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SMITH & SCANTLEBURY, L.C.

Attorneys at Law

David C. Smith

Suite 205, Law & Commerce Building
Bluefield, West Virginia 24701

Phone: (304) 327-8684

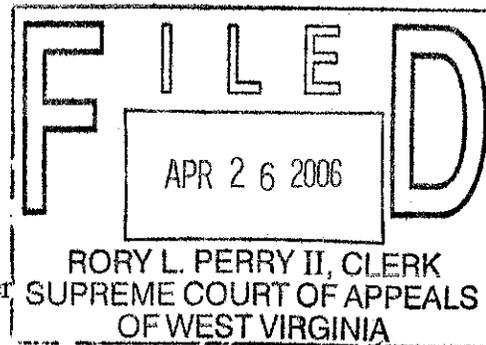
Fax: (304) 327-8857

*Phillip A. Scantlebury

* Admitted in WV and VA

April 26, 2006

Mr. Rory L. Perry II, Clerk
Supreme Court of Appeals of
West Virginia
State Capitol, Room E-317
1900 Kanawha Boulevard, East
Charleston, WV 25305



RE: State of West Virginia v. Valerie Whittaker
No. 33037

Dear Mr. Perry:

Please find enclosed an original and nine (9) copies of the "*Appellant's Brief*" in regard to the above styled matter. Please file in your usual manner and acknowledge receipt thereof by copy of this letter also enclosed hereto.

If you should have any questions, please do not hesitate to contact me.

Thank you for your kind and courteous attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "DCS".

David C. Smith

DCS/kcs

Enclosure

cc: Dawn E. Warfield, Esquire (w/enc.)
Ms. Valerie Whittaker(w/enc.)

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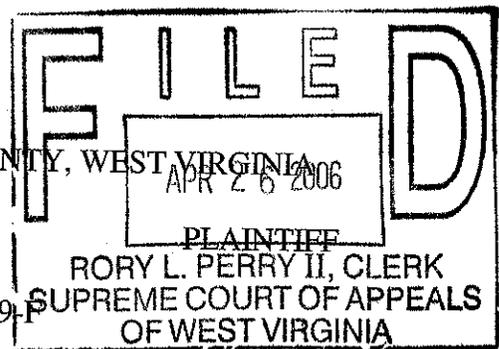
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IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA,
STATE OF WEST VIRGINIA,

vs.

VALERIE WHITTAKER,

INDICTMENT NO. 04-F-99



DEFENDANT.

APPELLANT'S BRIEF

COMES NOW your Appellant, Valerie Whittaker, and by way of an Appellant's Brief states the foregoing recital of fact and law:

TYPE OF CASE AND NATURE OF RULING BELOW

This is an appeal from an Order of the Circuit Court of Mercer County, West Virginia, adjudicating Appellant guilty of the felony offense of manslaughter and sentencing her to ten years in the State penitentiary.

STATEMENT OF FACT

Appellant, Valerie Whittaker, lived in a battered tin can of a trailer with her nine-year-old daughter, Jaclyn Whittaker, alongside a gravel track in North Eastern Mercer County in a spot that was about as far from humanity as a person could achieve in Southern West Virginia. Although her aged and ailing parents lived within six hundred yards of her home, her next nearest neighbors were miles distant.

It wasn't much of a home, but it was hers, as she had purchased it several months earlier in a failed attempt to escape her significant other of ten year's duration, the deceased Jerry Calvin Mills, Jr. Mr. Mills, however, had followed her, despite owning a rather nice home of his own in Princeton, West Virginia, and had moved in with his firearms, hunting trophies, liquor, beer, drugs, game cocks, and a large stuffed boar head he hung on her wall. On the day of his demise in the

hallway between Appellant's kitchen and their daughter Jaclyn's bedroom, the deceased weighed two hundred, thirty-three pounds, stood six foot, four inches, and sported a Grim Reaper tattoo on his bicep. He had concentrations of alcohol, hydrocodone and valium in his blood without a prescription for the same – just enough so that he could feel good about killing Appellant and their daughter, as he said he was going to.

Appellant, Valerie Whittaker, who had no prior criminal record, testified at trial that she was afraid for her and her daughter's lives when she got Calvin's .38 caliber revolver out of their kitchen cabinet. Evidence addressed at trial independent of Appellant demonstrated she had every reason to be fearful for her and her daughter's life. From the antlers that littered the premises to the medical records where the deceased, high on cocaine, had shot himself with a rifle while riding around Mercer County taking pot shots out of his car window, to the warrants documenting the incidents within two months of his demise where he, his father, and his hunting buddy, James Duncan, were drunk and brandishing a weapon at the neighbors in the middle of the street, there was little dispute that the deceased was skilled at tracking things down and killing them¹.

Evidence adduced at trial demonstrated that the relationship between Appellant Whittaker and the deceased Mills had been marred by violence over its ten-year span. Assorted family members testified to having given shelter to Valerie and Jaclyn over the years, the minister of the local Pentecostal church testified to giving them shelter on several occasions prior – Valerie and Jaclyn were constants on the prayer list. Even Calvin's drinking buddy, James Duncan, testified that he thought it odd how Valerie would disappear with relatives for weeks at a time.

¹Among other items of carnage he left in his wake, were the family dog – shot; the family cat – bashed against the barn; and Jaclyn's pet Rooster, Fluffy – killed in a cockfight, Jaclyn's attendance at the same required.

It was proven at trial that Appellant Valerie Whittaker could expect little help from the agents of the State, as she confronted a drinking, drugging, Jerry Calvin Mills, Jr. in her kitchen – providing they could even find the place in time to prevent a killing.² In fact, Appellant had taken out four separate Domestic Violence Petitions in the past. The deceased Mills evaded service on three of them and nothing of consequence happened on the one that was served. Indeed, a Domestic Violence Petition brought by Appellant was chasing the deceased on the day of his demise. Although unserved, he had actual knowledge of its existence, further feeling his rage.³

The events leading up to the deceased's demise began approximately three weeks earlier when, in a foul mood, he had chased Appellant, Valerie Whittaker and their nine-year-old daughter, Jaelyn out of their mobile home on a cold, wet spring night. The Whittakers, having nowhere else to go, sought shelter at Princeton Community Hospital because there were security guards there to protect them should Calvin put in an appearance. Hospital personnel, upon discovering Appellant and her daughter camping out of their premises, in turn sent Appellant and her daughter to Pam's Place – the local battered women's shelter.

