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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

in

CHARLESTON, WEST VIRGINIA

RECORD NO. _____

**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,**

v.

**CASE NO. 05-F-9 (Clay County)
Hon. Richard A. Facemire, Judge**

**GERALD THOMPSON, JR.,
Defendant Below, Petitioner.**

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FILED
MAR 23 2006
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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GERALD THOMPSON, JR.,
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PETITION FOR APPEAL

PETITION FOR APPEAL FROM ORDER

Now comes the Petitioner, Gerald M. Thompson, Jr., (hereafter referred to as "Thompson"), by counsel, Jerome R. Novobilski, and offers for this Court's consideration

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the following in support of his Petition for Appeal:

JURISDICTION

The Circuit Court of Clay County had jurisdiction pursuant to W.V.R.Cr.P, Rule 1, and this Court has jurisdiction pursuant to W.V.R.A.P., Rule 1.

STATEMENT OF FACTS

On 13 April 2004, State Police and County Sheriff deputies arrived at the Thompson residence in response to a "shots being fired" 911-call. The call was placed by Thompson's family alleging had been on the premises discharging a firearm. Upon arrival at the scene Thompson was nowhere to be seen. Thereupon, two officers entered Thompson's mother's residence and two State Troopers went to Thompson's residence (a two-story cellar house) located a short distance behind the mother's residence.

During this search one Trooper claimed to have looked down into a small wooden barrel resting on the floor. He discovered therein a "meth-lab"- a small sealed mason jar with a length of clear tubing emerging out of the jar through the seal. The Trooper claimed to have seen chemicals inside the jar that looked like rock salt.

The "chemicals" seized were sent to the State Police crime lab for forensic testing. The subsequent testing found no contraband and no illicit substances- nothing was found that was even an immediate precursor to contraband or illicit substances (e.g. ephedrine).

Thomson was subsequently arrested; and, thereupon, a signed Miranda rights form and a statement were obtained from him.

The matter was finally tried from 30 August through 1 September 2005. Before the jury was sworn, defense counsel moved to strike Tabitha Tanner for cause because she was the daughter of Sergeant Slack of the Clay Country Sheriff's department (Tr. Pg. 40). At the

same time he moved to strike for cause Paul Holcomb, who, since he had not slept since 12:30 PM the previous day, would not be able to pay attention and focus on the evidence. At the same time, defense counsel moved to strike for cause, Diana McLaughlin, because she had once had a professional working relationship with and also had been the landlady of investigating officer, Trooper Bailey. Counsel for defense also moved to strike Jason Moore because, during a recess, while stepping from the juror box, he approached the complaining officer, Trooper Stevenson, shook hands with him and had a short conversation with him. (Tr. Pg. 41). Only Tabitha Tanner was struck.

At the opening of the second day of trial, the Court informed counsel that he observed the conduct of Juror April Hardway on the previous day of trial. She was making gestures and laughing and making gestures at the Court (Tr. Pg. 212, LL 20-23 and Pg. 213-214). The Court went on to note, "I heard her say, something to the effect, well I thought if I acted this way then I wouldn't get picked for other juries... ." (Tr. Pg. 213, LL 20-23). The Court conducted an in-camera session with Juror Hardway. (Tr. Pg. 217- 218). The Court informed Juror Hardway that, "... yesterday I could not help but notice that you were laughing a lot and joking a lot and was there... something funny.... ." (Tr. Pg. 217, LL. 1-3). Thereupon defense counsel moved for a mistrial. (Tr. 218, LL. 18-23). Said motion was denied.

During the course of the trial the Court conduct extensive questioning of many of the witnesses, including the State's two primary witnesses- complaining officer, Trooper Stevenson, (Tr.. pp. 164-174); and Lt. Michael Goff, a logistics and training officer in special operations for the State police, (Tr.. Pg. 306- 313 and Pg. 316 LL. 13-20). The Court also inquired of defense witness, Jesse Thompson defendant's's mother) (Tr. Pg. 422-427); and Kristin Thompson (defendant's wife) (Tr. Pg. 455-456).

