

No. 33298

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

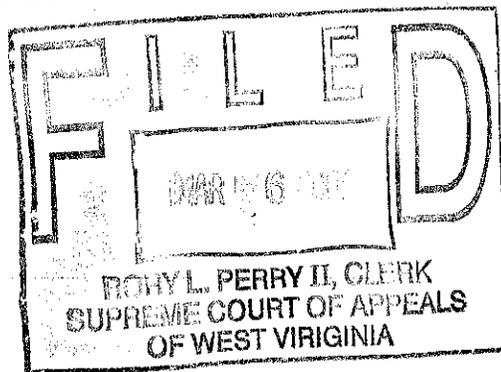
STATE OF WEST VIRGINIA,

Appellee,

v.

DANNY L. CECIL,

Appellant.



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BRIEF OF APPELLANT

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**I. Kind of Proceeding
and
Nature or Ruling**

Mr. Cecil appeals his conviction for the offenses of sexual abuse in the first degree and sexual abuse by a guardian or custodian, West Virginia Code, §§61-8B-7 and 61-8D-5 respectively. He was sentenced to a term of one (1) to five (5) years incarceration for violating §61-8B-7, a concurrent term of ten (10) to twenty (20) years for violating §61-8D-5 and a consecutive term of ten (10) to twenty (20) years for second violation of §61-8D-5. Thus, Mr. Cecil faces a minimum term of 20 years in prison. Currently, he is incarcerated at the Western Regional Jail.

II. Statement of Facts

On July 3, 2005, Mr. Cecil was accused of molesting a 13 year old neighbor at a time when she was spending the night with his daughter. The neighbor testified at trial that Mr. Cecil entered the room where she was sleeping, put his hand on her bottom, turned her over, and "inserted a finger in my vaginal area," TT 260-263. She also accused Mr. Cecil of touching her lips with his tongue. The girl testified that when she pretended to sleep Mr. Cecil left the room. She repeated her accusation to Mr. Cecil's daughter and later to both Mr. and Mrs. Cecil who promptly telephoned the girl's mother who lived only two (2) doors away, TT 264, 309-310, 560-564, 725.

On the 4th of July, 2005 after attending a swimming pool party at the home of the above accuser, Mr. Cecil's daughter told another child about the accusation. This disclosure occurred when the Cecils were gathered for the holiday at the home of friends, TT 570-571. The child to whom the disclosure was made then told her older sister, age 17, who thereafter reported that several years earlier Mr. Cecil had attempted to molest her, TT 401, 403-404. That girl testified

at trial that when she was spending the night at the Cecil home several years previously she was awakened by someone who "had their hand down my shirt and they were touching my breasts and later moved down to my lower area and tried to touch me," TT 404.

The first girl, identified as KJ, was named as the victim in Counts 3 and 4 of the indictment. Mr. Cecil was found *not guilty* of Count 3 which charged sexual assault in the second degree, but was convicted of Count 4 which charged sexual abuse by a guardian or custodian. Each count was based upon the same allegations. The second girl, identified as SD, was named in Counts 1 and 2 of the indictment which charged the crimes of sexual abuse in the first degree and sexual abuse by a guardian or custodian. Mr. Cecil was convicted as to both of these counts.

Each member of the Cecil family testified at trial. Together with a defense investigator the defense tried to recreate the environment within the Cecil household as it existed both in 2005 and, to the extent possible, in 2002 when SD claims that she was victimized. Exhibits included a DVD, Defendant Exhibit 11, and a computer generated drawing, Defendant Exhibit 21 which reflects measurements made of the upstairs hallway, stairway and distances between the rooms. The stairway and stairway rail were very noisy, creaking a lot when you walked upstairs, Exhibit 11, TT 555-556, 659 and 735.

Neighbors and 10 character witnesses testified on Mr. Cecil's behalf. The evidence included photographs of SD and her family taken at the Cecil household during holidays and at Mr. Cecil's birthday, Defendant's Exhibits 4, 5, 6, 7 and 8, TT 731. These photos were taken at times which were substantially after the time when SD claims that she was molested. These included photographs in which both SD and KJ appeared together. The defense also presented a

witness who saw SD and KJ together talking at a church picnic on the evening of July 2, 2005 - the evening when KJ spent the night with the Cecil's daughter, TT 684-685.

Dr. Christina Cooper-Lehki testified twice in the proceeding. She is a faculty psychiatrist at West Virginia University, an assistant professor at the medical school and medical director of the adolescent sex offender unit. Approximately half of her time is spent doing forensic evaluations, TT 137. This includes risk evaluations of sex offenders and teaching forensics to the psychiatric medical residents, TT 138. Dr. Cooper-Lehki explained to the Court the procedure and testing done when performing a psychosexual evaluation such as was done in this case, TT 139-140, 141-147. That testing actually begins with the presumption that inappropriate sexual behavior has in fact occurred. Dr. Cooper-Lehki testified to a reasonable degree of medical certainty that WVU evaluations of Mr. Cecil showed him to be a normal adult heterosexual male who exhibits no signs of pedophilia or paraphelia *i.e.* no sexual deviancy was indicated, TT 128-129, 154, 158, 163, 176. Her opinion was repeated in front of the jury, TT 620, 627.

During her *in camera* testimony Dr. Cooper-Lehki also addressed the interview of KJ which was filmed by Family Services social workers and pointed out the deficiencies therein, TT 185-197. At trial the State chose to withdraw this proposed witnesses – the social worker from Family Services – whom they had proffered before trial and in pleadings as an expert or “fact witness” who would say that KJ exhibited symptoms of having been sexually abused, see Transcript 1/13/06, pp. 65-66. Dr. Cooper-Lehki testified that she had never “seen anything like this,” stating that to be proper the assessment should always be an independent forensic unbiased examination, TT 194.

The doctor made the point during the *in camera* hearing that there exists what she calls a “known range of false reporting” of sex crimes which is accepted within the medical community, TT 188. The range was first reported as being anywhere between 5 and 40% depending upon the study. This false reporting can be about details or the accusation may be completely made up and could be the product of poor therapy techniques or therapist influence or coaching, TT 190-194. The doctor also pointed out that she had asked to evaluate the alleged victims which was denied, TT 174; see Defendant’s motion and argument, Transcript 1/13/06, pp. 48-62. In the trial transcript the Judge states “. . . what I’m struggling with is you’ve not seen the victims in this case.” However, a mere 18 days earlier the Judge had denied that very request by Mr. Cecil’s counsel that the doctor be able to meet with the accusers, T 62.