Appellant then stayed at Pam's Place for approximately two weeks while the Mercer County

² Circumstances later demonstrated that the police were not up to the challenge.

³ It is ironic that the very legislation meant to preserve life in this instance was the catalyst for the killing – the deceased being enraged that Appellant was going to disarm him, and cost him his ability to get a hunting license.

Sheriff's Department attempted to served a Domestic Violence Petition on the deceased. During her stay at Pam's Place, Appellant called the home of James Duncan and spoke with Carolyn Duncan, his wife. She asked Carolyn Duncan to tell the deceased that she had taken a Domestic Violence Petition against him, and that he should leave her alone or she would disarm him permanently. The message was promptly relayed to the deceased in a garbled form.

Appellant, not wishing to live off the charity of strangers, left Pam's Place and went to hide out at her Aunt Deborah Fowler's home. Approximately five days into her sojourn with her aunt, Appellant and her daughter kept a doctor's appointment with Dr. Shelia Brooks, a local podiatrist. The deceased, Jerry Calvin Mills, Jr., was waiting for them in the parking lot.⁴

Appellant testified that the deceased bullied and threatened her into going back to the mobile home. Although they were in separate cars, she made no further attempt to escape. Jerry Mills then accompanied them while she went to Hickman's Pharmacy to get a prescription filled. They also stopped at a local gas station. Appellant and Jerry Mills then made a stop at James Duncan's house to pick up a weed eater, drink beer, and eat potato chips. James Duncan testified as to the visit at

Page 215 of the record:

Q Now the time that Calvin and the Defendant were at your house I guess you had the opportunity to see them together and observe both of 'em?

A Yes sir, yes sir..

Q Did there seem to be any problems between 'em at that time?

A No not what you call problems, I mean, you know just normal -- they didn't really speak all that much, you know, they just went out -- like I said, they drank pop, everything, and the kid she's kinda hyperactive anyway and she wanted to go out and play so those two went out back and me and Calvin just

⁴ Officer Mankin's paraphrased statement missed the mark on this one by a wide margin.

sat there and, you know, normal talk.

Q Okay so you didn't detect anything out of the ordinary?

A No sir.

Q Now were you around them a pretty good bit?

A Yes sir, I seen Calvin at least once and maybe twice a week, and when huntin' season in, or fishin' time, or frog huntin', or whatever, we stayed together quite a bit.

After leaving James Duncan's and returning to her mobile home, Appellant testified as to the deceased's conduct at the time of the shooting at Page 399-400 of the record:

A Why did I grab the gun --

Q Right.

A -- when the gun went off?

Q Right.

A Because he said he was going to get the shotgun and he was going to kill us, he said that he was going to kill Jacqueline [sic] first, he -- he told --

Q And you believed, why, I mean he threatened many times before?

A Because he wasn't talkin' to me and he was talkin' to Jacqueline [sic]. When he come to the door he come up behind me with a pair of pliers gonna bust me in the head, I kept takin' steps back, I grabbed the phone, he was wantin' me to drop the petition, I told him I'd called the State Police and drop the petition then, and Jacqueline [sic] stepped up through the door and I said, Jacqueline call -- go to maw-maw's call the law, and he told me to hang the phone up, he shoved from the phone, which you all seen in the picture, across the room to where the sink is, he run and grabbed Jacqueline [sic] by her hair and her shirt, like this (demonstrating), run her down the hall and he rolled her in her bedroom across the floor like bowlin' ball.

At the time of the killing, Appellant described Calvin Mills as being angry beyond crazy and having

eyes like a wild animals. She testified as to her stand she made in her kitchen:

Q Well- what was his attitude, was he angry?

A He was - angry wasn't the word for it, he was beyond angry he was crazy.

Q Well what did his eyes look like?

A He- wild, they were wild, he looked wild like a wild animal in the face. He - he said that your mother's gonna have a F-n nigger daddy, she said that's not so, daddy, he hauled off and smacked her in the mouth.

Dr. Zia Sabet, the medical examiner, testified that Jerry Calvin Mills perished as the result of a single gunshot wound to the head. According to Dr. Sabet, he was dead before he hit the floor and felt no pain. The police investigation revealed that Appellant was seventeen feet away from the deceased at the time he was shot.

Immediately following the shooting, Appellant, by her own admission took a shotgun and put it in the hands of the deceased to bolster her self defense claim. She then called the West Virginia State Police to report the incident.

Trooper Christian and others responded to the call. Being unable to locate the trailer, they asked Appellant to meet them at a local landmark. She complied with the request. During the ride to the trailer, Appellant gave the first of several statements. Only portions selected by law enforcement survive, despite the fact that video tape and audio tape were one switch away. Trooper Christian drove because Appellant was too emotional to drive safely.

Once at the trailer, Trooper Christian took a tape recorded statement from Appellant. Being suspicious over the shotgun, Trooper Christian asked Appellant to accompany him to the State Police barracks for a third interview with Trooper Mankins, a polygraph operator.

Appellant began her interview with Officer Mankins at 11:30 P.M. or three hours after notifying the police about the shooting. The Mankins's interview lasted approximately one (1) hour. It was not tape recorded nor did Officer Mankins keep any notes. The polygraph was never given, because Appellant was too emotional to take it. At trial, this hour long interview was boiled down to a page or two of statements which were paraphrased by the officer. Predictably, any exculpatory information given by Appellant was concealed or ignored.

From the Mankins interview Appellant was taken to the Bluefield City Jail. At approximately 8:30 p.m., she was taken by Trooper Maddy to Princeton for arraignment before a magistrate. During this ride, Appellant also made statements that were used against her to the best memory of the officer which did not include exculpatory information.

Appellant stood trial for 1st Degree Murder before the Circuit Court of Mercer County, West Virginia on September 2, 2004, at the conclusion of which she was convicted of manslaughter. Thereafter, she was sentenced as aforesaid.

LAW AND ARGUMENT

A. The Court erred in failing to direct the verdict for the defense on the basis of self defense.

In challenging the factual sufficiency of the evidence to sustain the conviction, Appellant acknowledges the heavy burden imposed upon her. Nonetheless, Appellant affirmatively states that an injustice has been done herein and that she was entitled as a matter of law to defend herself in her kitchen from a drinking, drugging brute twice her size, sporting a Grim Reaper tattoo, who was bent

to do her and her daughter harm.⁵

To warrant interference with a verdict of guilty on the grounds of insufficiency of evidence, this Court must be convinced that the evidence was manifestly inadequate and that an injustice has been done. State v. Linkous, 460 SE 2d 288 (W.Va. 1995); State v. Mullins, 456 SE 2d 42 (W.Va. 1995).