The Court also inquired of Defendant Thompson (Tr. Pg. 490-491). One inquiry the Court made of Thompson was, "You would agree, you would have more to lose in this case than the Troopers do. (Tr. Pg. 491, LL. 9-10). The case concluded with a jury verdict of

guilty of "Attempting to Operate or Operating a Cladestine Drug Lab."

KIND OF PROCEEDING AND NATURE OF RULING BELOW

Thompson was indicted by the Grand Jury attending the March 2005 Term of the Circuit Court of Clay County, West Virginia. Count One of the Indictment charged that on or about the 13th day of April 2004, Thompson committed the felonious offense of "Possession with Intent to Deliver a Controlled Substance"¹ in violation of West Virginia Code, 60A-4-401(a), and in Count Two of the Indictment, Thompson was charged with violating West Virginia Code, 60A-4-411(a), "Operating or Attempting to Operate A Cladestine Drug Laboratory." Subsequent to being indicted by the grand jury, Thompson appeared for arraignment before the Circuit Court of Clay County (hereinafter "trial court") and entered a plea of "Not Guilty" to both counts in the Indictment returned against him. At a suppression hearing held on August 8, 2005, the trial court refused to suppress evidence seized from Thompson's residence.² At the suppression hearing on August 8, 2005, counsel for Thompson moved to dismiss Count One of the Indictment, and there being no opposition by the State, the trial court entered an Order dismissing Count One. The jury trial concluded on September 1, 2005, and after the jury was instructed and heard final arguments, and deliberated, it returned a verdict by which it found Thompson guilty of the charge that he violated West Virginia Code, 60A-4-411(a) as charged in Count Two of the Indictment.

It is from the October 28, 2005 Sentencing Order that this Appeal is taken.

A Notice Of Intent To Appeal was timely filed. Upon motion of Jerome Novobilski, the trial court entered an Order extending the time for the filing of this Petition until March 14, 2006.

STANDARD OF REVIEW

In Phillip Leon M. v. Greenbrier County Bd. of Educ., 199 W.Va. 400, 484 S.E.2d

¹ Marijuana, a Schedule 1 Controlled Substance.

² At all times relevant to this case, Thompson lived in a "cellar top" house located behind his mother's home in Clay County. Thompson's mother owned the property on which the cellar top house was located.

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909 (1996), this Court stated that "[b]ecause interpretations of the West Virginia Constitution, along with interpretations of statutes and rules, are primarily questions of law, we apply a de novo review."

This Court held in *Syllabus Point 3* of State v. Louk, 171 W.Va. 639, 301 S.E.2d 596 (1983), that "[t]he action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion."

ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it failed to grant Thompson's Motion To Dismiss Count Two of the Indictment because West Virginia Code, 60A-4-411 (2003) is overly broad and void for vagueness and is therefore unconstitutional under both the United States Constitution and the West Virginia Constitution.
2. Whether the trial court erred in making inquiries of testifying witnesses that tended to prejudice the jury against the defendant through the substance and form of the questions as well as by the tenor and tone of the questions.
3. Whether the trial court erred when it refused Thompson's Motions To Strike certain jurors for cause and whether the trial Court erred when it refused Thompson's Motion For Mistrial because of conduct of certain jurors that tended to give the appearance of impropriety.

DISCUSSION OF LAW AND POINTS OF AUTHORITY

- I. **Whether the trial court erred when it failed to grant Thompson's Motion To Dismiss Count Two of the Indictment because West Virginia Code, 60A-4-411 (2003) is overly broad and void for vagueness and is therefore unconstitutional under both the United States Constitution and the West Virginia Constitution.**

Thompson asserts that the trial court erred by failing to find that West Virginia Code, 60A-4-411 (2003) is unconstitutional because it is both overbroad and violates the so-called "void for vagueness doctrine."

