

No. _____

In The
Supreme Court of the United States

TERRY LEE WEST,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

**On Petition For A Writ Of Certiorari
To The Minnesota Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Were Appellant's *Miranda* rights violated when he was questioned while in custody, without being given his *Miranda* rights? Further, Appellant was questioned after having counsel appointed, without his counsel present. The trial court initially suppressed one of the statements but subsequently changed its own ruling and allowed all but the most flagrant violation/evidence to be used by the state.
- II. Were Appellant's Fourth Amendment rights violated when the trial court upheld the faulty warrant?
- III. Did the trial court err by allowing the prior testimony of Appellant into evidence at the second trial?
- IV. Did the trial court err by allowing exhibits/recording taken by the informant into evidence without testimony from the informant?
- V. Did the trial court err in finding Appellant guilty based upon inadmissible evidence?
- VI. Did the trial court err when finding that the firearms enhancement of MSA § 609.11 applied to Appellant?
- VII. Did the Trial Court Abuse its Discretion and Prejudice Appellant's Case by Denying the Defense the Ability to Have the Expert Witness Testify?

PARTIES TO THE PROCEEDINGS

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENTS	3
I. THE APPELLANT'S <i>MIRANDA</i> RIGHTS WERE VIOLATED WHEN HE WAS QUES- TIONED IN CUSTODY AND WITHOUT THE ASSISTANCE OF COUNSEL	3
A. Introduction	3
B. Mr. West's Right Against Self-Incrimi- nation Was Violated	4
C. No Waiver Of <i>Miranda</i> Rights Oc- curred	6
II. APPELLANT'S RIGHTS UNDER THE FOURTH AMENDMENT WERE VIOLATED WHEN THE DISTRICT COURT UPHELD THE FAULTY WARRANT	9
A. Introduction	9

TABLE OF CONTENTS – Continued

	Page
B. The Information Contained In The Application For The Warrant Was Stale By The Time The Warrant Was Executed	9
C. Probable Cause Does Not Exist To Establish An “Ongoing Enterprise”	10
III. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO USE PRIOR COMPELLED TESTIMONY OF APPELLANT ...	13
A. Introduction	13
B. Appellant’s Testimony Was The Result Of Misconduct By The State And Should Have Been Suppressed	16
IV. THE TRIAL COURT ERRED BY ALLOWING EXHIBITS/RECORDINGS TAKEN BY THE INFORMANT INTO EVIDENCE WITHOUT TESTIMONY FROM THE INFORMANT	21
A. Introduction	21
B. The Video Should Not Have Been Allowed Into Evidence	21
V. THE DISTRICT COURT ERRED BY FINDING APPELLANT GUILTY BY RELYING ON INADMISSIBLE EVIDENCE	22
A. Introduction	22

TABLE OF CONTENTS – Continued

	Page
VI. THE TRIAL COURT ERRED BY FINDING THAT THE FIREARMS ENHANCEMENT OF MSA § 609.11 APPLIED TO APPELLANT	22
A. Introduction.....	22
B. There Was No Marijuana At Appellant's Residence And The Firearms Enhancement Should Not Be Applied To Appellant	24
VII. THE TRIAL COURT ABUSED ITS DISCRETION AND PREJUDICE APPELLANT'S CASE BY DENYING THE DEFENSE THE ABILITY TO HAVE THE EXPERT WITNESS TO TESTIFY	26
A. Introduction.....	26
B. Background.....	28
C. Standard of Review	31
D. The Trial Court Abused Its Discretion When It Denied Appellant's Reasonable Request For A Continuance Or Recess...	31
E. Appellant Was Prejudiced By The Trial Court's Denial Of His Requested Continuance	36
CONCLUSION.....	37

TABLE OF CONTENTS – Continued

	Page
APPENDIX	
Minnesota Court of Appeals, Unpublished Opinion, November 6, 2017.....	App. 1
Polk County District Court, Order and Memorandum, January 2, 2015.....	App. 16
Minnesota Supreme Court, Order Denying Petition for Review	App. 34

TABLE OF AUTHORITIES

	Page
CASES	
<i>Berkemer v. McCarty</i> , 468 U.S. 420 (1984)	4
<i>Commonwealth v. Lahti</i> , 389 Mass. 829, 501 N.E.2d 511 (Mass. 1986)	19, 20, 21
<i>Estelle v. Smith</i> , 451 U.S. 454 (1981)	4
<i>Fikes v. Alabama</i> , 352 U.S. 191 (1957)	6, 7
<i>Haynes v. Washington</i> , 373 U.S. 503 (1963)	4
<i>Lynnum v. Illinois</i> , 372 U.S. 528 (1963)	4, 8
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	<i>passim</i>
<i>Missouri v. Seibert</i> , 542 U.S. 600 (2004)	8
<i>Ohio v. Robinette</i> , 519 U.S. 33 (1996)	8
<i>Roberts v. United States</i> , 445 U.S. 552 (1980)	5
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973)	4
<i>Spano v. New York</i> , 360 U.S. 315 (1959)	8
<i>State v. Barnes</i> , 713 N.W.2d 325 (Minn. 2006)	31
<i>State v. Beecroft</i> , 813 N.W.2d 814 (Minn. 2012)	32
<i>State v. Beveridge</i> , 277 N.W.2d 198 (Minn. 1979)	31, 32
<i>State v. Lloyd</i> , 345 N.W. 240 (Minn. 1984)	31, 33
<i>State v. Penkaty</i> , 708 N.W.2d 185 (Minn. 2006)	32
<i>State v. Sanders</i> , 598 N.W.2d 650 (Minn. 1999)	31, 33
<i>State v. Worthy</i> , 583 N.W.2d 270 (Minn. 1998)	31
<i>U.S. v. McLaughlin</i> 777 F.2d 388 (8th Cir. 1985)	5

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Bagley</i> , 473 U.S. 667, 105 S.Ct. 3375 (1985)	32
<i>United States v. Leonardi</i> , 623 F.2d 746 (2d Cir. 1980)	18
<i>United States v. Scios</i> , 590 F.2d 956 (D.C. Cir. 1978)	17, 19
<i>Washington v. Texas</i> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)	32

CONSTITUTIONAL PROVISIONS

Minn. Const. Art. I, § 7	4, 32, 36
Minn. Const. Art. I, § 10	9
U.S. Const. amend. IV	9
U.S. Const. amend. V	1, 4, 36
U.S. Const. amend. VI	2, 36
U.S. Const. amend. XIV	32, 36

STATUTES

28 U.S.C. § 1257(A)	1
Minn. Stat. § 609.11	<i>passim</i>
Minn. Stat. § 609.11, subd. 5	14
Minn. Stat. § 626.15	10

OTHER AUTHORITIES

W. R. LaFave, Search and Seizure § 11.4 (1978)	20
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PETITION FOR WRIT OF CERTIORARI

Petitioner Terry West respectfully requests that a writ of certiorari issue to review the opinion and judgment of the Minnesota Court of Appeals, for which review was denied by the Minnesota Supreme Court.