At the conclusion of the *in camera* hearing the Circuit Court ruled that Dr. Cooper-Lehki’s opinion was only relevant if there’s a psychiatric disorder, that she could rebut the social workers’ assessment if it were offered, and that she could not testify about incidents of false reporting or the reasons why girls might make up such accusations, TT 213-218.

Post-Trial Motions

Mr. Cecil’s motion to set aside verdict and for a new trial presented two rather uncommon issues. First, after trial, the jury foreman contacted his personal lawyer to express his concerns that one juror had conducted an independent investigation during the trial and that another juror appeared to him to be biased against the defense and in favor of the alleged victims based upon the comments which she had made in the presence of other jurors. Second, the true account about a stark difference between sworn trial testimony was believed to be resolvable simply by reviewing a film from the Courthouse security camera which was located on the

second floor, thus counsel requested that the Court order its production believing that a prosecution witness and family member of one victim had falsely testified. The post-trial motions were overruled, however the Court did order that the security surveillance film should be made available for counsel's review.

III. Assignments of Error and Decisions Below

1. The trial court improperly restricted the testimony of Dr. Christina Cooper-Lehki in contravention of Rule 702 of the West Virginia Rules of Evidence.

There is likely no more knowledgeable psychiatrist in West Virginia regarding sex offenses than Dr. Christina Cooper-Lehki of West Virginia University's School of Medicine. Dr. Cooper-Lehki teaches psychiatry to psychiatrists, works with sex offenders, works with adolescents, and even teaches some classes at the West Virginia University law school, TT 137-138. She performs risk assessments for those who have already been convicted of sex offenses. Dr. Cooper-Lehki testified *in camera* that accepted studies show that 5 to 35% of accusations of sex crimes are fabrications, TT 503. She spoke of the reasons why that occurs *e.g.* seeking attention, TT 504. Earlier Dr. Cooper-Lehki had testified concerning her criticisms of the social workers' or therapists techniques which were filmed in consulting with accuser KJ, indicating that false or exaggerated claims can result from poor counseling or therapist techniques, influences or coaching, TT 190-194, 489, 490-496. The trial judge ruled that while Dr. Cooper-Lehki could testify in rebuttal of the social worker, but she could not address the false reporting reasons or the statistics, TT 213-218.

The Circuit Court considered the State's view that psychiatric testimony is irrelevant unless there is a psychiatric disorder, TT 465. Of course Dan Cecil had displayed no such disorder based upon Dr. Cooper-Lehki's extensive testing and assessment of him and because the children had not been seen by Dr. Cooper-Lehki there was no evidence that they were suffering a disorder, TT 466. Further, the State urged the Circuit Court to reject Dr. Cooper-Lehki's testimony because the State had withdrawn their social worker as a witness although she had earlier been named as a State's expert witness to testify that KJ displayed symptoms of a sexual abuse victim, TT 468-470, and see discussion TT 472-485. The court ruled that under Rule 608 of our Rules of Evidence Dr. Cooper-Lehki could not address her opinion that KJ had undergone improper counseling techniques or address either statistics or reasons for false accusations of sex crimes, TT 484-485, 488-489. Ultimately, after a rather lengthy *in camera* hearing the court stated the following:

"THE COURT: All right, I understand. Okay. And I appreciate your patience with me in trying to narrow it down, because I tell you, you all are out on one of these cutting edges. It's somewhat akin to bringing in Dr. Susan Lauffer to talk about eye witness identification, can you bring that in, et cetera.

I go back to what all this is really about. It's about credibility. And I think 608 -- I mean, we may get there through experts and we may get there through Daubert, and we may now have someone who's qualified and has a basis and that's where Mr. Sorsaia is resting his argument, that there's no basis, it's not tied to the facts in this case, et cetera, and quite frankly, I concur with the State. But I want to go one step beyond that for purposes of the record in this case.

I agree with the Prosecutor, but I think there's another issue and I think that implicates 608. And that is the issue of credibility. How do you impeach credibility? You're suggesting that you do that through Dr. Cooper-Lehki. And I think that would be improper

and I think the only situation you have in West Virginia that our Supreme Court has said where psychiatric testimony is relevant to credibility issues is State versus Harmon and it's one that illustrates one of the examples that Dr. Cooper-Lehki gives us. And generally I follow, again I'm following former Justice Cleckley and now Professor of Evidence Cleckley in his Treatise on Evidence in the State of West Virginia, specifically Chapter 6, page 99, and he indicates – and this all comes about pre-Rules, post-Rules. Post-Rules talk about how we attack credibility and it may be done through opinion evidence. And that's how we end up with psychiatrists getting involved in it. Opinion evidence as to truthfulness.

[The Court quoted extensively from former Justice Cleckley's Treatise]

He then gives us the one exception that our court has recognized. 'On the other hand, the West Virginia court has recognized that there may be occasions where evidence of psychiatric disability may be admitted for impeachment purposes,' and that's the Harman case.

And when you go to State versus Harman, Syllabus Point 5, it indicates that in those situations, just at Dr. Cooper-Lehki described to us, where the child witness has a psychiatric disability, and that psychiatric disability may affect credibility, then it could be and – but it's limited, there must be a showing that the disorder affects the credibility of the witness, that the expert has had sufficient opportunity to make the diagnosis of that psychiatric disorder.

Though I understand from Dr. Cooper-Lehki that in general that's a possibility and can happen and does happen in real life, I don't have that here. Her testimony is geared to more broadly based as to the factors that do affect credibility. I find the only place that we recognize it is where you can show that the witness had a psychiatric disability, and all those other factors that she has indicated are academic. I understand in her profession these are worthy topics. But what we're talking about is how do they apply to the facts of this case and the evidence that's before this jury. And I would find that her testimony in that regard would not assist the trier of fact in this case, and in fact would be more confusion to a jury and would be likely to mislead a jury in its evaluation of this evidence.

I note your objection and I would tell you that you are out on the cutting edge of the law and as psychiatric testimony becomes more and more acceptable – We look at State versus Harman, folks, that was a 1980 case, and the field of psychiatry has certainly advanced since 1980. Edward Charles L., was the last time our Court even remotely addressed it and that was 1990. So I frankly can't tell you how the Supreme Court would view it. I've tried to give you as good a record as I can provide you. And I'm a trial judge. I don't make law, I apply law. And I'm trying to apply the law the best I can in an area of the law that is relatively unexplored in the State of West Virginia. That's the best I can tell you. Your objection is noted and preserved," TT 516-519.

