
NO. 33048

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

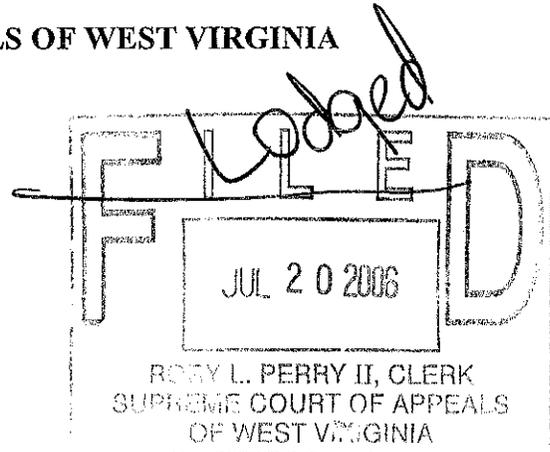
STATE OF WEST VIRGINIA,

Appellee,

v.

KEVIN RAY MIDDLETON,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

NICOLE A. COFER
THIRD YEAR LAW STUDENT
PRACTICING UNDER RULE 10

BARBARA H. ALLEN, WVSB # 1220
MANAGING DEPUTY ATTORNEY GENERAL
STATE CAPITOL, ROOM E-26
CHARLESTON, WEST VIRGINIA 25305
(304) 558-2021

Counsel for Appellee

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. KIND OF PROCEEDING AND NATURE OF RULING BELOW	2
II. STATEMENT OF THE FACTS	2
III. ASSIGNMENTS OF ERROR	5
IV. ARGUMENT	6
A. THE CIRCUIT COURT PROPERLY ALLOWED APPELLANT'S EXTRAJUDICIAL INCULPATORY STATEMENTS TO BE ADMITTED INTO EVIDENCE AT TRIAL	6
1. Because Appellant Was Not Subjected to a Custodial Interrogation, the Police Were Not Required to Give <i>Miranda</i> Warnings	7
2. The Police Properly Obtained a Voluntary, Knowing and Intelligent Waiver of Appellant's Right to Counsel for the Polygraph Test Process	11
3. Appellant Waived His Right to Counsel for the Post- polygraph Questioning and There Was No Violation of Appellant's <i>Miranda</i> Rights	17
4. It Is Clear from the Totality of the Circumstances That Appellant's Extrajudicial Inculpatory Statement Was Voluntary, Free from Any Police Coercion, and Properly Admitted by the Circuit Court	20
B. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S REQUEST TO DISCREDIT THE FATHER OF THE CHILD VICTIM	21
C. THE CIRCUIT COURT PROPERLY APPLIED APPELLANT'S TIME SERVED TO HIS SENTENCES	23
V. CONCLUSION	24

TABLE OF AUTHORITIES

	Page
CASES:	
<i>California v. Trombetta</i> , 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)	22, 23
<i>Crane v. Kentucky</i> , 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)	22
<i>Davis v. United States</i> , 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994)	17, 18, 19
<i>Holmes v. South Carolina</i> , 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)	23
<i>Johnson v. Zerbst</i> , 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)	17
<i>Lodowski v. State</i> , 307 Md. 233, 513 A.2d 299 (1986)	16
<i>McNeil v. Wisconsin</i> , 501 U.S. 171, 111 S. Ct. 2204 (1991)	20
<i>Moran v. Burbine</i> , 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)	14, 15, 16, 20
<i>North Carolina v. Butler</i> , 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)	14
<i>Oregon v. Mathiason</i> , 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977)	7, 10
<i>Poyner v. Murray</i> , 964 F.2d 1404, 1413 (4th Cir. 1992)	20
<i>State v. Barnes</i> , 345 N.C. 184, 481 S.E.2d 44 (1997)	16
<i>State v. Boxley</i> , 201 W. Va. 292, 496 S.E.2d 242 (1997)	12, 13, 18
<i>State v. Bradshaw</i> , 193 W. Va. 519, 457 S.E.2d 456, <i>cert denied</i> , 516 U.S. 872, 116 S. Ct. 196, 133 L. Ed. 2d 131 (1995)	12
<i>State v. DeWeese</i> , 213 W. Va. 339, 582 S.E.2d 786 (2003)	9, 10
<i>State v. Drayton</i> , 293 S.C. 417, 361 S.E.2d 329 (1987)	16

<i>State v. Farley</i> , 192 W. Va. 247, 452 S.E.2d 50 (1994)	12, 17, 18, 19
<i>State v. George</i> , 185 W. Va. 539, 408 S.E.2d 291 (1991)	17
<i>State v. Hager</i> , 204 W. Va. 28, 511 S.E.2d 139 (1998)	15, 16
<i>State v. Hanson</i> , 136 Wis. 2d 195, 401 N.W.2d 771 (1987)	16
<i>State v. Hickman</i> , 175 W. Va. 709, 338 S.E.2d 188 (1985)	12, 14, 16, 20
<i>State v. Jones</i> , 216 W. Va. 392, 607 S.E.2d 498 (2004)	11, 19, 20
<i>State v. Lacy</i> , 196 W. Va. 104, 468 S.E.2d 719 (1996)	6
<i>State v. Martisko</i> , 211 W. Va. 387, 566 S.E.2d 274 (2002)	21
<i>State v. McKenzie</i> , 197 W. Va. 429, 475 S.E.2d 521 (1996)	18
<i>State v. Milburn</i> , 204 W. Va. 203, 511 S.E.2d 828 (1998)	6
<i>State v. Montes</i> , 136 Ariz. 491, 667 P.2d 191 (1983)	14
<i>State v. Potter</i> , 197 W. Va. 734, 478 S.E.2d 742 (1996)	7, 9, 10, 12
<i>State v. Preece</i> , 181 W. Va. 633, 383 S.E.2d 815 (1989)	7, 12, 17
<i>State v. Reese</i> , 319 N.C. 110, 353 S.E.2d 352 (1987)	16
<i>State v. Rissler</i> , 165 W. Va. 640, 270 S.E.2d 778 (1980)	13
<i>State v. Rodoussakis</i> , 204 W. Va. 58, 511 S.E.2d 469 (1998)	21
<i>State v. Smith</i> , 218 W. Va. 127, 624 S.E.2d 474 (2005)	6, 12, 20
<i>State v. Starkley</i> , 161 W. Va. 517, 244 S.E.2d 219 (1978)	20
<i>State v. Starr</i> , 158 W. Va. 905, 216 S.E.2d 242 (1975)	6, 20
<i>State v. Wyant</i> , 174 W. Va. 567, 328 S.E.2d 174 (1985)	8
<i>Texas v. Cobb</i> , 532 U.S. 162, 121 S. Ct. 1335 (2001)	18
<i>United States v. Gordon</i> , 895 F.2d 932 (4th Cir. 1990)	18