OPINIONS BELOW

The Minnesota Court of Appeals order and Minnesota Supreme Court orders.



STATEMENT OF JURISDICTION

The judgment of the Minnesota Supreme Court was entered on January 16, 2018. That Court denied the petition for review of the November 7, 2017 order of the Minnesota Court of Appeals (A16-1959). Petitioner's This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(A). This petition is timely under Rule 13.1.



CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

“ . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . . ”

The Sixth Amendment provides, in relevant part:

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .”

STATEMENT OF THE CASE

On June 1, 2011, Appellant Terry Lee West was arrested and incarcerated for a total of 36 months. He was initially denied an omnibus hearing and the right to challenge any of the evidence against him. This was appealed while Appellant was in prison and the Minnesota Court of Appeals reversed the conviction due to the misrepresentation made to the district court by the prosecution. An ethical complaint was filed against the prosecution and the state determined that Appellant could not prove the prosecutor intentionally lied so no punishment was warranted.

Appellant was found guilty, sent to prison and was subsequently charged with perjury and was arrested on the day of his release. The state then tried Appellant for perjury prior to his second trial on this matter.

Appellant was then tried using all but one un-mirandized statement. He was denied the ability to present testimony of an expert witness on his behalf. The district court allowed all but one statement into evidence. The district court further allowed testimony from Appellant's sentencing hearing to be used by

the state in its case in chief. Appellant was convicted and appeals.

The confidential informant, pursuant to the state's disclosures, tipped off Appellant eleven days prior to the raid on the property. The marijuana alleged to be at the property was found in a shed. The opening of the room where the marijuana was alleged to be found was the only room opened during the raid whose opening was not filmed. The state then allegedly found giant marijuana plants which according to the state would have been harvested the previous fall and left in an unsealed room, unprocessed until the following June 1 of 2011.

◆

ARGUMENTS

I. THE APPELLANT'S *MIRANDA* RIGHTS WERE VIOLATED WHEN HE WAS QUESTIONED IN CUSTODY AND WITHOUT THE ASSISTANCE OF COUNSEL.

A. Introduction.

Appellant was questioned by Justin Swang, an investigator. Swang decided to interview Appellant while he was in custody at the Polk County Jail. On June 13, 2011 Swang had Appellant brought to the interview room at the jail and served a document on Appellant. Swang then decides to come back on June 30, 2011 under the guise of serving additional documents to surreptitiously record his interview with Appellant. This

is done while Swang knows that Appellant is represented by an attorney.

B. Mr. West's Right Against Self-Incrimination Was Violated.

Statements made by a defendant to law enforcement officers are only admissible if the State can prove that the statements were voluntarily made. *Haynes v. Washington*, 373 U.S. 503, 513 (1963). The voluntariness of a statement is determined by looking at the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). The totality of the circumstances test necessarily requires analyzing both "the characteristics of the accused and the details of the interrogation." *Id.* The purpose of this analysis is to determine "whether the defendant's will was overborne at the time he confessed." *Lynum v. Illinois*, 372 U.S. 528, 534 (1963).

Appellant is guaranteed the right against self-incrimination. See Minn. Const. Art. I, § 7; U.S. Const. amend. V. "The purpose of [the Miranda] admonitions is to combat what the Court saw as 'inherently compelling pressures' at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of foregoing it." *Estelle v. Smith*, 451 U.S. 454 (1981), quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). See also *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

A "conversation" becomes interrogation when it involves "not just general questioning but questioning by

a government agent who had “substantial reason to believe that the requested disclosures [were] likely to be incriminating.” *Roberts v. United States*, 445 U.S. 552, 559 (1980). Swang purposely recorded the second interview from the start, because he hoped the disclosures would be incriminating.¹

Appellant was actually in the jail, the definition of *in custody*, when he was directed to a small room where an investigator was sitting, waiting with a hidden recorder. This should be considered a custodial interrogation, deserving of the protections afforded by a *Miranda* warning:

Only if the government agent should reasonably be aware that the information sought, while merely for basic identification purposes in the usual case, is directly relevant to the substantive offense charged, will the questioning be subject to scrutiny. *U.S. v. McLaughlin* 777 F.2d 388, 391-392 (8th Cir. 1985) (citations omitted).

A *Miranda* warning should have been given to Appellant, though none ever was, especially when he was being questioned at the jail. Investigator Swang had reasonable awareness the information he was seeking was incriminating and relevant to the seizure of Appellant. The interview room statement was initiated by Swang for the purpose of obtaining incriminating information. There was nothing of a noncustodial or

¹ Transcript August 11, 2014, p. 47, 24-25 and p. 48, 1-10 “And that was with the intent to record the conversation, is that correct? A. Correct.”

voluntary nature at all about any of the interrogations that occurred on June 13, 2011 and June 30, 2011. At the time of his interrogations a reasonable person, who has not been advised of their rights, would find it extremely hard to not comply with an officer's request to answer questions.

The interrogations took place in a small room with the door closed with an officer of the law while in jail. Under a proper *Miranda* analysis, the number of uniformed officers, the type of questions, actions, and implications by the officers specific to Appellant, indicate the lack of a *Miranda* warning should bar all evidence gleaned in both jail statements which have become fruit of the illegal police conduct in the present case.