2. **Mr. Cecil was entitled to a directed verdict of acquittal on Counts 2 and 4 which charge him with the crime of sexual abuse by a guardian or custodian.**
 - a. The **evidence** offered by the State was **insufficient** to support Counts 2 and 4, thus entitling Mr. Cecil to judgment as a matter of law under **Rule 29** of the **Rules of Criminal Procedure**.
 - b. This Court's decision in the case of **State v. Stephens**, 525 S.E.2d 301 (1999), was **incorrectly applied** to this case.
 - c. The prosecution was in effect based upon an **ex post facto interpretation** of the law which appears to be the product of a misinterpretation of the law in **State v. Stephens**.
 - d. The prosecution violated the **Double Jeopardy** provisions of the State and United States Constitutions.
 - e. As pertains to alleged victim KJ, the **verdicts** are **inconsistent**.

At the close of the State's case in chief Mr. Cecil, through counsel, moved the court for a judgment of acquittal, TT 453. Counsel pointedly addressed Counts 2 and 4 which charged Mr. Cecil as a guardian and custodian under §61-8D-5. Counsel noted that the statute was amended

effective July 8, 2005, therefore the State's theory of criminal liability violated the *ex post facto* provisions of the Constitutions, TT 454. The court took the motion under advisement initially, TT 462.

The entitlement to an acquittal was raised again at the close of evidence, TT 855. The court then specifically considered the charges in the statute, the 1999 decision in State v. Stephens as it relied upon the Colorado decision of People v. Madril and decided that the question was one for the jury, TT 859. Counsel added that the prosecution violated double jeopardy, TT 859-860, which the court rejected. Following the verdict, those issues were reiterated in the Motion to Set Aside Verdict and to Award a New Trial adding the inconsistent verdict argument, R50, which the court verbally denied at hearing followed of course by the sentence order of April 27, 2006 R65 and its findings of April 14, 2006, R63.

3. A further hearing was required in order to consider juror misconduct and bias, State v. Richards, 466 S.E.2d 395 (1995). The trial court committed prejudicial error when it denied the request for the same.

The question of juror misconduct and bias was raised in the aforesaid post-trial motion, R50, ¶2 and attachments. A hearing took place on March 23, 2006 at which Mr. David Barnette of Jackson Kelly, PLLC testified, see Transcript of Hearing, R73. Mr. Barnette identified the e-mail which he had received from jury foreman Hamm which was made an exhibit. Mr. Barnette also spoke with Mr. Hamm about his concerns. Mr. Barnette's account follows:

"The juror called me and said that – and again he may have called me, I may have called him – but we communicated that morning of the Monday, February 13th, and indicated that during the jury deliberations there were two other jurors who had visited MySpace.com, which was a web site which apparently had figured

in testimony the preceding day. The juror believed that there was then a discussion and apparently the parties decided in light of instructions from Judge Spaulding that they should not continue to have that discussion. And again, I don't know who suggested that out of the three of these people that were talking, but the two other jurors apparently discussed with the gentleman who was talking with me, the fact that they had made their own investigation of MySpace.com and apparently the presence or absence of a particular web site or web sites on that which pertained to this particular trial, Hearing Transcript pp. 7-8.

And,

Apparently at least one of the jurors had picked up from the prosecution's witness that there was such a web site and then one or more of those jurors investigated that apparently on their own, which was then relayed to the gentleman who had the conversation with me, *Id.*

Further, Mr. Barnette stated that:

"I was clear from my conversation with him that at least one had visited the web site and that person had also spoken with one of their children. And the other was at least familiar with the web site and I'm not clear now re-reading the memorandum whether that second juror also visited the web site or was familiar with the web site or exactly what that would be. I didn't investigate. I simply wrote down the conversation I believed that I had with this gentleman. Concerned about my grasp for the details, I asked him then to write me an e-mail and send it to me so I would have some degree of precision in what I was then going to decide to either relay to the judge, the prosecutor, or to you, Transcript pp. 8-9.

Beyond the juror investigations juror Hamm told Mr. Barnette that a third juror seemed biased. According to what he was told:

"The third juror apparently worked for the Department of Health & Human Services and apparently there was a discussion amongst the jury as to whether or not personal experiences would be a factor in determining the guilt or innocence of the accused, and apparently the individual who worked for the Department of Health & Human Services expressed strong opinions which this particular juror felt were inappropriate, I guess.



Again my impression of what he was telling me was he felt that this juror was biased. Now whether or not that had an effect, I didn't explore that," Transcript p. 10.

Mr. Barnette summarized his impressions as follows:

I can just give you my impression. Because that juror apparently worked with children who were in similar situations to the accusing parties, the juror had strong opinions, which was to my way of thinking is understandable, but it apparently, the juror that was talking to me felt that that biased the jury – or at least that particular juror was biased, I guess is another way to put it. I didn't really explore to that depth.

You've got to understand these conversations were probably, this first telephone conversation probably about ten minutes, I got an e-mail, and I don't think I've spoken to the juror since that time. The only other conversation I've had about this has been with your associate and with you, Jim," Transcript p. 11.

Moreover, Mr. Barnette had the impression that Mr. Hamm believed that the third juror had based her decision on prejudices from matters

“outside of simply what was presented in Court . . .” Transcript p. 12.

The Circuit Court denied any further hearing by its order of April 14, 2006, R63. The Court found that any hearing would be foreclosed by Rule 606(b) of the Rules of Evidence, Order p. 8, that there is no evidence of juror bias and, if so, counsel failed to exercise due diligence, Order p. 17.

4. Because one juror lacked the requisite statutory qualifications to serve as a juror, Mr. Cecil stands convicted by a jury of eleven members.

