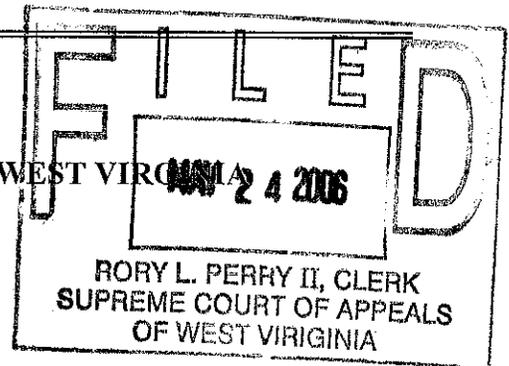


NO. 33035

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

RONNIE ALLEN RUSH,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

ROBERT D. GOLDBERG
ASSISTANT ATTORNEY GENERAL
STATE BAR NO. 7370
STATE CAPITOL, ROOM 26-E
CHARLESTON, WEST VIRGINIA 25305
(304) 558-2021

Counsel for Appellee

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. STATEMENT OF FACTS	2
A. FACTUAL SUMMARY	2
B. STATEMENT OF THE FACTS	3
III. PROCEDURAL HISTORY	13
IV. ARGUMENT	15
A. THE STATE DID NOT VIOLATE THE APPELLANT'S PROMPT PRESENTMENT RIGHTS	15
B. THE APPELLANT'S STATEMENTS WERE VOLUNTARY	26
C. THE COURT'S WAIVER OF ITS JUVENILE JURISDICTION WAS BASED UPON PROBABLE CAUSE	33
D. THERE IS NO STATUTORY PROVISION THAT REQUIRES A TRIAL COURT TO SENTENCE A JUVENILE UNDER 49-5-10 IF HE IS ACQUITTED OF THE TRANSFERRABLE OFFENSE BUT CONVICTED OF A LESSER INCLUDED OFFENSE	35
E. THE JURY'S VERDICT WAS CONSISTENT	36
F. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SENTENCING THE APPELLANT UNDER ITS CRIMINAL JURISDICTION	39
V. CONCLUSION	43

TABLE OF AUTHORITIES

	Page
CASES:	
<i>A.M. v. Butler</i> , 360 F.3d 787 (7th Cir. 2004)	17
<i>Berkemer v. McCarty</i> , 468 U.S. 420 (1984)	17
<i>California v. Beheler</i> , 463 U.S. 1121 (1983) (<i>per curiam</i>)	17
<i>Chrystal R.M. v. Charlie A.L.</i> , 194 W. Va. 138, 459 S.E.2d 415 (1995)	35
<i>Dunn v. United States</i> , 284 U.S. 390 (1932)	38
<i>Edwards v. Arizona</i> , 451 U.S. 477 (1981)	30, 31, 32
<i>Fare v. Michael C.</i> , 442 U.S. 707 (1979)	27
<i>Florida v. Bostick</i> , 501 U.S. 429 (1991)	17
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	36
<i>In re James L.P.</i> , 205 W. Va. 1, 516 S.E.2d 15 (1999)	15, 16
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	6, 16
<i>People v. Gillis</i> , 712 N.W.2d 419 (Mich. 2006)	37
<i>Rhode Island v. Innis</i> , 446 U.S. 291 (1980)	30
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	40
<i>Ruvalcaba v. Chandler</i> , 416 F.3d 555 (7th Cir. 2005)	29
<i>Smith v. Illinois</i> , 469 U.S. 91 (1984) (<i>per curiam</i>)	6
<i>Stansbury v. California</i> , 511 U.S. 318 (1994)	17
<i>State v. Bartlett</i> , 177 W. Va. 663, 355 S.E.2d 913 (1987)	38
<i>State v. Bowyer</i> , 181 W. Va. 26, 380 S.E.2d 193 (1989)	31

<i>State v. Eddie Tosh K.</i> , 194 W. Va. 354, 460 S.E.2d 489 (1995)	39
<i>State v. Farley</i> , 192 W. Va. 247, 452 S.E.2d 50 (1994)	26
<i>State v. Flippo</i> , 212 W. Va. 560, 575 S.E.2d 170 (2002)	11
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	36
<i>State v. Hall</i> , 174 W. Va. 599, 328 S.E.2d 206 (1985)	36, 38
<i>State v. Hosea</i> , 199 W. Va. 62, 483 S.E.2d 62 (1996)	15
<i>State v. Lucas</i> , 178 W. Va. 686, 364 S.E.2d 12 (1987)	31
<i>State v. Potter</i> , 197 W. Va. 734, 478 S.E.2d 742 (1996)	17
<i>State v. Robert McL</i> , 201 W. Va. 317, 496 S.E.2d 887 (1997)	36
<i>State v. Singleton</i> , 218 W. Va. 180, 624 S.E.2d 527 (2005)	16
<i>State v. Sugg</i> , 193 W. Va. 388, 456 S.E.2d 469 (1995)	26
<i>State v. Vance</i> , 162 W. Va. 467, 250 S.E.2d 146 (1978)	26
<i>United States ex. rel. Cathey v. Cox</i> , 203 F. Supp. 2d 949 (N.D. Ill. 2002)	37
<i>United States v. Collins</i> , 972 F.2d 1385 (5th Cir. 1992)	18, 20
<i>United States v. Czichray</i> , 378 F.3d 822 (8th Cir. 2004)	18
<i>United States v. Daigle</i> , 149 F. Supp. 409 (D.C. 1957)	38
<i>United States v. Muegge</i> , 225 F.3d 1267 (11th Cir. 2000)	18
<i>United States v. Powell</i> , 469 U.S. 57 (1984)	38
<i>United States v. Ritchie</i> , 35 F.3d 1477 (10th Cir. 1994)	23
<i>Walker v. West Virginia Ethics Commission</i> , 201 W. Va. 108, 492 S.E.2d 167 (1997)	35

STATUTES:

W. Va. Code § 49-5-8(c)(4) 15

W. Va. Code § 49-5-10(d)(1) 13, 33, 35, 36

W. Va. Code § 49-5-13(e) 36, 39

OTHER:

Barbe, Edwin S., Annotation, *What Constitutes Termination
of a Felony for Purposes of the Felony-Murder Rule*,
58 A.L.R.3d 851 (1974) 37

Cleckley, Franklin D., *Handbook of West Virginia Criminal Procedure*,
vol. I (2d ed. 2002) 26

LaFave, W., *Criminal Procedure*, vol. I (1984 & 1991 Supp.) 23

NO. 33035

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

RONNIE ALLEN RUSH,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

Following a jury trial in the Circuit Court of Calhoun County (Evans, J.) a petit jury convicted Ronnie Allen Rush ("Appellant") of two counts of voluntary manslaughter (a lesser included offense of first degree murder), robbery, nighttime burglary, and conspiracy to commit robbery. The trial court sentenced him to 15 years on each manslaughter count, 35 years on the robbery count, 1 to 15 years on the burglary count, and 1 to 5 years on the conspiracy count. With the exception of the conspiracy count, the court ordered that all of the sentences to run consecutively.

(Record [hereinafter "R"] at 1874-79.)¹

¹The circuit clerk reproduced the record without separating the documents from the transcripts. Instead, each volume includes both copies of documents and hearing transcripts, each filed chronologically and sequentially numbered. In order to avoid confusion the Appellee will use the sequential numbers located at the bottom of each page to identify citations to both documents and transcripts. Citations from the juvenile record will be cited as Juv. R. __; citations to the felony record will be cited as R. ____.

II.

STATEMENT OF FACTS

A. **FACTUAL SUMMARY.**

At approximately midnight on May 15, 2003, 69-year-old Warden Groves and his companion, 60-year-old Mary Hicks, were murdered while asleep in separate bedrooms at Mr. Groves' house in Sand Ridge, Calhoun County, West Virginia. (Juv. R. 50-52, 787; R. 863, 867-72, 876-77, 879.) Both were shot at close range with a shotgun. It is undisputed that the Appellant, then 16 years old,² was present when the murder took place. Recently, Mr. Groves had come into a sizeable inheritance. The Appellant, who enjoyed a close relationship with Mr. Groves, was aware of this inheritance, and was in need of money. (R. 1043-44.)

During the investigation the State found money on the front floorboard of a blue truck recently purchased by the Appellant from Mr. Groves and parked in front of the Groves' residence. The investigating officers also found a large sum of money in the back seat of a car the Appellant had driven the short distance from the murder scene to his trailer. This car belonged to Mr. Groves. Two weeks after the Appellant was arrested, his father found over \$2,000 in a trash can in the Appellant's residence. The Appellant's father could not account for the money.

Although there was no physical evidence linking the Appellant to the murders or the theft, the police found a large sum of money in a crawlspace at the Groves' residence. The money was stored in an idiosyncratic fashion, with the bills wrapped lengthwise in bailing twine and the change pre-rolled and separated into denominations. The money found in the car driven by the Appellant

²The Appellant was born on October 23, 1986. (Juv. R. 7.) The murder took place on May 15, 2003. (Juv. R. 12.)

was wrapped in the same fashion, as was the money contained in the green suitcase and black trash bag found in the Appellant's blue truck.

During the course of the investigation the Appellant gave a series of statements. Initially he claimed that two men had entered the Groves' house, murdered Mr. Groves and Ms. Hicks, jumped from a high porch onto a steep slope, ran to a car and drove away. The Appellant waited until they were gone, drove to his father's trailer, and called 911. Later that morning the Appellant changed his story several times. That evening, the Appellant claimed that Robert Shamblin broke into the victim's house, held the Appellant at knife point, while holding two shotguns in one hand and the knife in the other, forced the Appellant to go downstairs,³ placed a shotgun on his shoulder and shot both victims. Later, Appellant claimed he was sleeping when "Bobby Shamblin and another guy come walking up to the porch with a gun." (R. 1904.) As Appellant hid upstairs he heard two shots. When he ran downstairs he found both Mr. Groves and Ms. Hicks dead. In this final statement he admitted that he had lied in both of his earlier statements. (R. 1904.)