C. No Waiver Of *Miranda* Rights Occurred.

The general rule is that the state will be deemed to have met its burden of proof on the issue of waiver if it shows that a *Miranda* warning has been given and that the individual stated that he understood those rights and then gave a statement. Consent is voluntary if a reasonable person would have felt free to decline the officer[s] requests or otherwise terminate the encounter. The coerciveness of the conduct necessary to render a statement or consent involuntary varies depending on the personal characteristics of the defendant. *Fikes v. Alabama*, 352 U.S. 191, 193 (1957). Thus, conduct which may not be considered sufficiently coercive to overbear the will of one person may still render statements of another person involuntary. *Id.* at

197-198 (stating “what would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal.”) Several of these factors are found to some degree in the present case and kept Appellant from making statements or giving consent under his own free will. He was **never** given a *Miranda* warning and was questioned in jail and *in the absence of his attorney* yet the district court held the statements were admissible.²

The will of Mr. West was easily overcome because of his physical condition and also because he had no prior experience with the justice system. Moreover, Mr. West was not expressly told he did not have to answer questions. Mr. West was exhausted and he had been in Jail for up to a month while being interrogated.³ When asked by prosecution the officer states he had concerns about Appellant’s state of mind due to him stating he couldn’t sleep. If police pressure or fatigue is found to cause a defendant’s will to be overborne to the point of obtaining an involuntary statement, the court will find the statement inadmissible. *Spano v. New York*, 360 U.S. 315, 323 (1959).

² January 2, 2015 order of the Hon. Tamara Yon, p. 10.

³ Inv. Swang testified he had concerns for Mr. West’s state of mind while he was in jail and used this to take advantage on June 30, 2011. TJS p. 20, l. 8-12.

Q. And do you have any concerns about Mr. West’s state of mind at this point in time?

A. A little bit because he was telling me he couldn’t sleep at night and he was worried what was going to happen with his property and stuff.

Mr. West was not only exhausted, but he had no prior experience with law enforcement. In fact he had a healthy respect for law enforcement, and was unaware of the manipulative tactics that can be used by law enforcement in the interrogation process. This fact is taken seriously in legal precedent as people with no experience in the justice system are more vulnerable than those who have been questioned before. See *Lynumn v. State of Illinois*, 372 U.S. 528 (1963). Mr. West's respect, submission, and fear of law enforcement's authority are very evident from the way he conducted himself throughout his contacts with law enforcement. As stated by the United States Supreme Court, where the court suppressed a statement, finding that a key fact in determining voluntariness is "whether the suspect was aware that he was being investigated for a serious crime. See *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). Mr. West was keenly aware that he was under investigation for a serious crime. This was made clear to him as soon as he was taken into custody.

Statements made **after** a *Miranda* warning may be inadmissible due to a prior coercive interrogation. See *Missouri v. Seibert*, 542 U.S. 600 (2004). The goal of the suppression rule is to correct erroneous police conduct as well as to prevent the use of inherently untrustworthy statements and admissions that are produced by coercive interrogations.

II. APPELLANT'S RIGHTS UNDER THE FOURTH AMENDMENT WERE VIOLATED

**WHEN THE DISTRICT COURT UPHELD
THE FAULTY WARRANT.**

A. Introduction.

The Appellant challenged the search warrant based upon the contents within the “four corners” of the warrant for his residence. Said warrant was issued and executed on the same date, June 1, 2011. The entirety of information regarding the Appellant and his residence comes from events of May 20, 2011, nothing before or after. Because the warrant was stale, all evidence collected under the warrant should be suppressed and the conviction reversed.

B. The Information Contained In The Application For The Warrant Was Stale By The Time The Warrant Was Executed.

The delay of eleven days (excluding the date of issuance) between the establishment of probable cause – the marijuana purchase – and the issuance of the search warrant and its execution violated Mr. West’s state and federal protections against unreasonable search and seizure under Art. I, § 10 of the Minnesota Constitution and the Fourth Amendment to the U.S. Constitution. Whether a delay in executing a search warrant is unconstitutional depends on whether the probable cause recited in the affidavit still exists at the time of the execution of the warrant.

In the present case, by the time the warrant was executed, the controlled-buy occurred eleven days before the warrant was issued. Consequently, by the time

officers finally executed the warrant, probable cause had dissipated. The facts in the present case do not serve to extend the life of probable cause beyond a few days after the controlled purchase. Under Minn. Stat. § 626.15 a search warrant must be executed and returned to the court within ten days of issuance. After the expiration of this time, the warrant is void unless previously executed. A delay in executing a warrant, although within the ten-day statutory period, is nonetheless unconstitutional when probable cause dissipates by the time the warrant is executed. This statute provides additional guidance on the staleness issue. Any probable cause for the issuance of the search warrant for Defendant's residence had gone cold in the intervening eleven days.

C. Probable Cause Does Not Exist To Establish An "Ongoing Enterprise."

The district court upheld the warrant⁴ and found that the "evidence was NOT stale."⁵ However, a closer review of the evidence recited in the warrant affidavit puts this issue in serious question. The sale of marijuana is not akin to, say the possession of stolen property, in which the holder benefits from the property. The best interests of the seller of marijuana is in the quickest possible sales of the marijuana. A person possessing with intent to sell an unidentified amount of

⁴ Order of Hon. Tamara Yon, January 2, 2015.

⁵ *Id.* at p. 9.

marijuana on May 20 would not likely be possessing the same marijuana on June 1.

If Appellant was involved in an ongoing sale of marijuana, that fact had certainly evaded the police. There is no evidence in the affidavit to suggest that the police knew anything about marijuana sales involving the Appellant prior or subsequent to May 20, 2011. He was apparently not under any investigation and the police had not received any tipster information from any source regarding the Appellant. The affidavit indicates that Appellant's residence is in a wooded area, making it "difficult for officers to conduct any type of surveillance". Ergo, no corroborating surveillance was ever done to establish any type of regular traffic to or from the residence. The police did no corroboration that would suggest anything beyond the single episode of sale of a relatively small amount of marijuana on May 20, 2011.

