

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

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

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

STATE OF WEST VIRGINIA  
Plaintiff Below, Appellee

VS.

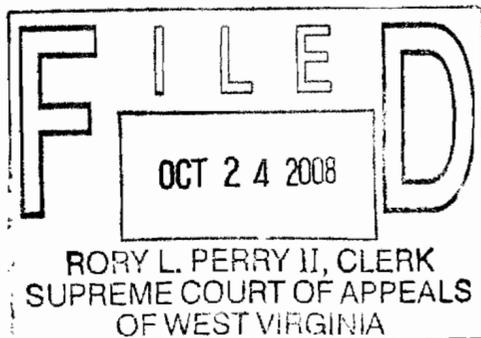
CIRCUIT COURT OF CABELL COUNTY  
CASE # 07-F-143  
JUDGE JOHN CUMMINGS

JUSTIN BLACK,  
Defendant Below, Appellant

\_\_\_\_\_  
**PETITION FOR APPEAL**  
\_\_\_\_\_

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## POINTS AND AUTHORITIES

*State v. Persinger*, 169 W.Va. 121 (1982).

*State v. Parsons*, 108 W.Va. 705 (1930).

*Crane v. Kentucky*, 476 U.S. 683 (1986).

*California v. Trombetta*, 467 U.S. 479 (1984).

*Strickland v. Washington*, 466 U.S. 668 (1984).

*In re Oliver*, 333 U.S. 257 (1948).

*Grannis v. Ordean*, 234 U.S. 385 (1914).

*United States v. Cronic*, 466 U.S. 648 (1984).

*State v. Stringham*, 2003-Ohio-1100.

*Holloman v. Commonwealth*, 37 S.W.3d 764 (Ky. 2001).

*People v. Hamilton*, 163 Mich. App. 661 (1987).

*Pritchett v. Commonwealth*, 263 Va. 182 (2002).

*State v. Buechler*, 253 Neb. 727 (1998).

*People v. Lopez*, 946 P.2d 478 (Colo.App. 1997).

*State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

*Youngblood v. State of West Virginia*, 2006 WL 1666862, (U.S.W.Va.).

*Kyles v. Whitley*, 514 U.S. 419 (1995).

*United States v. Bagley*, 473 U.S. 667 (1985).

*United States v. Agurs*, 427 U.S. 97 (1976).

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

*State v. Mullens*, 650 S.E.2d 169 (WV 2007).

*Crawford v. Washington*, 541 U.S. 36 (2004).

Rule 702 of the West Virginia Rules of Evidence

Rule 12.1(b) of the West Virginia Rules of Criminal Procedure

F. Cleckley, *Handbook on West Virginia Criminal Procedure*, 1-737 (2d ed. 1993)

## **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 the 20<sup>th</sup> day of February, 2008, Justin Black's first trial was declared a mistrial because of the mention of polygraph in front of the jury by State witness Cpl. Kim Pack. On the 21<sup>st</sup> day of April, 2008, Justin Black was found guilty by a Cabell County Jury of 2<sup>nd</sup> degree murder. On June 6, 2008 he was sentenced to forty years confinement in the West Virginia Penitentiary. On June 6, 2008, Defendant's Motion for a Post Judgment Verdict of Acquittal, having been filed on April 29, 2008, was denied by Circuit Judge John Cummings.

#### **STATEMENT OF FACTS**

On August 8, 2002, the body of Deanna Crawford was found in the weeds on an abandoned farm on Hickory Ridge in Cabell County, West Virginia. The cause of death was determined to be strangulation. Ms. Crawford was unfortunately a known prostitute and crack cocaine addict in Huntington, West Virginia. Deanna had been living in a crack house known as the gravel pit with Grant McClure and others according to Defense witness Rachel Fairchild. According to Fairchild, Deanna regularly engaged in prostitution with a man named John Vinton who visited that crack house during that time period any time he was in town.

John Vinton, known to often engage the services of various prostitutes, was robbed by a prostitute not long before Deanna's body was found. He had asked Betty Cull to look up Deanna's address information at the Cabell County Department of Health and Human Resources office. Betty Cull refused and was then visited by Vinton at her home on August 5, 2002 which was three days before Deanna's body was found on Hickory Ridge next to a boarded shack.

Vinton asked Cull if she had looked up the information he requested and Cull said no. Vinton then explained that nobody would have to worry about that girl robbing anyone else again because her body was up on Hickory Ridge in an old shack. Three days later, Deanna's body was found on Hickory Ridge next to an old shack.

Rachel Fairchild, one of Deanna's close friends, last saw Ms. Crawford about one week before her body was found. During Ms. Fairchild's last moments with Ms. Crawford in the hours from Friday night into early Saturday morning which was August 3, 2002, she observed Deanna rob Mike Sinclair in his own home. Deanna had also been living with Mike Sinclair just prior to her death in 2002. Furthermore, Deanna was seen on a Speedway video with a man named Ira Crocket at around 3:00 A.M. on August 4, 2002.

In 2003, West Virginia State Trooper John Black executed a search warrant on John Vinton, authorized by Circuit Judge John Cummings, with Vinton's statements to Betty Cull included in the search warrant affidavit. Vinton eventually died and the case went cold. According to West Virginia State Trooper Tony Cummings, Vinton had been excluded by his department anyway.

In January of 2007, Brian Dement was brought by West Virginia State Troopers to their Barracks in Huntington, WV. During the course of several hours, Mr. Dement signed two written statements which detailed Deanna's murder. Each written version contained asserted facts which were inconsistent with each other. Mr. Dement claimed that he, along with Justin Black, Philip Barnett, and Nathan Barnett, left a party at Justin Black's home with Deanna Crawford in a car. He claimed that they stopped the car at the abandoned farm, physically assaulted Deanna with kicks and punches, and eventually killed her.