In Syllabus Point 3 of State v. Guthrie, 461 SE 2d 163 (W.Va. 1995) this Court opined:

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must [***22] review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court.

In the case at Bar, Appellant states that the overwhelming weight of the evidence demonstrated self defense. The killing took place in her kitchen; he was not supposed to be there; he was of a notoriously violent disposition who enjoyed taking pot shots out of car windows while high on cocaine; he had killed about everything that walked and crawled in his vicinity including the family pets; he was known to brandish firearms in a drunken state at the neighbors; his death threats had forced Appellant to seek shelter at Pam's Place.

If the truth be known, with a few exceptions, such as Trooper Christian, there exists a paucity of people who would not have shot Jerry Calvin Mills – particularly if placed in Appellant's position. Simply put, he aggressed on her turf after chasing her across the better part of Mercer County. He

⁵This matter is easily distinguishable, for example, from State v. Miller, 513 S.E. 2d 147 (W.Va. 1998) because the evidence demonstrated he was hunting her, rather than her hunting him.

was the hound. She was the hare. Indeed, an argument may be made that the deceased was infringing on West Virginia Code § 61-2-214 or the kidnapping statute at the time of his demise.

Perhaps the most telling point was the existence of the domestic violence petition. Although unserved, it was undisputed that the deceased had actual knowledge of its existence. It is this point that distinguishes this case from a host of other battered women defense cases which have crashed and burned before this Court.

The deceased presence in Appellant's kitchen was and remains unlawful pursuant to **18 USC § 922(g) (8)**; and a criminal violation of West Virginia Code § 61-7-7.

Appellant argues that the net effect of West Virginia Code § 48-27-101 et seq.; **18 USC Section 922 (g) (8)**; and West Virginia Code § 61-7-7 is to create a presumption that the deceased was there to do her grave bodily harm. Appellant says that her kitchen was her castle. It was not much of a castle, but it was hers and that as a matter of law, she was entitled to protect herself against unlawful and potentially deadly assault therein. See State v. Bates, 380 SE 2d 203 (W.Va. 1989); State v. Blizzard, 166 SE 2d 560 (W.Va. 1969).

Appellant acknowledges the difficulty presented by her stupid use of a throw down firearm to bolster her self defense claim. This evidence is analogous to evidence of flight and is admissible presumably to show guilty knowledge. Occurring after the fact in reality, it has little impact on Appellant's claim of self defense, and is far from outcome determinative – particularly with a dead man lying in the floor. Its evidentiary value is slight. See State v. Mayle, 69 SE 2d 212 (W.Va. 1952); U.S. v. Fautz, 540 F 2nd 733 (4th Cir. 1976).

At trial, Counsel for the State argued to the jury that a DVP was just a piece of paper, having little significance. The U. S. Supreme Court has recently ruled that DVP's give people like

Appellant few rights – particularly the right to recompense when law enforcement blows them off as a nuisance.

In the case at bar, to Appellant the DVP was essentially all the law had to place between her and a potentially life threatening beating.⁶ It was all she had. If the Courts, prosecutors and police officers are going to treat DVP's with just a modicum of lip service, Appellant, Valerie Whittaker, prays that this Court would hold that the DVP at a minimum entitles her to protect herself and her child in her kitchen from a man fatally bent or mischief and not send her to the Penitentiary for it.

WHEREFORE, Appellant Valerie Whittaker prays that this Honorable Court will grant her an appeal herein and reverse her conviction.

B. The Trial Court abused its discretion in limiting the testimony of Erma Jean Hudgins.

Erma Jean Hudgins is Appellant Valerie Whittaker's pastor and spiritual counselor. Evidence presented at trial demonstrated that Appellant and her daughter sought shelter at Ms. Hudgin's church, The New Life Tabernacle on five different occasions in the two years preceeding Jerry Calvin Mill's demise.

Appellant's proffered testimony (attached hereto as *Exhibit A*) demonstrated that her reasons for being there were assorted acts of violence and threats made to her by the deceased.

At trial, the Court ruled that the statements made by Appellant Whittaker to Erma Hudgins were inadmissible hearsay. Ms. Hudgins could testify as to Appellant's fearful demeanor, but not give any of Appellant's explanation for it.

Appellant argues that the testimony was not inadmissible hearsay, but that it went straight

⁶ Law enforcement did not find either roses or a box of chocolates on Appellant's kitchen table; rather, they found beer and pliers. The deceased wasn't there to kiss and make up; rather he was there to intimidate, bully, and beat Appellant.

to the core of her defense, and that the action of the Trial Court in ruling it out of bounds was an abuse of discretion.

Appellant argues first that these statements were not hearsay, but were original evidence possessing importance just because they were made. The statements tend to prove who was the aggressor as well as demonstrate Appellant's state of mind upon which Appellant presented expert testimony. Consequently, they were admissible without resort to the hearsay rule. See Beech Aircraft v. Rainey, 485 U.S. 904 (1988); State v. Golden, 336 SE 2d 198 (W.Va. 1985); State v. Greenleaf, 285 SE 2d 391 (W.Va. 1981); State v. Ganguer, 283 SE 2d 839 (W.Va. 1981).

Appellant argues that the statements made were the verbal portion of her actions and thus constitute original evidence. As Professor Cleckley wrote at page 8-22 of his Handbook on Evidence for West Virginia Lawyers:

A second category of original evidence is that of verbal parts of acts. When conduct, viewed in isolation, is ambiguous in nature, contemporaneous statements clarifying that ambiguity may be exempt from the hearsay rule. Thus, a declaration of an actor, made coincidental in time with an act of uncertain meaning, which explains the meaning of the act is original evidence and not hearsay.

In the case at bar, the statements took an ambiguous act – Appellant's fearfully hiding out at the church – and explained them. Thus, they are original evidence.

Moreover, pursuant to Rule 801 of the West Virginia Rules of Evidence, these statements were exempt from operation of the hearsay rule because they were offered to rebut the express or implied charge against Appellant of recent fabrication. The State proceeded on a theory that Appellant somehow lured the deceased to the trailer to kill him. Appellant was entitled to this evidence to rebut a significant portion of the State's theory of fabrication. Appellant did testify and

was subject to cross examination on the point.