Investigator Rasch obtained and reviewed records from Wild Rice Electric Company for Mr. West's residence. The records show "substantially higher usage during January through March 2010, than January through March 2011." Based upon this information, Investigator Rasch "believes that Terry Lee West was growing marijuana inside of his residence and that Terry Lee West may have been diverting electricity in order to do so". This, of course, is an absurd conclusion, unless Investigator Rasch believes that Appellant had been growing marijuana more than a year earlier and had ceased to grow marijuana at the present time. This

information certainly does not contribute to probable cause.

This leaves only the statements of the "cooperating criminal defendant", Adam Sterry. Mr. Sterry has apparently been selling marijuana for a long time. His source is a person in Grand Forks. However, Mr. Sterry, allegedly told the police, after his arrest, that he recently had been getting his marijuana from the Appellant once a month. No time frame is given as to how long this relationship was in place. The Court cannot, therefore, presume its length to be significant. Mr. Sterry's obvious long-term connections to the criminal underworld render his statements dubious, at best. This type of informant, caught in crime and with every motive to get someone else in trouble and exaggerate the other's culpability, cannot have a presumption of credibility and is of doubtful reliability. Probable cause did not exist to search Appellant's residence at the time of the issuance and execution of the search warrant in this case. All evidence toward this issue had become stale. The search warrant affidavit also does not contain sufficient evidence to reliably establish that Appellant was engaged in a long-term, ongoing criminal enterprise involving the regular sale of marijuana. All subsequent searches, search warrants, and discovered evidence and statements were the derivative result of the fruits of the unlawful search of Appellant's residence pursuant to the warrant.

III. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO USE PRIOR COMPELLED TESTIMONY OF APPELLANT.

A. Introduction.

Terry West was tried by the Hon. Tamara Yon after the Court refused to allow any challenge to the state's evidence.⁶ The state convinced the Court that Mr. West had "withdrawn his motions."⁷ The District Court then allowed all evidence presented by the state to come in including the non-mirandized confession taken at the time of Mr. West's arrest.⁸ This was done over the clear objections of the defense.⁹ Judge Yon then convicted Mr. West who did not testify at his trial.

At the subsequent § 609.11 hearing, essentially a hearing to determine if West would get the presumptive probation sentence provided for by the drug charge or the mandatory 36 months required by § 609.11, West felt compelled to testify in an attempt to avoid further incarceration.¹⁰ Mr. West was faced

⁶ "On September 27, 2011, the district court denied appellant's request to schedule an omnibus hearing, finding 'that the defendant and his prior attorneys have waived the defendant's right to an omnibus hearing in this case by failing to file timely and proper omnibus motions or by withdrawing any motions that had been filed.'" *State v. Terry Lee West*, p. 1, copy attached.

⁷ "At the September 26, 2011 hearing, the prosecution represented to the district court that on July 11, 2011, appellant 'specifically stated he was withdrawing all of [his omnibus] motions.'" *Id.* p. 2-3.

⁸ Transcript of May 1, 2012 hearing, p. 28, l. 8-25.

⁹ Transcript of May 1, 2012 p. 26, l. 21-25, p. 27, l. 1-25, p. 28, l. 1-7.

¹⁰ West was arrested June 1, 2011 and testified on June 2, 2012. He was held in custody from the date of his arrest until his brief release from prison and was then arrested on the perjury charge.

with the option of trying to convince Judge Yon that he did not possess firearms for the purpose of drug dealing and therefore did not meet the criteria under § 609.11, subd. 5, or not testifying and having the Court rule against him.

At the subsequent § 609.11 hearing, essentially a hearing to determine if West would get the presumptive probation sentence provided for by the drug charge or the mandatory 36 months required by § 609.11, West felt compelled to testify in an attempt to avoid further incarceration.¹¹ Mr. West was faced with the option of trying to convince Judge Yon that he did not possess firearms for the purpose of drug dealing and therefore did not meet the criteria under § 609.11, subd. 5, or not testifying and having the Court rule against him.

The confession¹² was considered by Judge Yon in her finding of guilt and West knew it would be considered by the Court in determining whether West was released or sentenced to 36 months. Given the fact that the confession, a weighty piece of evidence, had been allowed into evidence over the defense objections, West felt the only option to try to avoid further jail time was to testify. The testimony was meant to convince the

¹¹ West was arrested June 1, 2011 and testified on June 2, 2012. He was held in custody from the date of his arrest until his brief release from prison and was then arrested on the perjury charge.

¹² The confession was later suppressed by Judge Yon. In the suppressed confession, West admits to providing marijuana to Adam Sterry.

Court that the § 609.11 sanctions should not be applied to him and why they should not apply.

Despite his testimony, attempting to show the Court that he was a firearm collector,¹³ not a gun-toting drug dealer,¹⁴ the Court sentenced him to 36 months. In his testimony, West also tried to explain that the firearms found loaded by the entryway were not normally kept loaded or by the door but had been loaded by Adam Sterry a few days prior. Sterry had come to the West residence and asked West to show him how to use the firearms. West testified that he normally did not leave any firearms loaded. He further testified that he normally kept his firearms in a locked separate building and they were in the house to be cleaned after allowing Sterry to shoot them.

West also attempted to explain in his testimony that he was not operating a retail drug house but had only ever provided any marijuana to Sterry. West specifically testified that there were no firearms in his residence at the time of the marijuana transaction with Sterry and the firearms were in the residence because Sterry asked to shoot them. He further testified that he would not have firearms in proximity to drugs.

It is clear from the testimony that West wanted to show he should not be sentenced to 36 months. All of this testimony was provided under fear of further

¹³ Transcript of June 6, 2012 hearing, p. 4, l. 20-25, p. 5, l. 1, p. 9, l. 12-22.

¹⁴ West had no prior criminal convictions, transcript of June 6, 2012 p. 8, l. 6-8.

incarceration. It was impossible for West to believe that, given the confession was in evidence and firearms were found in the residence, the Court would not sentence him to 36 months absent a showing by his testimony to mitigate the presence of the firearms at the residence.