In January of 2007, Justin Black voluntarily went to the WV State Troopers' Barracks in Cabell County for questioning after he heard that Trooper Tony Cummings was looking for him. During the course of several hours he denied any involvement in the murder. He also denied having been with Dement at any time during the Summer of 2002. He also denied having ever seen Deanna in his life. Several hours later, at the end of the interrogation, he signed a statement claiming he was in the car with Dement, the Barnetts, and the girl.

Justin explained, however, that he stayed by the car to urinate while the Barnetts, Dement, and Deanna went up to the old house on the farm. He further stated that the Barnetts returned to the car, at which point, he and the Barnetts left in the car. Justin stated that he thought they were playing a joke on Dement by leaving him there. He also was audio recorded stating basically the same information that was in the written statement.

Justin Black was then released. Justin Black returned to speak with Trooper Cummings a week later to recant everything he said concerning being in the car with Deanna and the others. Nonetheless, Justin Black was indicted for murder in May of 2007 along with Brian Dement, Philip Barnett, and Nathan Barnett.

Dement pled guilty the very day his trial was scheduled to begin in September of 2007. The plea deal consisted of Dement pleading guilty to 2<sup>nd</sup> degree murder and promising to testify truthfully in the trials of his codefendants in exchange for the State recommending a prison sentence between 20 and 24 years. When asked by Judge Cummings why they killed Deanna, Dement looked at the ground and said, "I don't know."

In October of 2007, Dement spoke with Nathan Barnett's private investigator, Greg Cook, at the Western Regional Jail in Barboursville, West Virginia. Dement's attorneys permitted Mr. Cook to do so. In that conversation, which was recorded without Dement's

knowledge, Dement recanted everything in his confessions to Deanna's murder which he gave to the State Troopers and to Judge Cummings at his plea hearing. A portion of that recording was played for the jury in Justin Black's trial.

In March of 2008, Dement spoke with Justin Black's private investigator, Danny Lane, and Black's defense counsel, Jay Love, at the Western Regional Jail with the permission from Dement's attorneys. In that recorded conversation with Dement's consent, Dement recanted everything in his confessions to Deanna's murder. Dement explained that he was high on Xanax's, marijuana, and alcohol the day he was taken to the Troopers' barracks and confessed to Deanna's murder. Dement explained that once he realized he was facing life in prison because of a confession he gave under the influence of drugs and alcohol, he felt he had no other choice but to take the plea offer from the State. Portions of both of these recordings were played for the jury during Mr. Black's trial. Some portions were redacted pursuant to an agreement between the Defense, the State, and the Court.

Justin Black testified in his own suppression hearing in August of 2007. Black explained the manner in which he was manipulated into giving a false statement to the Troopers. He was given all the pieces of information about the crime from various troopers. The Troopers told Justin Black the information that they claimed Dement gave to them. When he would not give the statement the Troopers wanted, a trained polygrapher named Trooper Kim Pack was called to come to the Barracks and speak with Justin Black in the interrogation room. That room was a small room with cement walls in the basement with no windows.

According to Black on page 73 of the transcript from the suppression hearing, he was questioned by Trooper Pack who told him, "I know you are on parole, that could easily be taken away." Black continued in his testimony by saying, "And then, as - - I told her, What do you

want to hear? I just want to go home. What do you want to hear? And I just made up some BS and she let me go... Well, actually it was more from the details that the troopers gave. The story - - I made up the story from what the troopers told me, because otherwise I wouldn't know anything about this. I used exactly the words that came out of the troopers' mouths, the exact words."

By this time several hours had passed and Black signed the written statement which was hand written by the Troopers at 2 A.M. Black also gave an oral statement which was audio recorded. Over objections of Black's defense counsel, Judge Cummings ruled that Black's statements would be admissible at trial.

At trial, Brian Dement testified against Justin Black. The recordings of Dement's recantations were played for the jury. In addition, the recording of Justin Black's statement to the Troopers was played for the jury. Justin Black testified he falsely confessed to the State Troopers that he was with Brian Dement and Deanna Crawford the night she was killed.

Witnesses from the party in question testified. One stated that Justin Black did not leave the party. One stated she engaged in sexual intimacy with Justin Black that night. Some did not know whether he left or not. Some stated that Brian Dement was not at the party. Some stated that they had never seen Deanna or Dement in their lives prior to their pictures being shown on television and in the newspaper.

Some of the party witnesses testified that the party in question occurred on the weekend of July 28, 2002, not August 5, 2002 as the Prosecution claimed. One witness, who attended the 2002 parties at Justin Black's home, was Candace Day. She testified that codefendant Nathan Barnett, who was her live in boyfriend at that time, never attended or left those parties without her.

## ASSIGNMENTS OF ERROR

- A. The Trial Court admitted the Defendant's statements to the West Virginia State Troopers into evidence at trial in violation of *State v. Persinger*, 169 W.Va. 121 (1982) which resulted in a denial of Defendant's constitutional right to a fair and impartial trial as guaranteed by the Constitution of West Virginia, Article 3, Sections 10 and 13, and the Constitution of the United States, Amendments VI and XIV.
- B. The Trial Court erred in excluding expert testimony on false confessions in violation of *Crane v. Kentucky*, 476 U.S. 683 (1986) and the Due Process Clause of the 14<sup>th</sup> Amendment which resulted in a denial of Defendant's constitutional right to a fair trial.
- C. The Trial Court erred in excluding Defendant's rebuttal evidence consisting of testimony from the owner of Yellow Cab which directly contradicted State witness Brian Dement's testimony.
- D. The Trial Court erred in striking Defense Witness Jessica Carson's testimony from the record ruling it was irrelevant.
- E. The Trial Court erred in denying Defendant's Motion to Change Venue/Venire.
- F. The Prosecuting Attorney failed to disclose exculpatory evidence to the Defense prior to trial.
- G. The Trial Court erred, in violation of WV Rule of Criminal Procedure 12.1(b), in denying the Defense's motion to exclude every state witness upon whom the state intended to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses relied on by the State of West Virginia to rebut testimony of any of the defendant's alibi witnesses.
- H. The Trial Court erred in permitting the State to make reference, in its closing argument, to inadmissible out of court statements by State witness Brian Dement in violation of the Court's previous rulings on August 21, 2007.