B. STATEMENT OF THE FACTS.

The investigating officers found Mr. Groves lying on his left side, with the bed covers pulled up around his shoulders. (R. 607-09, 925.) According to State Medical Examiner Zia Sabat, the shotgun shell that killed Mr. Groves entered from behind his right ear, passed through his skull, destroying his brain, and exited his forehead, shearing away the top of his head. (R. 869, 871-72.) Dr. Sabat estimated that the shotgun was three to five feet away from Mr. Groves when fired. (R. 873.) Ms. Hicks was found lying on her back with her left foot and left arm dangling from the side

³This portion of the Appellant's story caused great consternation among the investigating officers, and was obviously "corrected" by the Appellant in his statement contained in his pre-sentence report. (R. 1904.)

of her bed. According to Dr. Sabat, Ms. Hicks was shot under her left arm. (R. 879.) The shotgun was approximately six to seven feet away from Hicks when it was fired. (*Id.*)

Sometime between 12:00 and 1:00 a.m. on May 15, 2003, Calhoun County 911 operator Walter Wilson received two calls from the Appellant. (R. 563, 568-75.) The Appellant initially stated that he had slept in an upstairs bedroom at Mr. Groves' house that evening.⁴ At some point he allegedly heard two gunshots, and then the sound of a car driving away. After he heard the shots he jumped out of his bedroom window onto the porch, came into the house, and discovered both Mr. Groves and Ms. Hicks dead. (R. 568.) Although the telephones in Mr. Groves' house worked and the Appellant did not have a driver's license, the Appellant drove back to his father's trailer before calling 911.⁵ (R. 605, 666, 824, 831, 1050.)

West Virginia State Trooper Doug Starcher received a dispatch call at approximately 1:00 a.m., and was the first investigating officer to arrive at the Groves' house. Subsequently, Trooper Mullen, County Sheriff Parsons, and Deputy Sheriff Carl Ballengee arrived. (R. 596.) Trooper Starcher testified that visibility around the house was poor, and that the ground was damp. (R. 590-91.) Trooper Starcher found the kitchen light on. (R. 595, 597.) The kitchen door, located at the back of the house, was locked, but a door on the right side of the house standing open. (R. 595.) There were no signs of a struggle. (R. 823-24.)

⁴Both the Appellant and his father enjoyed a close relationship with Mr. Groves, who often provided the Appellant with the opportunity to earn money by doing chores around his house. It was not unusual for the Appellant to spend the night at the Groves' house.

⁵Shortly after the officers arrived at the Groves' house Trooper Doug Starcher sent one of the officers to retrieve the Appellant. On the way back the officer placed his hand on the car's hood finding it warm to the touch. In his opinion, the car had been driven further than the short distance between the murder scene and the Appellant's house.

Both Trooper Starcher and Trooper Mullen proceeded through the opened door into the kitchen and down an adjoining hallway where they found Ms. Hicks' bedroom. (R. 597.) Because of the poor lighting in the house Trooper Mullen could not see Ms. Hicks until he shined his flashlight into her room. (*Id.*)

Trooper Starcher found Mr. Groves in his bed on his side with his bed covers over his shoulders. (R. 598.) There was splattered blood and brain matter on the wall behind his bed frame. (R. 608-09.) Both the wall and his metal bed frame had also been pockmarked by ricocheted shotgun pellets. (R. 608.) Trooper Starcher found 10 to 15 shotgun pellets on the floor next to Mr. Groves' bed. (R. 608, 615, 619.) He also found a pair of Mr. Groves' pants on the bedroom floor; their pockets had been turned inside out. (R. 618.)

After completing the sweep of Mr. Groves' home, Trooper Starcher asked Calhoun County Deputy George Ballengee to bring the Appellant back to the crime scene. (R. 824.) Sheriff Parsons and Deputy Ballengee arrived at Mr. Rush's residence at about 1:55 a.m. The owner, Appellant's father Paul Rush, met them at the door and invited them in. (R. 828; Juv. R. 443.) Deputy Ballengee saw the Appellant awake and slumped down in a chair in the living room; he did not display any signs of nervousness or fear. (R. 829.) The Appellant agreed to return to Mr. Groves' house to answer some questions.⁶ (R. 830, 895.) Although he did not accompany his son, the Appellant's father consented. (*Id.*) The crime scene was less than a half a mile from his house.

⁶During his transfer hearing the Appellant testified that that Sheriff Parsons and Deputy Ballengee arrived at his house at about 1:00 a.m., and were invited in by his father. During their five-minute stay they asked him if he would be willing to come back to the crime scene. The Appellant conceded the he was not under arrest, and that he left with them voluntarily. (Juv. R. 937, 955.) Once they arrived at Mr. Groves' house Deputy Ballengee told the Appellant that someone wanted to question him. The Appellant agreed to wait. When Deputy Ballengee came to perform the GSR test, the Appellant consented. (Juv. R. 958.) The Appellant testified that he chose to speak to Trooper Starcher, and had no problem giving him a statement. (Juv. R. 960, 962.) At some point after the initial interview, the Appellant fell asleep in Trooper Starcher's cruiser. Starcher then told him that he needed to come with him. The Appellant agreed. (Transfer Hr'g. 486.)

While walking to the cruiser Deputy Ballengee noticed Mr. Groves' car in the trailer's driveway. The Appellant told him that the car belonged to Mr. Groves and that he had driven it to his house to call 911. After shining his flashlight inside the front and back windows Deputy Ballengee discovered a roll of money which had been tied endways using bailer's twine lying in plain sight on the floorboard behind the driver's seat. (R. 836.) He recovered the money, placed it in an evidence bag, and dropped it off with Trooper Starcher. (R. 835.)

The Appellant arrived back at Mr. Groves' house at about 2:00 a.m. (R. 634.) While Trooper Starcher continued his investigation, the Appellant waited in the back of Sheriff Parsons' jeep, falling asleep at one point. (Juv. R. 471-72, 526-27; R. 634, 902.) While the Appellant waited Trooper Starcher's asked Deputy Ballengee to perform a gunshot residue test, swabbing the Appellant's hands and face.⁷ (R. 837, 839, 901.)

At approximately 3:30 a.m. the Appellant was taken from Deputy Parsons' jeep to Trooper Starcher's cruiser which was parked on Route 33, directly outside of Ward Groves' home. (R. 651.) Because the Appellant could not read, Trooper Starcher carefully explained his *Miranda* rights⁸ to him.⁹ (Juv. R. 523; R. 653, 655-56.) He told the Appellant that he was being questioned about the murder of Mr. Groves and Ms. Hicks, was not under arrest, and was free to go at any time. (R. 654, 662.) The Appellant signed a waiver form at 3:41 a.m. (R. 665.)

⁷The GSR test came back negative. During the juvenile transfer hearing Deputy Ballengee testified that the Appellant's hair and clothing were dirty, but his hands and face were clean. (Juv. R. 491-92.)

⁸See *Miranda v. Arizona*, 384 U.S. 439, 469-473 (1966).

⁹When asked if he wanted an attorney present, the Appellant said, "I don't know." Trooper Starcher responded, "Is that a yes or no." The Appellant said it was a no. (R. 664.) During post-trial motions defense counsel attempted to characterize this as a request for counsel. The court held that the Appellant's words were too equivocal to constitute a valid request. See *Smith v. Illinois*, 469 U.S. 91, 97-98 (1984) (*per curiam*) (A statement is an assertion of a right to counsel or it is not.)

Trooper Starcher proceeded to interview the Appellant while standing outside his cruiser, with a tape recorder on the car's hood. The Appellant told him his first story:

I don't know what time it was, but 'um I was up there, upstairs sleepin'. Well, I wasn't asleep yet. Ward asked me if I heard anything. He hollered up there and said "Did you heard anything?" and I said, "No." And he hollered again, "Did you hear somethin'?" And I said, "I think I did." And, after that I didn't hear nothin' till', I don't know what time it was. I must've fell asleep or somethin' and then I heard two gunshots. Sounded like they happened right at the same time. And I got up and ran down the stairs and I seen two people runnin' down the steps right there and gettin' in a vehicle and goin' this way. I couldn't tell who they was or what kind of vehicle they was or anything, and I ran out there and jumped in Wards' vehicle and run up there to my, run up there to my dad's place real quick and called you all.

(R. 665-66.)

While the Appellant was speaking both Trooper Starcher and Deputy Ballengee noticed a red mark about an inch and a half wide, and three inches long on the front of Appellant's right shoulder. (R. 669-70, 716, 846; Juv. R. 452-53, 532; 539-40.) Both testified that the mark was consistent with the mark that the recoil of a shotgun might cause after someone had fired it more than once. (Juv. R. 453, 540.) Both also noticed small red spots, and a disk shaped black spot on the Appellant's face. (R. 679, 716, 719-20, 846, 849.) When asked to explain why his shoulder was red, the Appellant stated that he had been shooting a .22 rifle earlier that day. (R. 670.)

Several parts of the Appellant's statements did not set well with Trooper Starcher. The Appellant stated that he could see two people jump off of the porch and drive away. Trooper Starcher told him that it was too dark for this to be true. The Appellant told him that all of the lights in the house were on, and that he had not turned them off when he drove to his father's trailer. When Trooper Starcher arrived at the scene, only the kitchen light was on. Although the Appellant claimed he could see both victims, after walking through the house Trooper Starcher noted that the light from the kitchen did not shine into either victim's bedrooms.