Appellant further asserts that the statements were admissible under Rule 803 (1) as a present sense impression; admissible under Rule 803 (2); as part of the Res Gestae; and were admissible under Rule 803 (3) as they demonstrated a then existing mental, emotional, or physical condition of Appellant's (state of mind).

Appellant was prejudiced in the extreme by the Trial Court refusal to admit these statements in that it destroyed Appellant's ability to fight accusations of fabrication, impacted her ability to use her battered women's psychological defense, and seriously impacted her ability to demonstrate conclusively who the aggressor was.

Succinctly put, this ruling of the trial judge denied Appellant her right to a fair trial because it was potentially outcome determinative. The ruling of the Trial Court constitutes an abuse of discretion.

WHEREFORE, Appellant, Valerie Whittaker, prays that this honorable court would grant her an appeal and award her a new trial herein.

C. The Trial Court erred in limiting the testimony of Sandra Brinkley.

At trial, Appellant offered testimony for her Aunt Sandra Brinkley. Ms. Brinkley's proffered testimony is set forth in the record.

Essentially, Ms. Brinkley was going to testify that Appellant had hid out at her house on three or four different occasions because of her fear of the deceased. As part of her explanation as to why she was there, Appellant would talk about the violent personality changes in the deceased when mixing alcoholic beverages with pain pills, as well as her explanations as to why she was on the run -- "He had a shotgun settin', and he was fussin', and I told Jacqueline [sic] to come on and we took

off a runnin' and got in the car because I was afraid that he was going to shoot through the window ...” (Page 425 of the record)

Also, Ms. Brinkley would, if given the opportunity by the Trial Court, have testified – “She was afraid that he would kill her and her little girl ...” she said, “Sandra, I didn’t have time enough to go and tell Mommy and them ... because, says I’m afraid ... he will shoot through the windshield on my car and said I had to get away.”

Appellant, Valerie Whittaker, argues that for the reasons set forth in section B, herein, that these statements were admissible and that the ruling of the trial court constituted an abuse of discretion which seriously impaired her ability to defend herself at trial and that she was greatly prejudiced thereby.

WHEREFORE, Appellant, Valerie Whittaker prays that this Honorable Court would grant her an appeal and award her a new trial herein.

D. The trial court abused its discretion in limiting the testimony of Deborah Fowler.

At trial, Appellant, Valerie Whittaker, sought to elicit testimony from her Aunt Deborah Fowler. Ms. Fowler’s house was where Appellant attempted to hide out from the deceased on the day of his death. Appellant left her clothes there when going to see the foot doctor.

Ms. Fowler testified at her proffer:

Q Did she give you any explanation as to why she was at your house?

A She said she needed a place to stay because she was afraid Calvin was gonna hurt her.

Q Did she say anything else about why she felt that way?

A She said that he had threatened ‘em with knives and guns and stuff, and I said well I don’t want any here, you’re welcome to come here but I don’t want

him even know where you're at.

Q Okay, were you worried some reason that he would find out?

A Yes I was.

Appellant argues that she was entitled to the testimony to explain why she was hiding at her aunt's home. For the reasons set forth in Section B, herein, Appellant says that she was entitled as a matter of law to this testimony, that it was an abuse of discretion for the trial court to rule it inadmissible, and that she was manifestly and greatly prejudiced thereby.

WHEREFORE, Appellant, Valerie Whittaker, prays that this Honorable Court would grant her an appeal and reverse her conviction herein.

E. The trial court abused its discretion in ruling the deceased cock fighting paraphernalia inadmissible.

Appellant, Valerie Whittaker, next argues that the trial court abused its discretion by not allowing the deceased cock fighting paraphernalia into evidence.

At trial, Appellant sought to establish by independent evidence known to her that the deceased was a cruel man with a lust for blood sports. Part of her proof in these regards was a tool kit containing cock fighting equipment. Contained in the kit were two sets of bladed spurs, syringes, and drugs for doping the birds.⁷

Appellant argues that this was relevant physical evidence which bolstered her testimony in these regards. There existed no reason to keep it out. Succinctly put, if the State seeks to introduce

⁷The trial court permitted them to be exhibited to the jury but not introduced into evidence.

the physical items she used (the gun); then she, too, is entitled to her physical items of proof (his spurs). Appellant argues that the bladed spurs, syringes, and drugs explain the cruelty of the deceased in ways that mere words cannot.

Succinctly put, Appellant argues that she, too, is entitled to exhibits and that the exclusion of this evidence constitutes an abuse of discretion denying her of her Constitutional right to introduce evidence in her own defense.

WHEREFORE, Appellant prays that this Honorable Court would grant her an appeal and reverse her conviction herein.

F. The trial court erred in admitting certain statements allegedly made by Appellant.

By way of her last assignment of error, Appellant, Valerie Whittaker argues that the trial Court erred in admitting into evidence certain statements made by her.

Appellant concedes that she was properly Mirandized before speaking to the officers, that she went to the barracks of her own accord, and that she was not promised or threatened into giving the statement. Facially, it would seem that the statements are admissible. See State v. Persinger, 286 SE 2d 545 (W.Va. 1982); State v. Bradshaw, 457 SE 2d 456 (W.Va. 1995); State v. Davis, 172 SE 2d 569 (W.Va. 1970).

This, however, should not end the inquiry. According to Project Innocence, 17 out of their first seventy (70) exonerations involved Mickey Mouse confessions (See Innocence Project Web Page attached hereto as *Exhibit B*). It should be noted that these numbers are only in capital cases. If they were extrapolated to run of the mill felonies, the number of people falsely imprisoned on bad confessions has to be staggering.

It should also be noted that a variety of courts, applying laws similar to West Virginia's

passed upon these confessions, and it is only with the advent of DNA that this cause of bad verdicts in the criminal justice system has come to light.

One of the reforms urged by the Innocence Project is the mandatory taping of police interviews where practical. Two states, Alaska and Minnesota, currently mandate taping. Additionally taping of police interviews is required in the United Kingdom. (See *Exhibit B*, Innocence Project Web Page).

In the case at bar, the first statement given to Trooper Christian while riding to the scene in the cruiser should have been taped. It was undisputed that Trooper Christian could have both video taped and audio taped this conversation with the flip of a switch. He chose not to do so because it would also have turned his blue light on. Why Trooper Christian going to the scene of a killing didn't want to turn on his blue lights is inexplicable.