## ARGUMENT AND DISCUSSION OF LAW

- A. The Trial Court erred in admitting the Defendant's statements to the West Virginia State Troopers into evidence at trial in violation of *State v. Persinger*, 169 W.Va. 121 (1982) which resulted in a denial of Defendant's constitutional right to a fair and impartial trial as guaranteed by the Constitution of West Virginia, Article 3, Sections 10 and 13, and the Constitution of the United States, Amendments VI and XIV.

Defense counsel filed a motion to suppress the Defendant's January 30, 2007 statements to the West Virginia State Troopers. At that hearing which was on August 21, 2007, Trooper Pack admitted to the fact that she knew Justin was on parole and that his parole was discussed during her interview with him. On page 52 of that transcript, Defense counsel Ashley Lockwood asked, "The question was, he amended his statement to you after you and he had discussed parole; isn't that correct?" Pack answered, "You got to understand, sir, if he's on parole, that's an issue for him from beginning to end. I understand that. So his issue of parole and whether he's revoked is not something that we can- - it's a big elephant in the room. It's discussed. So did I sit there and say your parole is going to be revoked, this, that, and the other, I don't recall specifically saying that. But it was an issue for him, because he's on parole."

On page 45 of that transcript, the Defense asked, "And you indicated you would hate to see him revoked?" Pack answered, "I hate to see anybody get revoked. I don't know what you mean." Pack later stated on page 46, "Sir, if he's on parole, we discussed him being on parole. I can't recall saying I hope he doesn't get revoked."

Furthermore, Defendant Justin Black testified that Trooper Pack said, "I know you are on parole, that could easily be taken away." The Defendant further stated that he cried at that point and asked, "What do you want to hear?" Mr. Black was terrified of having his parole revoked and being returned to prison.

Defendant Justin Black testified that he then gave the Troopers the story he thought they wanted to hear in order to avoid having his parole revoked. Mr. Black was on parole for a malicious wounding charge in which the victim was a male. Trooper Pack testified that she did not recall specifically saying that Justin's parole would be revoked. The State Troopers' threat of parole revocation rendered Mr. Black's statements to the Troopers on January 30, 2007 involuntary.

According to the West Virginia Supreme Court of Appeals in *State v. Persinger*, 169 W.Va. 121 (1982):

Independent of the failure to terminate the interrogation after the defendant had requested counsel, we conclude that the confession was inadmissible on another ground. The *in camera* hearing discloses that prior to the inculpatory second confession, one of the interrogating officers told the defendant that if he cooperated with them, the officer would give a good recommendation to the probation officer at the time of the presentence investigation...The fact that a defendant waives his right of self-incrimination and right to have counsel, which are the traditional *Miranda* rights, does not mean that thereafter the interrogating officers are free to extract a confession by any manner of inducement or coercion. Courts have recognized that confessions obtained through coercion or inducement are inadmissible even though a *Miranda* waiver has been given. *E.g., M.D.B. v. State*, 311 So.2d 399 (Fla. 1975); *State v. Setzer*, 20 Wash. App. 46, 579 P.2d 957 (1978); *State v. Davis*, 73 Wash.2d 271, 438 P.2d 185 (1968).

The Court went on to state the following:

In *State v. Parsons*, 108 W.Va. 705, 152 S.E. 745 (1930), we set this principle in its single Syllabus: "When the representations of one in authority are calculated to foment hope or despair in the mind of the accused to any material degree, and a confession ensues, it cannot be deemed voluntary."... Much the same test stated in *Parsons* was reached in *Bram v. United States*, 168 U.S. 532, 542-43, 42 L.Ed. 568, 573, 18 S.Ct. 183, 187 (1897), where the Supreme Court held that a confession "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." This was confirmed in *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1966)... Here, the interrogating officer's statement was explicit: if the defendant would cooperate, the officer would give the accused a good recommendation to the probation officer. This statement can only be viewed as calculated to foment a hope for leniency in the mind of the accused and under *Parsons* renders the confession inadmissible.

Here in Mr. Black's case, a West Virginia State Trooper, clothed in the authority of the State, according to Mr. Black, represented to him that his parole could easily be taken away. Those representations were calculated to foment despair in the Defendant's mind to such a degree that a confession ensued and Mr. Black implicated himself in the murder of Deanna Crawford. He implicated himself by placing himself at the very place her body was found with the very man who confessed to the murder and accused Mr. Black of participating. Mr. Black's statements, after such a threat by one clothed in such authority as Trooper Pack, were rendered inadmissible and must be deemed involuntary.

- B. The Trial Court erred in excluding expert testimony on false confessions in violation of *Crane v. Kentucky*, 476 U.S. 683 (1986) and the Due Process Clause of the 14<sup>th</sup> Amendment which resulted in a denial of Defendant's constitutional right to a fair trial.

The United States Supreme Court stated the following: "Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility." *Crane v. Kentucky*, 476 U.S. 683, 689 (1986). Counsel for the Defendant timely notified the State of West Virginia of Defendant's intention to call forensic psychiatrist Bobby Miller, M.D., as an expert witness on false confessions at trial. In that notice, Defense counsel represented to the State and to the Circuit Judge that Dr. Miller's testimony was to cover four main points: 1. False confessions do occur and are not infrequent. 2. Persons with certain mental diseases/defects or personality structures are more prone to make a false confession. 3. The topic of false confessions has been studied in the psychiatric and related literature. 4. Forensic psychiatrists are often called by the Court for the purpose of educating the Jury regarding false confessions.