A statute is void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by

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the statute and because it encourages arbitrary and erratic arrests and convictions." Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed. 110 (1972). See Also Village of Hoffman Estates v. Flipside, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) where the Court said "[a]s generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

It is conceded by Thompson that the West Virginia Legislature had a noble and socially necessary purpose when it attempted to address the scourge of methamphetamine (commonly known as "crank") and the myriad problems the manufacture, sale, and use of methamphetamine has caused in this state when it enacted West Virginia Code, 60A-4-411.³

Unfortunately, the 2003 version of West Virginia Code, 60A-4-411 enacted by the legislature contained language that rendered the cure for the methamphetamine disease far more dangerous than the illness itself. As enacted by the legislature, West Virginia Code, 60A-4-411 (2003), has encouraged arbitrary and discriminatory conduct by well-meaning law enforcement personnel in attempting to use this fatally-flawed statute to rid society of illegally manufactured methamphetamine. That is to say that an ordinarily law-abiding citizen who happens to have a mason jar, a can of coleman fuel, flashlight batteries, matches from his favorite restaurant, a camp stove sitting on a picnic table in a state park, and a police officer with a passing knowledge of the contents of the 2003 version of West Virginia Code, 60A-4-411, may be arrested, incarcerated, tried, and

³ The case *sub judice* involves the first enactment of West Virginia Code, 60-4-411, wherein the legislature stated that (a) Any person who operates or attempts to operate a clandestine drug laboratory is guilty of a felony and, upon conviction, shall be confined in a state correctional facility for not less than two years nor more than ten years or fined not less than five thousand dollars nor more than twenty-five thousand dollars, or both.

(b) For purposes of this section, a "clandestine drug laboratory" means any property, real or personal, on or in which a person assembles any chemicals or equipment or combination thereof for the purpose of manufacturing methamphetamine, methylenedioxymethamphetamine or lysergic acid diethylamide in violation of the provisions of section four hundred one of this article.

(c) Any person convicted of a violation of subsection (a) of this section shall be responsible for all reasonable costs, if any, associated with remediation of the site of the clandestine drug laboratory. Acts 2003, c. 75, eff. 90 days after March 8, 2003.

convicted irrespective of the fact that the citizen does not realize that his conduct is forbidden by statute.⁴ As the U. S. Supreme Court has previously recognized not encouraging arbitrary and discriminatory enforcement of penal statutes is of special importance. "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." Kolendar v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed. 903 (1983), quoted with approval in State ex rel Sale v. Goldman, 208 W.Va. 186, 539 S.E.2d 446 (2000).

The net cast over Thompson by West Virginia Code, 60A-4-411 (2003) was both overbroad and the language used to ensnare him by the police was void for vagueness. Therefore, this statute is unable to withstand the test set forth by Justice Douglas in Papachristou as set forth hereinabove. Thus, this Court, Thompson asserts, must find the offending statute to be unconstitutional and grant appropriate relief to the petitioner.

Thompson further asserts that the statute in question is constitutionally defective because it neither proscribes any specific chemical nor any specific piece of equipment nor any combination of chemicals and equipment. The statute's failure to proscribe any specific chemical or piece of equipment creates a situation where law enforcement is forced to interpret the legislative intent and this leads to a environment in which the police are encouraged to engage in arbitrary and discriminatory enforcement of the statute as written by the legislature.

II. Whether the trial court erred in making inquiries of testifying witnesses that tended to prejudice the jury against the petitioner through the substance and form of the questions as well as by the tenor and tone of the questions.

A review of the trial transcript, Thompson argues, reveals that the trial court erred by making inquiries of the testifying witnesses that tended to prejudice the jury against the petitioner through the substance and form of the trial court's questions as well as by the tenor and tone of the voice used in the questions.