<i>United States v. Leon Delfis</i> , 203 F.2d 103 (1st Cir. 1999)	19
<i>Wilson v. Murray</i> , 806 F.2d 1232 (4th Cir. 1986)	17
<i>Wyrick v. Fields</i> , 459 U.S. 42, 103 S. Ct. 394, 74 L. Ed. 2d 214 (1982)	13, 21

NO. 33048

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

KEVIN RAY MIDDLETON,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

INTRODUCTION

This is an appeal by Kevin Ray Middleton (hereinafter Appellant) from his convictions in the Circuit Court of Kanawha County of one count of sexual abuse by a parent, teacher or guardian and one count of first degree sexual abuse. The Appellant's victim was a five-year-old girl, Shaylie W.

On appeal, Appellant alleges that the court below erred in allowing the Appellant's extrajudicial inculpatory statement to be admitted into evidence at trial, on the ground that the police subjected him to custodial interrogation or interrogation in a custodial atmosphere without giving him the required *Miranda* warnings; that the police failed to obtain a voluntary, knowing and intelligent waiver of Appellant's right to counsel for a post-polygraph interrogation; that the police violated Appellant's *Miranda* rights by failing to cease their interrogations following his alleged request for counsel and the waiver signed for the polygraph test did not constitute a waiver of right

to counsel for the post polygraph interrogation; and that in the totality of the circumstances, Appellant's extrajudicial inculpatory statement was not voluntary but was the result of coercive police activity.

The Appellant further alleges that the circuit court erred in denying him the opportunity to confront the complaining father of the children, who had no firsthand knowledge of the material facts, or to present evidence that the father had ill motive and intent toward Appellant and had filed prior false reports with authorities.

Finally, Appellant contends that the court below erred in failing to credit his pre-trial incarceration time to both of his consecutive sentences.

I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

The State agrees with and adopts Appellant's discussion of "Proceedings and Rulings Below," found at pages 1 and 2 of his Brief.

II.

STATEMENT OF THE FACTS

On January 14, 2002, Tom Wilkins had a disturbing telephone conversation with his five-year-old twin daughters in which he learned that the Appellant, who had been living with the girls' mother for four or five months, had inappropriate sexual contact with one of the twins, Shaylie W. Immediately thereafter, Mr. Wilkins did what would be expected of any parent: he contacted the authorities and reported the incident. Trooper Nichols contacted a magistrate about the claims and was given the "green light" to investigate the allegations and remove the twins from the home shared by their mother and the Appellant.

Shaylie W. (and her sister) were picked up at their babysitter's home by State Police and taken to the Quincy Detachment, where Shaylie was interviewed by Trooper Aaron Nichols.¹ Shaylie told Trooper Nichols that Appellant had "touched her monkey" through her pants, had touched her in the bathtub, and used a knife on one occasion. (Tr. 268-70.) Later that day Shaylie was interviewed by Suzanne King, an emergency room nurse with specialized training for sexual assault. (Tr. 237-38.) Shaylie again reported that Appellant had "touched her monkey," and said that it hurt. (Tr. 239, 248.) She said that the abuse had occurred "yesterday," which may not have been accurate; psychologist Stephen O'Keefe testified that inconsistencies with time and date are to be expected when a five-year-old child is the reporter. (Tr. 446.)

On January 15, 2002, while Shaylie W. was being interviewed by the WVSP, Appellant showed up at the Quincy Detachment without an appointment. (Tr. 268-69.) He told Trooper Nichols that he didn't do anything, but reported that he had observed one of the twins naked on the floor "playing with herself." (Tr. 268.) At some point the description of this incident changed slightly; the twin was allegedly in a gown and under a blanket, "messaging with herself." (Tr. 277.) Trooper Nichols arranged for Appellant to return the next day for a polygraph exam.

On January 16, 2002, Appellant voluntarily returned to the detachment for the exam. He read and executed both a *Miranda* Waiver and a Polygraph Release form. (Tr. 50-51, 273, 299; Exs. 1 & 3.) Trooper Christopher Smith, who administered the polygraph, advised Appellant verbally that he would be questioned after the test. (Tr. 60, 62, 68.) Appellant initially reiterated that he hadn't

¹Although there was some suggestion by defense counsel that Shaylie W.'s father had accompanied her to the detachment, Shaylie testified without contradiction that she rode to the interview with a trooper, *not* with her father. Thus, there was no possibility of parental coaching or any other interference with the child prior to her giving her statement.

done anything but claimed that the twins played with themselves all the time, leading him to predict to their mother “that some day that they would make an allegation like this.” (Tr. 303.) After being told that he had flunked the polygraph:

Q: Why didn’t you leave after the test?