Prosecuting Attorney Chris Chiles filed a motion to exclude Dr. Miller from testifying at trial. A full hearing was conducted, legal memoranda were filed, and the Circuit Judge ruled on the morning of the first day of the first trial. Judge Cummings stated the following: "This is not a confession that you're asking Dr. Miller to testify to. At the most it is a statement that may be slightly against the interest of the defendant. To allow him to testify about confessions in this matter would, I think, be very confusing to the jury. Further, his testimony does not come up to any standards of reliability as far as scientific testing goes, so the testimony of Dr. Miller will be excluded in this regard."

A confession is a statement against interest. Justin Black's statements to the State Troopers were confessions in light of the fact that he placed himself at the location where the body was recovered which was the location where his codefendant described the killing occurred in detail. Mr. Black claimed, however, that they were false confessions and thus unreliable. Mr. Black was denied his constitutional right of "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); cf. *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984).

Multiple state supreme courts have derived authority from the holding in the U.S. Supreme Court case *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) to hold that the trial court erred in excluding expert testimony on false confessions. The U.S. Supreme Court stated the following:

...But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be "insufficiently corroborated or otherwise . . . unworthy of belief." *Lego v. Twomey*, supra, at 485-486. Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: if the defendant is

innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

*Crane v. Kentucky*, 476 U.S. 683, 689 (1986).

Furthermore, the Court stated:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment...or in the Compulsory Process or Confrontation clauses of the Sixth Amendment...the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. at 485; cf. *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible [476 U.S. 691] of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656 (1984).

*Id.* at 690.

Lastly, the Court went on to hold the following:

Under these principles, the Kentucky courts erred in foreclosing petitioner's efforts to introduce testimony about the environment in which the police secured his confession. As both *Lego* and *Jackson* make clear, evidence about the manner in which a confession was obtained is often highly relevant to its reliability and credibility. Such evidence was especially relevant in the rather peculiar circumstances of this case. Petitioner's entire defense was that there was no physical evidence to link him to the crime, and that, for a variety of reasons, his earlier admission of guilt was not to be believed. To support that defense, he sought to paint a picture of a young, uneducated boy who was kept against his will in a small, windowless room for a protracted period of time until he confessed to every unsolved crime in the county, including the one for which he now stands convicted. We do not, of course, pass on the strength or merits of that defense. We do, however, think it plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of its succeeding. Especially since neither the Supreme Court of Kentucky in its opinion, nor respondent in its argument to this Court, has advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence, the decision below must be reversed.

*Id.* at 690.

The Ohio State Supreme Court, relying on the authority established by *Crane v. Kentucky*, reached a holding in 2003 with regard to expert testimony on false confessions pertaining to assisting the jury in evaluating the reliability of a confession. In that case, the defendant confessed to being in the car with the victim and 2 other men en route to buying drugs. The defendant then stated that they stopped the car to urinate when one of the other passengers shot the victim. Shortly thereafter, the defendant confessed to being the actual shooter and then later recanted saying he was not the shooter. He was convicted at trial and sentenced to life in prison. The Ohio Supreme Court held:

{¶43} Although *Crane* involved the physical and psychological environment of a confession and the impact that environment had on its reliability, the legal principle articulated by the U.S. Supreme Court is broader than *Crane's* facts. Indeed, the *Crane* Court recognized that a criminal defendant enjoys a general constitutional right to introduce any competent, reliable evidence bearing on the credibility of his confession, when such evidence is central to his claim of innocence and in the absence of a valid state justification for its exclusion. *Id.* at 690. Thus, we are unpersuaded by the trial court's attempt to distinguish *Crane* on the basis that the defendant therein sought to introduce evidence of the environment surrounding his confession, whereas Stringham sought to introduce expert testimony about certain psychological traits, diagnoses, or characteristics and their impact on the reliability of a confession. In both *Crane* and the present case, the defendant sought to introduce presumably competent, reliable evidence to explain why he confessed to something that he did not do.<sup>(fn10)</sup> Likewise, in both cases the evidence was crucial to the defense, and it had a bearing on the reliability of the confession. Finally, in neither case did the State offer a valid justification for the wholesale exclusion of such evidence.

*State v. Stringham*, 2003-Ohio-1100.

The Ohio State Supreme Court went on to cite other jurisdictions (KY, WA, MI, VA) which derived authority from *Crane* to rule on the subject of expert testimony regarding confessions:

{¶44} Notably, we are not alone in our view that *Crane* extends to cases other than those in which the evidence at issue concerns the environment that yielded the confession. See, e.g., *Holloman v. Kentucky* (Ky. 2001), 37 S.W.3d 764 (finding reversible error in the exclusion of expert testimony that the defendant's mental retardation made him

vulnerable to suggestibility, manipulation and intimidation, as such testimony had a bearing on the reliability of his confession and was admissible under *Crane*); *State v. Miller* (June 17, 1997), 86 Wash. App. 1064, 1997 WL 328740 (relying on *Crane* to find that the trial court erred in excluding expert testimony about “how and why someone could make a falsely incriminating statement”);(fn11) *Michigan v. Hamilton* (1987), 163 Mich. App. 661, 666 (“*Crane* did not concern evidence of the defendant’s psychological makeup, but focused instead on the physical and psychological aspects of an interrogation. Nonetheless, we believe the United States Supreme Court’s reasoning is equally applicable to otherwise admissible expert testimony.”).(fn12)

{¶45} In any event, we see no reason why Stringham’s own psychological traits, diagnoses, or characteristics would not constitute part of the overall *psychological environment* that contributed to his confession and had a bearing on its reliability.(fn13) See *Crane*, 476 U.S. at 689 (recognizing that “the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant’s guilt or innocence). In an analogous case, *Pritchett v. Virginia* (2002), 263 Va. 182, the Virginia Supreme Court recently held that the trial court erred in excluding expert psychological testimony about “two factors which characterize people who ‘may be prone . . . to false confessions[.]’” *Id.* at 185. In that case, two experts proffered testimony that the defendant was mildly retarded and that, as a result, he was prone to be compliant and to be vulnerable to “interrogative suggestibility.” *Id.*

*State v. Stringham*, 2003-Ohio-1100.