⁴ See United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989

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It is well-settled law in the State of West Virginia that a "[t]rial judge in a criminal trial must consistently be aware that he occupies a unique position in the minds of the jurors and is capable, because of his position, of unduly influencing jurors in the discharge of their duty as triers of the facts. This Court has consistently required trial judges not to intimate an opinion on any fact in issue in any manner. In criminal cases, we have frequently held that conduct of the trial judge which indicates his opinion on any material matter will result in a guilty verdict being set aside and a new trial awarded." *Syl. Pt. 4, State v. Wotring*, 167 W.Va. 104, 279 S.E.2d 182 (1981). *Syl. Pt. 4, State v. Rogers*, 215 W.Va. 499, 600 S.E.2d 211 (2004). Furthermore, our Court recently restated its long-standing admonition to trial court judges that "[i]n the trial of a criminal case the jurors, not the court, are the triers of the facts, and the court should be extremely cautious not to intimate in any manner, by word, tone or demeanor, his opinion upon any fact in issue." *Syl. Pt. 7, State v. Austin*, 93 W.Va. 704, 117 S.E. 607 (1923), *Syl. Pt. 3, State v. Rogers*, 215 W.Va. 499, 600 S.E.2d 211 (2004).

In the instant case, the trial court unduly influenced jurors in the discharge of their duty as triers of the facts by repeatedly posing questions to the testifying witnesses that intimated his opinion on the facts in issue and indicated through his questions and comments his opinion on material matters that were rightly the province of the triers of fact, that is, the jurors. One of several available examples from the trial transcript is found in the trial court's questioning in the presence of the jury of state witness Goff as follows:

Judge: Officer this defendant is charged with operating, or attempting to operate a clandestine drug laboratory. Now based upon the information you have before you, based upon your investigation, based upon the knowledge of the confession⁵ [emphasis added by

⁵ The statement taken from Thompson says:

- Q. Was that your meth lab we found at your house on Reed Fork Road?
A. Yes.
Q. When was the last time you cooked meth with that lab?
A. About a month ago I cooked meth in different places.
Q. What did you cook meth for?
A. I used it.
Q. Where was the last place that you cooked meth at?
A. Up Reed Fork but it wasn't in the house.
Q. Do you have a certain spot that you go up Reed Fork to cook meth?
A. No, I just picked a spot in the woods anywhere and I would cook it.
Q. Did you sell to anyone else?
A. I did not sell to anyone else.
Q. ...

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petitioner] that the defendant, gave to the police officers, and based upon your experience, training, and knowledge. Is it your opinion that there was a laboratory either being attempted to be operated, or operated in that scene?

Goff: Yes, sir, I do.

Jerome (counsel for defendant): Objection, your honor.

Judge: I'll note your objection.

Jerome: Ultimate issue question. 8/30/05 Trial Transcript, Page 316, Lines 13-23.

See Additional and Similar Questioning by Trial Court for this Witness beginning at Page 306, Line 12, 8/30/05 Trial Transcript..

The above use of the word "confession" carries a valence equivalent to saying "admission of guilt." Coming from the Court such a word virtually instructs the jury to accept Thompson's statement as an admission of guilt. When taken in the entire context of the question, it unduly influences the jury to accept only one conclusion as to the facts and evidence with which the case presented them. The Court here fatally abandons its role as a neutral arbiter in the trial and invades the province of the jury as the trier of fact. This witness was one of only two key witnesses the State presented in its case in chief.

The trial transcript is replete with examples of the trial court's failure to heed the clear mandate of law as set forth in Austin, Rogers, and Wotring.⁶

A. ...

Q. ...

A. ...

Q. How many batches of meth did you cook?

A. Maybe 3 or 4 batches.

Q. How much meth did you get from a cook?

A. Probably a couple 8 balls it just depends on how much you put in.

⁶ 8/30/05 Trial Transcript, Page 309, Line 15:

Judge: Now, I note that Exhibit 3a and 3b are recipes, so to speak.

Goff: Yes, sir, lists of ingredients that sort of . . .

Judge: No, I **assume** these recipes aren't for making a cake. [emphasis added by petitioner]

Goff: That's correct, sir. Not a cake I'd want to eat.

Judge: So these recipes are consistent for making what?

Goff: The items listed are consistent with one of the, recipes for manufacturing methamphetamine.

Judge: And anybody that possessed wouldn't have any other reason to possess it, other than the information to make meth?

