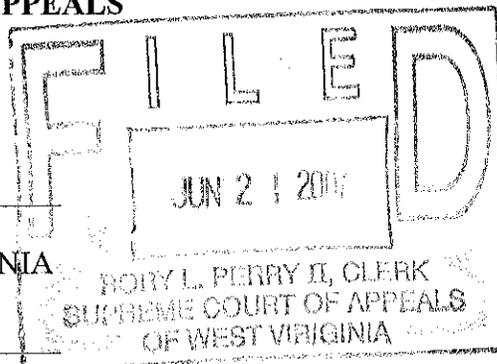


NO. \_\_\_\_\_

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

\_\_\_\_\_  
CHARLESTON, WEST VIRGINIA  
\_\_\_\_\_



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

VS.

CIRCUIT COURT OF ROANE COUNTY  
CASE # 06-F-7

**OWEN HAWK, III,**  
Defendant Below - Petitioner.

\_\_\_\_\_  
**APPELLANT BRIEF**  
\_\_\_\_\_

Counsel for Petitioner:  
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## TABLE OF AUTHORITIES

### UNITED STATES CONSTITUTION

*United States Constitution Amendment 5*

### UNITED STATE CASES

*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963)

*U.S. v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976)

### WEST VIRGINIA CONSTITUTION

*West Virginia Constitution Article III Section 14*

### WEST VIRGINIA CASES

*State v. Barker* 169 W.Va. 620, 289 S.E.2d 207 (1982)

*State v. Blair*, 158 W.Va. 647, 214 S.E. 2d 330 (1975)

*State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982)

*State v. McArdle*, 156 W.Va. 409, 194 S.E.2d 174 (1973)

*Wilhelm v. Whyte*, 161 W.Va. 67, 239 S.E.2d 735 (1977)

**P E T I T I O N**

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

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

On January 26, 2006 the Defendant, Owen Hawk III, was present for the return of his indictment. A copy of the indictment was given to the Defendant. After paperwork was filed, the Public Defender Corporation was appointed as counsel for the Defendant. The case was continued to January 30, 2006 for motions or arraignment.

On January 30, 2006, the Defendant appeared for arraignment. The Court granted the Defendant's motion to return all misdemeanor offenses to the jurisdiction of the Roane County Magistrate Court. The Defendant waived the reading of the indictment and pled "Not Guilty." The indictment charged the Defendant with: one count of Fleeing From An Officer While Under the Influence of Alcohol and one count of Driving Under the Influence Second Offense. The Court ordered the case continued to April 24, 2006 or pre-trial status and July 25, 2006 for jury trial.

On April 24, 2006, a status hearing was held and the case was continued to July 17, 2006 for further pretrial hearing.

On July 17, 2006, the Defendant moved to send the DUI Second charge back to the magistrate court and the Court granted that motion. The case was continued to July 25, 2005 for jury trial.

On July 25, 2006 the Defendant moved to continue the trial due to late discovery presented by the state that required further investigation to prepare for trial. The Court

denied that motion forced the Defendant to go to trial. A jury was chosen. The State presented its evidence. The trial was continued to July 26, 2006 for continuation of trial.

On July 26, 2006 the trial resumed. The state concluded its case. The Defendant presented evidence. After instructions and deliberations, the jury found the Defendant guilty of Fleeing from an Officer While Under the Influence of Alcohol. The case was continued to August 7, 2006 for post-trial motions.

On August 7, 2006 a hearing on the Defendant's Motion for a New Trial was heard. The Court denied the motion. The case was continued to September 25, 2006 for sentencing.

On September 25, 2007, due to defense counsel's illness, the case was continued to September 28, 2007 for sentencing.

On September 28, 2006, the Defendant was sentenced to serve one to five years in the state penitentiary. The Defendant announced his intention to appeal and the Defendant moved for an appeal bond and the matter was taken under advisement. The case was continued to October 16, 2006 for hearing on the appeal bond.

On October 16, 2006 the Court denied the Defendant's motion for an appeal bond.

The Defendant/Petitioner now appeals the sentencing order of the hearing September 28, 2006.