With regard to Rule 702 of the West Virginia Rules of Evidence, Counsel for Justin Black wanted to offer Dr. Bobby Miller’s expert testimony on false confessions to assist the jury in making its own assessment of the reliability or credibility of Mr. Black’s statement to the West Virginia State Troopers in January of 2007. Dr. Miller would have provided “relevant information better enabling the jury itself, as the trier of fact, to evaluate the reliability of the confession.” *Id.* The Ohio Supreme Court in *Stringham*, relying on the U.S. Supreme Court holding in *Crane*, spoke directly to this issue:

{¶46} Finally, we disagree with the trial court’s determination that Mossman’s proposed testimony was inadmissible, as it constituted “the expert’s opinion on [Stringham’s] veracity.” . . . It is well settled that an expert witness may not render a personal opinion as to whether a particular witness is telling the truth... However, an expert witness may provide testimony that assists the jury in making its own assessment of a witness’ credibility or veracity... In the present case, it does not appear that Mossman would have provided his own opinion about whether Stringham’s confession was reliable. Rather, he would have provided relevant information better enabling the jury itself, as

the trier of fact, to evaluate the reliability of the confession.(fn14) Such testimony is proper under Ohio law.(fn15) Consequently, the trial court erred in excluding Mossman's proposed testimony on the basis that it constituted an improper comment on Stringham's veracity.

*State v. Stringham*, 2003-Ohio-1100.

Supreme Courts in Virginia, Nebraska, and Colorado also ruled, relying on the U.S. Supreme Court holding in *Crane*, that expert testimony would assist the jury in evaluating the reliability of the defendant's confession.

The state court of appeals affirmed the trial court's exclusion of the testimony, but the Virginia Supreme Court reversed on the basis of *Crane*. In so doing, the Virginia high court appears to have found that the expert testimony pertained to the psychological environment that yielded the confession. *Id.* at 186. The *Pritchett* court also found that the expert testimony was admissible, as it assisted the jury in evaluating the reliability of the defendant's confession. *Id.*; see also *State v. Buechler* (1998), 253 Neb. 727, 738-739 (reasoning that under *Crane* a psychologist should have been allowed to testify that the defendant's drug withdrawal and psychological disorders may have resulted in a false confession, as such testimony pertained to the psychological circumstances under which he confessed and had a bearing on the reliability of the confession); *People v. Lopez* (1997), 946 P.2d 478 (reversing the trial court and finding, based on *Crane*, that a psychologist's expert testimony was admissible, as it related to the "psychological environment surrounding the interrogation" and had a bearing on the reliability of the defendant's confession).

*State v. Stringham*, 2003-Ohio-1100.

The testimony proffered by the expert in *Stringham* was almost directly on point with the proffered testimony of Dr. Bobby Miller in this case before the Cabell County Circuit Court. For example:

Rather, as noted above, Stringham sought to use the doctor's testimony only to assist the jury in assessing the *reliability* or *credibility* of his confession. Insofar as the trial court found that Mossman's testimony related to the lone issue of voluntariness, and therefore was inadmissible, we believe that the trial court erred...In our view, Mossman plainly distinguished the voluntariness of a confession from the reliability or credibility of that confession. In essence, he proposed to testify about psychological reasons why a person would give a voluntary yet completely false confession. Mossman's testimony concerned the peculiar phenomenon of individuals telling voluntary lies to implicate themselves in crimes that they did not commit. As set forth more fully above, Mossman proposed to testify about psychologically based reasons why people might engage in such behavior. He also proposed to testify about the psychological traits, diagnoses, or

characteristics observed in people who voluntarily, yet falsely, implicate themselves in crimes...

*State v. Stringham*, 2003-Ohio-1100.

In this case regarding Justin Black, Dr. Miller proffered to testify in an almost identical manner. As Dr. Miller testified in the pre-trial hearing, one cannot become a licensed forensic psychiatrist without first mastering the phenomenon of false confessions which is part of the core curriculum. It is therefore a specialized knowledge of which forensic psychiatrists are experts.

Dr. Miller's proffered expert testimony has a bearing on the jury's determination of the reliability or credibility of Justin Black's statements, and it is "central to his defense." *Id.* It should therefore be admissible under Rule 702 to assist the jury to understand the evidence and make that determination. "As a result, absent any valid justification for excluding the testimony (and the State has not asserted any such justification)," the wholesale exclusion of Miller's testimony violated Justin Black's constitutional right to present a complete defense and an opportunity to be heard. *Crane*, 476 U.S. at 690. Indeed, the Circuit Court's exclusion of Miller's testimony precluded him from assisting the jury in answering the one question every rational juror needs answered: If the defendant is innocent and he was never at the crime scene with the victim, why did he previously admit to being there after learning from the State Troopers that Brian Dement claimed that Deanna was killed there with his participation? *Crane*, 476 U.S. at 689.

Justin Black's falsely incriminating statement to the State troopers in January of 2007 is a confession, albeit a false confession, when viewed in the light of Brian Dement's written confessions, Dement's testimony at his plea hearing, Dement's subsequent recantations, Dement's testimony at Justin Black's trial, and Justin Black's recantations at his suppression hearing, his trial, and to Trooper Cummings. It was Justin Black's defense that both he and Brian

Dement falsely confessed to the WV State Troopers. More specifically, it was Justin's defense that Dement was an idiot who falsely confessed to a murder and, as he explained in his recantations to Greg Cook and Danny Lane, simply took a deal to avoid life in prison and cooperated with the State at trial to shorten his sentence.