Goff: I know of no other reason to have a list anything involving the ingredients together, no.

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As if the trial court's questioning of witnesses in and of itself, including the tone and tenor of the questioning, is not sufficiently indicative of the trial court's prejudice against Thompson and the trial court's predisposition to prosecute the case against Thompson, the following excerpts from the trial transcript reveal the trial court's demeanor toward Thompson's counsel during the course of the trial:

Judge: I don't see any relevancy in the issue. I think we went through enough of the numbers, Mr. Novobilski. The number of photographs, now, if they're missing, we can go to the clerk and see what the situation is, but, I mean, it's an issue if you want to argue it at closing, that's fine. But, but, you know, I think we're dwelling too much on counting photographs and not enough on the focusing on the elements of the offense, quite frankly. If we're going to start counting all the photographs, then we're all going to start counting the fibers in the carpet, we're going to be here for the next three months, and, I suggest to you that we get to the focus of the case, and the primary importance of this case.

8/30/05 Trial Transcript, Page 291, Line 20 - _____. See additional inquiry by trial court at Page 422, beginning at line 2 and ending on Page 427, at line 15.

In addition, the trial court's obvious bias toward Thompson's counsel when defense counsel' cross-examination of Trooper Stevenson was interrupted by the trial court and counsel was threatened with Rule 11 sanction.

III. Whether the trial court erred when it refused Thompson's Motions To Strike certain jurors for cause and whether the trial Court erred when it refused Thompson's Motion For Mistrial because of conduct of certain jurors that tended to give the appearance of impropriety.

"When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror." Syl. Pt. 3, *O'Dell v. Miller*, 211 *W.Va.* 285, 565 *S.E. 2d* 407 (2002)

The matter was finally tried from 30 August through 1 September 2005. Before the jury was sworn, defense counsel moved to strike Tabitha Tanner because she was the daughter of Sergeant Slack of the Clay County Sheriff's Department (Tr. Pg. 40). At the same time he moved to strike Paul Holcomb, who, since he had not slept since 12:30 P.M. the previous day and had been up working for at least 14 hours and had not known he was to serve on the jury until 7:30 A.M. that morning. (Tr. Pg. 10, LL. 6-22). The Court did not proceed into a full inquiry that would have fairly evaluated Juror Holcomb's reluctance or possible reasonable inability to properly serve on this jury. When defense counsel later in voir dire attempted to question Juror Holcomb about his possible sleeping at that time, the Court at side bar refused to let counsel pursue that line of questioning. (Tr. Pg. 36, LL. 12-21). Counsel for defense should have been allowed to pursue a line of questioning to determine if Juror Holcomb would be able to pay attention and focus on the evidence, as the Court mandated in O'Dell v. Miller.

Counsel also moved to strike Diana McLaughlin for cause. (Tr. Pg. 40, LL. 21-23). Counsel for defense elicited on voir dire that Juror McLaughlin had a working relationship with one of the State's chief witnesses, Trooper M.S. Bailey, in that she worked in the State License Division at the troopers detachment and that at one time had been Trooper Bailey's landlady. (Tr. Pg. 35, LL. 6-23 & Tr. Pg. 36, LL. 1-11). Juror McLaughlin working for the State Division of Motor Vehicles but based in the Clay Detachment had a close day-to-day with each member of the Clay County State Police force. It is certainly reasonable and logical that she could not be totally fair and unbiased in hearing the evidence in this matter.

Counsel for defense also moved to strike for cause Juror Jason Moore (Tr. Pg. 41, LL. 6-9) because, during a recess, while stepping from the juror box, he approached the complaining officer, Trooper Stevenson, shook hands with him and had a short conversation with him. (Tr. Pg. 34, LL. 11-23 & Tr. Pg. 35, LL. 1-5). This warm and friendly gesture on the part of Juror Holcomb certainly has the appearance of impropriety because it was directed at the State's complaining witness, Trooper Stevenson.

Only Juror Tabitha Tanner was struck for cause.