B. Appellant's Testimony Was The Result Of Misconduct By The State And Should Have Been Suppressed.

When evidence, including testimony is given due to coercion or illegal means, it must be suppressed. In a District of Columbia Circuit case, the Court suppressed testimony obtained as a result of an illegal search. The Court found that the testimony it suppressed was based on an illegal search. As stated by the D.C. Circuit Court:

In the present case, it is plain that Massa's giving of testimony before the grand jury, and presumably at the trial is purely and simply a product of coercion. Massa's decision to testify is not a matter of choice, or free will, but made solely to avoid being jailed for contempt. His decision to testify in such circumstances can hardly be what Judge Burger had in mind in *Smith* and *Bowden* when he spoke of the "human personality whose attributes of will, perception, memory and Volition interact to determine what testimony he will give." 117 U.S.App.D.C. at 3, 324 F.2d at 881.

United States v. Scios, 590 F.2d 956, 961 (D.C. Cir. 1978).

Terry West's testimony is analogous to the situation in *Scios*, he did not testify at his trial, only later upon threat of the 36 months presented by the § 609.11 sanction did West feel compelled to testify. He knew that the Court, especially in light of the un-mirandized confession, would (and did) sentence him to additional incarceration. His only option was to try to explain the presence of the firearms or be sent off to prison. Testify or surely go to (stay) in jail. West spent an additional 12 months in the MCF Stillwater. As stated in *Scios*:

The case at bar stands in marked contrast to Ceccolini on these critical factors: (1) In Ceccolini, Hennessey's testimony "was an act of her own free will in no way coerced or even induced by official authority." In contrast, Massa initially refused to consult with the authorities, and agreed to confer and to testify only in response to pressure by the prosecutor, including the threat of a contempt citation.

Id.

Testimony which is the fruit of the poisonous tree must be suppressed. The testimony by West is a direct result of the illegal statement taken by law enforcement. It should be noted that West was only read his *Miranda* rights after he was released from prison and was arrested at the front door of the prison. The *Miranda* warning was for the new charge of perjury. West was never Mirandized for the case at hand.

The purpose of suppression is to deter the illegal conduct by law enforcement. As stated in the Second Circuit Court:

In order to discourage disregard of Fourth Amendment guarantees, the Supreme Court long ago promulgated the exclusionary rule, requiring the suppression at trial of evidence discovered as the direct or remote consequence of an unreasonable government search. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). In both theory and application, the prohibition encompasses all manner of evidence so derived, whether it be simple physical evidence or the testimony of witnesses whose identities and knowledge of the matters under investigation are revealed as a result of the illicit intrusion of law enforcement authorities. *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963); *United States v. Karathanos*, 531 F.2d 26, 32-35 (2d Cir.), cert. denied, 428 U.S. 910, 96 S.Ct. 3221, 49 L.Ed.2d 1217 (1976); *United States v. Tane*, 329 F.2d 848, 853 (2d Cir. 1964).

United States v. Leonardi, 623 F.2d 746, 751-752 (2d Cir. 1980).

If this conduct, the arrest, interrogation, trial and imprisonment of West, all without the benefit of *Miranda*, is allowed to continue, why would the police not continue this same tactic? If this type of conduct is not punished by use of the exclusionary rule, it will continue.

The search and illegal evidence taken in West is very analogous to the *Scios* case:

Massa's existence as a potential witness was entirely unknown to the authorities before they searched Scios's files . . . The search of Scios's files was to gain evidence, the FBI having come to the scene to arrest Scios for illegal wiretapping. . . . Excluding the fruit of that illegal search cannot be dismissed as of "negligible deterrent effect."

United States v. Scios, 590 F.2d 956, 961 (D.C. Cir. 1978).

The search and illegal interrogation of West was done for these same reasons. The testimony which came about as a direct result of the illegal search and subsequent illegal conviction must be suppressed.

The *Doughty* case also cited to *Commonwealth v. Lahti*, in that case the Court even suppressed the testimony of victims that were discovered by illegal conduct by law enforcement:

From *Wong Sun v. United States*, supra at 485-488, we learn that not only may physical materials obtained during or as a direct result of an unlawful invasion of a defendant's Fourth Amendment rights be barred from evidence, but evidence of visual and auditory observations made in such circumstances may be barred as well. The present case raises the question, not whether materials the government has acquired or observations its witnesses have made as a result of an unlawful

intrusion are admissible, but rather whether the testimony of a witness discovered through the involuntary statement of a defendant is admissible.

Commonwealth v. Lahti, 389 Mass. 829 at 833, 501 N.E.2d 511 (Mass. 1986).

In *Lahti*, police obtained a statement from the defendant which led them to find additional victims. The *Lahti* Court explained why there was an important need for deterrence:

In this case, therefore, legitimate concerns for deterrence compel the application of the exclusionary rule to the children's testimony. As the Court in *Ceccolini* noted, "Of course, the analysis might be different where the search was conducted by the police for the specific purpose of discovering potential witnesses." *Id.* at 276 n. 4. We are persuaded that the attenuation analysis not only might be different but must be different in a case such as this, where the issue is the admissibility of the expected testimony of witnesses whose identity the police purposefully discovered by taking an involuntary statement from the defendant. "[S]urely the exclusionary rule should not be withheld as to the very kind of evidence which motivated the [taking of the statement]." W. R. LaFare, *Search and Seizure* § 11.4, at 673 (1978). We hold that in this case the link between the defendant's involuntary statement and the children's expected testimony is so close that to permit the Commonwealth to use the testimony at a trial of the

defendant would defeat the exclusionary rule's purpose to protect constitutionally guaranteed rights and privileges. Therefore, we affirm the order suppressing the children's testimony.

Id. at 837.

The Defendant, Terry West, testified at the § 609.11 hearing to avoid the 36-month mandatory sentence provided for by the statute. Allowing the testimony from the hearing into evidence defeats the purpose of the exclusionary rule and also presumes the guilt of the Defendant. This presumption cannot be overcome and allows the state to use illegally obtained testimony to keep West from getting a fair trial.

IV. THE TRIAL COURT ERRED BY ALLOWING EXHIBITS/RECORDINGS TAKEN BY THE INFORMANT INTO EVIDENCE WITHOUT TESTIMONY FROM THE INFORMANT.