Furthermore, it was Justin's defense that Dement, as he explained in his recorded recantations which were played for the jury, was placed in this precarious situation because he falsely confessed to a murder in a drunken, drugged up stupor after hours of interrogation. Moreover, it was Justin's defense that he himself caved in and falsely confessed to being with Deanna, Dement, and the Barnetts because he feared that the Troopers would have his parole revoked. In addition, it was Justin's defense that he was not mentally strong enough to withstand hours of such intense interrogation by the trained WV State Troopers. He basically did what he thought he had to do to get out of the Troopers' barracks and go home which was put the story together with all the details that the Troopers had spent hours feeding him.

Both Justin Black's audio statement to the Troopers and his recantation of that audio statement being heard by the jury in conjunction with Brian Dement's testimony and his audio recorded recantations being heard by the jury renders Dr. Bobby Miller's expert testimony on false confessions relevant in this case in compliance with rule 702 to assist the jury in making its own assessment of the reliability or credibility of Mr. Black's statements and Brian Dement's statements.

These pieces of evidence were also supplemented by testimony that Dement and Deanna did not attend Justin Black's 2002 parties according to multiple witnesses who attended those parties that summer. In fact, these witnesses testified that they had never seen or heard of Deanna until they saw pictures of her after her death. Some of them had never even seen Dement until he

was arrested in 2007. In addition, testimony by state witness Ashley Newton revealed that Justin Black told her, "I just told them what they wanted to hear," when referring to his January 2007 statements to the State Troopers. Furthermore, Candace Day testified that Nathan Barnett, Justin Black's codefendant who he names in his confession to the Troopers, did not go to or leave Justin Black's 2002 summer parties without her.

The first trial in February of 2008 ended in a mistrial. Defense counsel filed a motion to reconsider the Circuit Court's ruling regarding the exclusion of Dr. Bobby Miller. The Circuit Judge denied the Defendant's motion and the second trial in April of 2008 ended in the Defendant being convicted of 2<sup>nd</sup> degree murder. Dr. Miller would not have provided his own opinion about whether Defendant Justin Black's confession was reliable. Rather, he would have provided relevant information better enabling the jury itself, as the trier of fact, to evaluate the reliability of the confession.

- C. The Trial Court erred in excluding Defendant's rebuttal evidence consisting of testimony from the owner of Yellow Cab which directly contradicted State witness Brian Dement's testimony.

Brian Dement testified that he called a cab after Deanna Crawford was murdered. Please see pages 441, 478, 481, 507, and 517 of the trial transcript. Brian Dement specifically testified as to what the phone number was for the cab company. He gave "529-7371" as the number which is the phone number for Yellow Cab in Huntington, WV.

In the Defendant's case in chief, Defense counsel called Jamie Malone, owner of Yellow Cab, as a witness. On page 769 of the trial transcript, Prosecutor Chris Chiles objected on the basis that he did not receive any notification from Defense counsel prior to trial that Jamie Malone would be called as a witness. Defense counsel then responded by stating that they had

just learned about Malone that very day. In addition, Defense counsel further argued that Malone should be permitted to testify even though he was not placed on the witness list because he was a rebuttal witness. Defense counsel then proffered that the witness would testify that as owner of Yellow Cab in 2002, it was his company policy not to send cabs to Salt Rock due to a shooting prior that year.

This proffered testimony directly contradicted Brian Dement's testimony at trial that, shortly after his codefendants killed Deanna, he ran from the crime scene to a nearby payphone, called a cab, and was subsequently picked up by a cab. Judge Cummings ruled that the witness would be excluded because Chris Chiles was not given notification and that it would be an unfair surprise to the State.

D. The Trial Court erred in striking Defense Witness Jessica Carson's testimony from the record ruling it was irrelevant.

Defense witness Jessica Carson testified that she sometimes had sex with a white male in his red truck in the woods on Hickory Ridge in places similar to the location Deanna's body was found. She testified that this man, whose name was Jason Thompson, would choke her during the sex in his truck while leaving her top on which left her nude only from the waist down. Carson further testified that the basis of their relationship was that Thompson supported her drug habit. According to Carson, Jason Thompson's family home was a few blocks away from the very location Deanna's body was found.

Prior to Carson's testimony, Defense witness Sherry Faulkner testified that she had seen a girl with a black top walking past her house on Hickory Ridge. This was a few days before she heard of Deanna's body being found on the news. Faulkner testified that a white male in a red truck approached the girl in the black top and spoke with her. Also, State Trooper Sgt. McCord

testified earlier in the trial that Deanna was found nude from the waist down with a black top. In addition, the state medical witness previously testified that the cause of death was strangulation.

Chris Chiles moved the court to strike Carson's testimony from the record stating that it was irrelevant. Over Defense counsel's objection, Judge Cummings struck Carson's testimony as being totally irrelevant to this case and ordered the jury to disregard the testimony in its entirety.

The similarities are relevant and should not have been stricken from the record. For example, Deanna was found strangled while nude from the waist down. Carson was choked during sex while nude from the waist down. Deanna was found in the weeds on Hickory Ridge. Carson engaged in sex in the woods on Hickory Ridge. Deanna was a drug addict who prostituted herself. Carson was a drug addict who had sex with a man only because he supported her addiction. A girl with a black top was talking to a male in a red truck on Hickory Ridge just days before the body was found with a black top. Carson was choked during sex in a red truck by a white male on Hickory Ridge.

E. The Trial Court erred in denying Defendant's Motion to Change Venue/Venire.

According to the West Virginia Supreme Court of Appeals in 1994: "A present hostile sentiment against an accused, extending throughout the entire county in which he is brought to trial, is good cause for removing the case to another county." Point 2, Syllabus, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994). Justin Black's first trial resulted in a mistrial due to State Trooper Kim Pack's mention of Justin Black's willingness to take a polygraph in her testimony before the jury. Kim Pack's interrogation of Justin Black led to his recorded admissions of being in the car with Deanna Crawford and Brian Dement the night she was killed.