## STATEMENT OF FACTS

On December 9, 2005 Roane County Sheriff Todd Cole was parked in front of the Roane County Sheriff Office in the courthouse parking lot. Sheriff Cole had arrested another person, Harry Reger, earlier and was awaiting a magistrate to arraign Mr. Reger. (Record p. 266) At 9:40 p.m., Sheriff Cole observed a 1985 Chevrolet Monte Carlo traveling without headlights, going in the wrong direction on a one-way street by the courthouse. (Record p. 267) Sheriff Cole followed the vehicle and turned on his blue lights. (Record p. 268) The Monte Carlo sped up and the Sheriff pursued the vehicle through the town of Spencer. (Record p. 269) Sheriff Cole then radioed other law enforcement for help. (Record p. 268) Spencer city officer Roger Simons was ahead of the Monte Carlo. (Record p. 270) Officer Simons turned his cruiser sideways in the road to block traffic. (Record p. 270) The Monte Carlo struck the city cruiser and three parked cars on the lot of a car dealership in Spencer. (Record p. 270) The driver side door was blocked so the Sheriff pulled Mr. Hawk out of the vehicle through the driver side window. (Record p. 273) Mr. Hawk was immediately taken to the ground by the officers and pushed head first into the pavement. (Record p. 273)

Mr. Hawk was placed in a city cruiser with Harry Reger. (Record p. 378) Mr. Hawk was transported to the West Virginia State Police barracks and was offered an intoximeter test. (Record p. 398) Mr. Hawk refused the test. Mr. Hawk was transported to the Roane County Emergency Center for medical treatment of a head wound sustained during arrest. (Record p. 399) Arrangements were made and Mr. Hawk was transported to another place and placed in the custody of two Roane County Sheriff deputies.

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(Record p. 399) The deputies were transporting Hawk and another defendant to the Central Regional Jail.

At the exchange, Mr. Hawk fell against the back shield of a police cruiser with enough force to shatter the glass. (Record p. 401) Upon arrival at the Central Regional Jail, the jail refused to take Mr. Hawk until he was medically cleared through Braxton General Hospital. (Record p. 459) Mr. Hawk was taken to the hospital and evaluated. After medical clearance, Mr. Hawk was incarcerated. When he bonded later that day, Mr. Hawk returned to the Braxton General Hospital emergency room for further treatment. (Record p. 487)

The name of the other defendant in the car at the time of the exchange was not provided to defense counsel until the morning of the trial. (Record p. 196)

### ASSIGNMENTS OF ERROR

1. The Court erred and violated the Defendant's Constitutional right to due process and a fair trial by not granting the Defendant a continuance upon notice of late Brady disclosure.
2. The Court erred and violated the Defendant's Constitutional right to due process and a fair trial by not requiring the State to turn over all Brady material prior to trial in a timely manner which would allow the Defense to fully investigate the case.

**POINTS AND AUTHORITIES RELIED UPON**

UNITED STATES CONSTITUTION

*United States Constitution Amendment 5*

UNITED STATE CASES

*Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963)*

*U.S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976)*

WEST VIRGINIA CONSTITUTION

*West Virginia Constitution Article III Section 14*

WEST VIRGINIA CASES

*State v. Blair, 158 W.Va. 647, 214 S.E. 2d 330 (1975)*

*State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982)*

*State v. McArdle, 156 W.Va. 409, 194 S.E.2d 174 (1973)*

*Wilhelm v. Whyte, 161 W.Va. 67, 239 S.E.2d 735 (1977)*

## ARGUMENT AND DISCUSSION OF LAW

### **1. The Court erred and violated the Defendant's Constitutional right to due process and a fair trial by not granting the Defendant a continuance upon notice of late Brady disclosure.**

In this case, the State failed to timely disclose a police report of one of the police officers involved in this case. The report was slipped under defense counsel's office door after hours the day before the trial. Counsel was not aware of the disclosure until the day of trial. In this disclosure, for the first time, the name of another witness to the Defendant's level of intoxication was revealed. Counsel moved the Court for a continuance to allow her a chance to fully investigate this information. The State did not object to the continuance, however the Court denied the motion anyway. The trial had not been previously continued.

*West Virginia Constitution Article III Section 14* allows that a Defendant shall be afforded:

Trials of crimes and misdemeanors, unless otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offence was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county. In all such trials, the accused shall be fully and plainly informed of the character and cause of the accusation, and be confronted with the witness against him, and shall have the assistance of counsel, and **a reasonable time to prepare his defence**; and there shall be awarded to him compulsory process for obtaining witnesses in his favor. (emphasis added)

This Court has determined that granting of continuances is in the discretion of the Court. However, this Court has also recognized exceptions to this policy. In *Wilhelm v. Whyte*, 161 W.Va. 67, 239 S.E.2d 735 (1977), this court held in Syllabus Pt. 3 that:

There may be occasions when the denial of a continuance in a criminal trial is so arbitrary as to violate due process, and because of the particular wording in Article III, Section 14 of the West Virginia Constitution, that the accused "shall have the assistance of counsel, and a reasonable time to prepare for his defense [sic]", there is independent of the Due Process Clause in our Constitution, a constitutional right to a continuance if the defendant is not accorded a reasonable time to prepare his defense.