Trooper Starcher asked the Appellant what he knew about Mr. Groves' finances:

RAR: I knowed [Mr. Groves] he had a bunch of money, cause his brother just passed away not too long ago, and he, 'um, Junior Groves.

DPS: Inaudible

RAR: He lived on I think it was Left Hand.

DPS: Okay, how much money did he have?

RAR: I don't know, but 'um, will 'um his brother left him. He bought this house, he bought them vehicles there.

DPS: Where did he keep money in the house?

RAR: Huh, I don't know. I don't know.

DPS: Did you have to look for it or

RAR: I didn't look for nothin.

DPS: You knew where it was?

RAR: No, I didn't know nothin' about no money. I just knowed he had money cause I was with him there one time me and my ah.

(R. 678.)

The entire interview lasted 40 minutes. It occurred on a public street within walking distance of the Appellant's home, the Appellant was not cuffed or restrained.

After speaking with the Appellant, Trooper Starcher and Deputy Ballengee went back to Mr. Groves' house to re-investigate the scene. The Appellant waited in Sheriff Parson's jeep, and then Trooper Hunt's cruiser. (R. 722.) Trooper Starcher's second sweep did not corroborate the Appellant's statement. (R. 721-22.) After they turned all of the lights off, except for the light in the kitchen, and walked around the house they could not see inside the victims' bedrooms without a flashlight. (Juv. R. 464; R. 721-22.) Trooper Starcher noted that the part of the porch from where the two assailants allegedly jumped was too steep. There was a flower bed directly beneath this area and although the ground was wet, there were no signs of footprints. (R. 721; Juv. R. 454, 530, 779.)

Once Trooper Starcher finished securing the crime scene, he drove the Appellant to the Grantsville State Police Detachment, arriving at approximately 5:55 a.m. (R. 1344.) After reading the Appellant his *Miranda* rights Trooper Dale Fluharty interviewed the Appellant for approximately

two hours.¹⁰ (R. 1350.) Before interviewing him, Trooper Fluharty again told the Appellant that he was not under arrest and was free to leave at any time. (R. 1349.) The Appellant signed a second waiver form. (*Id.*)

The Appellant testified that Trooper Starcher took him to the Grantsville detachment at about 6:00 a.m. (Juv. R. 942.) He did not ask to be taken home, nor did Trooper Starcher tell him he had the right to leave. (*Id.*) Once Trooper Fluharty told him he was free to go, the Appellant got up to leave at which point Trooper Fluharty said, "Are you trying to get smart with me, I'll rip your fucking head off."¹¹ (Juv. R. 944.)

Trooper Fluharty denied the incident, but did admit that he had used profanity in the Appellant's presence. Although he claimed that he did not believe the Appellant was a suspect, he asked the Appellant if he would take a polygraph. (R. 1350, 1352.) At approximately 2:00 p.m. Trooper Streyle arrived to administer the test. (R. 1528.)

Before administering the test Trooper Streyle read the Appellant his *Miranda* rights again and asked him to sign another waiver form. (R. 1149.) He then conducted a pre-interview designed to build a rapport with the Appellant. (R. 1153.) After the pre-interview, Trooper Streyle asked the Appellant if he could truthfully respond to a question about who had killed Mr. Groves and Ms. Hicks. The Appellant told him that he would probably fail that part of the test. (R. 1159.) He asked Trooper Streyle if he could have shot the victims in his sleep. (*Id.*) He then asked Trooper Streyle if he could go home that evening because he was a juvenile, that he had a paper which stated that he

¹⁰Trooper Fluharty arrived at Mr. Groves' house at 4:00 a.m., and returned to the Grantsville attachment at approximately 5:50 a.m. (R. 1344.) He had asked Trooper Starcher to transport the Appellant to the Grantsville detachment. (R. 1346.)

¹¹The Appellant was 16 at the time. Trooper Fluharty had been a State Trooper for 20 years.

was mentally retarded, that since he was a juvenile would he be tried as an adult, and how much time would he spend in jail if he were tried as a juvenile. (R. 1158.) Trooper Streyle said that he did not know the answers to the Appellant's questions. (*Id.*)

At some point during the interview the office door swung open. Trooper Fluharty appeared on the otherside yelling, "We just come up with a lot of shit on you. You better start talking." (R. 1530.) He then stormed out of the office. After telling the Appellant to relax, Trooper Streyle went outside to ask Trooper Fluharty what they had found. The trooper stated that Trooper Cooper had found the green suitcase, and black garbage bag in the Appellant's truck. (R. 1532.) After Trooper Streyle came back into the office, the Appellant asked him what Trooper Fluharty what "shit" he was referring to. (R. 1533.) Trooper Streyle left the office again and spoke to Fluharty. Streyle claimed that it would help him if Fluharty would come back into the room and reassure the Appellant. (*Id.*)

Ignoring Trooper Streyle's request, Trooper Fluharty came back into the office, sat five feet from the Appellant, and in a raised tone of voice told him that he did not know why Trooper Streyle still wanted to talk to him, but if he knew what was good for him he would continue cooperating. (R. 1533-34.) After Trooper Fluharty left the room, the Appellant told Trooper Streyle that he would not answer any other questions without counsel present. (R. 1534.) Trooper Streyle told Fluharty about Appellant's request, and left the detachment without completing the test. (R. 1535.)

At approximately 9:30-10:00 a.m. Detachment Commander State Trooper Jeff Cooper arrived at Mr. Groves' residence. After conducting a walk-through of the house, and speaking with the other officers at the scene, Trooper Cooper drove to the Appellant's trailer. The Appellant's father consented to a search of his trailer, including the Appellant's bedroom where the trooper found a title to a 1972 Chevy truck. (R. 936, 1144.)

After returning to Mr. Groves' house Trooper Cooper found two rifles in the blue truck, partially wrapped in a green blanket. (R. 946.) Believing them to have some relevance to the crime, Trooper Cooper obtained a warrant to search the truck. During his search of the passenger compartment he found a green plastic suitcase, and a black trash bag on the driver's side floorboard. (4/16/04 Tr. 625.) He also found a .22 rifle, and a .308 rifle.

The green suitcase, which weighed 60 to 70 pounds, contained rolls of change separated by denominations. The black trash bag was knotted at the top and contained \$242 wrapped in a cloth. (R. 951, 958-959, 960, 963.) In addition to this money, Trooper Cooper found more cash under the truck's front seat.¹² (R. 954.)

While inside Mr. Groves' home, Trooper Cooper noticed a door to a crawlspace angled to one side and pieces of plaster on the floor directly beneath the entrance. (R. 964-65.) Once inside the space the trooper found a shoe box with \$2,300, and \$2,200 in a leather case.¹³ (R. 965-66.) The money in the shoe box was tied lengthwise, in the same manner as the money found in Mr. Groves' car. (R. 968.)

Given the inconsistencies in the Appellant's statements, the evidence found in the GMC Jimmy, and the money found in the Appellant's blue truck, Trooper Cooper believed he had sufficient cause to take the Appellant into custody. (R. 133, 159.) Trooper Cooper then drove across

¹²The trial court suppressed several other items recovered from the upstairs bedroom because the Appellant, who was a regular overnight visitor to Mr. Groves' home and a friend of the family, had a reasonable expectation of privacy in this bedroom, and had revoked any previous consent when he became a suspect at 2:00 p.m. *See* Syl. pt. 2, *State v. Flippo*, 212 W. Va. 560, 563, 575 S.E.2d 170, 173 (2002) ("As long as a person summoning the police is not a suspect in the case, or does not affirmatively revoke his/her implied consent, the police may search the premises without a warrant for the purposes of investigating the reported offense and identifying the perpetrator, and evidence obtained thereby is admissible.") (*See* Juv. R. 19-20; R. 182-187.)

¹³The Appellant did not sleep in this part of the house.

the county searching for then County Prosecutor Tony Morgan in order to get his opinion.¹⁴ (R. 133.)

After speaking with Trooper Cooper, Trooper Fluharty told the Appellant that he was free to leave or that he could wait at the detachment until Trooper Cooper returned from the prosecutor's office. If the prosecutor advised Trooper Cooper to arrest the Appellant, they would come to his trailer later that evening. (Juv. R. 700.)

Trooper Cooper arrived back at the detachment at about 7:30-7:50 p.m. (R. 972.) When he arrived the Appellant was sitting on a couch eating pizza.¹⁵ (*Id.*) Trooper Cooper took the Appellant into his back office and told him that he was drafting complaints charging the Appellant with murder. (R. 974.) After a short silence, the Appellant became emotional, stating "I'm sorry. I loved Ward and Mary." (*Id.*) At this point Trooper Cooper *Mirandized* the Appellant again. (*Id.*) In a taped statement the Appellant told Trooper Cooper that his first statement had not been true, and that he had been coerced into shooting Mr. Groves and Ms. Hicks by a person named Chris Shamblin. (R. 976.) Originally, the Appellant claimed that he blacked out during the incident. (R. 990.) As his statement grew longer, the Appellant's memory grew better.

On the evening of the murder, the Appellant was awoken by Mr. Shamblin who held a knife to his back. (R. 986-87, 988.) Mr. Shamblin, carrying two shotguns in one hand, and a knife in another, led the Appellant down the steps of the attic bedroom to the hallway across from Ms. Hicks' room. (R. 990.) He then propped one of the shotguns on the Appellant's shoulder and shot Ms.

¹⁴He began searching for the prosecutor at 6:00 p.m., and did not return to the Grantsville detachment until sometime between 7:30 and 7:52 p.m. (R. 149.)

¹⁵According to Trooper Fluharty the Appellant ate twice during the day—once around lunch time and once in the evening. (Juv. R. 698.)