The subsequent media coverage in Cabell County potentially tainted any future jury pool in the county. For example, one internet article from the [herald-dispatch.com](http://herald-dispatch.com) on February 20, 2008, cited in the defendant's motion to change venue, stated: "Black's attorneys requested the

mistrial, after West Virginia State Police Cpl. Kim Pack made mention of the defendant's willingness to take a polygraph test in January 2007... Cummings had excluded results of Black's polygraph test at an earlier hearing." Two more internet articles from wowktv.com and wboy.com stated the following: "Cabell County Prosecuting Attorney Chris Chiles said a witness testifying for the prosecution mentioned a polygraph examination. Polygraph's are not admissible in West Virginia courts."

These articles were cited as exhibits in Defendant's motion to change venue. Defense counsel argued that they could not go into the community and interview people to show proof of the existing present hostile sentiment throughout the county toward Mr. Black because doing so would further spread the news of the polygraph issue. In addition, the next trial date was merely 8 weeks away from the dates these articles were published and counsel for the Defendant needed to spend time preparing for the next trial instead of polling the community sentiment.

"One of the inquiries on a motion for a change of venue should not be whether the community remembered or heard the facts of the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt or innocence of the defendant." Point 3, Syllabus, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

F. The Prosecuting Attorney failed to disclose exculpatory evidence to the Defense prior to trial.

On the third day of trial, Chris Chiles called Alicia Wiblen to the witness stand. On redirect, Mr. Chiles asked the following which was recorded on page 578 of the trial transcript, "Do you remember telling Sergeant Cummings back in February...Did you tell us that?" Ms. Wiblen then stated, "Yes. I also said that - that you asked me a question about me being at Punkin's house

and the guy was crying in his beer about killing Deanna.” Mr. Chiles then responded by saying, “Right.”

Defense counsel was never notified by Mr. Chiles of any individual named Punkin. Furthermore, Mr. Chiles never notified the Defense that a guy at Punkin’s house was crying in his beer about killing Deanna. Ms. Wiblen’s testimony on redirect was the first time the Defense had ever heard of such information which left no time for a follow up investigation due to it being the third day of trial. Mr. Chiles should have disclosed such information to the Defense at a reasonable time in advance of trial. As a result, Justin Black’s rights were violated under *Youngblood v. State of West Virginia*, 2006 WL 1666862, \*1 (U.S.W.Va.), *Kyles v. Whitley*, 115 S. Ct. 1555 (1995), *United States v. Bagley*, 473 U.S. 667 (1985), *United States v. Agurs*, 427 U.S. 97 (1976) and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

As this Honorable Court is well aware, pursuant to *Youngblood v. State of West Virginia*, *Kyles v. Whitley*, *United States v. Bagley*, *United States v. Agurs*, and *Brady v. Maryland*, the State of West Virginia must meet its duty to SEARCH out and LEARN of any and all exculpatory evidence known to it or others acting on the State’s behalf, and to provide to defendant at a reasonable time in advance of trial, any and all exculpatory and impeachment materials favorable to the accused which negate or tend to negate guilt for the offenses alleged or which may mitigate punishment.

G. The Trial Court erred, in violation of WV Rule of Criminal Procedure 12.1(b), in denying the Defense’s motion to exclude every state witness upon whom the state intended to rely to establish the defendant’s presence at the scene of the alleged offense and any other witnesses relied on by the State of West Virginia to rebut testimony of any of the defendant’s alibi witnesses.

“Once the defendant notifies the government of the intention to use the defense of alibi, the government is required to inform the defendant of the specific time, date, and place of the

commission of the alleged offense...The government in turn furnishes the defendant with the names and addresses of its witnesses upon which it relies to prove the commission of the offense by the defendant.” Cleckley on West Virginia Criminal Procedure, I-737.

In this case, the Defense notified the State of West Virginia of its intent to use an alibi defense including a list of alibi witnesses. The State failed to comply with West Virginia Rule of Criminal Procedure 12.1 in that the State failed to inform the Defendant, Justin Black, of the specific time and date of the commission of the alleged offense prior to trial. At the hearing of this motion held on the 12th day of February, 2008, the State still failed to provide the specific time and date of the commission of the alleged offense to the Defense.

“If either party fails to comply with this rule [12.1], the court has the power to exclude the testimony of any witness relied upon by either side.” Cleckley on West Virginia Criminal Procedure, I-737. Brian Dement was the only witness upon which the State relied to establish Justin Black’s presence at the scene of the alleged offense.

Justin Black’s alibi was that he never left the party in which certain events, detailed by the State at trial, occurred. Events such as Defense witness Tessa Wilson having a confrontation with state witness Ashley Newton according to Wilson, Newton, and State witness Jessica Noel who all testified at trial. Justin testified that he engaged in sex with his girlfriend, Defense witness Tara Gillespie, at that party and slept all night with her in the same bed while never leaving the party. Justin’s own statement to the state troopers cited July 28, 2002 as the party date in which he allegedly left the party with the Barnetts, Dement, and the girl. Evidence at trial clearly showed that Deanna Crawford was still alive in the early morning hours of August 4, 2002. The indictment simply stated “between August 4 and August 8, 2002”.

Defense alibi witness, Ben Hatfield, testified that he was in attendance at the party in question. Hatfield testified that Justin Black never left that party in which Tessa Wilson got into a confrontation with Ashley Newton. Tara Gillespie testified that she did not recall Justin Black ever leaving that particular party and that she engaged in sex with Justin that night which was her July 29 birthday party. Yet Mr. Chiles sought to prove that this very party in which Tessa and Ashley had a dispute was the very party that Dement, Justin, the Barnetts, and Deanna left to go to the farm where Deanna was found dead. It was not until Mr. Chiles' opening argument that he revealed he sought to prove that this party in question occurred on August 5, 2002.