Counsel wishes to emphasize that this issue was first raised upon appeal in that the error was not known until a time when jury foreman Hamm telephoned the undersigned counsel after Mr. Cecil was sentenced. Counsel noticed that Mr. Hamm's home phone number which he left with counsel's secretary was a Charleston number. After speaking by phone to Mr. Hamm it was determined that Mr. Hamm was and had been a Kanawha County resident. He had written in the questionnaire sent to jurors that:

"My permanent address is at my parents' house in Scott Depot. I currently reside in a rented house in Charleston. My drivers license and voters registration is in Putnam County along with vehicle registration for my car. I currently work in the Southeastern corner of Boone County. The question came as if I were a legal resident of Putnam County. DMV says that it would follow my drivers license. I would like to serve if conditions permit," R 80.

On January 9, 2006, the Judge wrote Mr. Hamm that:

"Everyone has one permanent address, but may have multiple domiciles. Your permanent residence is determined by your intentions . . . it all depends on where you consider your permanent residence to be," R79.

The Court directed Mr. Hamm to telephone Darlene Smith in the Circuit Clerk's office. It appears that on January 10, 2006 Darlene Smith spoke with Mr. Hamm who then indicated to her that he believed Putnam County to be his permanent residence. The initials DS do appear by the circled "yes" to the question about residence (number 2) on the questionnaire.

5. Mr. Cecil's sentence is "disproportional" in contravention of West Virginia Constitution, Article 3, Section 5.

Mr. Cecil's sentence is for 20 -40 years, R65. The victims offered no evidence of physical harm. While they state there is emotional harm the palpable evidence is limited to \$514.92 for counseling of KJ.

IV. Points, Authorities and Discussion of the Law

A. The Circuit Court Improperly Restricted the Expert Testimony of Dr. Christina Cooper-Lehki.

Dr. Christina Cooper-Lehki was prepared and thoroughly qualified to testify concerning false reports of sexual abuse and the reasons people make them. From other evidence it is known that accuser KJ wrote in her MySpace that the reader should "remember my face because I'm gonna be famous someday," avowal Exhibit and that the C.A.M.C. records showed no physical findings and a history of previous sexual abuse, State's Exhibit 1. Further, there was a known history of these two accusers meeting together both before and after the accusation made by KJ and of a questionable video-taped interview by a social worker or counselor. And, there was no corroboration of the accusations – merely she said/he denied. Dr. Bailey who examined KJ at C.A.M.C. spoke of the "gold standard" as disclosure *i.e.* if the child discloses it the provider considers it as true, TT 353-354. Of course, that may well resonate with the jurors also who would quite naturally question why one would make a false accusation about a sex crime.

What the defense proposed at trial was an answer to the question of why one might make a false accusation of a sex crime. Moreover, that statistics exist about the frequency of false accusations is not an unimportant or insignificant fact. It happens and the jury is, or ought to be, sufficiently equipped to determine whether the accused is the victim of a false accusation.

Rule 702 of the West Virginia Rules of Evidence states:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.”

This Court has held that under Rule 702 expert testimony, to be admissible, must not only be relevant, it must also be reliable, Wilt v. Buracker, 443 S.E.2d 196 (1993). The purpose of the rule is to prevent the introduction of absurd or irrational pseudoscientific assertions, Daubert v. Merrell Down Pharmaceuticals, Inc., 509 U.S. 579 (1993). This Court has stated:

“The trial court’s initial inquiry must consider whether the testimony is based on an assertion or inference derived from scientific methodology. Moreover, the testimony must be relevant to a fact in issue.” Wilt v. Buracker, 443 S.E.2d at 203.

In that Rule 702 of the Federal Rules of Evidence is identical to our State rule the influence of federal decisions is unavoidable, see Davis “Admitting Expert Testimony in Federal Courts and Its Impact on West Virginia Jurisprudence,” 104 W.Va.L.Rev. 485 (2002). The federal courts have interpreted Rule 702 as being designed to liberalize the admissibility of the expert’s testimony. The doubts about testimony are resolved in favor of admitting the testimony as questionable testimony can be dealt with by cross-examination, Saltzburg, Martin and Capra, Federal Rules of Evidence Manual (9th ed.); Daubert v. Merrell Dow Pharmaceuticals, Inc., *supra*; Blevins v. New Holland North America, 128 F.Supp.2d 952, 956 (W.D.Va. 2001). The foregoing authority stands for the proposition that in admitting expert testimony the trial court must first find that (1) the expert is basing his/her opinion on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the

principles and methods to the facts. Ultimately, will the information be helpful to the jury in its determination of the facts in issue.

In the context of sex crime prosecutions courts have liberally allowed expert testimony when the prosecution is the offering party. For example, this Court has approved of testimony concerning the so-called rape trauma syndrome to help explain intervening activities of the victim and reporting delays, State v. McCoy, 366 S.E.2d 731 (1988); State v. Jackson, 383 S.E.2d 79 (1989); generally see Annota. 42. ALR 4th 879 Admissibility, At Criminal Prosecution Of Expert Testimony On Rape Trauma Syndrome. McCoy initially recognized a rape counselor as an expert on the behavior of rape victims because her testimony “helped” the jury as per Rule 702, however the case was remanded in large part because the counselor’s testimony amounted to a statement that she believed the victim and to assure that the witness was qualified.

Other courts have permitted expert opinion testimony in child sex abuse cases concerning child accommodation syndrome (called CSAAS) in order to explain recantation and delayed disclosure, Annota. 85 SLR 5th 595, Admissibility Of Expert Testimony On Child Sexual Abuse Accommodation Syndrome (CSAAS) In Criminal Cases. Likewise expert testimony about the domestic violence syndrome has been liberally admitted, Annota. 57 ALR 5th 315, Admissibility Of Expert Testimony Concerning Domestic Violence Syndrome To Assist Jury In Evaluating Victim’s Testimony Or Behavior.

This Court has recognized expert opinion psychological testimony that a child exhibits the psychological and behavioral profile of a child sexual abuse victim, State v. Edward Charles L., 398 S.E.2d 123 (1990), State v. Wood, 460 S.E.2d 771 (1995). Moreover, in State v. Beck, 286 S.E.2d 234 (1981), the Court implicitly recognized the accused’s right to call a defense

psychologist about his or her findings after examining the accused, although the expert could be subjected to vigorous cross-examination about the defendant. Indeed, that kind of testimony was a part of Mr. Cecil's case, see Cooper-Lehki testimony, TT 622.

In light of the foregoing it is submitted that the proffered testimony of Dr. Cooper-Lehki would serve the "helpfulness" purpose of Rule 702. Moreover, the testimony was relevant and reliable. Contrary, to the Circuit Court's belief, it was tied to known facts. The Circuit Court however, also found that admitting the testimony would run counter to Rule 608 of the Rules of Evidence, TT 516. Rule 608(b) states:

"Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of a witness other than the accused (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony under this rule by a witness does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility." (Emphasis added).