At the opening of the second day of trial, the Court informed counsel that he observed the conduct of Juror April Hardway on the previous day of trial. She was making gestures and laughing and making gestures at the Court (Tr. Pg. 212, LL 20-23 through Tr. Pg. 221, LL 1-14). The Court went on to note, "I heard her say, something to the effect, well I thought if I acted this way then I wouldn't get picked for other juries..." (Tr. p. 213, ll 20-23). The Court conducted an in-camera session with Juror Hardway. (Tr. Pg. 217- 218). The Court informed Juror Hardway that, "... yesterday I could not help but notice that you were laughing a lot and joking a lot and was there... something funny.... ." (Tr. Pg. 217, LL 1-3). The Court again did not conduct a full inquiry of Juror Hardway as to the reasons for such conduct. However, the Court did note, as pointed out previously, Juror Hardway was motivated to act in such a way because she did not want to serve on a jury. Under the totality of the circumstances Juror Hardway lacked a sober and mature attitude required of a trier of fact in a serious felony case. Her conduct had been indicative of inattention and flippancy which should have made her susceptible to a Motion To Strike For Cause.

As an example of the lack of a mature attitude toward these proceedings it should be pointed out that the Judge noted, "... there's times when she may be, uh, has commentary about the evidence and that she makes those commentaries about the evidence or the witness to fellow jurors and then they snicker..." (Tr. Pg. 219, LL. 5-8). The Court denied defense counsel's Motion For A Mistrial because of Juror Hardway's conduct. (Tr. Pg. 221, LL. 1-13). Said Motion was denied. Counsel for defense again motioned for a mistrial for misconduct at the conclusion of the State's case noting that she had continued to act in the same manner as the first day of the trial. In denying said Motion the Court stated, "... and I would note that it appeared that *her demeanor was improved* (emphasis added) from yesterday, and I did not notice anything out of the ordinary or unusual this morning, or this afternoon, quite frankly." (Tr. Pg. 357, LL 17-19). Under the totality of the circumstances, Juror Hardway's conduct presented ample ground for a mistrial.

CONCLUSION & PRAYER

Wherefore, Thompson prays that this Court find W.VA.. Code 60A-4-411 (2003) unconstitutional because it is overbroad and void for vagueness since it leaves it totally up to the discretion of law enforcement as to what the elements of a "clandestine drug lab" are. In the alternative, Thompson prays for his conviction to be overturned and his case be remanded to the Circuit Court for a new trial because the trial Court unduly influenced the triers of fact by repeated questioning of witnesses that intimated his opinions as to the facts in issue. Thompson also prays for remand that under the totality of the circumstances certain jurors should have been stricken for cause since their ability to be neutral triers of fact or properly attentive to the evidence presented. Thompson further prays for remand on the grounds that a mistrial should have been granted at the trial below due to the immature and frivolous conduct that juror exhibited at trial. Thompson asserts that the lower court erred as set forth hereinabove and for any other errors that may appear in the record of this case.

GERALD THOMPSON, JR.
Petitioner, By Counsel.



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STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

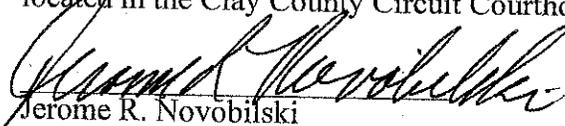
v.

CASE NO. 05-F-9 (Clay County)
Hon. Richard A. Facemire, Judge

GERALD M. THOMPSON, Jr.,
Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, Jerome R. Novobilski, hereby certify that on this the 13th day of March, 2006, I served a true copy of the foregoing *Petition for Appeal* along with a completed Supreme Court Docketing Statement; Designation Of Record; and the Order of the Circuit Court of Clay County extending the time period to file a petition for appeal upon the State of West Virginia attorney for the State of West Virginia, by her attorney, Jim E. Samples, Prosecuting Attorney for Clay County, West Virginia, by hand delivering the same to him at his Office located in the Clay County Circuit Courthouse.



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