A: I was still willing to try to prove my innocence – well, I wished I could, you know, that’s what I was wanting to do. I didn’t want to make it look like, well, I’m guilty, I’m leaving, you know.

(Tr. 96.)

Appellant was questioned for several more hours, by several different State Troopers, during which time he made several admissions: first, continuing with the “young temptresses” theme he had earlier established, Appellant said that Shaylie W. and her twin would expose themselves in front of him and this excited him; and second, that he may have touched Shaylie in bed, thinking that it was his wife. (Tr. 303.) This happened once or twice, and Appellant opined that “[i]t would probably feel good being rubbed in your sleep.” (Tr. 319-20.)

Although Appellant testified at the suppression hearing that he felt he wasn’t free to go, and that he had said “I need a lawyer,” the court below disbelieved his testimony and credited the testimony of Troopers Nichols, Smith, and Bledsoe, all of whom said Appellant did not ask for a lawyer, was not threatened, coerced or promised anything, and was not only free to go but *did* ultimately go. (Tr. 98-100, 274-75, 293-95, 301.)

While Appellant was at the Quincy Detachment, his girlfriend (Shaylie W.’s mother) showed up at 11-12:00, left, and then returned at 1-1:30 or so. (Tr. 112, 117.) At some point she had a conversation with Trooper Lemmon, who told her that attorney Aaron Alexander had called him after being contacted by Appellant’s boss. Trooper Lemmon gave Ms. Wilkins the attorney’s

number. (Tr. 118.) Attorney Alexander didn't arrive until 5:00, right as Appellant was leaving. (Tr. 119.)

Aaron Alexander testified that he had talked to Trooper Lemmon and told Lemmon that he (Alexander) was Appellant's lawyer and didn't want him questioned until he arrived. (Tr. 124.) This conversation took place some time early in the afternoon. (Tr. 125.)

Appellant left the detachment at about 5:00. (Tr. 119, 294-95.) He was arrested 13 days later. (Tr. 294-95.)

III.

ASSIGNMENTS OF ERROR

Appellant assigns the following grounds as error:

- A. The Circuit Court erred in allowing Appellant's extrajudicial inculpatory statement to be admitted into evidence at trial.
 - 1. The police subjected Appellant to custodial interrogation or interrogation in a custodial atmosphere without giving him the required Miranda warnings.
 - 2. The police failed to obtain a voluntary, knowing and intelligent waiver of Appellant's right to counsel for the post-polygraph interrogation.
 - 3. The police violated Appellant's Miranda rights by failing to cease their interrogations following Appellant's request for counsel and the waiver signed for the polygraph test did not constitute a waiver of right to counsel for the post-polygraph interrogation.
 - 4. It is clear from the totality of the circumstances that Appellant's extrajudicial inculpatory statement was not voluntary but was the result of coercive police activity.
- B. The Circuit Court erred in denying Appellant the opportunity to confront the complaining father of the children or to present evidence that he had ill

motive and intent towards Appellant and had filed prior false reports with the authorities.

- C. The Circuit Court erred in failing to credit Appellant's incarceration time to both counts at sentencing.

(Appellant's Brief at 10).

IV.

ARGUMENT

A. THE CIRCUIT COURT PROPERLY ALLOWED APPELLANT'S EXTRAJUDICIAL INCULPATORY STATEMENTS TO BE ADMITTED INTO EVIDENCE AT TRIAL.

“When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below.” Syl. Pt. 1, *State v. Smith*, 218 W. Va. 127, 624 S.E.2d 474 (2005) (quoting Syl. Pt. 1, *State v. Lacy*, 196 W. Va 104, 468 S.E.2d 719 (1996)). “The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.” Syl. Pt. 5, *State v. Starr*, 158 W. Va. 905, 216 S.E.2d 242 (1975).

Furthermore, “[b]ecause of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court’s factual findings are reviewed for *clear error*.” Syl. Pt. 3, *State v. Milburn*, 204 W. Va. 203, 511 S.E.2d 828 (1998) (quoting Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996)) (emphasis added).

In this case, the court below correctly concluded that Appellant’s extrajudicial inculpatory statements were admissible, as the evidence taken during the suppression hearing showed that

Appellant was neither under arrest nor in custody at the time the statements were given. In short, Appellant's statements were voluntary and there was no *Miranda* violation.

1. Because Appellant Was Not Subjected to a Custodial Interrogation, the Police Were Not Required to Give *Miranda* Warnings.

The only issue for resolution in this assignment of error is whether Appellant was in custody on January 16, 2002, when he came to the detachment to take a polygraph and remained for post-polygraph questioning, thus requiring that *Miranda* warnings be provided. This Court has held that “[w]hether the individual was ‘in custody’ is determined by an objective test and asking whether, viewing the totality of the circumstances, a reasonable person in that individual’s position would have his freedom of action restricted to the degree associated with a formal arrest.” *State v. Potter*, 197 W. Va 734, 744, 478 S.E.2d 742, 752 (1996). The Court has further held that *Miranda* warnings must be given “only where there has been such a restriction on a person’s freedom as to render him ‘in custody.’” *State v. Potter*, 197 W. Va. 734, 478 S.E.2d 742 (1996) (emphasis added), citing *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714, 719 (1977) (*per curiam*).

The following factors must be considered in determining whether or not a person is in custody:

The factors to be considered by the trial court in making such a determination, while not all-inclusive, include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect’s verbal and non-verbal responses to the police officers; and the length of time between the questioning and the formal arrest.

State v. Preece, 181 W. Va. 633, 383 S.E.2d 815 (1989).