Under the court's ruling if the accusers had made other claims of sex abuse and those claims were found to be meritless, evidence of the same would be denied and a trained forensic psychiatrist would not be permitted to refer to it in testimony even if the accuser placed the meritless accusations on her MySpace. The issue presented is thus whether Rule 608 as interpreted by the Circuit Court trumps Rule 702. It is submitted that the proper resolution of this question is like that of the recanting victim in the domestic battery case, State v. Martisko,

566 S.E.2d 274 (2002) *i.e.* the prior allegations that were recanted by the alleged victim along with the recantation should be admitted. After all, it represents conduct of a principal witness which may be considered as being inconsistent with her testimony.

B. Mr. Cecil Was Entitled to a Judgment of Acquittal as to Counts 2 and 4 Which Charge Sexual Abuse by a Guardian or Custodian.

This argument is comprised of three components which are by no means distinct from each other. One, the statute in issue is inapplicable to Mr. Cecil. Two, the essential elements were not established. Three, the law has been misinterpreted and misused in a way which conflicts with constitutional protections.

Rule 29 of our Rules of Criminal Procedure replaced the former motions for directed verdict with motions for judgment of acquittal. 29(b) allows the court to reserve its decision on the motion which is what the Circuit Court did below. When the court does so "it must decide the motion on the basis of the evidence at the time the ruling was reserved." Therefore, in order to address this issue the statute involved in this charge and the supporting evidence must be analyzed at the time the State's case in chief ended and the motion was first made.

West Virginia Code, §61-8D-5 at the time covering these charges read as follows:

"(a) In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection, as follows: If any parent, guardian or custodian of a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct, or the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct, then such parent, guardian or custodian shall be guilty of a felony and, upon

conviction thereof, shall be imprisoned in the penitentiary not less than ten nor more than twenty years, or fined not less than five hundred nor more than five thousand dollars and imprisoned in the penitentiary not less than ten years nor more than twenty years."

Simply stated, Mr. Cecil was not a "parent, guardian or custodian." Further, when Mr. Cecil made his motion for acquittal under Rule 29 the entire body of evidence on the subject of these charges was as follows:

"Q: Were the Cecils *responsible* for you that evening?

A: Yes," TT 403.

The question was asked of SD and *that was it!* Nothing more on the subject occurred during the State's case in chief. The word "responsible" is emphasized here because of its further significance, *infra*. p. 20.

The test of course is whether the evidence then existing when viewed in the light most favorable to the State is sufficient to prove guilt, State v. Fiske, 607 S.E.2d 471 (2004). Stated another way, was the evidence *manifestly inadequate* so that a consequent injustice has been done, State v. Starky, 244 S.E.2d 219 (1978)? *The standard is applicable to each element of the offense charged*; Orfield's Criminal Procedure Under The Federal Rules (2nd ed.), p. 533 citing Cartwright v. U.S., 335 F.2d 919 (10th Cir. 1964) and U.S. v. Andrews, 431 F.2d 952 (5th Cir. 1970).

In Mr. Cecil's case there was *no evidence* which established the requisite element under §61-8D-5 proving his custodial status. Ultimately, at the close of the evidence the court stated its reliance on this Court's opinion in State v. Stephens, 525 S.E.2d 301 (1999) which held that it is a fact question as to whether a babysitter is a custodian under §61-8D-5, TT 858. Not only is the

reliance on Stephens misplaced as Mr. Cecil was clearly not serving as a babysitter, but also Stephens was decided and applied in this case on an incorrect basis.

The Stephens decision relies upon the Colorado opinion in People v. Madril, 746 P.2d 1329 (Colo. 1987). However, the Colorado legislature had passed a “position of trust” provision prior to Mr. Madril’s conduct, see Madril’s reference to elements of the offense, 746 P.2d at 1332-1334, see also C.R.S. 18-3-401. Mr. Cecil’s prosecution represents a common mistake which has crept into prosecutions of alleged sex crimes in West Virginia as will be hereinafter developed.

Our legislature clearly “upped the ante” when it passed §61-8D-5. Under this statute the potential penalty is substantially increased when compared to most of the other sections of the Code governing sex crimes although the proscribed conduct is identical. However, the law as it was originally written omitted an area of growing public concern. The terms “parent, guardian or custodian” were deemed by most not to reach the conduct of such people as medical providers, counselors, teachers and coaches, see e.g. W.Va. Dept. Of Human Services v. Boley, 358 S.E.2d 438 (1987); and see Morosco, The Prosecution and Defense of Sex Crimes, Chapter 12A discussing the history and purpose of “persons of trust” statutes. In 2005, the West Virginia legislature added “position of trust” to §61-8D-5 and to the definitions provision of §61-8D-1 which became effective on July 8, 2005 – after the times for which Mr. Cecil is accused. In effect, Mr. Cecil has been prosecuted under the notion that he was a “person of trust” as he certainly was not a custodian. §61-8D-1 now defines persons of trust as:

“ . . . any person who is acting in the place of a parent and charged with any of the parent’s rights, duties or responsibilities concerning a child or someone *responsible* for the general supervision of a

child's welfare, or any person who by virtue of their occupation or position is charged with any duty or responsibility for the health, education, welfare, or supervision of the child." (Emphasis added).

Ergo, the single question which was asked of SD during the State's case in chief – "were the Cecils responsible for you that evening?"

By contrast, the applicable definition for the times in question was aimed at a person who "shares actual physical possession or care and custody on a full-time or temporary basis . . ." Consequently, the State has accomplished indirectly what the State could not do directly. They have prosecuted Mr. Cecil under the definitions, supporting evidence, and upon a theory concerning his conduct predicated upon legal concepts which were not in effect at the times in question. Such a prosecution is violative of the *ex post facto* provisions of the West Virginia and U.S. Constitutions, State v. Petry, 273 S.E.2d 346 (1980); State v. Short, 350 S.E.2d 885 (1992).