A. Introduction.

The video of the events of May 20, 2011 was taken by the confidential informant. The informant was not called as a witness to either allow confrontation by the Appellant or to establish the foundation of the video.

B. The Video Should Not Have Been Allowed Into Evidence.

The video was introduced for the truth of the matter and without foundation.

V. THE DISTRICT COURT ERRED BY FINDING APPELLANT GUILTY BY RELYING ON INADMISSIBLE EVIDENCE.

A. Introduction.

The trial court relied on evidence which should have been suppressed. This includes not only the statements taken at the jail in June of 2011 but also the Appellant's prior testimony.

VI. THE TRIAL COURT ERRED BY FINDING THAT THE FIREARMS ENHANCEMENT OF MSA § 609.11 APPLIED TO APPELLANT.

A. Introduction.

There was no marijuana found in the Appellant's residence on June 11, 2011. At the Perjury jury trial (Polk County File No. 60-CR-13-1098) Officer Norland testified that there was no marijuana found in the Appellant's residence. This was after the initial arrest, trial and imprisonment of Appellant. This is also after what should have been adequate trial preparation of its witnesses by the state for what was its second trial on the same set of facts. The Officer testified that:

"Q. You were trying to do a thorough search correct?

A. I was videotaping, so yes.

Q. Okay. All right. Where in that video was the marijuana found in the residence?

A. Say that again?

Q. Where in that video was the marijuana found in the residence?

A. Marijuana found in the residence?

Q. Was there marijuana found in the residence?

A. I don't believe so. Not on that video. I didn't see any marijuana on that video."

Further searching was done at the residence. A second video was taken by Officer Norland when the officers were unloading and inventorying the firearms. When asked if marijuana was found in the residence at that time Officer Norland replied:

A. "I did not see any marijuana on that footage.

Q. So you don't recall marijuana being found in the house?

A. Not - **I never saw any marijuana in the house when I was searching or videotaping."**

It should be noted that Officer Norland was the lead investigator for this matter. He testified at the perjury trial, that he never saw any marijuana in the house. Sergeant Norland's testimony is then disputed by one of his subordinates. Officer Nathan Rasch subsequently testified that he had found some marijuana in the house and that it was sitting out in plain view. Officer Rasch then testifies that some marijuana was

found in a box but he was not the person who found it or opened the box and he did not know who found it or who took the photographs used as exhibits.

B. There Was No Marijuana At Appellant's Residence And The Firearms Enhancement Should Not Be Applied To Appellant.

The inconsistent testimony about whether there was marijuana found in the house creates reasonable doubt. Sergeant Norlund went through and filmed the house first. He testified that he did not see any marijuana when filming or searching. He seemed surprised when asked about the marijuana found in the residence. After a break in the trial, Officer Rasch testified that he saw marijuana just sitting out in the open on a shard of pottery. This was *not* seen on the initial search or on the video. Officer Rasch further testified that he did not know how the marijuana found in the box came to be out of the box in the house. The marijuana claimed to have been found in the house somehow appeared after it was not shown on the initial (or subsequent) video. We just have to ponder as to who found the marijuana in the house and set it on the pottery shard or took it out of a box. It is inconsistent with the testimony of Sergeant Norland who, at the time of the perjury trial, was still unaware of the marijuana found in the residence back in 2011.

The state would have the court believe that the defendant was tipped off by the confidential informant

and eleven days later, still had quantities of marijuana laying around his house as well as 12 giant “Christmas tree” sized plants in his shed. These “small quantities of marijuana”¹⁵ around his house, which were not seen by Sergeant Norlund (even though they were in plain sight) at any point during his searching or filming, were all that the state claims was found in the residence.

There has been no showing by the state that there was a felony amount of marijuana found in the residence. Despite this, the district court found that the enhancement applied.¹⁶ Without a felony amount of marijuana, MSA § 609.11, subd. 9 should not have applied to Appellant. All the state has shown is there were firearms in the residence. Further, the state has not and cannot show there were any firearms in the residence on May 20, 2011. The state cannot establish that any of the firearms were handled or otherwise employed in the commission of a felony. Mere ownership is not enough to invoke MSA § 609.11’s “otherwise employ” language. There is reasonable doubt that any marijuana was found in the residence based upon the inconsistent testimony of the *state’s own witnesses*. Even if the Court were to find that marijuana was found at the residence, there is no showing that a felony amount was present. Because the state presented no evidence that Appellant used a firearm in

¹⁵ State’s June 27, 2016 submission, p. 19.

¹⁶ August 11, 2016 Order of the Hon. Kurt Marben p. 6, finding 7.

commission of a felony, the finding that Appellant did so must be reversed.

VII. THE TRIAL COURT ABUSED ITS DISCRETION AND PREJUDICE APPELLANT'S CASE BY DENYING THE DEFENSE THE ABILITY TO HAVE THE EXPERT WITNESS TO TESTIFY.

A. Introduction.

The trial court abused its discretion when it denied Appellant the opportunity to present its own expert witness testimony. Appellant advised the trial court that it had an expert witness to call at the trial. The dates for the trial were then moved around making it impossible for the Appellant to present the expert witness testimony. The Appellant made all reasonable efforts to have the expert witness testify. The trial court's denial of the opportunity to present continuance request was a prejudicial abuse of discretion. The defense attempted to have Ed Primeau testify at trial. Due to the conflicting and shifting trial dates provided, Mr. Primeau was unable to testify.¹⁷ Mr. Primeau is an expert on video and audio analysis and planned to provide testimony about the quality, reliability and veracity of the state's video and audio evidence.

The state relies heavily on their video and audio evidence in the presentation of its case. The state cites its "overwhelming" evidence, specifically the audio/

¹⁷ See letters to District Court dated, April 6, 2016 and April 14, 2016.

video, numerous times in its June 27, 2016 submission. “The video recording of the controlled buy . . . in it.”¹⁸ The state depends on this video:

“[T]he video clearly showed Appellant’s face, as well as Appellant reaching into a blue tote, grabbing what appeared to be marijuana, and placing the marijuana on some paperwork. TT at 96-100; Exs. 5 and 6-14 (still photographs from controlled buy video). In addition, there appeared to be a growing marijuana plant in Appellant’s residence. (Exs. 5 and 15) still photograph from controlled buy video.