Hicks from the hallway. (R. 991.) Mr. Shamblin then entered Mr. Groves' room and shot him, again using the Appellant's shoulder to prop up his shotgun. (R. 991-92.) The statement was a half-hour long.

Trooper Cooper then took the Appellant to Magistrate Theresa Robinson for arraignment. Two weeks later, Trooper Hunt received a telephone call from the Appellant's father. While emptying the trash in the bathroom, Mr. Rush found a large sum of money hidden underneath the can's plastic bag which he could not account for.¹⁶ (R. 1032-33.) The Appellant arrived home late in evening/early morning of May 15, upset and nervous. Mr. Rush could not recall whether he walked into the back bathroom before Deputy Ballengee arrived or not. (R. 1039.) In a statement to Trooper Hunt, Mr. Rush could not recall whether he had emptied the trash since then. (Juv. R. 670; R. 1037.)

III.

PROCEDURAL HISTORY

The Appellant was charged by criminal complaint with one count of accessory before the fact, and one count of accessory after the fact to murder. (Juv. R. 12.) The magistrate also ordered that the Appellant be held at the North Central Regional Juvenile Detention Facility until 11:00 a.m. May 16, 2003. (R. 22.) The State, by Prosecuting Attorney Tony Morgan, filed a juvenile petition with the Circuit Court of Calhoun County on May 16, 2003. (Juv. R. 7-11.)

The State requested that the court waive its juvenile jurisdiction over the Appellant, and try him under its criminal jurisdiction by motion dated May 29, 2003. (R. 115-17.) *See* W. Va. Code § 49-5-10(d)(1). After several continuances, the court convened a transfer hearing on April 5, 2004.

¹⁶It was later established that there was \$2,732 in the trash can. (Juv. R. 664; R. 1040.)

The court heard testimony on the State's motion on April 5, April 16, and May 4, 2004. Upon due consideration of the evidence presented at this hearing, and the arguments of counsel, including their proposed findings of fact and conclusions of law, the court issued its Findings of Fact, Conclusions of Law and Order Granting Motion to Transfer to Criminal Jurisdiction. (Juv. R. 1030-57.)

The September 2004 Term of the Calhoun County Grand Jury returned an eight-count indictment against the Appellant charging him with two counts of first degree murder (Counts 1 & 2), one count of first degree robbery (Count 3), one count of nighttime burglary (Count 4), one count of grand larceny (Count 5), two counts of conspiracy to commit murder (Counts 6 and 7), and one count of conspiracy to commit robbery. (R. 1-6.) On September 8, 2004, the Circuit Court of Calhoun County arraigned the Appellant and set a trial date of September 20, 2004.

The Appellant's trial began on December 13 and ended on December 22, 2004. The jury found the Appellant guilty of two counts of voluntary manslaughter, one count of first degree robbery, one count of nighttime burglary, and one count of conspiracy to commit robbery. (R. 309-14.) The court sentenced the Appellant on March 18, 2005. After denying Appellant's motions to sentence the Appellant as a juvenile, and upon consideration of arguments of counsel, and the pre-sentence report the court sentenced the Appellant to 15 years on both counts of voluntary manslaughter, 35 years for the robbery count, an indeterminate sentence of 1 to 15 years on the nighttime burglary count, and 1 to 15 years on the conspiracy count. With the exception of the conspiracy count the court ordered that all other sentences were to run consecutively. (R. 1874-78.)

IV.

ARGUMENT

A. THE STATE DID NOT VIOLATE THE APPELLANT'S PROMPT PRESENTMENT RIGHTS.

1. The Standard of Review.

The Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession was obtained as a result of the delay in the presentment of a juvenile after being taken into custody before a referee, circuit judge, or a magistrate when the primary purpose for the delay was to obtain a confession from the juvenile. The factual findings upon which the ultimate question of admissibility is predicated will be reviewed under the deferential standard of clearly erroneous.

Syl. pt. 2, *State v. Hosea*, 199 W. Va. 62, 483 S.E.2d 62 (1996).

2. Discussion.

West Virginia Code § 49-5-8(c)(4) states:

A child in custody must immediately be taken before a referee or judge of the circuit court and in no event shall a delay exceed the next succeeding judicial day: . . . The judge, referee or magistrate shall inform the child of his or her right to remain silent, that any statement may be used against him or her and of his or her right to counsel, and no interrogation shall be made without the presence of a parent or counsel, If the child or his or her parent, guardian or custodian has not retained counsel, counsel shall be appointed as soon as practicable. . .

The State triggers a juvenile's statutory right to prompt presentment when it takes the juvenile into custody. This Court has equated "custody" with formal arrest.

Both of these statutory ["prompt presentment" and "parental notification"] requirements are dependent on a juvenile being 'in custody.' This Court has stated that, in the context of juveniles who are suspected of having committed criminal offenses, the 'custody' status triggering the application of the statutory requirements is ordinarily the same as and the equivalent of 'arrest' status. *State v. Ellsworth J.R.*, 175 W.Va. 64, 70-71, 331 S.E.2d 503, 509 (1985). See also *State v. Gregory Anthony W.*, 200 W.Va. 86, 92, 488 S.E.2d 361, 367 (1996); *In the Matter of Steven William T.*, 201 W.Va. 654, 661, 499 S.E.2d 876, 883 (1997).

In re James L.P., 205 W. Va. 1, 14, 516 S.E.2d 15, 28 (1999).

It is the trial court's job to determine the facts surrounding a juvenile appellant's confession. If the trial court's factual determinations, including determinations regarding credibility, are reasonably supported by the record, this Court will not disturb them on appeal:

As previously noted, as an appellate court, we generally give great deference to factual determinations by trial court. In the instant case, the circuit judge had the job of deciding whether to believe the appellant's version of the factual events and the circumstances that led up to the appellant's confession, or the version of the events testified to by the police. After carefully reviewing all of the testimony and evidence presented at the transfer hearing, we think that the circuit judge was entitled to conclude that the appellant was not telling the truth about important facts, and circumstances that led up to the appellant's confession.

Id., 205 W. Va. at 14, 516 S.E.2d at 28 (emphasis added.)

Both this Court and the United States Supreme Court have defined a formal arrest as, "the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 5, *In re James L.P.*, 205 W. Va. at 2, 516 S.E.2d at 16 (quoting Syl. pt. 1, *State v. Muegge*, 178 W. Va. 439, 360 S.E.2d 216 (1987), *overruled on other grounds*, *State v. Honaker*, 193 W. Va. 51, 454 S.E.2d 96 (1994)); *State v. Singleton*, 218 W. Va. 180, 185, 624 S.E.2d 527, 532 (2005) (*per curiam*). See *Miranda v. Arizona*, 384 U.S. at 444 (Custodial interrogation defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.").

Although this Court must consider the totality of the circumstances surrounding the interrogation, the ultimate inquiry is whether there was a "formal arrest or restraining on freedom

of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (*per curiam*) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

The objective circumstances of the interrogation, not the subjective intention of the interrogating officer or the subjective understanding of the person being questioned, is evaluated in determining whether the person was in custody. "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time"; rather, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). Both this Court and the United States Supreme Court have made it clear that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming the suspicions remain undisclosed) is not relevant for purposes of determining custody. *State v. Potter*, 197 W. Va. 734, 744, 478 S.E.2d 742, 752 (1996); *Stansbury v. California*, 511 U.S. 318, 320 (1994).

The United States Supreme Court has defined a "reasonable person" as a "reasonably innocent person." *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (emphasis added); *A.M. v. Butler*, 360 F.3d 787, 796 (7th Cir. 2004) (Actions of police officers towards defendant who voluntarily came to the police station, was treated well, not handcuffed, photographed or fingerprinted did not give rise to circumstances which would lead a reasonable, innocent person to believe he was under arrest.).

An unambiguous statement from a police officer that an individual is not under arrest and free to go is powerful evidence that a reasonable innocent person would not consider themselves under arrest:

[I]f the individual being questioned were innocent, and was told directly he might leave, in the absence of evidence to the contrary the interrogation was non-custodial as a matter of law. There may be situations where the restraints placed on a suspect's freedom are so extensive that telling the suspect he was free to leave could not cure the custodial aspect of the interview, but that was not the case here.

United States v. Muegge, 225 F.3d 1267, 1271 (11th Cir. 2000). See also *United States v. Czichray*, 378 F.3d 822, 826 (8th Cir. 2004) (Statement by officer that individual not in custody powerful evidence that a reasonable person was free to terminate the interview.); *United States v. Collins*, 972 F.2d 1385, 1405 (5th Cir. 1992) (finding defendants not in custody when they were told "explicitly and repeatedly" that they were not under arrest and were free to leave.).

The Appellant claims that he was under formal arrest from the time Deputy Ballengee drove him to the crime scene until he was arraigned. To support this the Appellant argues that he was driven to Mr. Groves' house in the early morning hours by two police officers, questioned by Trooper Starcher, transported to the Grantsville detachment where he was denied sleep and food and continuously questioned until his arraignment at 11:00 that evening.

The trial court first addressed this issue in its May 18, 2004, Findings of Fact, Conclusions of Law and Order Granting Motion to Transfer to Criminal Jurisdiction. The Appellant's brief completely ignores the court's factual findings. (Juv. R. 1030-57.) The court found:

7. The prompt presentment rule is not invoked when a person, whether adult or a juvenile, becomes a suspect. It occurs when he is arrested or circumstances are such that a reasonable person would conclude that they were under arrest. This occurs when a person's freedom is deprived of them. The court is convinced that any such rule was not violated here – at least as to the oral statements made by Ronnie Rush to the polygraph operator – any delay was prompted by the police and Ronnie Rush desiring to wait for the arrival of a polygraph, and not for the purpose of obtaining a confession from Ronnie Rush. The court makes no ruling on delay occurring subsequent to the assertion of right to counsel, because no evidence is offered at this hearing obtained from Ronnie Rush subsequent to that time.