The prosecution of Mr. Cecil under both the underlying substantive charge and the charge of having violated §61-8D-5 also contravenes the constitutional protection against Double Jeopardy, U.S. Constitution, Amendment XIV, West Virginia Constitution Article 3 §5. This Court has ruled that double jeopardy as defined in Article 3 §5 shall be defined by either the "same evidence test" or the "same transaction test" *whichever affords the greater protection*, State ex rel. Dowdy v. Robinson, 257 S.E.2d 167 (1979), *see* State v. Adkins overruling syl. pt. 2, 289 S.E.2d 720 (1982). Syllabus 1 remains good law in this State. The "same evidence test" provides that the offenses are the same unless one requires proof of a fact which the other does not. The "same transaction test" provides that offenses are the same if they grow out of a single act, occurrence, episode or transaction. In Mr. Cecil's case his prosecution plainly violates the "same transaction test" of Dowdy v. Robinson.

Double jeopardy can also be contravened when one offense is included in another offense, Harris v. Oklahoma, 433 U.S. 682 (1977); State v. Julius, 408 S.E.2d (1991). In the instant case it was the charge that Mr. Cecil sexually abused SD in Count One that was merely reasserted in Count Two and the sexual assault in Count Three that was merely reasserted in Count Four. This appears indistinguishable from the arson which was deemed to be part of the felony murder in State v. Julius, *supra*.

Insofar as the crimes involving KJ are concerned there exists the added feature of an acquittal upon the charge contained in Count Three. In this connection it is noted that the U.S. Supreme Court has concluded that the doctrines of *res judicata* and *collateral estoppel* are related to and part of double jeopardy, Ashe v. Swenson, 397 U.S. 436 (1970). Moreover, it is well settled that a violation of the common law rule of consistency requires that not guilty verdicts in crimes which require more than one actor will ordinarily lead to reversals, Harris v. Rivera, 454 U.S. 339 (1981); Iannelli v. U.S., 420 U.S. 770 (1975). As a practical matter the acquittal of Mr. Cecil in Count Three and his conviction in Count Four are logically inconsistent in a way which appears to conflict with notions of estoppel and *res judicata*.

Counsel acknowledges that as a general rule inconsistent verdicts may stand, Annota., Inconsistency Of Criminal Verdict As Between Different Counts Of Indictment Or Information, 18 ALR.3d 259, State v. Hall, 328 S.E.2d 206 (1985). The question raised is whether the factual or legal conclusions which are implicit in the finding are rationally compatible? The undersigned submits that they clearly are not. This is particularly so when the acquittal negates an essential element which is contained in the other count. Unlike the case of State v. Hall, *supra*. which allowed the inconsistent verdicts to stand, in Mr. Cecil's case presents issues of double jeopardy,

res judicata and *collateral estoppel*. In this case the parties are the same, the accuser's allegation involves a single episode and there was no evidence offered to support the additional element of "custody" under §61-8D-5. Yet one count stands as not guilty while the other is guilty. The guilty verdict cannot stand.

C. The Circuit Court Improperly Denied Mr. Cecil's Request for a Hearing into Possible Juror Misconduct and Bias.

The testimony of attorney David Barnette was clear. One and perhaps two jurors engaged in external investigations. One of these jurors even spoke with her daughter whom she had revealed was a fellow student with accuser SD and knew the family. The foreman also reported that he thought the comments of another juror showed a preconceived bias in favor of how she would view the State's evidence.

This Court has considered cases in which jurors engage in extracurricular activities and injecting the same into the deliberative process, State v. Richards, 466 S.E.2d 395 (1995); State v. Strauss, 415 S.E.2d 888 (1992); State ex rel. Trump v. Hott, 421 S.E.2d 500 (1992); and State v. Scotchel, 285 S.E.2d 384 (1981). The rule which is followed is that a jury verdict may not ordinarily be impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict, but the verdict may be impeached for misconduct which is extrinsic to the deliberative process, Scotchel supra. syl pts. 1 and 2.

The U.S. Supreme Court has held that a jury's exposure to external influences is *presumed to be prejudicial*, Remmer v. U.S., 347 U.S. 227 (1954). The presumption may be rebutted, but that requires an evidentiary hearing. The hearing which Mr. Cecil requested was

entirely in conformity with Richards and Scotchel. Mr. Barnette's testimony supplied the foundation which requires a further hearing. The presumption of prejudice exists because evidence of extraneous information prejudicial to Mr. Cecil has been referred to and that presumption was not rebutted at the March 23, 2006 hearing.

The Circuit Court found that Mr. Cecil's motion if granted would run counter to Rule 606(b) of the Rules of Evidence. That Rule states:

“(b) Inquiry into validity of verdict or indictment. – Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.”
(Emphasis added).

In conclusion, counsel submits that not only does Mr. Cecil's request for the Circuit Court to conduct a further hearing into the conduct not run counter to Rule 606(b), but also that the motion absolutely conforms with the said Rule as emphasized above.

D. The Jury Foreman Was Not Qualified to Serve as a Putnam County Juror. Consequently, Mr. Cecil Was in Effect Tried and Convicted by a Jury of Eleven.

Juror Brian Hamm was a resident of Charleston, Kanawha County. He lived at 1567 Loudon Heights Road in Charleston with his wife and child at the time when the Court found that he was qualified for jury service in Putnam County and when he so served. In the materials

which were provided by the Clerk to counsel before trial Mr. Hamm's address was listed at 306 East Maplewood Estates, Scott Depot which is, of course, in Putnam County. On Mr. Hamm's questionnaire which he apparently filled out on December 19, 2005 he wrote:

"My permanent address is at my parents' house in Scott Depot. I currently reside in a rented house in Charleston. My drivers license and voters registration is in Putnam County along with vehicle registration for my car. I currently work in the Southeastern corner of Boone County. The question came as if I were a legal resident of Putnam County. DMV says that it would follow my drivers license. *I would like to serve if conditions permit.*" (Emphasis added).

The questionnaire also indicates that the matter of whether Mr. Hamm was a resident of Putnam County as posed by question 2 was left blank initially. Thereafter, it appears that a clerk circled yes in response to question 2 with the clerk's initials. A deeper review of the records maintained in the Putnam County Clerk's office discloses that on January 9, 2006, Judge O. C. Spaulding wrote a letter to Mr. Hamm at his Charleston address in which the Judge states the following, *inter alia*:

"Everyone has one permanent address, but may have multiple domiciles. Your permanent residence is determined by your intentions. . . . it all depends on where you consider your permanent residence to be."