As a result, the jury heard Trooper Christian's statement and not Appellant's because the officer paraphrased it. A half-an-hour's worth of statements became, at best a five minute statement with the exculpatory sections excised.

This became even more egregious when applied to Officer Mankins statement. Once again, the jury heard the officer's paraphrase of the statement. An hour-long interview became distilled into five minutes worth of testimony. Predictably, the exculpatory information was omitted. It was only in cross examination that this matter came to light. Predictably, much of it was never disclosed as required by Rule 16 of the West Virginia Rules of Criminal Procedure. Again, crucial information for the defense was lost.

Trooper Mankin's explanation for failing to tape record the statements was that the Wage and Hour Law, since he was a polygraph operator, precluded him from doing so. Respectfully stated,

Appellant says that Wage and Hour Laws have no applicability to a murder investigator.

Appellant says that the failure of the police to use a ten dollar appliance in their desk drawer violated her rights to Due Process of Law, by denying her exculpatory evidence necessary for her defense and permitted the officers to flim flam her statement to make it incriminate her. **See State v. Osakalumi, 461 SE 2d 504 (W.Va 1995)**. The means of preserving evidence of interest to the defense rested solely in the hands of the officers, and they deliberately chose not to use it. Appellant would like to have the jury hear her statements in total as opposed to being given a police cut and paste paraphrase deliberately crafted to incriminate her.

Moreover, the mandatory tape recording of confessions would act ultimately to protect officers from false allegations of misconduct, and would in all likelihood eliminate many false claims of police misconduct routinely passed on by the West Virginia Courts.

Of equal importance, the mandatory taping of confessions would act to enhance the internal integrity of the justice system, help insure that only the guilty receive room and board at taxpayers expense, and that truly guilty persons go to jail as opposed to targets of police investigations.

Appellant notes that a large number of drug transactions are routinely taped in this state by law enforcement. Oddly enough the same technology isn't employed where vital evidence such as confessions are involved to protect and enhance the basic truth finding role of the courts.

Appellant, Valerie Whittaker says that tape recording police interviews is a common sense reform that needs adopting in the State of West Virginia. The constitutional basis for it is already present in the State of West Virginia under the heading of duty to preserve exculpatory evidence. This Court should explain to Trooper Christian, why he needs to use his tape recorder.

Wherefore, Appellant, Valerie Whittaker, prays that this Honorable Court would grant her

appeal, reverse her conviction, and remand this matter for further proceedings.

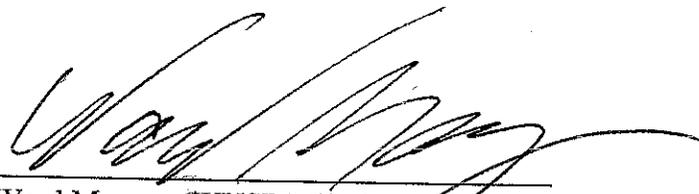
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VALERIE WHITTAKER,

By Counsel:



David C. Smith (WVSB# 3461)
Smith & Scantlebury, L.C.
Suite 205, Law & Commerce Building
Bluefield, WV 24701



Ward Morgan (WVSB# 5814)
3217 Cumberland Road
Bluefield, West Virginia 24701
(304) 323-2250

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF

vs.

NO. 33037

VALERIE WHITTAKER

DEFENDANT

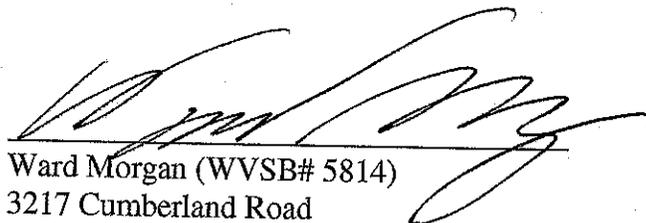
CERTIFICATE OF SERVICE

I, David C. Smith, do hereby certify that I have served a true and correct copy of the foregoing Appellant's Brief upon Dawn E. Warfield, Attorney General's Office- Capitol; Building 1, Rm. E-26; 1900 Kanawha Boulevard, East; Charleston, WV 25305, by United States mail, postage prepaid.

Dated this the 26th day of April, 2006.



David C. Smith (WVSB# 3461)
Smith & Scantlebury, L.C.
Suite 205, Law & Commerce Building
Bluefield, WV 24701
(304) 327-8684



Ward Morgan (WVSB# 5814)
3217 Cumberland Road
Bluefield, West Virginia 24701
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Exhibit A

ERMA JEAN HUDGINS

8/17/2004

5:30pm - 5:40pm

PHONE

STATEMENT

Witness: Erma Jean Hudgins
Pastor of New Life Tabernacle Church
Old Athens Road
(304)425-4637
Resides on Kee Street, Drives Black Lincoln Continental

Phone Interview Conducted By: Jessica M. Roebuck

3 Rings.....

Jessica: Yes, May I speak to Erma Jean.

Erma: This is her.

Jessica: Uh, Yes Ma'm This is Jessica Roebuck and I am an investigator working on behalf of David Smith and Ward Morgan for Valerie Whittaker and she had given me your name just to call and get a statement, just a character statement on her and how you know her. How long have you known Valerie Whittaker?

Erma: Her entire life. She is about the age of my children. How I ever met her honey is was in a church service with her family.

Jessica: Right

Erma: I have known her for a I would say a good well I have been in my church now up here for 26 years.

Jessica: Wow

Erma: So it leaves that long and before.

Jessica: What type of person is Valerie Whittaker?

Erma: Valerie has always been a well respected lady. She has always been helpful to anybody.

Jessica: Right. So you have known her for 30 years so. Um, Have you-all just always went to church together?

Erma: Yes that has been our acquaintances and then there has been times no when she has had problems in the last five years and I have delt with her and Jacklyn.

Jessica: Right

Erma: And uh in reference to being fearful.

Jessica: What all has Valerie told you?

Erma: Well there are several times she would come to my church being afraid to go home due to the fact of the abuse that was going which she told me was her husband.

Jessica: Right

Erma: And uh that uh she said that he had threatened her and had abused her and her little girl and even one time they came to my home and stayed here for a while, not over night but quite a while here.

Jessica: Right

Erma: On several different occasions actually and even this man, her father, her husband or whatever he is in that family.

Jessica: It was her husband.

Erma: He had been abusive to the child with her cat it was a little cat the little thing. She was so upset here one evening in my home. He had threatened to kill her cat and different things like that.