This Court has upheld this principle in *State v. Barker* 169 W.Va. 620, 289 S.E.2d 207 (1982) and several other cases.

This Court has also held that:

Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt. Syllabus Pt. 5, *State v. Blair*, 158 W.Va. 647, 214 S.E. 2d 330 (1975)

The Court abused its discretion in this case and did not allow counsel time to adequately prepare a defense. In this case, the trial was upon one felony count of Fleeing While Under the Influence of Alcohol. The Defendant refused to take the intoximeter test and therefore the State was required to prove the Defendant was under the influence of alcohol. The State introduced the testimony of several police officers in its case in chief. However, practically all of the officers at some point the night of the incident were involved in allegedly creating or allowing physical harm to the Defendant. The Sheriff and city officers pulled the Defendant from his car at the scene causing head trauma. The sheriff deputies had allowed the Defendant to fall upon the back windshield of the exchange cruiser with enough force to shatter the glass. These officers have an interest in saying the Defendant was intoxicated. Harry Reger testified that he had been drinking

too, and his charges were later reduced and he was allowed to bond and never went to the regional jail.

However, the Braxton General Doctor commented in the hospital report which was introduced into evidence at trial, that the Defendant did not appear drunk and that his claims of unjust police brutality should be considered. The doctor was an unbiased third party who observed the Defendant's state of intoxication. There was another witness. That witness was the other person arrested and taken to the regional jail the night of the incident. The person named to defense counsel in the report filed just before trial.

- 2. The Court erred and violated the Defendant's Constitutional right to due process and a fair trial by not requiring the State to turn over all Brady material prior to trial in a timely manner which would allow the Defense to fully investigate the case.**

As stated in the prior assignment of error, the State did not disclose information, that had been within its control, to counsel until the morning of trial. The United States Supreme Court held in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) that:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The Court found that failure to disclose violated the *United States Constitution Amendment 5* Due Process rights. Further in *U.S. v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976) the Court stated that :

A prosecutor does not violate the constitutional duty of disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial.

This Court has also decided many Brady Cases. This Court held in *State v. McArdle*, 156 W.Va. 409, 194 S.E.2d 174 (1973) that :

A prosecution that withholds evidence on the demand of the accused which, if made available would tend to exculpate him, violates due process of law.

This Court further held in *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982) that:

A prosecution that withholds evidence which would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution.

Under the analysis of this Court as well as the United States Supreme Court, as explained in the preceding section, a potentially valuable fact witness for the Defendant was not disclosed until the day of trial. While this witness would not totally exculpate the guilt of the Defendant, if the witness could shed light upon the issue of the Defendant's level of intoxication, then the jury could have found the Defendant guilty of Fleeing in A Vehicle, which is a misdemeanor offense. It should be noted that the jury sent a note to the judge concerning the alcohol issue asking about alcohol tests at the hospital. They were clearly concerned about this issue.

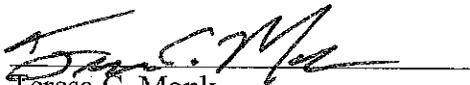
Another point to consider is that the Defendant testified that he refused to take a chemical breath test because the officers had badly beaten him. All of the officers denied this theory. A witness to the "accidental breaking of the back shield" would have further proven the Defendant's assertions, even though the witness came after the refusal.

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**PRAYER FOR RELIEF**

Therefore, the Petitioner respectfully prays that this Honorable Court will grant his appeal, reverse the conviction and remand the case with instructions for a new trial.

OWEN HAWK III  
By Counsel

  
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**CERTIFICATE OF SERVICE**

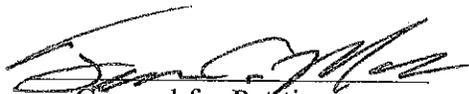
I, Teresa C. Monk, hereby certify that I have served this BRIEF OF PETITIONER on the

21st day of June, 2007 by personal delivery to:

Mark G. Sargent, Esq.  
Roane County Prosecuting Attorney  
P.O. Box  
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1900 Kanawha Blvd. East  
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I filed the original and nine copies with the West Virginia Supreme Court of Appeals.

  
Counsel for Petitioner