The Court directed Mr. Hamm to telephone Darlene Smith in the Circuit Clerk's office. It appears that on January 10, 2006 Darlene Smith spoke with Mr. Hamm who then indicated to her that he believed Putnam County to be his permanent residence. The initials DS in fact do appear by the circled "yes" to question number 2 on the questionnaire.

West Virginia Code, Chapter 52, Article 1, Section 8 directs the Court to determine juror qualification on the basis of information contained on the juror qualification form or from an

interview with the prospective juror or after investigating other matters. That statute also indicates that the prospective juror shall be a resident of the county, §52-1-8(b)(1).

Counsel fully acknowledges the provision of law embodied in West Virginia Code, Chapter 56, Article 6, Section 16:

“No irregularity in any writ of venire facias, or in the drawing, summoning, or impaneling of jurors, shall be sufficient to set aside a verdict, unless objection specifically pointing out such irregularity was made before the swearing of the jury, or unless the party making the objection was injured by the irregularity.”

This Court has interpreted juror disqualification as a ground for setting aside a verdict only if the party making the motion did not know of, and could not have discovered, such disqualification by the use of reasonable diligence before the jury was sworn, Garrett v. Patton, 95 S.E. 437 (1918). Counsel further acknowledges that this Court’s precedent requires an initial analysis of whether or not due diligence appears to discover the infirmity and also whether or not the moving party has been prejudiced. Counsel respectfully urges this Court to reassess this analysis. As it turns out in this case Mr. Hamm was as a matter of law disqualified to serve as a juror in Putnam County as he was not a resident contrary to what was stated in the materials provided by the Clerk to counsel before trial. Consequently, Mr. Cecil was convicted by a panel of 11 qualified jurors although 12 jurors is constitutionally required unless expressly waived by the accused.

The Circuit Court erred in the letter of opinion dated January 9, 2006. Counsel must acknowledge that this letter was discovered by counsel at a time which was well after verdict and which was the result of Mr. Hamm’s phone call to counsel. However, the law is simply not what the Judge’s statement to Mr. Hamm says it is. While a party can have many residences, there can only be one domicile. To constitute a domicile two things must exist: first, residence *i.e.* a

physical presence, and second, the intention to remain in that place for an indefinite time, White v. Tennant, 8 S.E. 596 (1888). A person may have only one domicile at the same time, Dean v. Cannon, 16 S.E. 444 (1892); Shaw v. Shaw, 187 S.E.2d 124 (1972). The fatal flaw in this juror's "residency" is that he lacked a physical presence in Putnam County, West Virginia living as he did with his wife and child in Charleston. All of the alleged *indicia* of residence upon which the Circuit Judge and Circuit Clerk relied are those documents which can be considered when determining residency, but which are not dispositive standing alone as there must be a physical presence. Residency for jury service equates to domicile. In fact, if as stated by Mr. Hamm his drivers license still uses his parents' address then that is contrary to West Virginia Code, §17B-2-13 which requires him to use Charleston after residing here for 20 days. Likewise, he should be a Kanawha County voter, West Virginia Code, §3-2-11(a).

This Court is asked to find that Mr. Cecil's constitutional right to a trial by a jury of 12 was denied. This conclusion exists even if counsel is deemed to have failed to exercise due diligence in that only Mr. Cecil can waive his constitutional rights.

E. Mr. Cecil's Prison Sentence of 20-40 Years Violates the Proportionality Principle of West Virginia Constitution Article III, Section 5.

Mr. Cecil was sentenced to consecutive terms for his convictions under §61-8D-5. A term of 1-5 years is to run concurrently with the 10-20 year term under Count 2. The West Virginia Constitution, Article III, Section 5 contains an express statement of the proportionality principle: "Penalties shall be proportioned to the character and degree of the offense," Syl. 1 State v. Houston, 273 S.E.2d 375 (1980); State v. Lewis, 447 S.E.2d 570 (1994). This Court reviews sentencing orders under a deferential abuse of discretion standard unless the order violates statutory or constitutional commands, State v. Watkins, 590 S.E.2d 670 (2003).

This Court has considered such challenges by applying both a subjective and an objective test, see State v. Adams, 565 S.E.2d 553 (2002). Under the subjective test the Court determines whether the sentence which was imposed shocks the conscience. In reaching that determination the Court considers all of the circumstances surrounding the offense. Under the objective test the Court considers the nature of the offense, the legislative purpose behind the punishment, compares the punishment to that in other jurisdictions and compares the punishment with other offenses in this jurisdiction.

Spread throughout the trial record and contained in the pre-sentence report which was prepared by the Probation Department of Putnam County is the fact that Mr. Cecil not only has no criminal record whatsoever, but that he has an excellent work record, is well-educated, has an extremely nice family living who reside in a nice home. The ten character witnesses and the many letters of support forwarded to the probation officer and thereafter to the Court speak highly of Mr. Cecil, past good deeds and many acts of friendship. Mr. Cecil is 51 year old man who had a stable marriage and two fine children who have done well both in school and in their extracurricular activities. Mr. Cecil himself was successful in his military service and in his chosen profession. In light of these facts and the further fact that neither accuser was hospitalized renders the sentence of 20 - 40 years as shocking.

Within the record there exists little or no information beyond a few rather self-serving remarks which would suggest the presence of dire effects resulting from the acts which SD and KJ have alleged and on which the jury returned the verdicts. While the victim impact statements make representations about mental health issues there is no corroboration of the same. In fact, the evidence from counselors indicated that KJ attended a counseling session and thereafter

missed further counseling in order to participate in her chosen extracurricular activities. The last of these sessions was said to be in September, 2005 according to the materials submitted to probation. The medical records submitted are limited to KJ and approximate \$500 in total costs. There are no records submitted by or for SD. SD says Mr. Cecil touched her breasts and tried to touch her "below" but was stopped. KJ says he fingered her, but that allegation was obviously rejected by the jury when it returned the not guilty verdict. Thus, what remains is that Mr. Cecil turned her over and tried to kiss her. For these alleged transgressions Mr. Cecil is sentenced to a term of imprisonment of up to 40 years. Further, as it pertains to KJ, the security video referred to *supra*, clearly demonstrates her demeanor upon departing from the courtroom immediately following her testimony. She appears to mock her courtroom "tears" exactly as witness Denise Neely testified to at trial and exactly the opposite of how KJ's aunt testified on rebuttal, see the disk which is a part of the appellate record.