In this case, Appellant voluntarily arrived at the Quincy Detachment on two separate occasions, the first of which was unannounced and a complete surprise to the troopers involved, stating that he “wanted to prove his innocence.” (Tr. 91.) The questioning of Appellant occurred after the Appellant voluntarily re-appeared at the detachment for a polygraph test regarding Shaylie W.’s allegations. *Id.* Although Appellant argues that there were four officers present during the questioning, the evidence disclosed that there were never more than two troopers involved in the interrogation at any one time. (Tr. 42.)

Appellant was advised of his *Miranda* rights prior to the polygraph test and Trooper Smith explained that there were three parts to the test: a pre-interview, the examination, and a post-interview to review the results. (Tr. 68.) Appellant reviewed and signed a standard *Miranda* Rights form at 10:07 a.m., and then reviewed and signed a separate Polygraph Release Form again waiving his right to counsel at 10:12 a.m. (Tr. 48-51.) He was advised that he was not under arrest and free to leave at any time; he initialed that he understood this fact. In this regard, this Court has said that telling a suspect he is not under arrest and is free to leave is usually sufficient to rebut a claim of custody. *See State v. Wyant*, 174 W. Va. 567, 328 S.E.2d 174 (1985).

The troopers were all sequestered prior to their testimony. Each testified that there were no threats and no promises made to induce Appellant to give a statement, leaving us with only the word of Appellant (that was specifically disbelieved by the court below) that any threats or promises were made. (Tr. 204.)

Upon learning that he had failed the polygraph exam, Appellant began to reformulate his story. (Tr. 57.) Furthermore, at the suppression hearing Appellant testified that he remained at the detachment for the post-polygraph interview because “[he] was *still willing* to try to prove [his]

innocence.” (Tr. 96; emphasis added.) He further testified that “[he] didn’t want to make it look like, well, I’m guilty, I’m leaving, you know.” *Id.* After the questioning, Appellant left the Quincy Detachment on his own accord with his girlfriend and employer. (Tr. 44.) He was not arrested until 13 days after the interrogation. (Tr. 109.) Furthermore, when asked if he felt that he was free to leave, Appellant said he did not feel free to leave solely because he was asked to turn over his cellular phone, (Tr. 98), which is customary during the administration of a polygraph exam to avoid any interference with the exam. (Tr. 64.) Further, the evidence showed that the reason Appellant’s phone was taken was so that his girlfriend (Shaylie W.’s mother) could use it to call and check in with her employer. (Tr. 35, 113.)

It is clear from the totality of the circumstances that a reasonable person in the Appellant’s position would not believe that he was in custody, as the court below found, and therefore *Miranda* warnings were not required.

Appellant further contends that under the *DeWeese* totality of the circumstances test, the original *Miranda* warnings had become so stale by the time of the post-polygraph questioning as to dilute their effectiveness. (Appellant’s Brief at 20.) As a threshold matter, Appellant must be found to have been in custody, which he was not, before *Miranda* warnings would be required. *See Potter, supra.* But even assuming *arguendo* that Appellant was in custody during his visit to the Quincy Detachment, this Court has stated:

In determining whether *Miranda* warnings became so stale as to dilute their effectiveness because of a significant lapse in the process of interrogation, the following totality-of-the-circumstances criteria should be considered: (1) the length of time between the giving of the first warnings and subsequent interrogation, (2) whether the warnings and the subsequent interrogation were given in the same or different places, (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers, (4) the extent to which the

subsequent statement differed from any previous statements, and (5) the apparent intellectual and emotional state of the suspect. "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time...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, 82 L.Ed.2d 317, 104 S.Ct. 3138 (1984).

State v. DeWeese, 213 W. Va. 339, 582 S.E.2d 786 (2003).

Appellant was given his *Miranda* warnings at 10:07 am on the morning of January 16, 2002 (R. 211-212), and signed his Polygraph Release form at 10:12 am (Tr. 50-51.) According to Appellant, the post-polygraph examination began approximately 50 minutes later, "if it was that long." (Tr. 92-93.) The warnings and the initial post-polygraph questioning both occurred at the Quincy Detachment. In this regard, this Court has held "[t]hat the questioning took place in a police station is relevant but not controlling." *Potter*, 478 S.E.2d at 752, citing *Mathiason*, *supra*, 429 U.S. at 495, 97 S. Ct. at 714, 50 L. Ed. 2d at 719. Both the *Miranda* warnings and the initial post-polygraph interview were done by Trooper Smith. (Tr. 47-59.) Trooper Smith, however, was not the only officer present and only stayed for an hour and a half of the post-polygraph questioning, which would leave approximately an hour and a half of questioning in his absence. (Tr. at 61.)

Appellant's initial statement on January 16, 2002, during the pre-polygraph interview was that he had never touched the Shaylie W. in an inappropriate manner; he added, however, that on many occasions both Shaylie and her twin sister played with themselves in his presence. The polygraph test was administered, and Appellant was told that the results of the test revealed deception. At this point he spontaneously informed Trooper Smith of some information he had omitted from his initial statement:

[T]he girls pull their panties down in front of him all the time and pull their privates apart and ask him to touch them. . . . [O]netime he started to touch Shaylie, however

he knew better and stopped before he touched her. He also admitted that when he saw Shaylie touching herself that it excited him.

(R. 2.)²

Viewing the totality of the circumstances, according to the testimony of Trooper Smith, which was credited by the court below, Appellant began changing his story almost immediately after being informed that the polygraph test showed him to be untruthful. (Tr. 57.) By his own admission, Appellant *wanted to stay* and “prove his innocence.” (Tr. 96.) Beginning with the aforementioned statement to Trooper Smith, Appellant immediately began to reconstruct the events in a fashion that seemed accidental, concluding that “[he] had woke up, and [] was rubbing up and down. [He] was rubbing, and [] got up to a pussy. [He] thought it was [his] girlfriend [, and] realized it was smaller . . . [i]t probably [felt] good being rubbed in [her] sleep.” (Tr. 481.) In a desperate attempt to cover up that he had failed the polygraph test, Appellant formulated the “accidental touching” story, expanding on his earlier admission that seeing Shaylie W. play with herself was “exciting.” (R. 2.)