Jessica: Right

Erma: And actually she was under fear all the time.

Jessica: So Valerie and Jacklyn were very fearful when they came to see you?

Erma: Oh yes. Yes. Yes.

Jessica: Did you ever see any bruises or cuts or scrapes or did Valerie ever show you where he?

Erma: No, No she did not. I mainly didn't question her honey as being a pastor of a church. I didn't question her only thing I did tell her if she wanted to call when church was over to make sure if he was gone or at home before she went there and was maybe fought on or beat up on or whatever.

Jessica: Right

Erma: But I really didn't know the situation inside that household. But I knew it was a fearful thing for Valerie and Jacklyn.

Jessica: Right, So did Jacklyn ever talk to you one on one about anything?

Erma: No, She just told me that she was scared to go home her daddy was mean.

Jessica: Right, So she had faith in you and told you things?

Erma: Uh huh! She told me that.

Jessica: Right.

Erma: It was always in reference to how her Mommy and her was afraid and they would have to go and leave home and that her Daddy was mean to her about this cat, her animal.

Jessica: About how many times in the past, let's say 5 years, that Valerie and Jacklyn have come to you?

Erma: Oh probably, I would say in the past couple of years maybe 4 or 5 times.

Jessica: Right. Um, Did you ever know Jerry Calvin Mills? Which was her husband?

Erma: Well I didn't know who her husband was at the timing.

Jessica: Right

Erma: And I was never given a name but to be honest with you I knew that child when he was born.

Jessica: Right

Erma: I went to church with his Mother and his Father

Jessica: Right, Do you know what kind of person he was?

Erma: Well, As a child uh I knew him as Calvin Mills. That is what I knew him as.

Jessica: Right. That is what most people know him by.

Erma: Like I said I taught him in Sunday school. And like I said I never knew this is who she was married to. She would always say her Husband and the child would say my Daddy.

Jessica: Right

Erma: But uh the household that he came out of from his Mother and his Father at the time growing up was very, very good.

Jessica: Right

Erma: What people would see from the outside looking into their environment? I was never like more than 3 or 4 times inside that child's home.

Jessica: Right. Did you know him as an adult?

Erma: No ma'm. I wish that I would have known this was his name to where I could have maybe got to the young man and talked to him and she never told me who her husband was.

Jessica: Right

Erma: It was always my husband or my Daddy the child would say.

Jessica: Was Valerie and Jacklyn Consistent. Did they come to church there?

Erma: They came occasionally. Not faithfully.

Jessica: Right

Erma: But I have been in tent revivals with her and I years and years before I started pasturing a regular church here in town on the Old Athens Road. I pastured a store front building.

Jessica: What is your last name?

Erma: Hudgins

Jessica: Hudgins

Erma: H-U-D-G-I-N-S

Jessica: Ok

Erma: And uh so I have been in services with her family uh I have been in services at the ??? Uh service with her family. Leonard Joe Adkins tent revivals I have been in that with them.

Jessica: Wow you have been to a lot

Erma: Oh yes honey, ya know and I have seen, I've been , in fact their family, a lot of their family is members of my Church

Jessica: Right

Erma: And um, and then to I have myself helped, at different times to um, with Valerie and Jacklyn, to try and get them ya know to not be so fearful. If you are afraid to go home then you know call before you go.

Jessica: Right

Erma: And I have even said said to her, "If you need me, call me" and I will be there.

Jessica: Right

Erma: There have been many times that she has come up to my house and sit probably in the last two years I would say at least 4 to 5 times that she has come to my home.

Jessica: Was she ever detailed what he had done to her?

Erma: He would beat her, she said he would beat her, she said he threaten to kill her. And one time I remember she had told me that she had gone to a doctor's appointment and when she came out the door to get in the vehicle he was there and had threatened her and Jacklyn.

Jessica: Right

Erma: And then uh I don't know dates or nothing. That is just what I have delt with her on. Naturally I have delt with her through the death of her Mother you-know and the family.

Jessica: Right, That was a very hard time for them.

Erma: It was. Yes, Ma'm.

Jessica: Um I can't think of anything else right now. If you can think of anything, I don't know what else you would know? Um..... Is there anything else you can think of?

Erma: The only thing that just now comes to my mind is there was all the time a financial problem for Valerie.

Jessica: Right

Erma: He would never let her have any finances at all. And when he did he would only limit her finances is what she would tell me. You know I don't know that to be positive. I am just giving you the hear say from her.

Jessica: I do understand. Um....Did you ever give her money or the Church?

Erma: No, I don't think so. If I ever did it was only like \$5.00 if I ever did to be honest.

Jessica: Right

Erma; I really don't really remember but I would have to be honest I would have. In fact I would have given her a place here at my home to stay because I live alone.

Jessica: Right

Erma: And I have raised 22 children.

Jessica: Wow

Erma: I would have kept her and the baby if he would come for instance he come from his home or where ever they live and she went up here to my presence I would have kept her for her safety and her daughter.

Jessica: Do you find Valerie to be Credible?

Erma: Oh, yes, yes I do. I just feel like she would be due any credibility.

Jessica: Ok

Erma: Yes

Jessica: Well that is why I was calling and I do appreciate your time.

Erma: Alright honey

Jessica: If we have any other questions I will be in touch with you and it was very nice talking to you.

Erma: And I appreciate you calling.

Jessica: Alright, Thanks Again

Erma: Bless You

Jessica: You too, Bye Bye.

Exhibit B

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FALSE CONFESSIONS

In a disturbing number of DNA exoneration cases, defendants have made incriminating statements or delivered outright confessions. Many factors arise from interrogation that may lead to a false confession, including: duress, coercion, intoxication, diminished capacity, ignorance of the law, and mental impairment. Fear of violence (threatened or performed) and threats of extreme sentences have also led innocent people to confess to crimes they did not perpetrate.

All interrogations should be videotaped, thereby providing an objective record. This is not only feasible, it has been made law throughout Alaska, Minnesota, and the United Kingdom.

The infamous Central Park Jogger case illustrates the catastrophic results of false confessions. Five young men, then teenagers, confessed to a brutal crime in which they had no involvement. DNA testing has corroborated the confession of the actual perpetrator. The defendants - **Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana, and Kharey Wise** - have served their respective sentences. Their claims of coercive interrogation tactics were overwhelmed by their videotaped statements, though their stories contained many inconsistent and inaccurate details.