State’s submission, page 2. The state uses the buy video throughout its case, “the video of the controlled buy from May 20, 2011, showed the defendant (clear as a bell) grabbing marijuana from a tote in his residence, as well as a growing marijuana plant. Exs. 5-15. *This is also sufficient to establish the defendant’s possession (including his knowledge) of the 12 large marijuana plants.*”;¹⁹ “the video of the controlled buy showed the defendant (clear as a bell) grabbing marijuana from a tote in his residence and placing it in front of Mr. Sterry, Exs. 5-14.”²⁰ The state also relied on other video, “[t]he officers then searched Appellant’s property and found numerous drug-related items. TT at 69-70, 100-103; Ex. 21 (video of execution of search warrant).”²¹ In addition, the state introduced and relies on the illegal

¹⁸ State’s June 27, 2016 submission, p. 2.

¹⁹ State’s June 27, 2016 submission, p. 10 (emphasis added).

²⁰ State’s June 27, 2016 submission, p. 13.

²¹ State’s June 27, 2016 submission, p. 3.

interviews of defendant taken while he was in custody at the jail. One of these was surreptitiously recorded by law enforcement. Both were taken without *Miranda* rights and without defendant's attorney present.

The defendant was not allowed to dispute any of the video/audio used by the state.

B. Background.

Appellant's case was set for trial on April 18, 2016 by the trial courts order of January 29, 2016. On April 5, 2016 at 6:46 pm., court administration sent an email with the Polk County jury term list. The jury term list put the Appellant's case at number six in order of trials. On April 6, 2016, Appellant's counsel sent a letter to the district court informing the court that Appellant had an expert witness, asking when the trial would start and advising the court that a previous trial on the same facts took three days for the state to present its case. The district court responded with an email from Carole Olson (April 6, 2016, 2:50 pm). This email stated, "In response to your letter to Judge Marben regarding when your case might be called for trial, I have been instructed to inform you that you should call the attorneys in the cases ahead of yours to see where they are at."²² Appellant's counsel followed the court's instructions and contacted the other attorneys. It was learned that there was one trial that would take a day and a second trial that would take slightly more than one day. Appellant then contacted the expert witness

²² 04/06/16 email from Carole Olson.

to be ready to testify on Friday, April 22, 2016. This allowed for the other trials and approximately 3 days for the state to present its case.

On April 14, 2016, the district court advised the Appellant via an email to counsel that he was now the “first up for trial on Monday, April 18th.”²³ Appellant’s counsel sent a letter to the district court on April 14, 2016 explaining what had happened and asking “that the matter be reset so that our expert witness will be able to testify or in the alternative that the trial be recessed at the end of the state’s case until the defense witness can testify.”²⁴ The district court responded by email that “[t]he case will proceed to trial on April 18 as previously ordered by the court.”²⁵

On the morning of trial (04/18/16), Appellant’s counsel requested that the matter be continued “a couple days”²⁶ and made a record of what had happened.²⁷ The district court advised Appellant that “it’s up to counsel to make sure that their witnesses are lined up and available.”²⁸ The district court then stated it would “consider a recess”²⁹ if this case would go into Thursday. The Respondent, after previously presenting its case to the district court, stated “Mr. Kenly and I tried

²³ 04/14/16 email from Jody Bergeron.

²⁴ 04/14/16 letter to Hon. Kurt Marben.

²⁵ 04/18/16 email from Hon. Kurt Marben.

²⁶ 04/18/16 Transcript, p. 2, 5-6.

²⁷ 04/18/16 Transcript, p. 2, 6-25, p. 3, 1-11.

²⁸ 04/18/16 Transcript, p. 3, 17-18.

²⁹ 04/18/16 Transcript, p. 3, 22-25.

this identical case once before. I am firmly confident this case would conclude on Wednesday.”³⁰ Appellant agreed that the case would take three days to try the matter and, having only one witness, stated to the district court “[t]he State will have its case done and if I don’t have a witness, I don’t know how I can drag it out long enough to get a recess from your Honor.”³¹

Appellant’s case went to trial before the district court long after Appellant had initially been convicted and served the entirety of his 36 month sentence. Appellant sought information from the district court regarding the trial date numerous times after having been prepared to proceed on April 18, 2016, consistent with the district court’s order. Thirteen days prior to the start of the trial, the Appellant was advised that the trial would not start on April 18, 2016 and was sixth in line for the jury term. The Appellant sought information pursuant to the court’s instructions and four days before the trial,³² upon being informed that the date was again moved, requested a continuance or a recess because the expert witness had been set to testify on April 22, 2016 in reliance on the information available. The Appellant explained to the court the efforts to have the expert witness there to give testimony yet the court refused to even have a one day recess.

³⁰ 04/18/16 Transcript, p. 4, 2-4. *See* p. 12, 16-25.

³¹ 04/18/16 Transcript, p. 4, 7-9.

³² 04/14/16 email from Jody Bergeron.

C. Standard Of Review.

The decision to grant or deny a continuance lies within the district court's discretion, and an appellate court will reverse the court's decision if the court abused its discretion. *State v. Barnes*, 713 N.W.2d 325, 333 (Minn. 2006); *State v. Sanders*, 598 N.W.2d 650, 654 (Minn. 1999).

D. The Trial Court Abused Its Discretion When It Denied Appellant's Reasonable Request For A Continuance Or Recess.

In determining whether the trial court abused its discretion by denying a continuance request, an appellate court considers the circumstances before the district court at the time the party made the motion. *State v. Beveridge*, 277 N.W.2d 198, 199 (Minn. 1979). Minnesota's appellate courts have considered the reason for the continuance request, the timing of the continuance request, the number and length of continuances previously granted to the moving party, and the prejudice the continuance would have caused the state. *See State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998) (stating district court did not abuse its discretion in denying defendant's continuance request to substitute counsel made only a few days before trial where appointed counsel was experienced, competent, and prepared to try case); *State v. Lloyd*, 345 N.W. 240, 247 (Minn. 1984) (upholding district court's decision denying continuance where defendant represented that certain unnamed witnesses might be willing to testify without providing offer of proof about what testimony would be

and without providing assurance that witnesses would testify and where court already gave defendant five continuances); *Beveridge*, 277 N.W.2d at 199 (concluding district court properly denied continuance request where state feared loss of its key witness's testimony).