(Juv. R. 1052.)

The trial court reviewed the Appellant's testimony at the transfer hearing and found:

Ronnie Rush testified during the transfer hearing. His attorney's motion to limit his testimony to the issue related to the motion to suppress evidence was granted. . . . Ronnie may not be able to read, but his demeanor, manner of testifying and general knowledge are consistent with a young man thoroughly familiar with all of his rights, the consequences of waiving his rights, and the importance of counsel. On May 15, 2003, this young man was repeatedly advised of his rights. Until approximately 2:30 p.m. of that day, he had knowingly and voluntarily waived his *Miranda* rights. He was not under arrest at that time, and while there is dispute about whether he was advised at the detachment that he had the right to leave, the court is of the view that Ronnie did not desire to leave and wished to stay so that he could take the polygraph test which he had agreed to do. Once Ronnie requested counsel, all interrogation should have ceased. While it did not in this case, there is no showing that the statements made by Ronnie Rush prior to the request for counsel were illegally obtained from him by the police.

(Juv. R. 1045-46.)

After the court transferred the Appellant to its criminal jurisdiction it convened a second suppression hearing focusing on the Appellant's final statement to State Trooper Cooper. The only witness called to testify was Trooper Cooper. On December 13, 2004, the court issued its Motion to Suppress Findings of Fact, Conclusions of Law and Order. (R. 300-08.) The court's order incorporated, by reference, Findings of Fact 1 - 28 from its May 18, 2004, transfer order. (R. 301.)

It also supplemented them, finding:

In addition to those findings, the court also finds that the State Police were quite solicitous of the rights of Ronnie Rush in relation to the polygraph test. The court finds that Sgt. Jeff Cooper went to the home of Ronnie's father and told him (Paul Rush) that Ronnie was going to take the polygraph test later in the day. Ronnie Rush's father had no objections to his son taking the polygraph test.

(R. 302.)

The court found that Trooper Fluharty had interrupted the Appellant's polygraph with a "angry, profane outburst"; but, taken within the context of the entire record it found that the Appellant had not been mistreated by the police. (R. 302.) Although the Appellant's stay at the detachment was long, most of it consisted of waiting. The Appellant was not subjected to a relentless, coercive interrogation conducted by a tag team of law enforcement officers. (*Id.*) On three occasions the Appellant was told that he was not under arrest, and was free to leave at any time. After he requested counsel, Trooper Fluharty offered to take him home. The Appellant refused, choosing to stay at the detachment until Trooper Cooper had spoken with the prosecutor. (*Id.*) The court found that the Appellant was not denied food, or sleep, and was treated in a "reasonable, non-coercive manner." (*Id.*)

Trooper Cooper arrived at the detachment at 7:45 p.m., at which time he told the Appellant that he was charging him with two counts of murder. At this point the Appellant became emotional and said, "I'm sorry. I loved Ward and Mary." (R. 303.) Trooper Cooper immediately *Mirandized* the Appellant, for a fourth time; this time the trooper told the Appellant that he was under arrest and not free to leave. (R. 304.) There was no evidence suggesting that the investigating officers attempted to interrogate the Appellant after he invoked his right to counsel (R. 304.)

The trial courts factual findings are reasonable, and firmly rooted in the record. One need look no further than the Appellant's own testimony to determine the admissibility of his first statement. During this testimony the Appellant conceded that he had voluntarily accompanied Deputy Ballengee to the crime scene.

Q: Did [Deputy Ballengee or Sheriff Parsons] tell you if you were under arrest or not?

A: I don't remember

....
Q: But they gave you a choice whether you wanted to go?
A: Yeah.

(Juv. R. 937.)

Q: Okay. At some point, did someone come and talk to you?
A: Yeah.
Q: Okay. At any point during the time you were there, did you ever ask if you could go home while you were at the scene?
A: No, not then.

(Juv. R. 940-41.)

On cross examination the Appellant elaborated:

Q: Do you remember what time [Deputy Ballengee and Sheriff Parsons came to your trailer]?
A: Maybe – maybe 1:00

(Juv. R. 953-54.)

Q: Okay. So your dad opens up the door?
A: Yeah.
Q: And invites Allen [Parsons] and Carl [Ballengee] in?
A: Yeah.
Q: Did they tell you that you were under arrest in any way?
A: No.
Q: Did they force you to come with them?
A: No.
Q: So you went of your own free will?
A: Yeah.
Q: So how long was Allen and Carl there with you?
A: Well, as soon as we went down there at Ward's. Is that what you're asking?
Q: Well, no. I'm just asking how long they were in the trailer before you went to Wards.
A: Maybe five or ten minutes.

(R. 955.)

Q: Okay. Now, so you were just sitting [in Deputy Parson's jeep at the scene] for awhile?
A: I was sitting there, yeah, for awhile yeah.

Q: Did you ask to go back home?

A: No. Carl got out of the vehicle as soon as we got down there, and maybe five or ten minutes after we got there, he said, "There's some other people wanting to talk to you." And I said, "All right.", and he asked me if I -- something about waiting here, and I said, "Okay." And I waited, and late on one of the others came and talked to me.

(Juv. R. 958.)

Q: Now, after [Deputy Ballengee performed the GSR test on you], did someone else come and talk to you?

A: I got back in the jeep.

Q: Back in the jeep?

A: And I waited for a little bit. And then it might have been Doug Starcher maybe. He came down and talked to me. Yeah, Doug Starcher came and talked to me.

Q: Doug came and talked to you?

A: Yeah.

Q: Okay. And did you talk to him willingly?

A: Yeah.

Q: Okay. So did -- you didn't have any problem -- say -- in telling what happened?

A: No.

(R. 960.)

The Appellant's own testimony corroborates the court's finding that the Appellant was not in custody at the time he gave his first statement. Knowing that the Appellant was the only witness to the crime, Trooper Starcher asked Deputy Ballengee to bring the Appellant back to the scene. (Juv. R. 526, 845.) The Appellant, who lived approximately 3/10 of a mile from Mr. Groves' house came voluntarily. (Juv. R. 660.) He was not cuffed, or physically coerced. (Juv. R. 442, 443, 445, 470.) Deputy Parsons informed his father where he was going, and his father consented. (Juv. R. 443.) Although Deputy Ballengee did not arrive at the Appellant's trailer until sometime before 2:00 a.m., his actions were prompt given that the Appellant had not called 911 until approximately 1:30

a.m. Neither the Appellant or his father were asleep when Deputy Ballengee arrived. (Juv. R. 443, 444.)

Nor did the Appellant's interactions with Trooper Starcher create an atmosphere so coercive as to create a *de facto* arrest. Before interviewing the Appellant, Trooper Starcher informed him of his *Miranda* rights, including the rights to counsel, to stop questioning, and the right to terminate the interview at any time. (Juv. R. 450, 519-520, 522-524.) He told him that he was not under arrest, and could leave at any time. (Juv. R. 522.) The Appellant was not cuffed or restrained and the interview took place outside, on the side of a public road, a short distance from his house. (Juv. R. 449, 520, 528-529.) *See United States v. Ritchie*, 35 F.3d 1477, 1485 (10th Cir. 1994) Although the location of the interview is surely not dispositive in determining whether the interviewee was in custody, "[c]ourts are much less likely to find the circumstances custodial when the interrogation occurs in *familiar or at least neutral surroundings*. . .) quoting 1 W. LaFare, *Criminal Procedure* § 6.6(e), at 496 (1984 & 1991 Supp.) (emphasis added).

Upon his arrival at the Grantsville detachment Trooper Fluharty *Mirandized* him. (Juv. R. 653, 681.) The Appellant was not cuffed or shackled. (Juv. R. 682.) He was told that he was free to leave at any time. (Juv. R. 655, 891.) He had access to a telephone, both before and after his polygraph examination, and was able to move around the detachment freely. (Juv. R. 654-655, 656, 701.) Clearly, the court credited Trooper Fluharty's testimony denying that he ever threatened the Appellant with violence. (Juv. R. 681, 695, 699.) After interviewing the Appellant for two hours, Trooper Fluharty asked the Appellant to take a polygraph. (Juv. R. 683.) Before the Appellant took the test Trooper Cooper drove to his father's house and asked him if he would consent, or if he

wanted to be present during the examination. The Appellant's father consented, but declined to be present for the test. (R. 146, 173-174, 1402.)

Trooper Streyle did not arrive at the Grantsville detachment until 2:00, and did not begin interviewing the Appellant until 2:30 p.m. There is no evidence that the investigating officers interrogated the Appellant while waiting for Trooper Streyle. After he arrived Trooper Streyle again *Mirandized* the Appellant. (Juv. R. 593.) He told the Appellant that he was not under arrest. (*Id.*) After reading him his rights, Trooper Streyle had the Appellant sign another waiver form. (Juv. R. 595.) The interview lasted from approximately 2:30 to 5:00 p.m. During the first 45 minutes to an hour Trooper Streyle conducted a pre-interview during which he did not question the Appellant about the homicides. (Juv. R. 596.)

At some point the Appellant asked Trooper Streyle if he would be treated any differently because he was a juvenile, or because he had been diagnosed as mentally retarded. (Juv. R. 801-02.) The trooper did not offer the Appellant any legal advice or inducements based upon the Appellant's status, or his mental condition. Notwithstanding the Appellant's alleged shortcomings, he comprehended his rights sufficiently to assert them. Indeed, the Appellant had the presence of mind to ask Trooper Fluharty exactly what sort of evidence he had found before asserting his right to counsel. After the Appellant asked for counsel Trooper Streyle stopped the interview. (Juv. R. 605.)