This Court must look at the totality of the circumstances to decide whether or not a post-polygraph statement should be admitted. *State v. Jones*, 216 W. Va. 392, 607 S.E.2d 498 (2004). If Appellant was indeed in custody, then it is clear from the totality of the circumstances that the *Miranda* warnings were not so stale as to dilute their effectiveness. Therefore, the officers were not required to re-warn him of his *Miranda* rights.

2. The Police Properly Obtained a Voluntary, Knowing and Intelligent Waiver of Appellant’s Right to Counsel for the Polygraph Test Process.

This Court has held that “[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.” Syl.

² As the Prosecuting Attorney pointed out in closing argument, each new piece of Appellant’s story attempted to minimize his actions with the “5 year old sexual temptresses.” (Tr. 480-82.)

Pt. 1, *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994) (citations omitted). “[The] Fifth Amendment right to counsel is triggered when a defendant is *taken into custody* by law enforcement officials who desire to interrogate him.” *State v. Hickman*, 175 W. Va. 709, 716, 338 S.E.2d 188, 195 (1985) (emphasis supplied and footnote omitted). At the risk of repetition, this is an issue of whether or not Appellant was in custody, because this Court has held that *Miranda* rights, including the right to counsel, must be given and honored “*only* where there has been such a restriction on a person’s freedom as to render him ‘in custody.’” *Potter*, 197 W. Va. 734, 478 S.E.2d 742 (1996) (emphasis added and citation omitted).

[T]he *Miranda* right to counsel has no applicability outside the context of custodial interrogation. Therefore, until the defendant was taken into custody, any effort on his part to invoke his *Miranda* was, legally speaking, an empty gesture. We believe the “window of opportunity” for the assertion of *Miranda* rights comes into existence only when that right is available.

State v. Bradshaw, 193 W. Va. 519, 530, 457 S.E.2d 456, 467, *cert denied*, 516 U.S. 872, 116 S. Ct. 196, 133 L. Ed. 2d 131 (1995) (footnote omitted). As previously stated, the evidence shows that Appellant was free to leave and was not in custody under the *Preece* analysis, and therefore *Miranda* rights were not available to Appellant. Furthermore, Appellant admitted that the only reason he stayed after the polygraph examination was because he was “still willing to prove his innocence.”

If the questioning of Appellant were to be found to have been “custodial,” then “[t]he totality of the circumstances must be examined to determine whether the Appellant waived his right to have an attorney present, and the State’s burden of persuasion is preponderance of the evidence” *State v. Smith*, 624 S.E.2d at 479 (citations omitted). This Court has held that “[w]hen determining whether a waiver was made, there are three considerations: were the rights given in proper form and substance; did the appellant understand them; and did he waive them?” *State v. Boxley*, 201 W. Va.

292, 297, 496 S.E.2d 242, 247 (1997), citing *State v. Rissler*, 165 W. Va. 640, 646, 270 S.E.2d 778, 782 (1980). Here, it is uncontested that Trooper Smith reviewed the *Miranda* Rights form with Appellant and that Appellant initialed and signed that he understood his rights. (R. 211.) When asked if he understood these rights, Appellant responded in the affirmative and said that he had no questions about the rights that were read to him. (Tr. 48-53.) As in *Boxley*, Appellant signed a waiver of rights prior to giving his statements that day. *Id.* Again, as in *Boxley*, the only evidence to support Appellant's claim that he invoked his rights to remain silent and to counsel is his own testimony, while there is ample testimony supporting the position that Appellant knowingly and voluntarily waived his rights. *Id.* at 297, 496 S.E.2d at 247. Appellant was given his *Miranda* rights in proper form and substance and he clearly understood those rights.

There is no evidence that Appellant was coerced into giving a statement. As in *Boxley*, Appellant testified that he voluntarily came to the state police detachment because he wanted to "prove his innocence." As in *Smith*, the Appellant neither requested an attorney nor refused to answer the questions which ultimately pointed to his guilt. *Smith* at 480. In reviewing the totality of the circumstances, the United States Supreme Court has noted that it would be unreasonable for an individual to assume that he would *not* be informed of the polygraph results and asked to explain any unfavorable results. *Wyrick v. Fields*, 459 U.S. 42, 47, 103 S. Ct. 394, 386, 74 L. Ed. 2d 214, 219 (1982).

The United States Supreme Court has also held that:

[a]n express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver...The Courts must

presume that a defendant did not waive his rights; the prosecution's burden is great, but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

North Carolina v. Butler, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979). See also *State v. Montes*, 136 Ariz. 491, 667 P.2d 191 (1983). In this case, Appellant's waiver of his right was both express and clearly inferrable.

With respect to the retention of counsel by Appellant's girlfriend and/or his employer, Appellant strongly relies on this Court's decision in *State v. Hickman*, 175 W. Va. 709, 338 S.E.2d 188 (1985), which held in Syllabus point 1 that "[a] defendant who is being held for custodial interrogation must be advised, in addition to the Miranda rights, that counsel has been retained or appointed to represent him where the law enforcement officials involved have knowledge of the attorney's retention or appointment. This rule is based on the theory that without this information, a defendant cannot be said to have voluntarily and intelligently waived his right to counsel."