Each of these factors supported granting Appellant's requested continuance or recess. Appellant asked for a continuance or recess for the important purpose of having the one and only witness for the defense testify. Testimony that he had reason to believe would be helpful to his defense. A defendant has a constitutional right to a meaningful opportunity to present a complete defense. *State v. Penkaty*, 708 N.W.2d 185 (Minn. 2006); U.S. Const. amend. XIV; Minn. Const. art. 1, § 7. In *Washington v. Texas*, the U.S. Supreme Court explained that inherent in this right is "the right to present the defendant's version of the facts . . . to the jury so it may decide where the truth lies." 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Furthermore, "a defendant has a right – at least in theory – to meet the State as an equal in our adversarial system of justice: 'strength against strength, resource against resource, argument against argument.'" *State v. Beecroft*, 813 N.W.2d 814, 839 (Minn. 2012) (quoting *United States v. Bagley*, 473 U.S. 667, 694 n. 2, 105 S.Ct. 3375 (1985) (Marshall, J., dissenting)). In this case, Appellant had the rare opportunity to meet the state's evidence with his own expert witness regarding the all important buy video, which was the basis for the search and subsequent arrest. Appellant had the expert witness ready to testify for months, relying on the April 18, 2016 trial

date. The date which then jumped all over the place, making it impossible for the defense.

Unlike the defendant in *Lloyd*, Appellant did not request a continuance “on the ground that some unnamed uncooperative witnesses might be willing to testify, if the defense were given more time to persuade them.” 345 N.W.2d at 247. The testimony Appellant sought was specific and obtainable. The expert witness was ready to testify until the trial date musical chairs game began. The court had every reason to believe that the witness would be in Polk County District Court to testify on Friday, April 22, 2016.

In assessing whether the trial court abused its discretion in denying a requested continuance (or one day recess), courts also consider whether the court has granted any previous motions for continuance. *Sanders*, 598 N.W.2d at 654. The court in Appellant’s case had been set numerous times, in fact it had already been tried with the Appellant serving his full 36 month sentence! Subsequently, upon the state’s demand, the Appellant had been tried for perjury as a result of his testimony at the original MSA 609.11 hearing. This was the conviction had been reversed for the drug charge. What, if any, prejudice there would be to the state is hard to imagine. Moreover, there can be no suggestion that Appellant’s need for a continuance or recess was due to some dilatory conduct on his part. This is not a case where the defendant sought a continuance because he wanted time to *find* an expert witness – the expert witness was retained and prepared to testify on April 22, 2016. The expert witness had

previously been prepared to testify on Wednesday April 20, 2016, the anticipated end of the state's case, until the trial date started moving around.

Moreover, there is nothing in the record that suggests Appellant's need for a continuance or recess was due to his conduct. Appellant had the expert witness ready to testify, the district court then moved the goal-post several times immediately prior to the trial. In denying the continuance, the trial court placed great weight on administrative concerns regarding its calendar. (TT 4, 8, 26, 38-39). The inconvenience to a trial court calendar cannot outweigh a defendant's right to counsel of his choice or ability to present a defense. Under these circumstances, the denial of Appellant's requests amounted to an abuse of discretion.

Finally, the state articulated absolutely no reason why Appellant's legitimate request for a continuance or recess would prejudice its case or even trouble its witnesses. The state's witnesses were law enforcement officers who lived and worked in Polk County and could be called to testify easily at any point. Furthermore, there were no victims who needed the trial to proceed quickly for closure or other emotional reasons. The state would not have been prejudiced by Appellant's request for a continuance. Indeed, the prosecutor did not weigh in on Appellant's request.

The trial court's reason for denying Appellant's requested continuance or recess is unpersuasive. The court did not articulate its precise rationale for refusing to continue the case beyond saying "It's impossible

for the Court to give counsel day certain trials, but I came as close as I could in this case, and it's up to counsel to make sure that their witnesses are lined up and available."³³ In the context of a violation of the right to a fair trial, to present the sole witness for the defense, calendar congestion does not qualify as good cause for a delay. By the same logic, calendar congestion should not validate the denial of a defendant's legitimate request for a continuance or one day recess. The number of cases on a court's docket or the inconvenience of rescheduling a case is not an adequate justification for depriving a defendant of his constitutional right to present a complete defense.

The trial court also disregarded defense counsel's explanation of why the dates moving had essentially pulled the rug out from under the Appellant. Defense counsel took pains to explain that the expert witness was ready to testify the morning of Friday April 22, 2016, consistent with Appellant's reliance upon the district court's instructions. The court made no effort to determine if the parties could agree on a later trial date. The court denied Appellant's motion without careful reflection and based solely on the convenience of keeping the trial as scheduled, but completely disregarding the fact that it was the district court that kept the trial date jumping around like a moving target. This was an abuse of discretion.

³³ 04/18/16 Transcript, p. 3, 15-18.

E. Appellant Was Prejudiced By The Trial Court's Denial Of His Requested Continuance.

A criminal defendant is entitled to due process of law, which includes the right to a fair trial. U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7. This includes the right to present witnesses. A criminal defendant also has a constitutional right to assistance of counsel for his own defense. The defense was denied the ability to present anything, its sole witness denied opportunity to present testimony. A defendant has a constitutional right to counsel of his choice and **to a meaningful opportunity to present a defense to criminal charges.** U.S. Const. amend. VI.

Here, Appellant informed the court that due to the date continually moving, he needed a one day recess (Thursday April, 21, 2016) to have an expert testify for the defense. Because the trial court denied Appellant's motion for a continuance or recess, Appellant's defense was substantially prejudiced. Appellant was prejudiced by the denial of the continuance and the trial court's actions constitute reversible error. Because Appellant was prejudiced by not being allowed to present expert testimony, his conviction must be reversed and his case remanded for a new trial.



CONCLUSION

For the reasons stated herein, the petition should be granted.

Respectfully submitted,

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