After Trooper Streyle left, Trooper Fluharty offered to drive the Appellant home. He stated that Trooper Cooper was out searching for the prosecutor. Trooper Fluharty gave the Appellant the option of staying until Trooper Cooper came back. The Appellant chose to stay. (Juv. R. 972.)

After speaking with the prosecutor, Trooper Cooper returned to the Grantsville detachment at approximately 7:45. (R. 132.) Upon his return he found the Appellant sitting on a couch eating

pizza. At that point he led him into his office and informed him that he was under arrest for murder, and possibly robbery. (R. 134-35, 169-70.) The Appellant became emotional and began to cry. Trooper Cooper stopped him from making any further statements, and read him his *Miranda* rights. (R. 136-37.) The Appellant signed a waiver form - his fourth - at 7:52 p.m. (R. 138.) He was well aware that he was under arrest, that he had requested counsel, and that he was under no obligation to talk with Trooper Cooper. Notwithstanding this, he agreed to give a statement. (R. 171.)

The statement began at 9:52 and ended at 10:22. Harlan Lott, Chief of Security at the North Central Juvenile Detention Center received a call from the Magistrate Court of Calhoun County sometime between 10:00 and 10:30 advising him that they were transporting the Appellant to his facility. (R. 1285.) The Appellant arrived at the North Central Juvenile Detention Center at approximately 12:30 a.m. on May 16. (R. 1278.)

The trial court's findings of fact reasonably support its conclusion of law. The Appellant was never in a position where a reasonable, innocent person would have felt that his freedom of movement was substantially infringed. Once he was arrested he was taken to a magistrate for arraignment.

The Appellant is simply asking this Court to re-examine credibility determinations made by the judge who presided over the trial. There is no reason for this Court to do so. There is no credible evidence to support the Appellant's assignment of error.

B. THE APPELLANT'S STATEMENTS WERE VOLUNTARY.

1. The Standard of Review.

The Appellant next argues that his confession was not voluntary. In Syl. pt. 3 *State v. Vance*, 162 W. Va. 467, 250 S.E.2d 146 (1978), this Court held:

A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence

Later, the Court modified its standard of review:

The Court is constitutionally obligated to give plenary, independent and *de novo* review to the ultimate question of whether a particular question is voluntary and whether the lower court applied the correct legal standard in making the determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions.

Syl. pt. 2, *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994).

"It devolves upon the trial judge in the first instance, before admitting it, to determine from the evidence whether a confession has been freely and voluntarily made. *State v. Bradley*, 104 W.Va. 523, 140 S.E. 546 (1927); *State v. Richards*, 101 W.Va. 136, 132 S.E. 375 (1926). After it has been judicially determined that the confession is admissible, the trial judge must resubmit the issue of voluntariness of the confession to the jury and upon request of the defendant give an instruction to the jury telling them to disregard the confession unless they find the State has proved by a preponderance of the evidence that it was made voluntarily. *State v. Vance*, [162 W.Va. 467, 250 S.E.2d 146 (1978)]; *State v. Taylor*, 285 S.E.2d 635 (1981).

I Franklin D. Cleckley, Handbook of West Virginia Criminal Procedure, I-519 (2d ed. 2002).

This State has adopted the "totality of the circumstances" rule when evaluating the voluntariness of a juvenile confession. *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995) (quoting *State v. Laws*, 162 W. Va. 359, 362, 251 S.E.2d 769, 772 (1978)).

2. Discussion.

In addition to the reasons set forth above, counsel also buttresses this assignment of error with evidence regarding the Appellant's youth, his illiteracy and low IQ, the number of interrogations, the duration of his alleged confinement, and the absence of his parents or counsel. (Appellant's Brief at 13.) Although wrapped in new garments, the Appellant's argument is a repeat of his first assignment of error and should be rejected based upon the same citations from the record, and for the same reasons.

The record affirmatively demonstrates that the Appellant's confession was voluntary. The investigating officers *Mirandized* him no less than four times.¹⁷ The State concedes that *Miranda* warnings do not render a confession voluntary *per se*; but repetition of the same warnings four times, notwithstanding the Appellant's limitations, should have assisted his understanding of his rights.

The Appellant claims that his youth, low IQ, and illiteracy rendered him more susceptible to psychological coercion, and less able to understand his rights. Clearly, an inquiry into the voluntariness of a juvenile's statement includes, "consideration of the individual's age, experience, education, background, and intelligence, and [considers] whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

The evidence before the court below was mixed. The Appellant was 16 years old when he gave his statements. His own expert, Dr. Sumit Anand, testified that the Appellant had an IQ of approximately 70, which placed him in the mildly mentally retarded range, was functionally illiterate

¹⁷Because the Appellant was not in custody when he gave the Starcher statement, during the Fluharty interview, and during Trooper Streyle's pre-interview, the Appellant's *Miranda* rights had yet to attach.

and had weak problem solving skills.¹⁸ (R. 1325, 1328, 1329.) But, based upon his GAF score Dr. Anand found that the Appellant was functioning “really well” and was able to maintain meaningful interpersonal relationships. (R. 1341-42.) The State’s expert, Dr. Ralph Smith, testified that the Appellant had the capability to understand and defend his own interests. Although this capability was not on par with the average person, he was capable of understanding his *Miranda* rights. (R. 1572-73.) His IQ was tested at 56, but Dr. Smith opined that the Appellant’s score, like most of his test scores, was the result of malingering

The trial court, upon consideration of all of the evidence and after observing the Appellant’s demeanor ruled:

THE COURT: The question is, under the totality of the circumstances, was there a valid waiver of the right to counsel? It seems to me that’s the question, whether he’s a juvenile or an adult. Yeah, with a juvenile that are other considerations. But from the evidence that was presented Ronnie Rush was not secreted from his family, wasn’t kept a prisoner. The police were in contact with his father. His father knew he was waiting there [at the detachment] to take a polygraph examination, according to the testimony that was presented here.

This is not a case where physical violence and force was used against your client. I think the evidence that the defense put in the record that related to his appearance when he was taken later that night to the juvenile detention facility – I mean he wasn’t beaten.¹⁹

MS. MONK: Right.

¹⁸Dr. Anand was originally employed to evaluate the Appellant to determine if he was competent to stand trial, and competent during the commission of the murder. The Doctor ruled that he was competent.

¹⁹The State introduced the results of a physical exam performed upon the Appellant’s admittance to the juvenile detention facility. The exam revealed no signs of abuse.

THE COURT: Yeah, he was there a long time, but the testimony also was that he was permitted to sleep, he was given food. One of the state policemen, the sergeant, testified that he offered to take him home after he had requested counsel. And I don't know if you remember that testimony.

MS. MONK: I don't remember - . . .

THE COURT: The long and the short of it is here, it's the opinion of the Court that Ronnie was advised of his rights, I counted, four times that day. And I believe that the record demonstrates under the totality of the circumstances that he waived counsel.
...

(R. 1856-57.)

The Appellant conceded that he voluntarily accompanied Deputy Ballengee and Sheriff Parsons to the crime scene on May 15. The court found that Deputy Parsons asked the Appellant's father if he could take the Appellant back to the crime scene. Although there was conflicting testimony as to why the Appellant was taken from the scene to the Grantsville detachment, the court found that the Appellant was free to leave the detachment any time he wanted. Nor was he subjected to any interrogation from the time he spoke with Trooper Starcher to the time he arrived at Grantsville.

While at the detachment the Appellant was free to move around and use the phone without asking for permission. He was told by Trooper Fluharty that he was not under arrest, and could leave at any time. Trooper Cooper went to the Appellant's house twice, once to inform his father that his son would be taking a polygraph test at the detachment. Indeed, the trooper offered to drive the father back to the detachment, but Mr. Rush declined.

Although the Appellant was at the police barracks for a long time, he was not subject to relentless, repeated interrogations. *See Ruvalcaba v. Chandler*, 416 F.3d 555, 561-562 (7th Cir.

2005) (Although juvenile detained for 14 hours evidence showed that statement was not coerced as he was not interrogated repeatedly during this period, was questioned for a total of less than two hours over the course of three separate sessions, and was provided with food, and rest during his period of detention.) His first statement to Trooper Starcher lasted less than an hour, he then spoke to Trooper Fluharty for two hours, Trooper Streyle began his interview at 2:30 and left at 5:00, and the Appellant's final statement to Trooper Cooper was a little more than a half of an hour. In between these statements the Appellant slept, ate, and spoke to his father.

After Trooper Fluharty's unprofessional behavior the Appellant requested counsel. Notwithstanding his low IQ, and poor problem solving skills, he understood his rights well enough to invoke them when Trooper Fluharty's behavior crossed the line. Of course, the Appellant's exercise of his right to counsel makes his statement to Trooper Cooper somewhat problematic. But the trial court properly addressed this issue in its final order.

In *Edwards v. Arizona*, 451 U.S. 477, 484 (1981), the United States Supreme Court that if an accused, during custodial police interrogation requests counsel, "the interrogation must cease until an attorney is present." The Court has defined "interrogation" as "express questioning . . . [or] any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). But a defendant may subsequently waive his right to counsel by initiating further communication, exchanges or conversations with the police.

In order to satisfy *Edwards* the accused "must initiate a conversation which shows an intelligent and knowledgeable desire for a generalized discussion about the investigation. A statement which is merely a necessary inquiry arising out of the incidence of the custodial

relationship will not satisfy this test.” *State v. Lucas*, 178 W. Va. 686, 689, 364 S.E.2d 12, 15 (1987) (quoting *State v. Crouch*, 178 W. Va. 221, 223, 358 S.E.2d 782, 784 (1987)).