First, it is clear that *Hickman* does not apply in this case because Appellant was not in custody. See argument *infra*. Second, *Hickman* was decided prior to the United States Supreme Court's opinion in *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). In *Moran*, the Court explained that "events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 422, 106 S. Ct. 1135. "But whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." *Id.* at 424, 106 S. Ct. at 1142. Further, "even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident." *Id.*

Subsequent to *Moran*, this Court acknowledged in *State v. Hager*, 204 W. Va. 28, 39, 511 S.E.2d 139, 150 (1998), that

the Supreme Court's *Moran* decision would compel an evaluation of whether the police had an obligation to inform Mr. Hager of legal representation if such representation existed and the police had knowledge thereof. Because we resolve this matter through an affirmance of the lower court's factual finding that legal counsel had not been retained, we do not squarely address that hypothetical. We do note, however, the significance of the *Moran* decision and its guidance should such a situation arise.

In the instant case, Mr. Alexander was contacted by either Appellant's girlfriend or his employer relative to Appellant's questioning, and he did call the Quincy detachment and request that questioning be halted until he arrived. However, the record is unclear (because both witnesses to the conversation had very little recollection of the time frame) as when this phone call occurred *vis a vis* any of Appellant's statements. There was no evidence of an attorney/client relationship between Appellant and Mr. Alexander, since Appellant didn't know of Mr. Alexander's existence. Additionally, Appellant was not in custody and had clearly waived his right to counsel when he signed the *Miranda* Rights and Polygraph Release forms. Further, it is uncontested that Mr. Alexander was not retained for or on behalf of Appellant by members of his family; rather he was contacted by Appellant's employer and/or his girlfriend of "five or six" months. Finally, by his own admission, Mr. Alexander did not arrive at the detachment until Appellant was already in the parking lot, heading for his truck and on the way home.

The bottom line here is that Appellant was aware of his right to request counsel and didn't do so; further, he was aware of the State's intention to use any incriminating statements he might make. *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct 1135, 89 L. Ed. 2d 410 (1986). As this Court said in *Hager*, "it is the defendant's state of mind, not the officer's knowledge, that is the dispositive

element in determining the voluntariness of a statement.” *Hager*, 204 W. Va. at 38, 511 S.E.2d at 149.

Courts in three of the five member states of the Fourth Circuit have held in accord with the United States Supreme Court’s decision in *Moran* on this issue, ruling that an otherwise knowing, intelligent and voluntary waiver of *Miranda* rights is not invalidated by the failure of police to inform an in-custody suspect of the fact that an attorney is present and attempting to reach the suspect. See *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987) *overruled on other grounds*, *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997); *State v. Drayton*, 293 S.C. 417, 361 S.E.2d 329 (1987); *Lodowski v. State*, 307 Md. 233, 513 A.2d 299 (1986). See also *State v. Hanson*, 136 Wis.2d 195, 401 N.W.2d 771 (1987), where the court wrote:

We do not believe that the suspect’s knowledge of the location of a particular counsel can affect the intelligent waiver of his constitutional rights as described in *Miranda* warnings. Since the knowledge of the location of counsel adds no constitutional rights, does not alter the facts of the case as the suspect knows them, and does not give rise to any coercive influence by the police, such knowledge is not relevant to the suspect’s voluntary decision to waive his rights. Although a suspect who was ready to waive his rights might change his mind when told an attorney was waiting to see him, the critical factor would be the convenience of seeing the attorney, not the intelligent perceived need for legal counsel. Since the convenience of the defendant is not constitutionally protected, the location of a particular attorney is not constitutionally required information.

Fifth Amendment *Miranda* rights belong solely to the person in custody; allowing third parties to invoke these rights brings into play the United States Supreme Court’s caution that “while such a rule might add marginally to *Miranda*’s goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations counsel against its adoption.” *Hickman*, *supra*, 204 W. Va. at 38, 511 S.E.2d at 149, quoting *Moran*, *supra*, 475 U.S. at 425, 106 S. Ct. at 1135.

3. Appellant Waived His Right to Counsel for the Post-polygraph Questioning and There Was No Violation of Appellant's *Miranda* rights.

Under existing case law, there is no serious question that *Miranda* rights do not even apply to this case since Appellant was not in custody. See *State v. George*, 185 W. Va. 539, 408 S.E.2d 291 (1991) (*Miranda* rights are not triggered unless there is custody); *State v. Preece*, 181 W. Va. 633, 383 S.E.2d 815 (1989) (no *Miranda* warnings necessary unless a reasonable person in the suspect's position would have considered his or her freedom of movement curtailed to a degree associated with a formal arrest). Here, there was ample evidence that Appellant knew he was free to leave yet freely chose to stay to "prove his innocence." Therefore, he was not in custody and *Miranda* right to counsel had not been triggered.

The Fourth Circuit has held that "[w]hether waiver has occurred is to be determined on a case-by-case basis, considering the 'particular facts and circumstances surrounding [each] case, including the background, experience and conduct of the accused.'" *Wilson v. Murray*, 806 F.2d 1232 (4th Cir. 1986), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938). Assuming *arguendo* that Appellant is found to have been in custody, the United States Supreme Court has held that in order for a suspect to invoke his *Miranda* right to counsel after an initial waiver, he must make a clear assertion of his right to counsel. *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). The Court further stated that:

requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present, [however] the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves.

State v. Farley, 192 W. Va. 247, 256, 452 S.E.2d 50, 59 (1994), quoting *Davis* at 460, 114 S. Ct. at

2356, 129 L. Ed. 2d at 372). In this case, Appellant testified that he knows many attorneys and could have brought one with him, but chose not to do so because he was embarrassed about the accusations. It would be a huge stretch to cite “embarrassment” as a factor falling under the “variety of other reasons” language in *Davis*, and even then it must be recalled that “the primary protection afforded suspects . . . is the Miranda warnings themselves . . .,” and Appellant was given his warnings approximately an hour before the post-polygraph questioning began.