The recent pardon of Paula Gray, following the 2001 decision overturning her conviction of murder, rape, and perjury also involved a false confession. Now known as the Ford Heights Four case, Gray was a principal in the conviction of four men, two of whom were sentenced to death, for 1978 the murder and rape of a young couple in Chicago. You can find more information about Gray's case [here](#).

The Central Park defendants and Paula Gray join a long list of proven false confession cases. Professors Richard Leo (UC-Irvine) and Steven Drizin (Northwestern) have long been studying these cases. The [Proven False Confession List](#) they have compiled and presented here represents cases at all stages of custody - from arrest to post-conviction.

Additional reforms have been suggested by [Governor Ryan's Commission on Capital Punishment](#). Please see Chapter 2, Police and Pretrial Investigation.

Only two states, Alaska and Minnesota, currently mandate the taping of interrogations. This common sense reform would help police minimize the occurrence of false confessions, which also means greater chances that the actual perpetrator is not free to commit more crimes.

FEATURED CASES

Click on any of the following to read more about cases involving false confessions where the actual perpetrator was eventually apprehended:

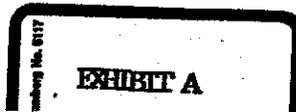
- [Kenneth Adams](#)
- [Rolando Cruz](#)
- [Richard Danziger](#)
- [Dennis Fritz](#)
- [Alejandro Hernandez](#)
- [Verneal Jimerson](#)
- [Antron McCray](#)
- [Robert Miller](#)
- [Bruce Nelson](#)
- [Christopher Ochoa](#)
- [Willie Rains](#)

- [Kevin Richardson](#)
- [Yusef Salaam](#)
- [Raymond Santana](#)
- [Frank Lee Smith](#)
- [Jerry Townsend](#)
- [David Vasquez](#)
- [Dennis Williams](#)
- [Ron Williamson](#)
- [Kharey Wise](#)

Truly startling is the number of false confession cases involving the mentally impaired and the mentally ill. Police interrogations in the following cases reveals a lack of training and a disregard for mental disabilities. All of these cases involved homicide. David Vasquez entered a guilty plea in order to avoid the death penalty. Earl Washington and Ron Williamson had been sentenced to die. Washington came within weeks - Williamson within days - of being executed.

Click the following names to read about their cases:

- [Eddie Joe Lloyd](#)
- [Jerry Frank Townsend](#)
- [David Vasquez](#)
- [Earl Washington](#)
- [Ron Williamson](#)



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CAUSES AND REMEDIES OF WRONGFUL CONVICTIONS

The American criminal justice system fails sometimes. This is not a disputed fact. One price of these failures is the loss of life and livelihood for those unfortunate enough to be wrongfully convicted. The cases of those exonerated by DNA testing have revealed disturbing trends in our criminal justice system. Some claim that the eventual exoneration of these men proves that the system works. If that were true, then justice is not being administered by our police, prosecutors, defense lawyers, or our courts. It is being dispensed by law students, journalism students, and a few concerned lawyers, organizations, and citizens. That is unacceptable.

RECENT DEVELOPMENTS:

Two years ago, Illinois Governor George Ryan issued an Executive Order Creating the Governor's Commission on Capital Punishment after imposing a moratorium on the death penalty in that state. The moratorium was imposed due to a mounting amount of evidence that the death penalty was not being applied fairly in the state of Illinois. In fact, since the reimposition of capital punishment in Illinois, twelve people had been executed and thirteen freed from death row after their innocence was proven, five of them due to postconviction DNA testing.

In April 2002, after two years of exploring the issues, the Commission released its findings. In the conclusion of the report, the Commission writes: "The Commission was unanimous in its belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death."

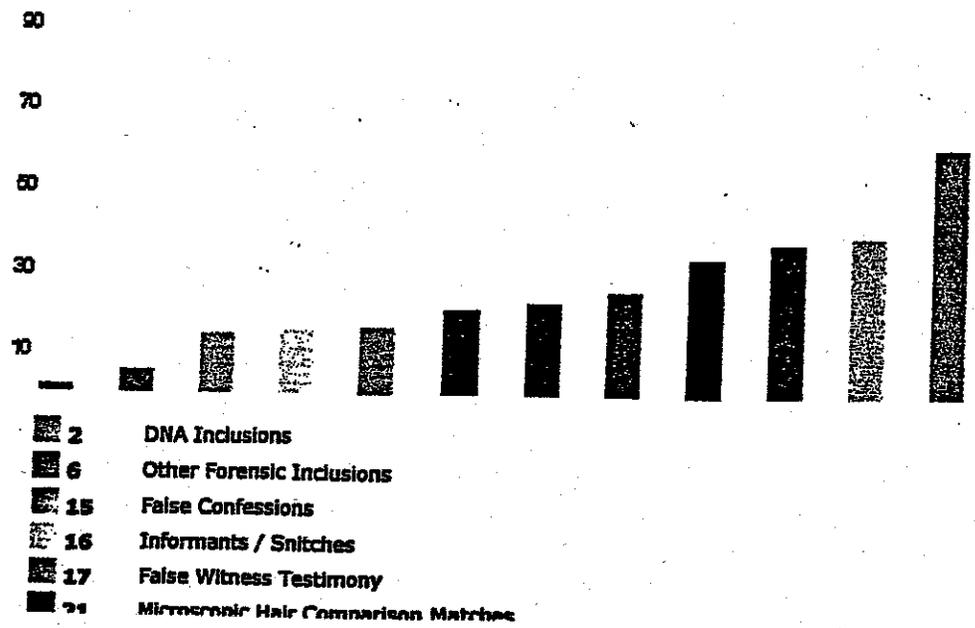
We hope that all states that have the death penalty will seriously re-examine their capital punishment standards and assess the fairness of their imposition of the death penalty.

RESOURCES:

- [Reports from The Commission on Capital Punishment](#)
- [The Justice Project - Campaign for Criminal Justice Reform](#)
- [Eyewitness Evidence: A Guide for Law Enforcement - National Institute of Justice \(DOJ\), 1999.](#)

FACTORS LEADING TO WRONGFUL CONVICTIONS

The most common factors leading to wrongful convictions that were found in the first 70 DNA exonerations.



- 23 Bad Lawyering
- 26 Defective or Fraudulent Science
- 34 Prosecutorial Misconduct
- 38 Police Misconduct
- 40 Serology Inclusion
- 61 Mistaken I.D.