Because the Appellant was not in custody when he requested counsel, the case at bar is distinguishable from *Edwards* and its progeny. Syl. pt. 2, in part, *State v. Bowyer*, 181 W. Va. 26, 380 S.E.2d 193 (1989) (“Once an accused asks for counsel *during custodial interrogation*, his is not subject to further interrogation by the authorities until counsel has been made available to him”). For the reasons argued above, it is clear that the Appellant was not in custody when he requested counsel. Indeed, Trooper Fluharty offered to drive the Appellant home after Trooper Streyle left the detachment. Once Trooper Cooper told the Appellant he was under arrest the Appellant did not request counsel. Therefore *Edwards* does not apply.

Even if this Court were to find that the Appellant was in custody at the time he requested counsel, because he initiated communication with Trooper Cooper the outcome is no different. The record demonstrates that Trooper Cooper did not interrogate the Appellant before he gave the trooper his statement:

- Q: All right. So – now, let’s go step by step through this sit down, as you called it. What did you do first?
A: As far as bringing him in the office?
Q: Yeah. Lets start with bringing him in the office.
A: Once I brought him into my office, I shut the door.
Q: All right. And describe – is this defendant that you were talking to?
A: Yes, sir.
Q: Describe him. Was he handcuffed?
A: No, sir; he wasn’t.
Q: Was he shackled?
A: No, sir.
Q: Was he restrained in any way?
A: No, sir.
Q: Was he coerced into that room?
A: No, sir.

Q: All right. Now, tell us, is there anyone else in the office besides you and this defendant?

A: Trooper Hammack was in there, also, I believe.

Q: Now, what happened next?

A: I had Ronnie Rush to have a seat directly across from me on the other side of my desk, and I advised him that, during the course of the day, course of the investigation, that I had uncovered enough evidence that the prosecutor felt was enough to charge him in this case and I was getting ready to write up a complaint for murder.

Q: At this point, tell us what happened?

A: As I sat down, he was sitting there across from me, I began to actually – I think I wrote a line or two on the complaint, and Ronnie began to sob and cry. At that time he looked at me and he said, “I’m sorry. I loved Ward and Mary.” And at that time I stopped him, because he was in the process of speaking to me. At that time I felt that it was important that I re-advise – that I advised him of his *Miranda* rights again, because I felt what was telling me was, in essence – it may be construed as some type of confession.

(R. 973-74.)

The lower court found:

The facts of this case are not distinguishable from those in *Oregon v. Bradshaw*, [462 U.S. 1039] (1983). In that case, the Defendant, after invoking his right to counsel during custodial interrogation, asked the police “[w]ell what is going to happen to me now?”

The U.S. Supreme Court held that by this inquiry, the Defendant initiated further conversation with the police. The majority opinion states:

Although ambiguous, the respondent’s question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation. That the police officer so understood it is apparent from the fact that he immediately reminded the accused that “you don’t have to talk to me” and only after the accused told him that he “understood” did they have a generalized conversation. Pet. 11. On these facts we believe that these was not a violation of the *Edwards* rule.

(R. 306-07.)

The lower court's legal conclusions in the case at bar are eminently reasonable. Unlike *Bradshaw*, this Appellant initiated conversation about the substance of the case. At that point Trooper Cooper stopped him, read him his *Miranda* rights, made sure he understood his position, and then heard his statement.

Under the circumstances, and viewed from an objective perspective, Trooper Cooper's conduct should be reasonably understood as simply informing the Appellant of the charges against him. To find otherwise would simply be absurd, and have disastrous public policy implications.

C. THE COURT'S WAIVER OF ITS JUVENILE JURISDICTION WAS BASED UPON PROBABLE CAUSE.

The Appellant next claims that the trial court's decision to transfer his case to the court's criminal jurisdiction was an abuse of discretion. West Virginia Code § 49-5-10(d)(1) clearly states that the circuit court must waive its juvenile jurisdiction over a defendant who is at least 14 years old, when there is probable cause to believe that the defendant committed the crime of first degree murder.

It is the Appellant's position that the trial court's probable cause finding was so intertwined with the Appellant's statements that, if the statements are not admissible, there was not sufficient evidence to transfer the Appellant. Therefore, this Assignment of Error is, in fact, a sub-part to Appellant's previous assignments of error.

In its 27-page transfer order, the court afforded substantial weight to the Appellant's two statements. (Juv. R. 1037-38, 1039, 1042, 1045-46, 1053-54.) The court found that the Appellant's pretrial statements were "willfully and deliberately false or misleading" and should be considered evidence of consciousness of guilt. (Juv. R. 1053-54.) The court also found that the Appellant

became a suspect after his interview with Trooper Starcher. (Juv. R. 1039.) The Appellant's motive, *i.e.* greed, was based, in part on the Appellant's admission to Trooper Starcher that he was aware of Mr. Groves' sizeable inheritance. (R. 1055.)

Therefore, if this Court were to find all of the Appellant's statements inadmissible, it would be virtually impossible for the State to argue harmless error. Although the State introduced other evidence supporting a finding of guilt - the red mark on the Appellant's shoulder, the money found in the GMC Jimmy, and the Appellant's blue truck, the similarity of this money to the money found in the Appellant's home, and the \$2,700 found in a trash can at the Appellant's home - the court's order is primarily based upon the Appellant's contradictory statements.

Therefore, if this Court finds that both statements are inadmissible, then the court's transfer order should also be reversed. But if the Court finds that only one statement is inadmissible the picture changes. Although the court focused on the discrepancies between the Starcher statement, and the Cooper statement, it also afforded great weight to the inconsistencies within the Starcher statement. (R. 1053.) Thus, if this Court were to rule that the Starcher statement was admissible, but the Cooper statement not; given the balance of independent evidence corroborating the State's theory, the court's decision to transfer the Appellant to its criminal jurisdiction would still be correct.

If the Court holds that the Cooper statement is admissible, but the Starcher statement inadmissible, the same holds true. The court based its decision to transfer the Appellant, in part, on the questionable nature of both statements. (R. 1053.) The Appellant did not confess, he simply told such ridiculous lies that the court interpreted these statements as demonstrating consciousness of guilt. Given the absurd, and inherently unbelievable nature of the Cooper statement, considered within the context of the balance of the evidence, the court's order is supportable.

D. THERE IS NO STATUTORY PROVISION THAT REQUIRES A TRIAL COURT TO SENTENCE A JUVENILE UNDER 49-5-10 IF HE IS ACQUITTED OF THE TRANSFERRABLE OFFENSE BUT CONVICTED OF A LESSER INCLUDED OFFENSE.

1. The Standard of Review.

This is a question of statutory interpretation. The Court's standard of review is, therefore, *de novo*. Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). Syl. pt. 5, in part, *Walker v. West Virginia Ethics Commission*, 201 W. Va. 108, 492 S.E.2d 167 (1997) ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.") (internal quotations and citations omitted).

2. Discussion.

The Appellant next argues that the trial court abused its discretion by failing to transfer this matter back to its juvenile jurisdiction after the Appellant was acquitted of the offense - first degree murder - which precipitated his transfer in the first place. The Appellant's argument ignores the plain language of the State's juvenile transfer statute, and confuses the court's sentencing discretion with its statutory duties.

West Virginia Code § 49-5-10(d)(1) clearly states that a circuit court shall transfer from its juvenile jurisdiction to its criminal jurisdiction if the defendant is 14 years or older, and there is probable cause to believe he committed first degree murder. In the case at bar, after a four-day hearing, the court found probable cause to waive its juvenile jurisdiction. The Appellant has not cited to a single statutory provision that requires a trial court to reassert its juvenile jurisdiction during sentencing if the Appellant is acquitted of one of the enumerated offenses, but convicted of a lesser included offense.

To require a court to return a transferred juvenile defendant who has been convicted of a lesser included offense back to its juvenile jurisdiction for sentencing purposes would render the discretionary “safety valve” function of West Virginia Code § 49-5-13(e) mere surplusage. Syl. pt. 2, *State v. Robert McL*, 201 W. Va. 317, 496 S.E.2d 887 (1997) (W. Va. Code § 49-5-10 and § 49-5-13 should be read *in pari materia*.). A mandatory re-transfer provision is not constitutionally mandated, nor is it contemplated by the juvenile code. Sentencing is an issue best left to the court’s discretion.

E. THE JURY’S VERDICT WAS CONSISTENT.

1. Standard of Review.

Appellate review of inconsistent verdicts is generally not available. *State v. Hall*, 174 W. Va. 599, 602, 328 S.E.2d 206, 210 (1985).

In *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), this Court adopted the federal standard of review for sufficiency of the evidence as set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979): A verdict of guilty will not be set aside due to insufficiency of the evidence if, reviewing the evidence in the light most favorable to the prosecution, the appellate court finds that “any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” 194 W. Va. at 667, 461 S.E.2d at 173 (quoting *Jackson*).

2. Discussion.

The Appellant was originally charged with, *inter alia*, two counts of first degree murder, and one count of first degree robbery. (R. 2.) At the close of the case the court instructed the jury on the elements of first degree murder, felony murder during the commission of aggravated robbery, felony murder during the commission of nighttime entering without breaking, second degree murder,

voluntary manslaughter, and aggravated robbery. (R. 1467-68, 1469-70, 1471-72, 1475, 1483.) The Appellant did not object to the court's instructions. The jury found the Appellant guilty of two counts of voluntary manslaughter, and one count of first degree robbery. The Appellant claims that these verdicts are inconsistent, and that evidence is insufficient to support a first degree robbery conviction.