The United States Supreme Court stated that “[n]either *Miranda* nor *Edwards* enforces the Fifth Amendment right unless the suspect makes a clear and unambiguous assertion of the right to the presence of counsel during custodial interrogation.” *Texas v. Cobb*, 532 U.S. 162, 121 S. Ct. 1335 (2001), citing *Davis*, 512 U.S. at 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). This Court has similarly held that there must be a finding of “clear and unequivocal assertion” of a right to counsel. *State v. McKenzie*, 197 W. Va. 429, 475 S.E.2d 521 (1996). Further, this Court has also held, following the suggestion of the United States Court of Appeals for the Fourth Circuit in *United States v. Gordon*, 895 F.2d 932, 938 (4th Cir. 1990), that “to assert the Miranda right to terminate police interrogation, the words or conduct must be explicitly clear that the suspect wishes to terminate all questioning and not merely a desire not to comment on or answer a particular question.” *State v. Farley*, 192 W. Va. 247, 256, 452 S.E.2d 50, 59 (1994) (citations omitted). Again, as in *Boxley*, the only evidence offered that Appellant requested counsel is his own testimony, which was specifically found not to be credible by the trial of fact. Troopers Nichols, Smith, and Bledsoe all testified that Appellant never requested an attorney be present for any portion of his polygraph examination process. This Court has held that under *Davis*, “insubstantial and trivial doubt, reasonably caused by the defendant’s ambiguous statements as to whether he wants the interrogation

to end, should be resolved in favor of the police” *Farley* at 256, 452 S.E.2d at 59 (citations omitted).

Appellant relies on this Court’s discussion in *State v. Jones*, 216 W. Va. 392, 607 S.E.2d 498 (2004), citing *United States v. Leon Delfis*, 203 F.2d 103 (1st Cir. 1999). In *Leon Delfis*, the defendant was in no way informed of the possibility of a post-polygraph questioning, whereas in the instant case, Appellant was verbally informed that there would be a post-polygraph interview. In this regard, Trooper Smith testified at the Suppression Hearing that though there was no form for the post-polygraph questioning, he has a practice of verbally explaining that there is a post-polygraph questioning where he reviews the results of the examination. (Tr. 60.) In *Jones*, this Court sustained the admission of a confession after a polygraph test where “the defendant had not been arrested, arguably was not in custody and did not have a lawyer.” *Jones* at 398, 607 S.E.2d at 504, citing *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994). These facts are hardly distinguishable from the instant case: Appellant was not under arrest at the time of the polygraph examination; by his own admission, he chose to stay for the post-polygraph questioning in order to “prove his innocence”; and he did not have an attorney, nor did he request one, at the time of the polygraph.

Though “*Wyrick* does not stand for the principle that a knowing, voluntary, and informed waiver of the rights to silence and to counsel prior to taking a polygraph test extends to post-test interrogation,” it does permit a finding of waiver if it is shown through the totality of the circumstances. *Jones* at 397-398, 607 S.E.2d at 503-504. It is clear from the aforementioned facts that the totality of the circumstances show that Appellant did make a intelligent and voluntary waiver of his right to counsel and that his *Miranda* rights were not violated.

4. It Is Clear from the Totality of the Circumstances That Appellant's Extrajudicial Inculpatory Statement Was Voluntary, Free from Any Police Coercion, and Properly Admitted by the Circuit Court.

This Court has held that “[t]he state must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.” Syl. Pt. 6, *State v. Smith*, 218 W. Va. 127, 624 S.E.2d 474 (2005); Syl. Pt. 5, *State v. Starr*, 158 W. Va. 905, 216 S.E.2d 242 (1975). See also Syl. Pt. 6, *State v. Hickman*, 175 W. Va. 709, 338 S.E.2d 188 (1985). In this case, a reasonable view of the evidence, taken in the light most favorable to the verdict winner, Syl. Pt. 1, *State v. Starkley*, 161 W. Va. 517, 244 S.E.2d 219 (1978), supports the circuit court’s finding that Appellant voluntarily gave his statements.

Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers “are more than merely “desirable”; they are essential to society’s compelling interest in finding, convicting, and punishing those who violate the law”

McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204 (1991), quoting *Moran v. Burbine*, 475 U.S. 412, 426, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)). The Fourth Circuit has stated that “[a] waiver is voluntary if it is “ ‘the product of a free and deliberate choice rather than intimidation, coercion, or deception’ on the part of the police.” *Poyner v. Murray*, 964 F.2d 1404, 1413 (4th Cir. 1992), quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986), cert. denied, 506 U.S. 958, 113 S. Ct. 419, 121 L. Ed. 2d 342 (1992).

In reviewing the totality of the circumstances, it is clear that Appellant’s argument is flawed. Contrary to Appellant’s assertion that four or five officers were in the room with him at one time, there is testimony that there were no more than two officers present with him at any given time.

Appellant contends that his cell phone was “taken from him and never returned”; however, the testimony of both Trooper Nichols and Mary Wilkins (Appellant’s girlfriend and Shaylie W.’s mother) confirms that his phone was taken from him at the request of Ms. Wilkins so that she could call and check in with her employer, not because of any police coercion. In reality, Appellant voluntarily came to the Quincy detachment because he wanted to prove his innocence. He was given his *Miranda* Rights which he signed and initialed, indicating that he understood the rights, that he was not under arrest and was free to leave at any time, and that he did not want counsel present. At that point he was administered the polygraph test, lasting less than fifty minutes, after which he was told that deception was detected. Appellant, still aware of his rights, chose to stay and talk with the troopers because he was “still willing to prove his innocence.” As noted earlier, the United States Supreme Court has held that one part of the totality of the circumstances test is the reasonable inference that Appellant should have known that he would be informed of the polygraph results and asked to explain any unfavorable results. *Wyrick* at 47, 103 S. Ct. at 396, 74 L. Ed. 2d at 219.