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LEGISLATION

There has been a major shift in criminal justice legislation over the past decade, in large part due to the phenomenon of DNA exonerations and innocent people being freed from death row. It is obvious from the extensive press coverage that the issue of wrongful convictions has played and will continue to play a big role in the American political arena. Initially, only New York and Illinois had legislation dealing specifically with postconviction DNA testing. Currently, thirty states have enacted statutes addressing post-conviction DNA testing.

The Innocence Protection Act (IPA) sets uniform national guidelines for courts to follow when DNA testing has been requested and establishes federal testing procedures. Importantly, the IPA provides for the preservation of evidence, payment for testing, and punishment for the unlawful alteration or destruction of evidence.

This groundbreaking act would grant any inmate convicted of a federal crime the right to petition a federal court for DNA testing if testing supports a claim of innocence. It would also withhold federal funds to states that do not adopt adequate measures to preserve evidence and make postconviction DNA testing available.

Other important provisions include: implementation of new and better standards of representation in capital cases, increased funding for federal capital defense and prosecutorial DNA testing programs, and compensation guidelines for state capital cases (including the withholding of federal funds to states that do not comply with the standards set forth).

The IPA was introduced in Congress in 2001 and 2002 and was twice endorsed by a majority of the Senate Judiciary Committee. Despite strong bi-partisan support in both houses of Congress, the IPA was never brought before the House or the Senate for a full vote.

On July 17, 2003, a subcommittee of the House Judiciary Committee held an oversight hearing entitled: "Advancing Justice Through Forensic DNA Technology and Competent Counsel Standards in Capital Cases." Appearing at the hearing was Peter Neufeld, co-director of the Innocence Project, who testified to the need to ensure fairness and accuracy in the criminal justice system by guaranteeing access to DNA testing and providing competent defense counsel.

Read: [Testimony of Peter Neufeld before the House Subcommittee on Crime, Terrorism, and Homeland Security](#)

Take Action: [Learn about and support the IPA and other wrongful conviction legislation](#)

Remarks: [From the news conference on the introduction of the IPA by U.S. Senator Patrick Leahy of Vermont](#)

David Smith

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA.

STATE OF WEST VIRGINIA,

VS.

INDICTMENT NO. 04-F-99-F

VALERIE WHITTAKER.

ORDER

This matter came on this day for disposition, there being present in Court is Timothy D. Boggess, her Assistant Prosecuting Attorney for the State of West Virginia; the defendant, in person and by counsel, David C. Smith and E. Ward Morgan, pursuant to the defendant having been found guilty by a jury of the offense of "Voluntary Manslaughter".

After due consideration, it is the ORDER and DECREE of this Court that the defendant, Valerie Whittaker, be and is hereby adjudged guilty of the offense of "Voluntary Manslaughter."

Whereupon, counsel for defendant renewed their motion to set aside the verdict of the jury and grant unto the defendant a new trial. And the Court, after hearing argument of counsel for the defendant and the State, is of the opinion that the matters and things contained therein are not sufficient in law or fact to set aside the verdict of the jury and grant unto the defendant a trial; therefore, defendant's motion is overruled, to which action of the Court the defendant objected, which objection the Court overruled, and to which ruling of the Court the defendant excepted.

Thereupon, the Court having received the report of the pre-sentence investigation from the probation department of this county and Court, and after considering said report and the statements of counsel and the defendant, as well as members of the victim's family, the Court finds that the

defendant is not a fit and proper person for probation because: (1) there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge; (2) probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime; (3) the public good would not be served by placing the defendant on probation; and (4) the public good would be served by the Court imposing a sentence of incarceration.

Whereupon, counsel for defendant moved the Court to impose the minimum sentence. And the Court inquired of the defendant if anything for herself she had or knew to say why the Court here should not now proceed to pronounce judgement against her and nothing being offered or alleged in delay of judgement, it is **ORDERED** that the said Valerie Whittaker be taken from the bar of this Court to the Southern Regional Jail and therein confined until such time as the warden of the penitentiary can conveniently send a guard for her and that she be taken from the Southern Regional Jail to the penitentiary of this State and therein confined for the determinate term of ten (10) years as provided by law for the offense of "Voluntary Manslaughter", as the State in its indictment herein hath alleged and by a jury hath been found guilty; that she be given credit for 524 days, this being the time she has been confined on said charge; and that she be dealt with in accordance with the rules and regulations of that institution and the laws of the State of West Virginia. The Court recommends that the defendant be placed in a minimum to medium secured facility.

Thereupon, counsel for defendant notified the Court of their intent to appeal said judgement to the Supreme Court of Appeals and moved the Court to grant unto the defendant a stay of execution and a post-conviction bond. After due consideration, the Court **GRANTS** the defendant a stay of execution, but **DENIES** the defendant's motion for a post-conviction bond, and **ORDERS** that the defendant be remanded to the Southern Regional Jail where she shall remain pending her appeal to the Supreme Court of Appeals. It is further **ORDERED** that the David C. Smith and E.

Ward Morgan are appointed to represent the defendant in her appeal, and that the court reporter shall prepare transcripts of the proceedings in this matter upon counsel's completion of appropriate forms.

The Clerk shall forward a copy of this Order to the probation department and counsel for defendant.

And the defendant is remanded to the Southern Regional Jail.

Dated this 14th day of January 2005.

ENTER:


JOHN R. FRAZIER, JUDGE

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF

vs.

INDICTMENT NO. 04-F-99-F.

VALERIE WHITTAKER,

DEFENDANT

DESIGNATION OF RECORD

Now comes Petitioner, Valerie Whittaker, by counsel, David C. Smith, and designates the record as follows:

1. The entire record on appeal.

MEMORANDUM OF PARTIES

Petitioner: Valerie Whittaker
Counsel: David C. Smith
Smith & Scantlebury, L.C.
Suite 205, Law & Commerce Building
Bluefield, WV 24701
(304) 327-8684

Respondent: State of West Virginia
Counsel: William J. Sadler, Prosecuting Attorney
Mercer County Courthouse
1501 W. Main Street
Princeton, WV 24740
(304) 487-8340

VALERIE WHITTAKER,

By Counsel:



David C. Smith (WVSB# 3461)
Smith & Scantlebury, L.C.
Suite 205, Law & Commerce Building
Bluefield, WV 24701



Ward Morgan (WVSB# 5814)
3217 Cumberland Road
Bluefield, West Virginia 24701
(304) 323-2250