"There is no rule that a guilty verdict in a felony requires a guilty verdict in any charged homicide associated with the felony, much as prosecutors might like to have such an instruction." *United States ex. rel. Cathey v. Cox*, 203 F. Supp. 2d 949, 951 (N.D. Ill. 2002). In order to convict the Appellant of robbery the State was required to prove that the Appellant took money belonging to the Mr. Groves, without Mr. Groves' consent by presenting a firearm, with the intent to permanently deprive Mr. Groves of his property. Felony murder requires proof of every element of the felony in addition to evidence that the Appellant killed Mr. Groves during the commission of the felony.

Given the nature of the verdict it is clear that this jury did not believe that the Appellant had the intention of killing Mr. Groves and Ms. Hicks when he entered their house. A reasonable jury may have found that the Appellant entered Mr. Groves' house only intending to steal his money. He may have accomplished this goal by threatening to kill both parties with his shotgun after which there was a break in the chain of events ultimately leading to the victims' deaths.

The question of whether a homicide occurred during the commission of a felony is one of fact which should be left for the jury. Edwin S. Barbe, Annotation, *What Constitutes Termination of a Felony for Purposes of the Felony-Murder Rule*, 58 A.L.R.3d 851 (1974); *People v. Gillis*, 712 N.W.2d 419, 441 (Mich. 2006) ("Whether a defendant is still in the perpetration of an enumerated

felony when a homicide occurs is either a question of law or a question of fact, depending on the strength of the evidence presented to the jury.”).

Although the State expresses no opinion about the jury’s final verdict, the verdict itself is not inherently contradictory.

Even if the verdicts were inconsistent, the outcome would be no different. Appellate review of inconsistent verdicts is not generally available. Syl. pt. 2 *State v. Bartlett*, 177 W. Va. 663, 665, 355 S.E.2d 913, 915 (1987) (quoting *State v. Hall*, 174 W. Va. 599, 328 S.E.2d 206 (1985)). In *Hall* this Court found, “Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.” *State v. Hall*, 174 W. Va. 599, 603, 328 S.E.2d 206, 211 (1985). The Appellant is correct when he asserts that this Court has quoted to dicta from *United States v. Powell*, 469 U.S. 57, 69 n.8 (1984), which states that the rule does not apply, “where a guilty verdict on one count logically excludes a finding of guilt on the other.” (*Id.*) This rule does not apply in this case.

The United States Supreme Court has made it clear that inconsistent verdicts may stand when one of the verdicts is a conviction and the other an acquittal. *Id.* at 65. The underlying rationale of these cases is that the acquittal on one count may be an exercise in lenity by the jury that is not grounded in its view of the evidence. *Dunn v. United States*, 284 U.S. 390, 393 (1932). The same logic holds true when a jury convicts an appellant of a lesser-included offense. This may also be an exercise in lenity by the jury.

The *Powell* footnote addresses instances when a defendant is convicted of two crimes, where a guilty verdict on one logically excludes a finding of guilt on the other. As stated above, there is no logical inconsistency in the jury’s verdicts. See *United States v. Daigle*, 149 F. Supp. 409, 414 (D.C. 1957) (When a guilty verdict on one count *negatives some fact essential to finding of guilty*

on a second count, two guilty verdicts cannot stand.”) The jury’s voluntary manslaughter verdict did not negative a fact essential to its robbery conviction.

F. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SENTENCING THE APPELLANT UNDER ITS CRIMINAL JURISDICTION.

1. The Standard of Review.

“Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” *State v. Eddie Tosh K.*, 194 W. Va. 354, 460 S.E.2d 489 (1995) (quoting Syl. pt. 2, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982)).

2. Discussion.

The Appellant next contends that the trial court’s decision to sentence him as an adult was an abuse of discretion because the court failed to consider his mental capacity, troubled familial background, or his potential for rehabilitation.

West Virginia Code § 49-5-13(e) states that, “if a juvenile charged with delinquency under this chapter is transferred to adult jurisdiction and there tried and convicted, the court *may* make its disposition in accordance with this section in lieu of sentencing such person as an adult.” (Emphasis added.) There is nothing in the language of the statute setting forth a set of criteria which a court must consider before sentencing a transferred juvenile. The language is purely discretionary.

The trial court’s decision was not an abuse of discretion. The Petitioner murdered two elderly people with whom he had a trusting relationship solely for pecuniary gain. (R. 1043-44.) Although he was 16 the day he killed Mr. Groves and Ms. Hicks, the Appellant was 18 by his sentencing date; too old to take advantage of the rehabilitative purposes of the juvenile code.

Defense counsel requested that the Appellant be sent to Salem until his 21st birthday; a total of three years, or that he be sent to the Anthony Center and then placed on probation.²⁰ (R. 1886.) Quoting from *Roper v. Simmons*, 543 U.S. 551 (2005), a case barring the death penalty for juveniles under the age of 18, defense counsel made generalized comments about the immaturity of juvenile defendants, and their propensity for reckless behavior. (R. 1889-1891). Apart from pointing out that the Appellant had been diagnosed as mildly mentally retarded, counsel did little to analogize a death penalty case to the case at bar. (R. 1894.)

The court heard from Mary Settles, Mary Hicks' oldest daughter. Ms. Settles described the close relationship between the Appellant, Mr. Groves, and Mr. Hicks, and how both Mr. Groves and Ms. Hicks treated the Appellant kindly. (R. 1899-1900.) The court then heard from Warner Settles, Mr. Groves' double first cousin, who testified that he had seen Mr. Groves and Ms. Hicks two days before they were killed. He described them as happy and contented. (R. 1902).

After considering arguments of counsel and statements of the family members, the court stated:

And in this case, we had have the most serious crime that could have been committed against Ward Groves and Ms. Hicks. But the most serious, obviously, this happened to two senior citizens, this happened in their home and this happened in a rural area of Calhoun County, which is a rural area of West Virginia. We must protect people in our homes and we must never forget that.

As part of the pre-sentence investigation, an offender is questioned by the probation officer and given an opportunity to say what happened here, the circumstances of the case. Now, Ronnie Rush did that in this case. . .

Ronnie Rush says, . . . "I was upstairs at Ward Groves' and Mary Hicks' house sleeping. I was almost asleep and Ward asked me if I heard any noise two or three times. I told him I never. I fell asleep.

²⁰Under the law a juvenile court retains jurisdiction over a defendant until he turns 21.

I heard Bobby Shamblin and another guy coming walking up to the porch with a gun. I didn't know the other guy. I couldn't see him.

The defendant said he hid upstairs down between the side of the bed. He heard two gunshots go off. He ran downstairs and discovered that Ward and Mary had been shot, and he went out of the side door and got in the Blazer and drove up to his father's house.

He says in his statement to the probation officer, again on page 16 of the [pre-sentence] report, that he lied to Trooper Cooper – Sergeant Cooper, a State policeman, when he told him that Bobby Shamblin had come up there and woke him up and held a knife on him, and he said he lied about Bobby Shamblin threatening him.

The Court is of the opinion that – you know, this is an exculpatory statement. This is a statement that concedes no involvement whatsoever. This is a statement that is telling the Court that Ronnie Rush is just a poor victim. . .

(R. 1904-05.)

I agree with Mr. Minney. I do not think that the defendant has acknowledged responsibility whatsoever or that he has any genuine remorse for what has happened here.

....

I agree with some of the statements made by [defense] counsel. A juvenile's part indeed is less mature, less sophisticated, less perhaps able to extricate themselves from situations. But that doesn't take away that the two people are dead, killed in a horrible way, shot and executed in their beds under very strange circumstances, if Ronnie Rush was not involved in this.

(R. 1906.)

The Court is – Ms. Settles indicated that Ward and Mary were good to Ronnie Rush, and the evidence that came out in the trial supports that. They – Ronnie traded with Ward. He was down at their house a lot. He slept at their house several nights every week. I find this simply to be a betrayal by Ronnie Rush. He betrayed Ward Groves and Mary Hicks and it was all for the love of money, for the love of money and greed.

....

The Court has considered the request of the defense to suspend sentence and send the offender. . . to the Anthony Correctional Center for the youthful offender program there. That's a commitment that is often done with young people in this court. . .

This is an extraordinary case, a very unusual case in many respects. Not only does the seriousness of the crime, in this Court's opinion, remove Youthful Offender treatment as realistic – well, under the law it is an option. The Court has considered it. The Court rejects it based on the fact that the seriousness of the crimes would be unduly deprecated by this sort of treatment of the defendant.

But more importantly, I'm rejecting it because Ronnie Rush has refused to accept any responsibility whatsoever for his crime. He has not been entirely truthful in his description of the facts in this case, in this Court's opinion. And absence of remorse and absence of acceptance of responsibility, I think, is the first step toward meaningful rehabilitation and meaningful success of the youthful offender program, without which, it seems to me, that the disposition would be doomed to failure. So that is rejected.

(R. 1908-09.)

The court's explanation was fair, and reasonable. Given the nature of the offenses, the Appellant's penchant for lying when it suited him, and his refusal to accept responsibility for his horrific actions, even after his conviction, three years in a juvenile lock up facility, or six months at Anthony Center followed by probation would not be a sentence: it would be an obscenity.

V.

CONCLUSION

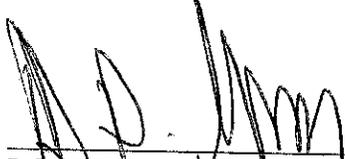
For the foregoing reasons, this Honorable Court should affirm the judgment of the Circuit Court of Calhoun County.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



ROBERT D. GOLDBERG, State Bar No. 7370
ASSISTANT ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee State of West Virginia, upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 24th day of May, 2006, addressed as follows:

To: Teresa C. Monk, Esq.
Public Defender Corp.
P.O. Box 894
Spencer, West Virginia 25276


ROBERT D. GOLDBERG