H. The Trial Court erred in permitting the State to make reference, in its closing argument, to inadmissible out of court statements by State witness Brian Dement in violation of the Court's previous rulings on August 21, 2007.

Brian Dement was audio recorded in his own home, without his knowledge, by his uncle, Greg Bailey, at the request of law enforcement. Judge Cummings ruled during Brian Dement's suppression hearing on 8/21/07: "I will suppress any statements made by—without the consent of the defendant in his residence or place where he was riding by an undercover or confidential person without his knowledge. In other words, Mullens situation."

Judge Cummings issued an additional ruling during codefendant Philip Barnett's hearing later that same day which he applied to all 4 codefendants. On page 6 of that transcript, the Court stated: "Well, one is a motion to exclude statements by codefendants. What basis do you have for that?" Barnett's attorney, Glen Conway, responded: "Judge, I believe if the statements are admitted without the testimony of the codefendant, without them being available--". The Court responded: "Are you talking about without them testifying?" Conway responded: "That's correct. If they testify, I don't believe they're admissible." The Court said, "Mr. Chiles, do you

plan on doing that?" Chiles said no. Then the Court finally stated the following, "I think that is an absolute Crawford issue and that will be granted and will be granted in all cases."

In other words, no out of court codefendant statement would be admitted against any other codefendant because of Crawford. In addition, any out of court statement made by a codefendant would also be inadmissible in the trial of each of his codefendants even if that particular codefendant, whose out of court statement was at issue during the trial of his codefendant, actually testified at one of his codefendant's trials.

In violation of these rulings, Chris Chiles, on page 865-866 of the transcript, stated the following during closing argument: "But the other thing to keep in mind is the reason why they came to Brian Dement was because Brian Dement had already been telling his uncle, Greg Bailey, about his involvement in that murder." Defense counsel objected to which the State replied, "It's in the statement. It's in the statement played for the jury... The same statement that they want you to rely on to show why Brian Dement's lying and not to be believed, in that statement to Mr. Cook, he said... He said that's how he got caught, because he had already said those things to Greg Bailey and Greg Bailey went to the police. Again, there would be no reason for them to feed this information, folks."

Defense counsel objected on the basis that this reference to Greg Bailey was redacted. In fact, the Dement statements that Mr. Chiles referenced were never made on either of the Defense's audios. The Defense was permitted by the Court to play two audios during its cross examination of Dement for the purpose of impeaching his testimony given on direct examination. One audio was a recorded conversation between private investigator Greg Cook and Brian Dement, without his knowledge, at the Western Regional Jail shortly after Dement pled guilty before Judge Cummings. Cook was working for codefendant Nathan Barnett. The

second audio was a recorded conversation of private investigator Danny Lane and Jay Love interviewing Brian Dement, with his knowledge of the conversation being recorded, at the Western Regional Jail shortly before Justin Black's April trial.

These audios were not permitted to go to the jury during jury deliberation. The Greg Cook recording did not contain any of the quoted statements referenced by Mr. Chiles in his closing. One portion was on page 5 of the audio transcript. Dement said, "Yes. Because my Uncle Greg wore a wire in on me, okay...And tried to get me to confess to all of this stuff." Another portion was on page 7 of that transcript. Dement said, "...But the reason I know all of that stuff is, like I said, my Uncle Greg came in and told me the state police came and questioned them. Told them what happened..."

In the Danny Lane audio, at 2:26 of the audio Danny Lane asked, "How did you come up with those three guys as opposed to somebody else that you might know?" From 2:31 to 2:48 of the audio, Dement responded, "I particularly didn't. My uncle Greg asked me who my friends was in the very beginning. And I told him who they were in Salt Rock, o.k. And then when I went down there... to the State barracks..." Then the section of the tape from 2:55 to 3:43 of the audio was redacted when played for the jury. That is where Dement said the following: "...Greg wore a wire on me and I didn't know it. And he asked me questions and I guess I, I don't know. It's just. I personally didn't give him names. I reckon they did. You see what I'm saying. Cause I really don't remember a lot of what happened..."

Dement never made the statements, that Chris Chiles referenced during his closing, in the Greg Cook audio or the Danny Lane audio. Even the redacted portion of the Danny Lane audio did not contain those statements Chris Chiles referenced. That section of Mr. Chiles' closing argument was a misrepresentation to the jury. Neither audio revealed that Brian Dement had

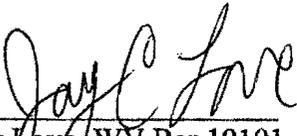
already been telling his uncle, Greg Bailey, about his involvement in that murder. Neither audio revealed Dement saying that he got caught because he had already said those things to Greg Bailey and Greg Bailey went to the police.

The Defense did not open the door to the statements quoted by Mr. Chiles in his closing argument. Those statements were not in either of the Defense's audios. Mr. Chiles' representation that they were was completely wrong. Also, the Defense did not use the audio conversation between Dement and Bailey to impeach Dement during cross examination or at any time during the trial. The Court eventually overruled the objection anyway. Mr. Chiles clearly stated on 8/21/07 that he did not plan on doing this.

## PRAYER FOR RELIEF

Wherefore, the Petitioner prays for the following relief from this Honorable Court:

1. A hearing.
2. That the Court reverse Petitioner's conviction for the charges in this petition;
3. That the Court expunge the Petitioner's criminal record to show no conviction and no arrest for the charges in this petition;
4. That the Court release the Appellant from his confinement, or in the alternative, set a bond;
5. That the Court grant Defendant a new trial.
6. That the Court grant any further relief that it deems necessary.



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