Under the objective test, the first matter to consider is the nature of the offense. Nothing stated herein should be construed as suggesting that sexual misconduct of any kind involving children represents acceptable behavior. Mr. Cecil testified and denied the accusations and he continues to stand upon his innocence notwithstanding the verdicts. SD says that it happened either in 2001 or 2002. Her trial testimony indicated the latter while her initial writing indicated the former. She did not come forward with the accusation until 2005 after Mr. Cecil's daughter told SD's sister of KJ's accusation which had been made the day before. There is no evidence of physical injury to SD or to KJ. In fact, the evidence is to the contrary. Each victim claims to be a good student who is involved in extracurricular activities which appears to be quite accurate. There is nothing aggravated about the facts of this case. The emotional claims are not documented in this record although these girls verbally claim to be "harmed."

While the legislation certainly permits an indeterminate sentence of not less than ten nor more than twenty years under §61-8D-5, the legislature also permits probation as an option. It is submitted that the mitigating factors in this case substantially outweigh the aggravating factors. As set forth *infra* the penalty contained in West Virginia's statute ranks among the highest in the country.

When compared with the following punishments for other offenses in the State of West Virginia this sentence also appears disproportional. For example, under West Virginia law a person who kills another and is convicted of the felony offense of voluntary manslaughter is subject to a sentence of 3 - 15 years, §61-2-4. If the accused is found guilty of second degree murder the term of incarceration is 10 - 40 years, §61-2-3. For malicious wounding (which can be and usually is done by shooting or stabbing another) the penalty is 2 - 10 years. For kidnaping, even if a child is involved and the purpose of the kidnaping was sexual the potential term is either 3 - 10 or 1 - 10 years, §61-2-14(a) and (b). The maximum sentence for third offense domestic battery is 1 - 5 years, §61-2-28(d). For an act of violence against an elderly person the statute contains a provision which allows as an option a sentence of one year or less, §61-2-10a.

When compared with other jurisdictions West Virginia's penalties under §61-8D-5 ranks among the harshest. It is reported that some 40 States have at least some statute addressing the "persons in a position of trust" status, Morosco, The Prosecution and Defense of Sex Crimes, Chapter 12A *supra*. Sexual misconduct statutes which have been collected by the National District Attorney's Association are listed at www.ndaa-apri.org. By comparison, Louisiana law states that whoever commits the crime of molestation of a juvenile when the offender has control

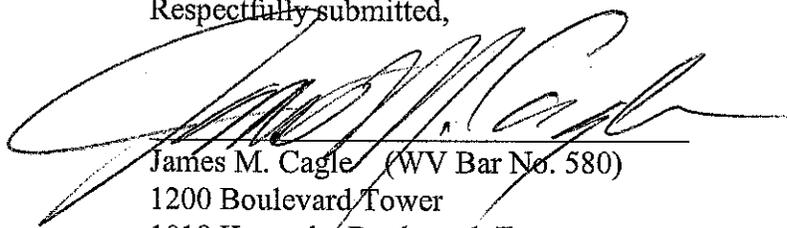
of supervision shall be fined not more than \$10,000 or imprisoned for not less than one nor more than fifteen years. La. Rev. Stat. Ann. §14:81.2 (West 2005). It is represented that Louisiana appears to fall at about the middle to high range for punishment. Idaho law sets the maximum period of incarceration for sexual abuse of a child under age 16 at 15 years, Idaho Code §18-1506 (Michie 2005). Kentucky law characterizes sexual abuse in the second degree even when committed by a person who provides a foster home for the abused child as a Class A misdemeanor, Ky. Rev. Stat. Ann §510.120 (Michie 2004). Our mother State of Virginia characterizes conduct by any person 18 years or older who has a custodial or supervisory relationship over a child under age 18 and has sexual relations with that child as a Class 6 felony which is punishable either by prison of 1 - 5 years, jail up to 12 months and a fine of \$2,500, Va. Code Ann. §18.2-370.1 (Michie 2005) and §18.2-10. Further, in Virginia when any person who is 18 years of age or older, including the parent who engages in consensual sexual intercourse with a child 15 years or older, that transgression may be considered as only a Class 1 misdemeanor, Va. Code Ann. §18.2-371 (Michie 2005). Ohio has a statute which addresses sex crimes by persons with "temporary or occasional disciplinary control." Whoever violates that section is guilty of sexual battery which is a felony of the third degree, therefore subject to a penalty of either one, two, three, four or five years and up to \$10,000 fine, Ohio Rev. Code Ann. §2907.03 (West 2005) and Ohio R.C. 2929.14 and 2929.18.

Whether the subjective or objective test is employed, Mr. Cecil's sentence appears disproportional to the acts. Indeed, counsel submits that is related to the reason West Virginia prosecutors have stretched the term "custodian" beyond its intended meaning. Adding or threatening to add a charge under §61-8D-5 provides considerable leverage to prosecutors when discussing plea agreements, see argument *supra*.

V. Relief Requested

The Appellant respectfully requests that this Court reverse his convictions, remand his case for retrial of Count One of the Indictment, enter judgment of acquittal as a matter of law as to Counts Two and Four of the Indictment and grant such other and further relief as shall be deemed proper.

Respectfully submitted,



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No. 33298

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

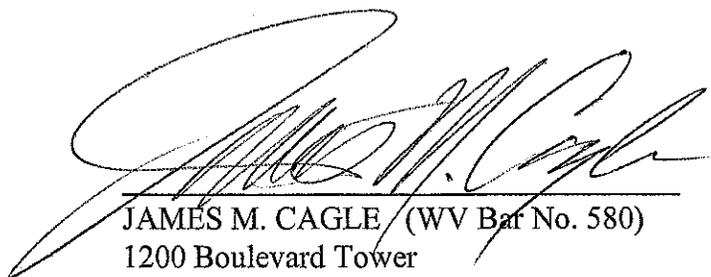
v.

DANNY L. CECIL,

Appellant.

CERTIFICATE OF SERVICE

I, James M. Cagle, hereby certify that I have served a true and exact copy of the foregoing Brief of Appellant on the State of West Virginia by forwarding said copy to Mark Sorsaia, Prosecuting Attorney, Putnam County Judicial Building, 3389 Winfield Road, Winfield, West Virginia 25213, on this the 26th day of March, 2007, in a properly stamped and addressed envelope.



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