It is clear from the totality of the circumstances that Appellant’s extrajudicial statement was voluntary, and not the product of coercive police activity.

B. THE CIRCUIT COURT PROPERLY DENIED APPELLANT’S REQUEST TO DISCREDIT THE FATHER OF THE CHILD VICTIM.

This Court has held that “[a] trial court’s evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an *abuse of discretion* standard.” Syl. Pt. 1, *State v. Martisko*, 211 W. Va. 387, 566 S.E.2d 274 (2002), quoting Syl. Pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998)) (emphasis added).

Appellant is attempting to muddy the waters with issues that are not relevant to this case. Appellant contends that he intended to base his case-in-chief on evidence that is not even remotely relevant to the instant case: the credibility of the initial reporter, Shaylie W.'s father. Even if Mr. Wilkins' prior police reports were found, after investigation, to be false, the instant case was thoroughly investigated and found to be true. In this case, Mr. Wilkins was told by his five year old daughter that she had been inappropriately touched by Appellant; since it is absurd to assume that a five year old would have the knowledge and understanding to contact the police about an inappropriate sexual contact made by an adult, Mr. Wilkins made the initial report for the minor child. Trooper Nichols testified that "Timothy Wilkins, the father of the victim, Shaylie Wilkins in this investigation, came to my detachment, and informed me of some allegations that he had learned about during a phone conversation he had with his children." (Tr. 10.) That is the extent of Mr. Wilkins' involvement in this investigation. Shaylie, the complaining witness in the instant case, talked to the troopers out of the presence of her father, testified at trial, and was cross-examined by Appellant' counsel. As the trial court correctly noted, "this man is not making an accusation here, is he? Isn't it his daughter that's making an accusation?" Thus, the court correctly held that Mr. Wilkins's motive or intent in relaying his daughter's disturbing allegations to the police, or his credibility generally, were irrelevant. (Tr. 349-52.) And it is not surprising that Mr. Wilkins did not testify, since he had no firsthand knowledge; his testimony would have been hearsay. Shaylie, the complaining witness, did testify.

The United States Supreme Court has indeed many times held that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986), quoting *California v.*

Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (citations omitted);

however, it wrote in its recent decision in *Holmes v. South Carolina* that:

[w]hile the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, *well-established rules of evidence permit trial judges to exclude evidence* if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Holmes v. South Carolina, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (emphasis added). The Court has further stated that the Constitution permits judges “to exclude evidence that is ‘repetitive . . . , only *marginally relevant*’ or poses an undue risk of ‘harassment, prejudice, [or] *confusion of the issues.*’” *Id.* at 1732 (emphasis supplied and citations omitted). Appellant ignores and discounts the fact that the complaining witness herself testified and was cross-examined by his counsel during the trial. Her father’s testimony would have been hearsay, and was unnecessary and irrelevant since Shaylie confirmed the story given in the initial report.

It is clear that the trial court did not abuse its discretion in denying Appellant’s request to compel the testimony of Shaylie W.’s father for the purpose of discrediting his the initial report , where that report simply restated what Shaylie had said to him and where Shaylie repeated her allegations, under oath and subject to cross examination, at the trial.

C. THE CIRCUIT COURT PROPERLY APPLIED APPELLANT’S TIME SERVED TO HIS SENTENCES.

Appellant’s argument here is quite creative, but is divorced from any statutory or case law support and misapprehends the effective sentence that Appellant received.

Appellant was sentenced to an indeterminate term of 10-20 years on Count One of the Indictment and an indeterminate term of 1-5 years on Count Two. These sentences were set to run

consecutively; thus, the effective sentence was 11-25 years, and Appellant's time served (185 days) is credited against the 11-year minimum. The time served credit applies to the total effective sentence, not separately to each component of the sentence.

V.

CONCLUSION

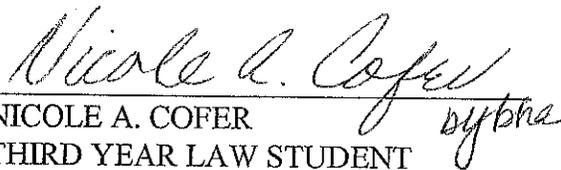
WHEREFORE, for the foregoing reasons, the judgement of the Circuit Court of Kanawha County should be affirmed by this Honorable Court.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



NICOLE A. COFER
THIRD YEAR LAW STUDENT
PRACTICING UNDER RULE 10



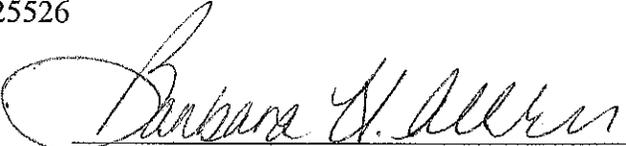
BARBARA H. ALLEN, WWSB # 1220
MANAGING DEPUTY ATTORNEY GENERAL
STATE CAPITOL, ROOM E-26
CHARLESTON, WEST VIRGINIA 25305
(304) 558-2021

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Appellee's Brief State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 20th day of July 2006, addressed as follows:

To: Kathleen T. Pettigrew, Esq.
P.O. Box 724
Charleston, WV 25323-0724

Herbert L. Hively, II, Esq.
3566 Teays Valley Road, Suite 202
Hurricane, WV 25526



BARBARA H. ALLEN